

THE DOCTRINE OF ADOPTION OF CUSTOMARY INTERNATIONAL LAW: A FUTURE IN CONFLICTING DOMESTIC LAW AND CROWN TORT LIABILITY

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In R v Hape, the Supreme Court of Canada recently stated that the doctrine of adoption of customary international law operates in Canada such that prohibitive rules of custom are incorporated into domestic law in the absence of conflicting legislation. Yet, in that case, it was not necessary for the Court to decide what adoption means or when conflicting legislation arises. This article attempts to do so. It puts forward a framework for ascertaining conflicting legislation. It then submits that adoption, properly understood, points in one principal direction: the tortious liability of the Crown for violations of customary international law.

Dans l'affaire R c Hape, la Cour suprême du Canada a récemment statué que la doctrine de l'adoption du droit international coutumier s'applique au Canada de manière à ce que les règles prohibitives du droit international coutumier soient incorporées au droit interne, sauf disposition législative contraire. Toutefois, dans cette affaire, il n'était pas nécessaire pour la Cour de préciser ce qu'elle entend par « adoption » ou de décrire les circonstances dans lesquelles on retrouve des dispositions législatives contraires; ce qui s'avère justement le but de cet article. L'auteur met de l'avant un cadre qui permet d'identifier les dispositions législatives contraires. Il soutient ensuite qu'une interprétation correcte de l'adoption aurait principalement comme effet d'entraîner la responsabilité délictuelle de la Couronne pour violations du droit international coutumier.

1. Introduction

Three years ago, in *R v Hape*,¹ the Supreme Court of Canada affirmed the doctrine of adoption for customary international law. Such law would be

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¹ 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].

treated as part of the law of Canada, even where it was not embraced by legislation. Since then, few Canadian judges have found it necessary to consider the doctrine. Further, while commentators have welcomed *Hape*, they have been coy as to its tangible impact on Canadian law.

This article seeks to highlight the principal path ahead for the doctrine of adoption in Canada, focusing on two issues. First, adoption must always begin with the question of whether there is inconsistency between a particular custom and domestic law. There is currently no framework for consideration of inconsistency. This article attempts to provide such a framework.

Second, adoption must obviously be distinguished from other uses of customary international law by Canadian courts that resemble the way those courts use unimplemented treaties. Accordingly, this article submits that the doctrine is only operative where custom is used to supply a free-standing norm of common law for enforcement by a Canadian court. This leaves adoption with one principal possibility: the tortious liability of the Crown for violations of customary international law.

2. *Decision in Hape*

Hape arose out of a criminal prosecution for money-laundering. RCMP officers had conducted parts of their investigation in a Caribbean jurisdiction. The question arose whether the work of those officers overseas engaged protections relating to fair trial contained in the Canadian *Charter of Rights and Freedoms*.² Given the extra-territorial dimension of the case, the Court interpreted the *Charter* in light of public international law, including custom. In the process, LeBel J, for the majority, made the following remarks about adoption:

Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation ...³

It is striking that the Court breathed new life into adoption in *Hape*, at a time when adoption was under siege elsewhere in the common law

² Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

³ *Hape*, *supra* note 1 at 316.

world. It had been rejected in criminal law by the Australian courts.⁴ In *R v Jones (Margaret)*,⁵ the House of Lords had done the same in England, on grounds that suggested all adoption might leave English shores.⁶ Other jurisdictions, notably Hong Kong and Singapore, have been less hostile and, as a result, their case law requires attention.

Despite its enthusiasm for adoption, the above passage from *Hape* leaves several questions unanswered. First, how does one identify conflicting legislation and what is the relevance of other conflicting domestic law? Second, what is adoption and how does it differ from other domestic arenas for public international law pursued in *Hape*, such as the interpretation of the *Charter*? These questions must be answered before adoption can properly be applied by Canadian courts. The present article aims to do so.

3. *Conflicting Domestic Law*

A) *Conflicting Legislation*

Hape cannot be criticised for making adoption subject to conflicting legislation. This notion was laid down by Lord Atkin for the Privy Council on appeal from Hong Kong in the 1930s,⁷ and this principle has endured. Under adoption, custom merely becomes part of the common law and, like any element of the common law, it must yield to the exercise of parliamentary sovereignty.⁸ The key question is the meaning of “conflicting.” It is submitted conflict should be divided into three categories – direct collision, express codification and implied codification.

1) *Direct Collision*

The concept of direct collision is easy to grasp.⁹ Custom confers some kind of benefit. The benefit is denied by statute. The former gives way and the latter is enforced by Canadian courts.

⁴ *Nulyarimma v Thompson*, [1999] FCA 1192, 96 FCR 153.

⁵ [2006] UKHL 16, [2007] 1 AC 136 [*Jones*].

⁶ *Ibid* at 155, 170, 179.

⁷ *Chung Chi Cheung v R*, [1939] AC 160 at 168 [*Chung*].

⁸ *Hape*, *supra* note 1 at 323.

⁹ The expression “direct collision” is borrowed from the High Court of Australia in its resolution of inconsistency between federal and state legislation under the Australian Constitution; see *Telstra Corp v Worthing*, [1999] HCA 12, (1999) 197 CLR 61 at 76. The Australian jurisprudence has greater overlap with the relationship between custom and domestic legislation than its Canadian counterpart; see generally *British Columbia (Attorney-General) v Lafarge Canada Inc*, 2007 SCC 23, [2007] 2 SCR 86.

Sometimes the denial of a benefit conferred under customary law is manifest. Thus, in *Mack v Attorney-General*,¹⁰ a group of Chinese Canadians challenged immigration statutes that had historically discriminated against them. The Ontario Court of Appeal ruled that “to the extent any customary international law prohibiting racial discrimination may have existed during the relevant time frame, it was clearly ousted by the impugned legislation.”¹¹

It is likely, though, that in some situations a statute must be interpreted before the denial of the benefits of customary law can be established. This raises the issue of how fast or slow Canadian courts should be to find that benefits have been denied. It is settled that in performing statutory or constitutional interpretation the courts will, as a matter of judicial policy, apply a presumption of conformity with international law. They will adopt a meaning “harmonized with the international commitments of Canada”¹² and “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.”¹³

This approach is most often applied where proceedings require the interpretation and enforcement of a statutory provision. The same approach should be applied, however, to the threshold question of conflicting legislation in proceedings referable to adoption, as the need to avoid a violation remains present. One source of controversy is the interpretation of provisions casting statutory discretion in general terms. How readily should they be understood to authorise violation of customary international law and, therefore, preclude adoption? In *R v Secretary of State for Home Department; Ex parte Brind*,¹⁴ the House of Lords refused to read down general statutory discretions so as to make them subject to compliance with an unincorporated human rights treaty.

The House of Lords was concerned, however, to prevent treaties which were not subject to adoption from being incorporated by the “back door.”¹⁵ Custom would be in a different position. In contrast, New Zealand courts have been willing to limit general statutory discretions on the basis

¹⁰ (2002), 60 OR (3d) 737, 217 DLR (4th) 583 [*Mack* cited to OR].

¹¹ *Ibid* at 750. The Supreme Court of Canada refused leave to appeal; see [2003] 1 SCR xiii.

¹² *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46, [2005] 2 SCR 401 at 422-23.

¹³ *Hape*, *supra* note 1 at 323.

¹⁴ [1991] 1 AC 696, [1991] 2 WLR 588 [*Brind* cited to AC].

¹⁵ *Ibid* at 762; see also 748-49.

of treaties or custom. In that jurisdiction, “national law is to be read, if at all possible, consistently with the related international law”¹⁶ even if this appears “difficult to reconcile with the seemingly generally applicable wording”¹⁷ of executive powers. An English judge has argued that the New Zealand jurisprudence is not applicable in his jurisdiction.¹⁸ A Hong Kong court broadly sided with this judge when it refused to limit a general statutory terminology according to customary international law.¹⁹

At some stage, Canadian courts will have to resolve this debate for their own legal system. The language they have so far used in relation to the presumption of conformity is generous, perhaps indicating that the New Zealand approach could be accepted.²⁰ If this occurs, it will be unlikely that legislation using general terms, particularly in the administrative context, will be considered to be in direct conflict with custom and thus prevent adoption from operating.

One critical point must be made. English statute law has become influenced by the “principle of legality.” This principle is a powerful tool of interpretation, enabling robust judicial defence against legislative encroachment of fundamental rights. Given its potency, however, the principle is only applicable in relation to rights already present in domestic law through “the necessary contextual backcloth of a relevant basic common law principle.”²¹ Even then, encroachment must be tolerated where effected by express language or necessary implication.²²

The principle of legality may overlap with the approach taken by the New Zealand courts.²³ This is not in itself enough, however, for the principle to become relevant to adoption. Another argument is that the principle of legality should apply in relation to customary norms concerning

¹⁶ *Sellers v Maritime Safety Inspector*, [1999] 2 NZLR 44 (CA) at 62.

¹⁷ *Ibid* at 61; see also *Zaoui v Attorney-General (No 2)*, [2006] 1 NZLR 289 (SC) at 321.

¹⁸ P Sales and J Clement, “International Law in Domestic Courts: the Developing Framework” (2008) 124 LQR 388 at 393, 402.

¹⁹ *Ubamaka Edward Wilson v Secretary for Security*, [2011] 1 HKLRD 359 [Ubamaka] at 411.

²⁰ See generally Gibran van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at Ch 5.

²¹ *R v Secretary of State for Home Department, Ex p Stafford*, [1999] 2 AC 38 (HL) [*Home Dept (Stafford)*] at 49.

²² *HM Treasury v Ahmed*, [2010] UKSC 2, [2010] 2 WLR 378 [*Ahmed*]. See also, in Australia, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259.

²³ *Supra* note 18; see also Oliver Jones, “Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: a Hong Kong Perspective” (2009) 58 ICLQ 443 at 462.

fundamental rights, on the basis that custom is part of the common law. Yet this turns on the instinctive but inaccurate view that adoption is automatic. Adoption is non-legislative, but it must still go through a judicial process to detect conflicting legislation, followed by ascertainment of the role of adoption at common law. This is anything but automatic.

Such reasoning was powerfully embraced in *Yong Vui Kong v Public Prosecutor*²⁴ by the Singapore Court of Appeal:

Ordinarily in common law jurisdictions, CIL [customary international law] is incorporated into domestic law by the courts as part of the common law in so far as it is not inconsistent with domestic rules ... The principle enunciated by Lord Atkin [in *Chung*, *supra* note 7] entails that, at common law, a CIL rule must first be accepted and adopted as part of our domestic law before it is valid in Singapore ... Without [the foregoing] the CIL rule in question would merely be floating in the air ... CIL is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court.²⁵

The same approach is probably also implicit in the House of Lords' view that "international law is not a part, but is one of the sources, of English law."²⁶ Something "floating in the air"²⁷ is a world away from "basic common law principle."²⁸ It follows, to say the least, that in Canadian cases considering custom as to fundamental rights for the first time, the principle of legality must not operate.

2) *Express or Implied Codification*

In *R v Secretary of State for Home Department, Ex parte Thakrar*,²⁹ the English Court of Appeal proceeded on the basis that a statute could be drafted in so much detail that it became a "comprehensive code" that barred from adoption any custom having the same subject matter.³⁰ This principle stems from the doctrine of Parliamentary supremacy. If Parliament chooses to legislate exhaustively, the courts must yield to its desire to exclude from a particular field all but its own pronouncements. Codification can occur on a micro or a macro scale. Typically, the statute

²⁴ [2010] 3 SLR 489 [*Yong Vui Kong*].

²⁵ *Ibid* at 530-31.

²⁶ *Jones, supra* note 5 at 155.

²⁷ *Yong Vui Kong, supra* note 24.

²⁸ See *Home Dept (Stafford), supra* note 21 at 49.

²⁹ [1974] QB 684, [1974] 2 All ER 261 [*Thakrar* cited to QB].

³⁰ *Ibid* at 708 *per* Orr LJ; see also 701, 703, 707 *per* Lord Denning MR and 710 *per* Lawton LJ.

as a whole would codify the field to which it relates. In principle, however, a particular provision of the statute could also be exhaustive in its necessarily smaller field.

The principle is seamless where the intention to codify is express. An example may be found in *Bouzari v Iran*,³¹ where the Ontario Court of Appeal held that a statutory provision conferring state immunity “except as provided by this Act” was a code preventing exceptions to that immunity also flowing from custom under the doctrine of adoption.³² Complications arise where codification is left to implication. There is no doubt that it is permissible for codification to arise in this way; *Thakrar* itself is an example in the field of immigration. The question is how the implication is to be drawn. There is obvious scope for judges to disagree. Indeed, in *Ruddock v Vadarlis*,³³ the Federal Court of Australia effectively departed from *Thakrar* in relation to its own immigration legislation.³⁴

The present author will restrict himself to one point in this regard. If a Canadian judge is satisfied that Parliament has legislated exhaustively, he or she must not adopt customary international law. This would be judicial rebellion against Parliamentary intention. In particular, the question of codification must not be confused with reading down general statutory discretions as occurs in New Zealand courts. There is no scope to say Parliament had the general intention to codify but, through judicial handiwork, that intention is subject to the operation of customary international law. Parliament either wished to codify or it did not. If it did, all law beyond the statute or particular provision, including custom, must give way.

Of course, the above reasoning could be circumvented by a judge refusing to imply codification. I can only urge Canadian judges not to allow sympathy for customary international law to prevent them from identifying, as neutrally as possible, Parliamentary aims.

3) *Order in Which Collision and Codification to be Considered*

To sum up, there are three instances where a statute precludes adoption:

- where the statute or a particular provision thereof announces itself as an exhaustive statement of the law in a particular area;

³¹ (2004), 71 OR (3d) 675, 243 DLR (4th) 406 [*Bouzari* cited to OR].

³² *Ibid* at 689-90, 696, considering the *State Immunity Act*, RSC 1985, c S-18.

³³ (2001), 110 FCR 491, 183 ALR 1 [*Ruddock* cited to FCR].

³⁴ *Ibid* at 514 *per* Beaumont J; 545 *per* French J; *cf* 508 *per* Black CJ.

- where one or more of the provisions of the statute directly collides with a customary norm; and
- where the statute or a particular provision thereof impliedly constitutes a code.

The order in which these instances have been stated is deliberate, and should be followed when deciding upon the presence of conflicting statute law. Express intention is obvious and renders inquiry into anything else superfluous. It is also much easier to locate a direct collision than to identify an implied intention.³⁵ Thus, implied intention may be considered last.

B) Inconsistency with Delegated Legislation and the Constitution

I have so far spoken of statutes rather than delegated legislation as the source of conflict. The Privy Council did the same in the 1930s decision in *Chung*.³⁶ The Supreme Court of Canada, however, has not clearly distinguished between statutes and delegated legislation. Further, there is no inherent difficulty with delegated legislation generating conflict and precluding adoption. It would simply be necessary for the enabling power to be wide, incorporating the ability to alter the general law.³⁷ In that event, it is more likely that delegated legislation would be the source of direct collision, rather than codification. This is because, in practice, it is hard to imagine delegated legislation supplying codification where the parent legislation had not already done so.

Inconsistency could also flow from the Canadian constitution, through direct collision or codification. As English law scholar Dr Roger O'Keefe has said, in words approved by the House of Lords, "customary international law is applicable ... only where the constitution permits."³⁸ There is, however, little need for concern as to inconsistency between custom recognising individual rights and the Canadian *Charter*. The common law and the *Charter* have nuanced relations.³⁹ In any event,

³⁵ Jones, *supra* note 23 at 461.

³⁶ *Supra* note 7.

³⁷ See, for an extreme example, *Re Gray*, [1918] 57 SCR 150, 42 DLR 1; see also *Edmonton (City) Assessor v J J C Holdings Ltd* (1984), 32 Alta LR (2d) 299 at 302, [1984] 6 WWR 561 and *Mixnam's Properties Ltd v Chertsey Urban District Council*, [1964] 1 QB 214 at 237-38, [1963] 2 All ER 787, *aff'd* [1965] AC 735, [1964] 2 WLR 1210, [1964] 2 All ER 627.

³⁸ Jones, *supra* note 5 at 160. *Contra* van Ert, *supra* note 20 at 215.

³⁹ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

whatever may be said of the *Human Rights Act 1998* (UK),⁴⁰ the Canadian *Charter* is not a code. Section 26 states:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.⁴¹

One might have foreseen difficulty of some kind where the *Charter* makes detailed provision as to a particular right. Perhaps those details were not intended to be supplemented by customary protection of the same right? Yet, the *Charter* has not been given any such restrictive operation. Rather, rights recognised by the *Charter* are also protected by other relevant law, being the older *Canadian Bill of Rights*,⁴² its provincial counterparts and the common law. They “produc[e] cumulative effects for the better protection of rights and freedoms.”⁴³ Custom, upon adoption, can join their company.

C) *Inconsistency with Common Law*

When the Privy Council stipulated that the doctrine of adoption was subject to conflicting statutes it also stated that the same result would flow from “rules ... finally declared ... by tribunals.”⁴⁴ This was not repeated by the Supreme Court, which referred to conflicting legislation alone. Still, there must be occasions where custom is barred from adoption by judge-made law. There is a debate over whether a lower court facing a custom previously adopted by a higher court, but subsequently changed by further customary international law, can apply the change notwithstanding the doctrine of precedent.⁴⁵ The debate is perhaps not that important. After all, the litigant invoking the change will have the motivation and often also the resources to appeal to the higher court.

More significant is the relationship between a custom, in its original or customarily altered form, and a separate rule of judge made law. A

⁴⁰ Roger O’Keefe, “The Doctrine of Incorporation Revisited” (2008) 79 *Brit YB Int’l L* 1 at 49-50.

⁴¹ See further Anne F Bayefsky, “International Human Rights Law in Canadian Courts” in Benedetto Conforti and Francesco Franconi, eds, *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997) 295 at 296.

⁴² SC 1960, c 44.

⁴³ *Singh v Canada (Minister for Employments and Immigration)*, [1985] 1 SCR 177 at 224, 16 DLR (4th) 422; *Chaoulli v Quebec* 2005 SCC 35, [2005] 1 SCR 791 at 814.

⁴⁴ *Chung*, *supra* note 7.

⁴⁵ See generally van Ert, *supra* note 20 at 208-18. For a different view, see O’Keefe, *supra* note 39 at 53-58. See also Stéphane Beaulac, “Customary International Law in Domestic Courts: Imbroglia, Lord Denning, Stare Decisis” in Christopher Waters, ed, *British and Canadian Perspectives on International Law* (Leiden: Martinus Nijhoff, 2006) at Ch 18.

Canadian court should seek to develop the common law consistently with custom. However, just as a statute can be beyond interpretative repair, so too can a rule of the common law be so established that the judiciary cannot intervene. The solution must be legislative.⁴⁶ In other words, there is a constitutional limitation on the capacity of the judiciary to reformulate the common law. The doctrine of adoption should not change this. Where that limitation is exceeded, the relevant custom must yield to inconsistent common law pending legislative intervention.

D) Limited Impact of Inconsistency

It must be emphasised that inconsistency need not be an absolute bar to adoption. If there remains some scope for adoption to operate notwithstanding the relevant intention or collision, then this should occur. Adoption is only precluded *to the extent of the inconsistency*.⁴⁷ A classic example of this is *Bouzari*.⁴⁸ As indicated, the Ontario Court of Appeal held that the *State Immunity Act* was expressly intended to be a code, with the result that it was inconsistent with and prevented the doctrine of adoption from applying in the field of state immunity.

However, s 18 of the *State Immunity Act* reads:

This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.

This provision raises two possibilities. The first is that there is no state immunity outside of the Act and, as a result, there is no state immunity in criminal proceedings whatsoever. An alternative view, which may or may not be correct, is illustrative for present purposes. While the statute may constitute a code precluding adoption, it only has this status in the civil sphere. The Act, as a barrier to adoption, has no impact in the criminal sphere. There, the doctrine of adoption would not be barred by inconsistency. In other words, the extent of inconsistency by codification is limited to civil proceedings, leaving adoption unimpeded elsewhere.

The same can arise in the context of direct collision. When seeking to give adoption a residual role outside of the direct collision, it will be necessary to ensure that implied codification is not also present. For this would prevent the residual role on the ground that Parliament had excluded

⁴⁶ See e.g. *R v Salituro*, [1991] 3 SCR 654 at 666, 8 CRR (2d) 173.

⁴⁷ Jones, *supra* note 23 at 467.

⁴⁸ *Supra* note 31. See also, in Quebec, *Kazemi (Estate) v Islamic Republic of Iran*, (2011) 330 DLR (4th) 1, leave to appeal allowed 330 DLR (4th) 66 [*Kazemi*] at para 44, 48, 51, 138.

all law apart from the statute itself. Yet where implied codification is absent, direct collision does not deny adoption all operation.

The following example comes from Hong Kong. Immigration legislation contains a general discretion to refuse permission to remain to persons without the right of abode in Hong Kong. While there is no general statutory adoption of refugee law, the authorities have a policy of not deporting refugees. In recent litigation, the Hong Kong Court of First Instance agreed that there was a customary norm prohibiting deportation of refugees. Right or wrong, the Court found direct collision between immigration legislation and that norm. The former enabled permission to be refused in violation of the latter.

Even if the Court were correct, the inconsistency it identified is not the end of the matter. Hong Kong administrative law recognises, somewhat differently from Canada, a doctrine of relevant considerations. This comprises factors a decision-maker exercising a statutory power is required to take into account, even if he or she ultimately acts contrary to those factors. The direct collision identified by the Court would not prevent refugee status from being a relevant consideration. The decision-maker may have statutory power to deport a refugee, but this is not impaired if there is requirement first to consider whether a person is a refugee and whether in light of this he or she should be deported.⁴⁹

4. *Finding the Meaning of Adoption*

The domestic status of customary international law in Canada since *Hape* is obscured by the absence of a definition of adoption. The present article seeks to construct a definition. It is best to start with what adoption cannot be. In Canada, treaties do not enjoy the doctrine of adoption.⁵⁰ They can only be introduced into domestic law by statute. This is because, if treaties became part of domestic law without the intervention of the legislature, the executive would be able to alter that law through its exercise of the prerogative power to conclude treaties. The separation of powers would be infringed.⁵¹

⁴⁹ See Jones, *supra* note 23. Compare *Ubamaka*, *supra* note 19 at paras 410-11.

⁵⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 860-61, 174 DLR (4th) 193 [*Baker* cited to SCR].

⁵¹ See e.g. *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326 at 347-48. A variety of approaches to implementation are available and the question of whether implementation is present can be controversial; see Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573 at 617-65.

Before they are introduced into domestic law, treaties are known as unimplemented treaties. They are nonetheless widely used by Canadian courts in statutory interpretation and administrative law. That use corresponds with certain uses of customary international law. It surely follows that the latter uses of custom cannot represent adoption. In other words, any use of custom reflecting use of an unimplemented treaty insulated from adoption cannot involve adoption of the custom. Adoption is also largely absent from the examples referred to by the Supreme Court in *Hape*. This leaves one principal possibility: the liability of the Crown in tort. Each of these propositions will be explored in the succeeding sections.

5. Use of Unimplemented Treaties

A) Statutory Interpretation

The presumption of conformity has already been mentioned. It is mainly used in proceedings involving the enforcement of a statutory or constitutional provision with a subject to matter to which an unimplemented treaty is relevant. This does not involve adoption. The proceedings are ultimately referable to the statute or constitution, not the treaty. Further, especially in relation to statutes, the treaty is not necessarily effective. If an otherwise competent legislature has been rather clear in its desire to violate an international treaty, the presumption gives way and the violation will be enforced by Canadian courts.⁵² The same would arise in the unlikely event the Canadian constitution itself derogated from international law.

A minority of the Supreme Court once objected that the presumption of conformity was the doctrine of adoption in disguise. It enabled a litigant “to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.”⁵³

This objection misfires. Courts performing statutory or constitutional interpretation are, often in a very specific context, presented with a choice between competing constructions. Making that choice is an unavoidable part of the judicial function. It surely falls far short of adoption for judges, in meeting this responsibility, to be guided by considerations that include consistency with a treaty. Thus, in *Lewis v Attorney-General (Jamaica)*,⁵⁴ the Privy Council was content to utilise a treaty for the purposes of

⁵² *Hape*, *supra* note 1 at 323.

⁵³ *Baker*, *supra* note 50 at 865-66.

⁵⁴ [2001] 2 AC 50, [2000] 3 WLR 1785 [*Lewis* cited to AC].

Caribbean constitutional interpretation “[w]hether or not the provisions of the [treaty] are enforceable as such in domestic courts.”⁵⁵

B) Use of Treaties in Administrative Law

This desire on the part of Canadian and English judges to utilise unimplemented treaties without effectively subjecting them to the doctrine of adoption is also apparent in administrative law. It is settled that an administrative decision is reviewable by the courts for reasonableness.⁵⁶ In *Baker*, the Supreme Court held that treaties can “help show the values that are central in determining whether [a particular] decision was a reasonable exercise [of an enabling power].”⁵⁷ In *Brind*, first mentioned above, the House of Lords took a similar approach, without any fear that doing so was adoption by the “back door.”⁵⁸

One can see how such use of treaties in administrative law avoids the accusation of *de facto* adoption. As *Baker* itself demonstrates, an administrative decision is not automatically invalid for inconsistency with an unimplemented treaty. Rather, when the judiciary considers whether or not an administrative decision is reasonable, it will merely have regard to the provisions of an unimplemented treaty or, more precisely, the values they enshrine. The judiciary may even uphold a decision ultimately negative to those values so long as the decision-maker has accorded them careful consideration.⁵⁹

C) Corresponding Uses of Custom

In short, there was no adoption of unimplemented treaties where they were merely one factor relevant to a wider judicial performance of statutory interpretation or assessment of reasonableness in administrative law. The same must be said where custom is correspondingly deployed. It has already been discussed how customary international law attracts the

⁵⁵ *Ibid* at 79.

⁵⁶ *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190.

⁵⁷ *Baker*, *supra* note 50 at 861-62.

⁵⁸ *Brind*, *supra* note 14 as applied in *R v Ministry of Defence, Ex p Smith*, [1996] QB 517 at 554, [1996] 2 WLR 305. See also the Australian decision of *Premalal v Minister for Immigration, Local Government and Ethnic Affairs* (1993), 41 FCR 117 at 138-39.

⁵⁹ *Baker*, *supra* note 50 at 863-64. Note that, despite the use of treaties in *Brind*, English courts are more reluctant to elevate treaties to the status of a relevant consideration; see e.g. *R (Hurst) v Coroner for Northern District London*, [2007] UKHL 13, [2007] 2 AC 189.

presumption of conformity. Whether the context is the ascertainment of conflicting legislation precluding adoption, or some other kind of proceeding, no actual adoption is involved. It is a case of statute or constitutional law. There would similarly be no adoption if custom, as is likely, were to influence reasonableness in administrative law.

6. *Examples from Hape*

In *Hape*, the Court mentioned two past situations where it felt the doctrine of adoption had been applied: maritime law and state immunity. The question is whether, in these situations, custom is used in a manner akin to statute or administrative law or has some other status, possibly amounting to adoption.

A) *Maritime Law*

1) *Authority Cited by Supreme Court*

The Court in *Hape* cited a decision it had made more than a century ago: *The "North" v R*.⁶⁰ In particular, the Court quoted a remark representing the views of two of five judges in that case:

[T]he Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations The right of hot pursuit ... being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.⁶¹

2) *No Adoption in North or Any Other Maritime Case*

Yet, a closer examination of *North* reveals that it did not actually involve the doctrine of adoption. Rather, it comprised the application of the presumption of conformity. The passage quoted by the Court went on to say that the "[statutory] language is ... quite broad enough to cover such a case as the one before us, and the fourth section of the statute, so far from negating the doctrine of immediate or hot pursuit of a poacher by its broad and general language, *may be said impliedly to adopt it*."⁶²

⁶⁰ (1906) 37 SCR 385 [*North*].

⁶¹ *Ibid* at 394.

⁶² *Ibid* at 394-95 (emphasis added). This point was recognised by van Ert, *supra* note 20 at 45, 161. See also *R v Sunila* (1986), 71 NSR (2d) 300, 28 DLR (4th) 450 (SC (AD)) at 456.

It is apparent that the position would be the same if *North* were decided by the Supreme Court today.⁶³ Indeed, one could go so far as to say that *any* application of customary international law in admiralty and maritime matters in Canada would occur pursuant to federal statute rather than the doctrine of adoption.⁶⁴ Further, in the English context, Dr O’Keefe has argued that law applied in admiralty proceedings, while subject to international influences, is *sui generis* and should not be regarded as an instance of the doctrine of adoption.⁶⁵ The Supreme Court has described the equivalent Canadian law in strikingly similar terms.⁶⁶

B) State Immunity

1) Authority Cited by Supreme Court

The Supreme Court gave three examples of adoption in the context of immunities:

- *Reference re: Exemption of United States Forces from Proceedings in Canadian Courts*;⁶⁷
- *Reference re: Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners’ Residences*;⁶⁸ and
- *Saint John (City) v Fraser-Brace Overseas Corp.*⁶⁹

2) Authority Sufficiently Strong

US Forces is not convincing. In that proceeding, the question was whether members of a visiting armed force were exempt from criminal proceedings in Canadian courts. At the time, there was no legislation providing immunity for the force. If it were to arise, it could only be through the operation of customary international law under the doctrine of adoption. Several judgments were delivered, yet only two clearly refer to the doctrine of adoption.⁷⁰ The remainder dispute the existence, scope or

⁶³ *Coastal Fisheries Protection Act*, RSC 1985, c 33 at ss 7(2), 9, 18.1(b), 18.2(1)(b).

⁶⁴ *International Terminal Operators Ltd v Miida Electronics Inc.*, [1986] 1 SCR 752 at 774, 779, 28 DLR (4th) 641.

⁶⁵ O’Keefe, *supra* note 40 at 6-8, 18-21, 27-28, 31.

⁶⁶ *Ordon Estate v Grail*, [1998] 3 SCR 437, 166 DLR (4th) 193 at 492-95.

⁶⁷ [1943] SCR 483, [1943] 4 DLR 11 [*US Forces*].

⁶⁸ [1943] SCR 208, [1943] 2 DLR 481 [*Foreign Legations*].

⁶⁹ [1958] SCR 263, 13 DLR (2d) 177 [*Saint John*].

⁷⁰ *US Forces*, *supra* note 67 at 501 *per* Kerwin J; at 510 *per* Taschereau J.

appropriateness for adoption of the relevant rules of customary international law, albeit without questioning adoption itself.⁷¹

Foreign Legations is a stronger authority. It concerned the legality of the imposition of municipal taxation on foreign diplomatic missions. There was general legislative provision for taxation but no relevant statutory immunities. Duff CJC, with whom Taschereau J and Rinfret J agreed,⁷² purported to apply adoption. An immunity from taxation for the missions was “implicit in the principles of international law recognized by the [common] law of England; and, consequently, by the [common] law of Ontario.”⁷³ There was no inconsistency in the relevant taxation legislation. Rather, it “must be construed as saving to the privileges of foreign states.”⁷⁴ Neither Kerwin J nor Hudson J dissented from adoption as part of Canadian law.⁷⁵

Saint John essentially applied *Foreign Legations*.⁷⁶ These authorities, particularly *Saint John*, cannot be dismissed as easily as *North* and maritime law. They did not involve statutory interpretation beyond identifying the absence of conflicting legislation. Nor were they referable to administrative law. In other words, custom was not simply one matter relevant to some wider judicial task or discretion. Rather, it was a norm enforced as a rule of common law in its own right. This must be what the Supreme Court means by adoption.

3) Authority Lacks Contemporary Significance

Even so, these examples are essentially historical. If *US Forces* were decided today, the Supreme Court would instead apply the jurisdictional provisions of the *Visiting Forces Act (VFA)*.⁷⁷ Likewise, *Foreign Legations* would come down to the taxation provisions of an instrument such as the *Vienna Convention on Diplomatic Relations*, incorporated into Canadian law by the *Foreign Missions and International Organisations Act (FMIOA)*.⁷⁸ *Saint John* would probably involve some combination of the foregoing legislation. Otherwise, it would be referable to a statute already

⁷¹ *Ibid* at 488 *per* Duff CJ and Hudson J; at 519 *per* Rand J. See also van Ert, *supra* note 120 at 198-99.

⁷² *Foreign Legations*, *supra* note 68 at 230-31.

⁷³ *Ibid*.

⁷⁴ *Ibid* at 231.

⁷⁵ *Ibid* at 238, 245.

⁷⁶ *Saint John*, *supra* note 69 at 266-67, 278, 282, 283.

⁷⁷ *Visiting Forces Act*, RSC 1985, c. V-2 at ss 5-7.

⁷⁸ *Foreign Missions and Organisations Act*, SC 1991, c. 41 at s 3(1), Sch 1 Art.s 23 and 28; see also Sch 2 Art 32.

touched upon, the *State Immunity Act*. While that statute might not prevent adoption from supplying immunity in criminal proceedings, such immunity would usually flow from the above provisions of the *VFA* and the penal provisions of the *FMIOA*.⁷⁹

7. *The Future in Crown Tort Liability*

A) *Crown Tort Liability Would Clearly be Adoption*

With immunities being a meagre harvest, it is necessary to look for other uses of custom that could constitute adoption. In other words, how else could a norm be enforced as a rule of common law in its own right, rather than a mere component in some wider judicial capacity under statute or administrative law? There is no point seeking solace in criminal law. Even if one could overlook the controversy of such a step in Australia and England, adoption in this form is probably excluded by the codification of criminal law in Canada.⁸⁰

One place to look is tort law. Crown tort liability could be an instance of adoption in Canada. It would mean that the Crown or, more precisely, Crown officials could be sued in tort where conduct unlawful as a matter of public law was also in breach of customary international law. In these circumstances, a rule of customary international would become a norm capable of independent enforcement in domestic law. It would be everything that was lacking in the interstitial use of treaties and custom already discussed.

For these purposes, the Crown should not be confined to the federal government. It should extend to provincial governments, reflecting the fact that their conduct is attributable to Canada under public international law.⁸¹ Other Canadian Crown entities may also suffice.⁸² Whether adoption could leap from Crown tort liability to that of foreign officials elsewhere in the Commonwealth or worldwide raises controversial questions of justiciability and the law of immunities, not to mention the conflict of laws, a full discussion of which is beyond the scope of this paper.⁸³

⁷⁹ *FMIOA* s 3(1), Sch 1 Art 31, Sch 2 Art.s 41, 43.

⁸⁰ *Criminal Code*, RSC 1985, c C-46 at ss 8-9.

⁸¹ James Crawford, *International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) at 94 and 97-98.

⁸² See generally Peter W Hogg and Patrick J Monahan, *Liability of the Crown*, 3d ed, (Ontario: Carswell, 2000) at Ch 12.

⁸³ See Oliver Jones, "*Jones v Ministry of Interior of Kingdom of Saudi Arabia: an Exercise in Interpretation*" (2007) 11 *SYBIL* 163; *R (Al Haq) v Secretary of State for Foreign and Commonwealth Affairs*, [2009] EWHC 1910 (Admin) [*Al Haq*]. See also *Kazemi*, *supra* note 48 at para 153.

B) Negative Decisions by English Courts

1) Litigation Giving Rise to Decisions

Crown tort liability for breach of customary international law was rejected by the English courts in the *Chagos Islanders* litigation. This litigation is well-known. British authorities forcibly depopulated a colony, the Chagos Islands of the Indian Ocean, to enable the United States of America to construct a military base there. At various stages, the Chagos Islanders challenged the validity of British legal instruments grounding their expulsion. They were for a time successful.⁸⁴ However, the challenge ultimately foundered in the House of Lords.⁸⁵

During the period when the challenge appeared to have been successful, the Chagos Islanders brought separate proceedings for compensation. At no point were those proceedings successful. The trial judge in the English High Court gave summary judgment against the Chagos Islanders,⁸⁶ and the Court of Appeal refused leave to appeal.⁸⁷ Before both courts, the Chagos Islanders invoked the doctrine of adoption. At that time, the conduct of the British authorities had been held invalid under public law. Further, that conduct was in breach of a custom prohibiting their exile. Accordingly, they argued, the British authorities were, through adoption, liable in tort.

2) Rejection of Crown Tort Liability by Trial Judge

The trial judge, Ouseley J, gave a “fundamental reason”⁸⁸ for excluding this use of adoption. It did not exhibit parallels with existing heads of Crown tort liability, which combined invalidity at administrative law with the requirements of specific torts. Rather, the tort was “no more and no less than a particular example of a tort for unlawful administrative acts, attempted in the field of immigration.”⁸⁹ It sought to disturb the settled

⁸⁴ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2001] QB 1067, [2001] 2 WLR 1219 [*Bancoult (No 1)*]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin) [*Bancoult (No 2) – DC*]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2007] EWCA Civ 498, [2008] QB 365 [*Bancoult (No 2) – CA*].

⁸⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2009] 1 AC 453 [*Bancoult (No 2) – HL*].

⁸⁶ *Chagos Islanders v Attorney-General*, [2003] EWHC 2222 [*Chagos Islanders–HC*].

⁸⁷ *Chagos Islanders v Attorney-General*, [2004] EWCA Civ 997 [*Chagos Islanders–CA*].

⁸⁸ *Chagos Islanders–HC*, *supra* note 86, at para 378.

⁸⁹ *Ibid.*

notion that “an *ultra vires* act does not of itself give rise to tortious liability.”⁹⁰ For these reasons, the only remedy for the Chagos Islanders lay in judicial review.⁹¹ The tort “[did] not arguably exist.”⁹²

3) *Rejection of Crown Tort Liability by English Court of Appeal*

The English Court of Appeal, in refusing permission to appeal, had a different objection to the suggested tort. Such a tort could only be committed by the state. Yet, unlike continental European legal systems, “English common law ha[d] no knowledge of the state.”⁹³ While there was recourse through judicial review, “the State ha[d] no tortious liability at common law for wrongs done by its servants, from ministers down.”⁹⁴ Even statutory reform of this position “d[id] not [relevantly] work by making the state a potential tortfeasor: it work[ed] by making the Crown vicariously liable for the torts of its servants.”⁹⁵ The Chagos Islanders had not “faced squarely up to this problem.”⁹⁶ They had invoked the tort so as to “implicate the state directly.”⁹⁷ This required something absent from England, namely “a legal system in which the Crown, in private law, can do wrong.”⁹⁸

C) *Limited Precedential Effect of Decisions*

The rejection, while strongly worded, has limited effect in precedent. At its highest, it comprises reasons given by the English Court of Appeal when refusing permission to appeal. Such reasons, while they may be cited before English courts,⁹⁹ are “at best only of persuasive weight.”¹⁰⁰ So even in England the rejection would be surmountable. Still, in any jurisdiction, there would need to be good reasons for rejecting a view of the English Court of Appeal. It is submitted that, at least in Canada, such reasons exist.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at para 379.

⁹² *Ibid* at para 383.

⁹³ *Chagos Islanders–CA*, *supra* note 87 at para 20.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at para 21.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at para 22.

⁹⁹ *Practice Direction (Citation of Authorities)*, [2001] 1 WLR 1001 at para 6.1; *Chagos Islanders–CA*, *supra* note 87, at para 1.

¹⁰⁰ *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at 1999, [2000] 3 All ER 752; see also *ibid* at 1991.

D) *Solid Grounds for Rejecting English Decisions*

Neither court was completely mistaken. As will be seen, the English High Court was undoubtedly right to say that unlawful administrative conduct must not be tortious *per se*. The English Court of Appeal was likewise correct to balk at making the Crown, rather than its servants, liable in tort. Neither point, though, should prevent adoption from leading to Crown tort liability.

1) *Correct to Say No Tort of Unlawful Administrative Acts*

There is old and high authority for the stance taken by Ouseley J.¹⁰¹ For example, the House of Lords said in its seminal decision on the tort of breach of statutory duty, *X (Minors) v Bedfordshire County Council*:¹⁰²

It is important to distinguish ... actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action.¹⁰³

The same is true in Canada, notwithstanding that breach of statutory duty has long been eclipsed by the law of negligence.¹⁰⁴ In *Holland v Saskatchewan*,¹⁰⁵ McLachlin CJC said for the Court:

The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence ... The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant [has] pursued this remedy ... and obtained a declaration that the government's action ... was unlawful and invalid. No parallel action lies in tort.¹⁰⁶

So, undeniably under the current law,¹⁰⁷ invalid administrative conduct cannot automatically lead to tortious liability. Rather, it is necessary for that conduct also to amount to a particular tort, be it breach of statutory

¹⁰¹ For an early instance, see *Entick v Carrington*, (1765) 2 Wils KB 275, 95 ER 807 at 818.

¹⁰² [1995] 2 AC 633, [1995] 3 WLR 152 [*X* cited to AC].

¹⁰³ *Ibid* at 730.

¹⁰⁴ *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205, 143 DLR (3d) 9.

¹⁰⁵ 2008 SCC 42, [2008] 2 SCR 551 at 567.

¹⁰⁶ *Ibid*.

¹⁰⁷ Note, though, statutory reform of this position is advocated by the English Law Commission; see Law Commission, Consultation Paper No 187, *Administrative Redress*:

duty in England, negligence in Canada or any other tort known to one of those jurisdictions.

2) Requirement Satisfied Where Adoption Leads to Crown Tort Liability

Even so, it will often be hard to separate the determination of whether conduct is invalid from whether that conduct also amounts to the commission of a tort. Sometimes, a finding of invalidity will necessarily produce a finding of tort liability. Take trespass to land and trespass to goods or conversion. An invalid exercise of a power to enter land or seize goods will result in tort liability.¹⁰⁸ The purported administrative action is necessarily also the conduct relevant to those torts – entry or seizure. The conclusion of invalidity automatically supplies their remaining element – absence of lawful authority.¹⁰⁹

On other occasions, the opposite applies. A finding that a particular tort has been committed also means that the administrative action in question was invalid. In *Odhavji Estate v Woodhouse*,¹¹⁰ the Supreme Court explained that one category of the tort of misfeasance in public office arose where a public officer engaged in “conduct that is specifically intended to injure a person or class of persons.”¹¹¹ In establishing the tort, “the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient ... owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public.”¹¹² In other words, the conduct attracting the tort, given its impropriety, necessarily entailed invalidity.

None of the above disturbs the settled principle that unlawful administrative action is not tortious *per se*. There will always be some cases where, due to the absence of a relevant tort, invalidity is the only outcome a litigant can achieve. Yet, in many cases, there is so much overlap between the purported administrative action and the ingredients of

Public Bodies and the Citizen (17 June 2008), online: Lord Chancellor and Secretary of State for Justice <http://www.lawcom.govuk/docs/cp187_web.pdf>.

¹⁰⁸ See e.g. *Cooper v Wandsworth Board of Works* (1863), 143 ER 414 at 417, 421, 14 CB NS 180. See also, by analogy, *Reynolds v Commissioner for Metropolitan Police*, [1985] QB 881 at 890 *per* Waller LJ; at 897 *per* Slade LJ; and at 904 *per* Purchas J.

¹⁰⁹ Clive Lewis, *Judicial Remedies in Public Law* (London: Sweet and Maxwell, 2009) at 571-72.

¹¹⁰ 2003 SCC 69, [2003] 3 SCR 263.

¹¹¹ *Ibid* at 281.

¹¹² *Ibid*.

the relevant tort that, with one starting point or another, the requirements of invalidity and tortious liability coalesce.

Allowing the doctrine of adoption to spawn Crown tort liability is similarly unobjectionable. It does not produce the result that unlawful administrative conduct is necessarily tortious. Rather, that result only emerges where the unlawful conduct also constitutes a breach of customary international law. The custom is judicially transformed into a tortious standard that operates like anything from assault to negligence. Of course, there could emerge the above overlap between findings of invalidity and tortious conduct. For example, administrative action could be unreasonable in light of a breach of customary international law. Even here, though, there would be no tortious liability from invalid conduct alone, as there would still need to be the customary violation.

3) *Accurate Objection to Tort Liability of Crown Itself*

The English Court of Appeal drew the line at any attempt to use the doctrine of adoption to impose tort liability on the Crown itself. To understand the correctness of this position, it is necessary to go back to the foundations of public tort liability in English law. That law was traditionally enshrined in the maxim that the Crown “can do no wrong.”¹¹³ In other words, whatever the position of Crown servants, the Crown itself could not be liable for a case in tort. This typically remains the case in England and Canada today. In England and almost all of Canada, even after extensive statutory reform, there are no more than two areas in which the Crown may be directly liable in tort: as an employer and as an occupier of property.¹¹⁴

4) *Problem Overcome for Adoption by Classic Device of Crown Servants' Liability*

The fact that the Crown in England and most of Canada faces so little direct liability in tort has not prevented sweeping public liability from

¹¹³ See e.g. *M v Home Office*, [1994] 1 AC 377 at 408, [1993] 3 WLR 433; *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 563-64, 4 DLR (4th) 193.

¹¹⁴ *Crown Proceedings Act, 1947* (UK), c 44 at s 2(1)(b) [CPA]; *Crown Liability Proceedings Act*, RSC 1985, c 50, s 3(b)(ii)[CLPA]. As to other Canadian legislation, see Hogg and Monahan, *supra* note 82 at 113, 129, 130-31. Compare *144096 Canada Ltd v Canada (Attorney-General)* (2003), 63 OR (3d) 172 at 180-81, 222 DLR (4th) 577 (CA). This is not the case in British Columbia and Quebec, where the Crown is subject to comprehensive direct liability in tort; see Hogg and Monahan, *supra* note 82 at 129. This article does not consider those provinces further, although it is possible tortious liability for breach of CIL could be imposed on the Crown in right of those provinces directly.

emerging in this area. Long before any statutory reform of this area, English and Canadian judges sidestepped Crown immunity by making servants of the Crown personally liable for Crown torts. This had the potential for injustice to both claimants and defendants. The courts, however, intimated that the Crown had a “moral obligation” to pay the damages awarded to a successful claimant. The Crown almost invariably complied.¹¹⁵

Over time, this practice was converted into an obligation by statutory provisions rendering the Crown vicariously liable for the torts of its servants or agents.¹¹⁶ In other words, the judicial device of maintaining Crown immunity from tort liability while subjecting Crown servants to that liability was continued. Hence the remark by the English Court of Appeal quoted above, namely that the statutory reforms “d[id] not [relevantly] work by making the state a potential tortfeasor: [they] work[ed] by making the Crown vicariously liable for the torts of its servants.”¹¹⁷

If the doctrine of adoption were to generate Crown tort liability, it could overcome the concern of the English Court of Appeal by observing this tradition. Crown servants could be made subject to liability in tort for breaches of customary international law. There would be no direct Crown liability for the same. Of course, it might be objected that it is false to distinguish between the Crown and its servants in this way. This is precisely the point, however. In the words of Sir William Wade, common law judges drew the “highly artificial” distinction between the Crown and individual officials Crown immunity “tolerable” and to ensure its “reconciling...with the rule of law.”¹¹⁸ This was ultimately embraced by statute law. It could occur once again in relation to customary international law.

¹¹⁵ See generally *Rogers v Rajendro Dutt* (1860), 15 ER 78 at 89, 8 Moo PC 209; *Matthews v Ministry of Defence*, [2003] 1 AC 1163 at 1169-70, 1182-83, 1184-86, 1192-93 and 1198, [2003] 2 WLR 435; *Conseil des Ports Nationaux v Langelier*, [1969] SCR 60 at 65-72, 2 DLR (3d) 81.

¹¹⁶ *CPA*, *supra* note 114 at s 2(1)(a). As to the Canadian legislation, see Hogg and Monahan, *supra* note 82 at 113.

¹¹⁷ *Chagos Islanders—CA*, *supra* note 87 at para 383.

¹¹⁸ William Wade, “The Crown, Ministers and Officials: Legal Status and Liability” in Maurice Sunkin and Sebastian Payne, eds, *Nature of the Crown: a Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 25-26.

5) *Crown Subject to Statutory Imposition of Vicarious Liability in Relation to Customary International Law*

A question that plainly remains is whether the tortious liability of Crown servants under adoption would attract the statutes rendering the Crown vicariously liable. Those statutes impose vicarious liability on the Crown in terms such as “if it were a person.”¹¹⁹ This means that the Crown has the same vicarious liability for its servants as a private person. The question is whether this is sufficient to leave the Crown vicariously liable for torts specific to the public sphere or, in other words, torts to which a private person is not subject. Such torts include tortious liability for breach of customary international law.

The answer lies in another tort specific to the public sphere: misfeasance in public office. In *Racz v Home Office*,¹²⁰ the House of Lords held that the Crown could be vicariously liable in relation to the tort of misfeasance in public office. That tort, of course, can only be committed by officials. At no point did the House mention the *CPA*. The statutory reforms had, however, been common ground before the Court of Appeal and were expressly accepted by that Court without demur.¹²¹ While the House of Lords reversed the judgment of the Court of Appeal, one may assume it would have addressed the critical question of the *CPA* had it disagreed with its application.

It is hard to quibble with this approach, whether for misfeasance in public office or breaches of customary international law. The statutory reforms do not have to be read as imposing on the Crown vicarious liability “as if it were a person” for only those torts to which the person is subject. Rather, it can be read as imposing such liability on the Crown in relation to any tortious liability, whether specific to the public sphere or shared with private persons.

E) *No Other Barrier to Adoption Generating Crown Tort Liability*

Three concerns, none fatal, remain. Each was raised by Dr O’Keefe in his discussion of adoption, including the question of Crown tort liability, under English law.

¹¹⁹ See e.g. *CPA*, *supra* note 114 at s 2(1); *Crown Liability and Proceedings Act*, RSC 1985, c. 50 at s 3(b)(i); Hogg and Monahan, *supra* note 82 at 112-14.

¹²⁰ [1994] 2 AC 45, [1994] 1 All ER 97 [*Racz*].

¹²¹ *Racz v Home Office* (1992), Times, 17 December (CA).

1) *No Distortion of Customary International Law*

Dr O'Keefe suggests that adoption is not automatic. Rather, it is a process of judicial adjustment by which custom is transported from the international plane to become a norm capable of enforcement in domestic law.¹²² So much has been judicially recognised, especially in Singapore. Dr O'Keefe goes on to say that there is some custom that cannot survive the process of adoption. This generally arises where the custom is of a strictly inter-state exception, rather than one directly embracing the position of individuals, as with the customary international law of human rights.¹²³ This might exclude certain custom from adoption but is no bar to adoption in the field of tort.

Perhaps Dr O'Keefe sows the seeds for a broader point that the process of adoption cannot distort customary international law. Still, this does not occur where tortious liability is imposed on servants of the Crown, rather than the Crown itself or, for that matter, private persons. No doubt, as Dr O'Keefe indicates, that "individual delictual responsibility is unknown to present [customary] international law,"¹²⁴ but it is surely axiomatic that a state has some discretion as to how it implements public international law on the domestic plane, especially for the purposes of constitutional law. The imposition in Canada of vicarious, rather than direct, liability of the Crown is thus uncontroversial.

2) *No Excess of Constitutional Role by Judiciary*

Dr O'Keefe's principal objection to adoption generating Crown tort liability under English law was constitutional. Building upon his judicially-approved dictum that "customary international law is applicable ... only where the constitution permits,"¹²⁵ Dr O'Keefe wrote:

the recognition by the courts of a cause of action in tort for the violation of a rule of customary international law would be no less than the judicial creation of a new tort, something which has not truly happened since the coining of the unified tort of negligence in *Donoghue v Stevenson* in 1932. The reason for this is essentially constitutional: given its wide-reaching implications, economic and sometimes political, the creation of a novel head of tort is now generally recognised as better left to Parliament, on account of the latter's democratic legitimacy and superior capacity to engage beforehand in the necessary research and consultation.¹²⁶

¹²² O'Keefe, *supra* note 40 at 37-42.

¹²³ *Ibid* at 29, 43-44.

¹²⁴ *Ibid* at 52.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

This forms part of a more general notion, identified as early as the 1960s by Sir Humphrey Waldock, that “a certain nervousness [exists] on the part of English judges as to the constitutional implications of [adoption].”¹²⁷ That nervousness, however much it may have motivated courts in Australia or England, is of limited relevance to Canada. The doctrine was strongly endorsed by the Supreme Court in *Hape*. It is scarcely likely that a final appellate court would take this step if it harboured doubts as to constitutional validity.

This leaves the specific objection of Dr O’Keefe to adoption generating tortious liability. There can be no denying the reality that recognising the full extent of adoption creates a new class of tort liability. This does not, however, place sanctioning this development beyond the judicial function in Canada. Of course, the Canadian courts have no quasi-legislative capacity to pluck torts out of thin air. Yet, no such thing would occur if adoption generated tort liability. The doctrine has long been accepted in Canada. Recognition of its reach in tort would be an elaboration like many before in the common law world. That elaboration would be all the more compelling as there is little else the doctrine could do.

Further, there can be clear limits to the extent of liability in tort under the doctrine of adoption. In particular, when Canadian judges identify customary international law, they can restrict themselves to gauging its current state as cautiously and forensically as possible. They can refrain from purporting to exercise anything like legislative power. As Lord Hoffmann said on behalf of the House of Lords in *Jones v Ministry of Interior of Kingdom of Saudi Arabia*:

international law ... is based upon the common consent of nations. It is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.¹²⁸

This sentiment is not new. In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry*,¹²⁹ Lord Oliver said, also for the House of Lords:

A rule of international law becomes a rule ... only when it is certain and is accepted generally by the body of civilised nations ... It is certainly not for a domestic tribunal

¹²⁷ Humphrey Waldock, “General Course on Public International Law” (1962) 106 *Rec des Cours* 5 at 137.

¹²⁸ [2007] 1 AC 270 at 298, [2006] 2 WLR 1424.

¹²⁹ [1990] 2 AC 418, [1989] 3 WLR 969 [*J H Rayner* cited to AC].

in effect to legislate a rule into existence for the purposes of domestic law ... on the basis of material that is wholly indeterminate.¹³⁰

Canadian courts can be understood to hold the same view.¹³¹

3) *No General Inconsistency with Common or Statute Law*

If adoption were allowed by Canadian courts to generate tort liability, it would be like any other instance of adoption. In particular, it would need to avoid inconsistency with statute or common law. If inconsistency were to arise, there would be no tortious liability. It should already be apparent there is no general inconsistency with the common law. Rather, adoption can generate tort liability by a route long practised at common law – through servants of the Crown.

The common law requirement that administrative conduct be invalid before it sounds in tort also avoids inconsistency with statute. For if the position were otherwise, there would be direct collision between adoption in this form and a statute authorising a breach of customary international law. This is subject to an exception: statutes barring administrative action purportedly under its provisions from grounding civil liability, expressly or by implication.¹³² While probably rare, this would stop adoption in its tracks.

8. *The Way Forward*

It must be asked which examples of customary international law could ground tortious liability. In *Hape*, the Supreme Court indicated that adoption was restricted to “prohibitive” rules of customary international law. The idea is that custom only attracts the doctrine where it outlaws something. Where custom facilitates without banning there is no work for the doctrine of adoption to do. This is a curious limitation on adoption not readily apparent elsewhere in the common law world. Still, whether it is right or wrong, the distinction will rarely bite. Most custom involves some

¹³⁰ *Ibid* at 513; see also *Serbia v Imagesat International NV*, [2009] EWHC 2853 (Comm) at paras 16 and 135.

¹³¹ *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86 at 118, 5 DLR (4th) 385 (“substantial uniformity or consistency, and general acceptance”); see also *Hape*, *supra* note 1 at 319.

¹³² See, for example, the discussion of the exclusion of private law remedies by the *Ontario Human Rights Code* in *Seneca College v Bhadauria*, [1981] 2 SCR 181, 124 DLR (3d) 193.

kind of bar or duty.¹³³ Further, prohibitive status could also be implied; for example, an individual right might by implication prohibit violation of that right, or permission to act in certain ways might by implication prohibit acting in other ways.

Some custom that could trigger Crown tort liability appears from the literature. There is torture¹³⁴ and *non-refoulement*, particularly of refugees.¹³⁵ Indeed, custom has a wide range of protections relevant to individuals. Where administrative conduct is invalid as a matter of public law, the victim could then sue in tort for violation of those protections. Doing so would be appropriate even where customary protection of the individual overlaps with *Charter* rights. As explained, the *Charter* allows its rights to be supplemented by other law. Further, while a *Charter* violation sounds in damages, they may not be awarded if there is another remedy that will adequately address the violation, particularly in tort.¹³⁶ This surely describes damages in tort for breach of customary rights.

In any event, there will be many cases where the protection provided by customary international law is unique. A fertile source of possible protections would be cases in the United States under the *Alien Tort Claims Act (ATCA)*.¹³⁷ While those cases are ultimately referable to statute and brought against foreign rather than local authorities, they provide a smorgasbord of possible customary norms of interest to individual litigants. Among the many norms invoked in *ATCA* litigation, one standout possibility for Canada is customary protection of the environment.¹³⁸

9. Conclusion

The conclusions of this article can be stated as follows:

- Adoption may be barred by a range of conflicting law, be it legislation, the Constitution or the common law. The *Charter* is unlikely to be conflicting in this respect.

¹³³ For one possible exception, see van Ert, *supra* note 20 at 221.

¹³⁴ Edward M Hyland, "International Human Rights Law and the Tort of Torture: What Possibility for Canada?" in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Oxford: Hart Publishing, 2001) at Ch 15.

¹³⁵ See Jones, *supra* note 23. See also generally *Suresh v Canada*, [2002] 1 SCR 3, 208 DLR (4th) 1.

¹³⁶ *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 at 44-45.

¹³⁷ 28 USC §1350.

¹³⁸ See further Richard L Herz, "Litigating Environmental Abuses Under the Alien Tort Claims Act: a Practical Assessment" (1999-2000) 40 Va J Int'l L 545.

- Inquiry into whether adoption is barred by inconsistent primary legislation, in particular, should comprise sequential investigation into express codification, direct collision and implied codification.
- Direct collision may require statutory interpretation in light of the presumption of conformity. Canadian courts will need to decide, in particular, whether to follow New Zealand and limit general statutory discretions according to custom.
- In light of Singaporean authority, the robust principle of legality adopted by English courts has no place in the ascertainment of direct collision (or, for that matter, implied codification).
- Implied codification must be found wherever a Canadian court is satisfied Parliament intended to legislate exhaustively. There should be no reading down of implied codification to preserve international law in a manner similar to the New Zealand treatment of general statutory discretions.
- Where inconsistency between a custom and conflict domestic law is found, adoption is only barred *to the extent of the inconsistency*. This may be demonstrated by examples involving express codification and direct collision.
- Adoption is present where a customary norm is sued upon and enforced as a rule of common law in its own right, rather than utilised as a mere component in some wider judicial capacity under statute or administrative law.
- Adoption should exist in Canada through Crown tort liability. Its rejection by English courts should not be followed. Contrary to their views, Crown tort liability for breach of customary international law would not create a tort of unlawful administrative acts. Rather, as has always been the case, invalidity would have to be combined with a judicially recognised tortious standard, in this case custom. Nor would tradition be disturbed by the Crown being liable directly. Crown servants would bear tortious liability. The Crown itself would be subject to vicarious, not direct, liability.
- Despite various suggestions in the literature, there is no other reason barring adoption from generating Crown tort liability. In particular, its recognition would not impermissibly distort

customary international law. Nor would it involve an excess of judicial power by Canadian courts.

- There is an exciting range of custom that could trigger Crown tort liability in Canada. Allowing such liability would even be appropriate where the custom overlaps with rights under the *Charter*. Customary protection of the environment, in light of *ACTA*, is ripe for exploration.