

CANADA'S INTERNATIONAL POSTURE ON HUMAN RIGHTS:
CONSEQUENCES IN THE DOMESTIC DOMAIN

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ABSTRACT

A fundamental tension exists today between the increasing willingness of states to participate in international efforts to protect fundamental human rights, and their desire to retain control over internal laws and procedures. Canada, as an active participant in international human rights regimes, has assumed numerous international obligations which have not for the most part been directly incorporated into Canadian law. Canadian law has traditionally drawn a distinction between the international obligations which Canada has undertaken as a party to international treaties, and the individual domestic rights which may be enforced in Canadian courts. In recent years, however, this distinction has become blurred.

At present, the international human rights instruments to which Canada is a party have an uneasy place in Canadian law. Many courts in Canada are unfamiliar with the provisions of these instruments. In recent years the Supreme Court of Canada has increasingly demonstrated a willingness to refer to international conventions, particularly as aids in interpreting the *Charter of Rights and Freedoms*, but the articulation of the impact of international human rights law on domestic law remains less than clear. Canada has accepted the competence of international treaty bodies to adjudicate upon individual complaints alleging violations of international human rights obligations by Canada, yet Canada's responses to the views and requests of these treaty bodies has been inconsistent. The result is a lack of clarity regarding Canada's policies on implementation of its international human rights obligations.

Questions are increasingly being raised in relation to the domestic impact of Canada's international posture on human rights. It is time that the Government of Canada recognize that there are serious issues that need to be addressed and reflect upon what steps might be taken to achieve a more rational, effective approach to the assumption and implementation of international human rights obligations. Four areas which the Government should examine in this regard are the pressing need for informed public debate, changes to the ratification process, the positions advanced before domestic courts, and the need to improve the credibility of the international treaty body process.

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CANADA'S INTERNATIONAL POSTURE ON HUMAN RIGHTS: CONSEQUENCES IN THE DOMESTIC DOMAIN

INTRODUCTION

No one would quarrel with the notion that states should enthusiastically endorse international instruments which promote principles such as "universal respect for and observance of human rights and fundamental freedoms". Most would applaud states' involvement in international efforts to recognize individual human rights and prevent their infringement. If participation in the arena of international human rights were a matter as simple and straightforward as that, there would be little reason for concern. However, over the past three decades, it has proven to be anything but a simple matter. States which have ratified international human rights instruments and acceded to their individual petition procedures find themselves struggling to reconcile the obligations they have assumed internationally with their desire to retain control over their domestic legal process.

This is the situation Canada finds itself in. Canada has been a good joiner. Though its initial venture into the international human rights arena was not without reservations, it has become an enthusiastic participant in the process, and has with pride developed an excellent reputation internationally with respect to human rights law. Along the way, some of the concerns that were expressed when Canada made its foray onto the international human rights stage, concerns with the vague and imprecise terminology contained in international instruments, the uses to which the language might be put, and the influences which the instruments might have on the future interpretation of obligations, seem to have been dismissed, in favour of ensuring a reputation as a promoter of fundamental human rights.

The consequences for Canada's domestic legal process are only slowly emerging. The potential domestic impact of Canada's international posture on human rights has never been the subject of informed public debate in Canada. Even many in the legal community have yet to familiarize themselves with Canada's international human rights obligations. But awareness is growing, and increasingly individuals are not only filing petitions (including requests for interim measures) with international treaty bodies, alleging violations by Canada of its international obligations, but are also challenging Canada's legislation and administrative decisions in the domestic courts, on the basis of Canada's international obligations.

These challenges are not only raising difficult legal questions regarding the domestic status of international human rights treaties, but are also testing the dividing line between national rules and international governance. Many of these challenges concern matters which go to the heart of the concept of state sovereignty, the right of the state to exercise control over its borders and to protect its own citizens. Some of the challenges, for example, concern decisions which Canada has taken to remove individuals from the country pursuant to immigration procedures. Other cases concern decisions to extradite individuals to countries where they may be subject to the death penalty. Faced with interim measures requests from international treaty bodies to delay removal of individuals from Canada for what might be lengthy periods of time, Canada has been reluctant, and in some cases unwilling, to abide by these requests. Faced with allegations in the domestic courts that by deporting or extraditing these individuals Canada is violating the international conventions to which it is a party, the Government has taken refuge in its dualist system and has relied on the well-established legal principle that an unincorporated international treaty has no direct application within Canadian law. While this principle is still good law, the courts are increasingly ready to apply unimplemented treaties

indirectly through statutory interpretation of domestic legislation, and the Supreme Court of Canada has recently signalled its willingness to use creative means to ensure that domestic law is interpreted in conformity with international human rights obligations.

Gradually, questions are being raised and criticism directed at Canada in relation to its international posture on human rights. There are those who call Canada a human rights violator and accuse Canada of not living up to its international obligations and of taking inconsistent positions internationally and domestically. There are others who are astonished that Canada has taken on obligations which potentially restrain government action on the basis of something other than domestic legislation, and question whether this poses a threat to state sovereignty and to the integrity of the state's domestic legal process.

What appears as inconsistency and confusion in the Canadian approach to these matters is illustrative of a fundamental tension that exists in Canada, as well as in other nations, between the state's increasing willingness, in this age of globalization and internationalisation, to be part of an international effort to protect fundamental human rights around the world, and the state's desire to retain control over what it views as domestic concerns. This thesis will explore this tension, and will examine Canada's participation in the arena of international human rights, its impact on Canada's domestic legal process, and ways in which Canada might develop a more rational and effective approach to international human rights obligations.

The thesis is divided into five chapters. Chapter 1 provides a theoretical framework for understanding the relationship between the concept of state sovereignty, in particular the desire of the state to retain control over its internal legal process, and the active participation of the state in the realization and international protection of fundamental human rights. The chapter examines the

evolving concept of state sovereignty and current paradigms of world order. It also undertakes an analysis of practices in the international human rights arena which touch upon the interplay of state sovereignty and the achievement of international standards. By examining the application of the principles of subsidiarity, the margin of appreciation, derogations and reservations, the chapter explores to what extent the existing international human rights system accommodates state sovereignty.

Chapter 2 takes a critical look at Canada's performance in the domestic implementation of its international human rights obligations. To gain an understanding of apparent inconsistencies in Canada's behaviour, the chapter examines the history of international human rights in Canada, the process by which Canada assumes international human rights obligations, and how issues concerning the relationship between international human rights law and domestic law are unfolding before Canada's courts.

Chapter 3 examines the optional individual complaint procedures to which Canada has acceded under international human rights conventions. A detailed examination is undertaken of the conclusions ("views") reached by international treaty bodies on individual complaints against Canada concerning alleged human rights violations, and Canada's responses to the views and requests of the treaty bodies.

There is a useful comparison to be made between the impact of Canada's international human rights obligations on the Canadian domestic legal process, and the effects which the United Kingdom's participation in the European human rights regime has had on the domestic legal process in the UK. Chapter 4 explores this comparison and examines whether the current debate in the UK offers Canada any insights into its own situation.

The final chapter, chapter 5, provides the writer's conclusions with respect to what consequences Canada's international posture on human rights is having in the domestic domain, and offers suggestions which might assist the Government of Canada in developing a more effective approach to the assumption and implementation of international human rights obligations.

The research for this thesis was completed on November 15, 1999, and accordingly the thesis does not include any reference to events occurring after that date.

CHAPTER 1

INTERNATIONAL HUMAN RIGHTS AND STATE SOVEREIGNTY: CONFLICTING OR COMPLEMENTARY?

The term "state sovereignty" often conjures up the image of states rigidly adhering to the notion that they can behave as they please, particularly within their own borders, without interference. The concept of "human rights" is frequently referred to in juxtaposition to "state sovereignty"; states are seen as the violators of fundamental human rights and "sovereignty" is perceived as a tool used by states to shield those violations committed within state territory.

A good deal of debate has taken place in recent years with respect to the meaning and status of "sovereignty", whether state sovereignty is eroding and a new world order emerging, and whether or to what extent the principle of state sovereignty is incompatible with or an obstacle to the realization of and the international protection of fundamental human rights. "Some time ago, sounding sovereignty's death knell came into academic vogue."¹ Scholars have spoken about the end of sovereignty, the decline of sovereignty, the erosion of sovereignty and the extinction of the nation-state.² These notions of the demise of state sovereignty are frequently accompanied by theories and models relating to the replacement of state sovereignty or the state-centric system with a global community or a new world order system. From the perspective of new world order proponents, state sovereignty is seen as the major impediment to the achievement of international human rights

¹Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State* (Pennsylvania: The Pennsylvania State University Press, 1995) at 1.

²These are by no means the only terms resorted to in describing changes in state sovereignty: "State sovereignty today is 'diffusing,' 'shifting,' 'diminishing,' 'maturing,' 'pooling,' 'leaking,' 'evaporating' -- and all this is happening, it would seem, at once.": Sohail H. Hashmi, ed., *State Sovereignty: Change and Persistence in International Relations* (University Park: Pennsylvania State U.P., 1997) at 3. Writers have also referred to the "unbundling" and the "transformation" of sovereignty. See, e.g., Saskia Sassen, *Losing Control? Sovereignty and Globalization* (New York, Columbia University Press, 1996) at 29-30.

standards and as a concept that has run its course and is obsolete.

This chapter examines the evolving concept of state sovereignty in the context of the international human rights movement, and whether the existing international human rights system possesses the capacity to accommodate state sovereignty but at the same time to move gradually toward the realization and protection of fundamental human rights.

The Meaning and Status of "State Sovereignty"

(i) Historical Roots

There is a good deal of lack of clarity surrounding the term "sovereignty".³ The origin and history of the concept of sovereignty is closely linked to the evolution of the state and to the development of centralized authority in early modern Europe.⁴ The establishment of the norm of sovereign statehood is usually associated with the historic Peace of Westphalia which ended the Thirty Years War in 1648:

Westphalia's norm of sovereign statehood set new standards for each of the...faces of sovereignty: it made the sovereign state the legitimate political unit; it established that the basic attributes of statehood - the existence of a government with control of its territory were now...the criteria for becoming a state; and, as it came to be practiced, it meant that there were no legitimate restrictions on a state's activities within its territory. Such a sweeping transition in sovereignty, affecting so

³The English word "sovereignty" originally derived from the French word "souverain", meaning a supreme ruler not accountable to anyone except perhaps to God. See Ivo D. Duchacek, *Nations and Men: International Politics Today* (New York: Holt, Rinehart and Winston, 1966) at 47, referred to in Fowler and Bunck, *supra* note 1 at 4.

⁴Joseph A. Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Great Britain: Edward Elgar Publishing Limited, 1992) at 15. Many historians say that the concept developed as an instrument for the assertion of royal authority over feudal princes in the construction of modern territorial states. Disorder was seen as a serious obstacle to a stable society and could only be overcome by governments that could maintain the capacity to provide order through the exercise of sovereignty. See Gene M. Lyons and Michael Mastanduno, eds., *Beyond Westphalia?: State Sovereignty and International Intervention* (Baltimore, Md.: The Johns Hopkins University Press, 1995) at 5.

many areas, would not be seen again until the European Community came into being in 1950.⁵

It has been said that “[i]n the history of sovereignty one can skip three hundred years without omitting noteworthy change. Westphalia[’s]...norm of sovereign statehood has remained intact up to the present”.⁶

Most contemporary formulations of the concept of sovereignty are based on philosophical and theoretical positions advanced in sixteenth and seventeenth century Europe.⁷ There were, however, different approaches to “sovereignty” which developed during that era, and the ambiguities that exist today in the definition of “sovereignty” are apparent in the theories which form the historical basis for contemporary formulations of the concept.⁸

⁵Daniel Philpott, “On the Cusp of Sovereignty” in Luis E. Lugo, ed., *Sovereignty at the Crossroads? Morality and International Politics in the Post-Cold War Era* (Lanham, Md.: Rowman & Littlefield Publishers, Inc., 1996) at 43. Most standard international law texts give 1648 as the advent of the modern law of nations. See Harold Hongju Koh, “Why Do Nations Obey International Law?” (1997) 106 Yale L.J. 2599 at 2607.

⁶Lugo, ed., *ibid.* at 43. It should be noted, however, that Westphalia did not produce a single model of the sovereign state, though the sovereign state was the important entity. Alternative models, involving limited or conditional sovereignty, developed, e.g., dependencies, protectorates, and vassal states. For a discussion of the “range of governmental entities considered by international law as possessing some degree of international personality, if not full sovereignty”, see Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 16 ff.

⁷Camilleri and Falk, *supra* note 4 at 15.

⁸A number of political thinkers significantly shaped the theory of sovereignty, among them Bodin, Hobbes, Locke, Rousseau, and Kant. Bodin perceived “sovereignty” as the supreme power over citizens and subjects, unrestrained by law, although he did view that supreme power as being subordinate to the laws of God and Nature. Hobbes discarded all limitations on sovereignty; in his view no authority outside the state could sit in judgment on the state. Locke saw society and the state as existing to preserve individual rights; the rights of life, liberty and estate were limitations on the authority of the state and sovereign power resided ultimately with the people. Locke built on the theory of Hugo Grotius “whose development of natural law qualifies him as the father of modern international law.”: See Jerome J. Shestack, “Role of the Lawyer in Human Rights Issues” in *Global Law in Practice* (The Hague: Kluwer Law International, 1997) at 30. Shestack goes on to say that the legal philosophy of Grotius and the enlightenment philosophers was “submerged and overridden by 19th and 20th century positivist doctrine which sacrificed human rights to the altar of the state...” (at 31). Rousseau attempted to fuse the sovereignty of the people with the sovereignty of the state; “the people” were

(ii) *"Sovereignty" as an Evolving Concept*

"Sovereignty" remains a central but ambiguous notion in international relations discussions today. It has been said that "[t]hough the frequency of its use has waxed and waned, sovereignty has never strayed far from the center of discourse about international relations...Yet, despite its regular use, sovereignty remains a somewhat misty concept clouded by a fog of contested assumptions and unresolved questions."⁹ In contemporary international relations discourse the term "sovereignty" is defined generally as "the right of a state to control its domestic and foreign affairs without external interference."¹⁰ As a concept of international law, "sovereignty" is said to have three major aspects: external, internal and territorial:

The external aspect of sovereignty is the right of the state freely to determine its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence. It is this aspect of sovereignty to which the rules of international law address themselves primarily...

The internal aspect of sovereignty is the state's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respect.

The territorial aspect of sovereignty is the complete and exclusive authority which a state exercises over all persons and things found on,

the ultimate repository of sovereign rights. Kant reasserted the principle of constitutional government; in Kant's theory, each citizen shared in the law of the sovereign by being involved in making the law, but the law, administered by the executive, was binding on all citizens. See Camilleri and Falk, *supra* note 4 at 18 - 23.

⁹Fowler and Bunck, *supra* note 1 at 3 and 32.

¹⁰See Peter A. Toma and Robert F. Gorman, *International Relations: Understanding Global Issues* (Pacific Grove, California: Brooks/Cole Publishing Company, 1991) at 25. Note: The United Nations Charter sets out the concept in similar terms. Article 7 begins as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..." Non-intervention is often described as the flip-side of sovereignty. See, e.g., Robert O. Matthews and Cranford Pratt, eds., *Human Rights in Canadian Foreign Policy* (Kingston and Montreal: McGill-Queen's University Press, 1988) at 291. The authors also point out that the principles of sovereignty and non-intervention are incorporated not only in the UN Charter but also in all regional organizations.

under or above its territory...

[S]overeignty in international law is the sum total of all three aspects...nearly all international relations are bound up with the sovereignty of states...¹¹

It is the "internal" aspect of "sovereignty" which has become the principal subject of reflection and concern in international human rights discourse.

Some of the confusion regarding sovereignty results from the multiple meanings attached to the term, as seen in the definition of "sovereignty" referred to above:

In international relations discourse, scholars, diplomats, politicians, and government officials often casually refer to sovereignty without identifying the sense in which they are using the term...As once stated of the similarly elusive term 'the balance of power,' the concept of sovereignty has been used not only in different senses by different people, or in different senses at different times by the same people, but in different senses by the same person in rapid succession.¹²

The lack of clarity in current discussions of the notion of sovereignty is due not only to its multiple meanings, but also to the existence of varying assumptions underlying the term. Some of the confusion may be attributable to a misunderstanding of the original theories on which contemporary formulations are based. One writer has stated, for example, that the concept of sovereignty associated with the notion of absolute power or authority of governments and states rests on an inaccurate reading of Bodin and his followers:

Bodin was not concerned with elaborating a principle of absolute power of governments (or of monarch) in the sense of limitless or even arbitrary power...he was concerned with the centralization of public authority in the monarch and doing away with competing power groups or authorities such as the church and the nobility. This

¹¹M. Sorenson, ed., *Manual of Public International Law* (1968) at 523, referred to in Henry Burmester, "National Sovereignty, Independence and the Impact of Treaties and International Standards (1995) 17 Sydney L.Rev. 127 at 128.

¹²Fowler and Bunck, *supra* note 1 at 4.

centralized authority was not conceived of as being unlimited.¹³

Louis Henkin has expressed the view that, "as applied to states in the international system, 'sovereignty' is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology".¹⁴ Henkin says as follows:

A political idea describing the locus of ultimate legitimate authority in national society, 'sovereignty' has been transmuted into an axiom of the inter-state system, which has become a barrier to international governance, to the growth of international law, and to the realization of human values.¹⁵

It is the perception of "sovereignty" as absolute sovereignty, i.e., the idea that the state is unlimited in its prerogative, unchallengeable, inviolable, that leads to the conclusion that state sovereignty is incompatible with and inevitably collides with the realization of and the protection of international human rights, that it has become dysfunctional or obsolete, and that it requires replacement.

One writer has postulated that there are two lines of thought associated with concepts of sovereignty. It is either "viewed as something absolute that may be won or lost or something variable that may be augmented or diminished".¹⁶ This has been described as the "chunk" and "basket" theories of sovereignty.¹⁷ One school of thought views sovereignty as a chunk of stone which cannot be enlarged or chipped away; it is monolithic and indivisible. The other school of thought views the

¹³Jost Delbrueck, "International Protection of Human Rights and State Sovereignty" (1982) 57 Indiana L.J. 567.

¹⁴Louis Henkin, "Human Rights and State 'Sovereignty'" (1995/96) 25 Georgia J. Int'l & Comp. Law 31.

¹⁵Henkin, *ibid.* at 31.

¹⁶Fowler and Bunck, *supra* note 1 at 64.

¹⁷Fowler and Bunck, *ibid.*

concept of sovereignty as a “basket of rights and duties” rather than a monolithic chunk. According to the “basket” theory, sovereignty is not something that must be possessed in full or not at all; sovereign rights and duties are inherently variable, not static; sovereignty is divisible; and the contents of the basket change. When sovereignty is viewed as variable and divisible, the idea that state sovereignty is not necessarily incompatible with international human rights and that the two concepts can be viewed as complementary rather than conflicting, begins to make sense.

Beginning in the eighteenth century, “the notion that the principle of sovereignty was an inherently limited one tended to be dismissed or forgotten in actual interstate relations”.¹⁸ Assumptions concerning sovereignty and international relations developed to include the notions that the state system is committed exclusively to state values and that the international system may not address what goes on within a state.¹⁹ However, particularly since the end of the Second World War the notion that states are entitled to do as they please within their territorial jurisdiction, has been undergoing modification.²⁰ This change has taken place partly within the context of the international human rights movement.

The human rights movement reflects the notion that states are obligated to meet certain standards in how they treat their nationals even within their own territory and that nonnational bodies as specified in the treaties are entitled to comment or take action on human rights issues. This is a revolutionary change...but (one) which

¹⁸Delbrueck, *supra* note 13 at 570.

¹⁹Henkin, *supra* note 14 at 32.

²⁰Major human rights developments prior to World War II were the 1864 Geneva Convention, asserting soldiers’ rights to medical attention; the Treaty of Versailles, protecting certain minority rights; the creation of the International Labour Organization, protecting labour rights; the League of Nation’s defense of rights of individuals in mandated territories; and the 1926 Convention outlawing slavery. These developments have been described by one writer as the “major pre-World War II exceptions to state sovereignty”: Phillippa Strum, “Rights, Responsibilities, and the Social Contract” in Kenneth W. Hunter and Timothy C. Mack, eds., *International Rights and Responsibilities for the Future* (Westport: Praeger, 1996) at 32.

still confronts a tradition of three centuries.²¹

Ali Khan, in an article entitled "The Extinction of Nation-States", argues that while territorial sovereignty has played a key role in the development of the international legal order, two prominent forces challenge the nation-state's traditional sovereignty -- economic interdependence and the universal recognition of human rights:

Economic interdependence creates a global market in which most nation-states can no longer exercise complete sovereignty. The logic of the global market dictates interdependence, not independence... The universal recognition of human rights, meanwhile, transforms both the relationship between states and the relationship between governments and their people. The international law of human rights aspires to subordinate the nation-state to the will of the people. Accordingly, governments have less legal authority to invoke the concept of sovereignty to justify policies that violate fundamental rights of citizens. Moreover, matters that historically belonged to domestic jurisdiction may now be lawfully examined in international fora of human rights.²²

Louis Henkin has expressed the view that "[h]uman rights law has shaken the sources of international law, reshaped its character, enlarged its domain...[It] is a revolutionary penetration of the once-impermeable state." His thesis is that there have been "important derogations" from certain traditional assumptions "deemed implicit in international 'sovereignty'". In particular, he says, "...the

²¹David P. Forsythe, *Human Rights and World Politics* (Lincoln, Nebraska: University of Nebraska Press, 1983) at 198.

²²Ali Khan, "The Extinction of Nation-States" (1992) 7 *American U. J. Int'l L. & Pol'y* 197 at 199. Mr. Khan's view is that the idea of the Grotian nation-state is becoming "increasingly dysfunctional" and that it will eventually be replaced by the concept of the Free State whose citizens will shift their allegiance from the nation-state to the World Community. Note: In addition to human rights and economic law, a third major development in international law in the post-War period was decolonization. This is not now seen as infringing on state sovereignty but was so seen by opponents. See Usha Sud, *Decolonization to World Order* (New Delhi: National Publishing House, 1983), at 36: "...the colonial powers were apprehensive and quite hesitant to accept specific provisions regarding the non-self-governing territories, even in the formative period of the United Nations Charter, since they were fully aware that once they surrendered the right of exclusive concern for their colonies to cooperative and international concern, they could not alter it even if they wished to in the near future".

international system, still very much a system of independent states, has moved beyond state values, towards human values".²³

One commentator has postulated that "sovereignty" today has little to do with the traditional notion of complete autonomy of the state without legal limitation. The "new sovereignty" comprises not territorial control or governmental autonomy but reputation or status in the international system:

[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. To be a player, the state must submit to the pressures that international regulations impose...

Sovereignty, in the end, is status -- the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.²⁴

While most of the fundamental rules of international relations continue to rest on the premise of state sovereignty,²⁵ the content of the concept of sovereignty and the perception of the rights and duties which sovereignty entails have changed. In the area of international human rights, this change allows for progress toward the achievement of the implementation of human rights standards without the need for sweeping changes to the state system or the end of sovereignty.

²³Henkin, *supra* note 14 at 32-39.

²⁴Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Massachusetts: Harvard University Press, 1995) at 27. And see, for a further example, Strum, *supra* note 20 at 33: "...one can reasonably assert that nations have formally accepted a social contract under which a government's respect for the rights of individuals is a major aspect of its legitimacy within the world community of nations...[E]njoyment of the rights of membership in the international community is predicated, at least in part, on the acceptance of specific responsibilities in the human rights area".

²⁵Jack Donnelly, "State Sovereignty and International Intervention: The Case of Human Rights" in Lyons and Mastanduno, eds., *supra* note 4 at 118.

Current Paradigms of World Order: Where are We on the Continuum?

Closely connected with contemporary discussions about state sovereignty, particularly where questions concerning sovereignty's demise are posed, are debates about varying visions of world order. One writer has analysed the current paradigms of world order by organizing them into three categories:

- (i) the statist or realist paradigm, with its Hobbesian and Grotian variants, which accepts the legitimacy of the nation-state;
- (ii) the pluralist or polyarchist paradigm, with its Mitranian and Kantian variations, which recognizes both the state and international institutions; and
- (iii) the centralist or globalist paradigm, with its Stoic and Marxist versions, which works with the idea of a central authority or system.²⁶

The realists view the state as the sole legitimate political authority, and acknowledge the existence of international institutions but only "as the product of the will of states expressed in treaties that they may abrogate".²⁷ They view the essential task of political authorities in the international arena as maintaining security, and see the future world order as continuing to be a state system, with some modifications due to increasing transnational relations. Statists see human rights as mainly a matter of sovereign national jurisdiction and only a peripheral concern of international relations.²⁸ "The highest goal...is the autonomy of State actors protected through maximum adherence to the norm of nonintervention".²⁹

The pluralist approach is that both nation-states and international institutions of political authority must be included in a world order. Their approach assumes the unfolding of new forms of

²⁶Justin Cooper, "The State, Transnational Relations, and Justice: A Critical Assessment of Competing Paradigms of World Order" in Lugo, ed., *supra* note 5 at 6.

²⁷Cooper, *ibid.* at 7.

²⁸Donnelly, *supra* note 25 at 121.

²⁹Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier Publishers, Inc., 1981) at 36.

political authority and the modification rather than the elimination of the nation-state. What has been labelled the Mitranian functionalist or modernist paradigm emphasizes the development of new actors alongside the traditional nation-state, and assumes that there will be “a plurality of rule-making structures and institutions that can be described as a ‘polyarchy’ and that usually will include some altered form of the nation-state in addition to institutions at the international level”.³⁰ The models that fall within this category are sometimes called “internationalist” models. Internationalists accept the centrality of states and of sovereignty in international relations, and see the international community as a society of states supplemented by non-state actors.³¹

Centralists or globalists reject the nation-state in favour of a central structure of global scope. One of the elements of the globalist approach is the concept that there is a need to institute common standards of justice based on the “universal moral community of humanity”.³² This approach is based on the presumption of radical change and transformation of the international system, although the idea of a world polity is based on a state model. This model is sometimes referred to as a “cosmopolitan” model; individuals are seen more as members of a single global political community (cosmopolis) than as citizens of states.³³

While these paradigms of world order are described as “competing” paradigms,³⁴ they seem to represent a continuum. The models in the continuum place varying degrees of emphasis on the respective roles of the nation-state and other actors in the world order. They are also based on

³⁰Cooper, *supra* note 26 at 10-11.

³¹Donnelly, *supra* note 25 at 121.

³²Cooper, *supra* note 26 at 8.

³³Donnelly, *supra* note 25 at 121.

³⁴Cooper, *supra* note 26 at 11.

varying perceptions of "sovereignty" which influence the conclusions regarding how much revision of the system is required in order to achieve the desired goals. One might ask, at what point on this continuum are we today, and at what point on the continuum do we strive to be? The answer to the first of these questions may vary considerably both according to the individual state or the particular "global" issue which is the subject of examination. However, one way of gaining some insight into these questions is by examining specific aspects of the present practice in the arena of international human rights where the operating principles touch upon the interplay of "state sovereignty" and the achievement of international standards.³⁵ Such areas include applications of the principle of "subsidiarity", utilization of the concept of the "margin of appreciation", and derogations and reservations. An examination of these areas demonstrates that generally speaking we occupy a space toward the centre of the continuum. States remain the most prominent actors in the system of international relations. Sovereign states serve as the foundation of the system, but a web of structures has been erected on top of and around that foundation. In the field of human rights, these new structures are engaged in the slow and difficult task of defining the limits of sovereignty and the limits of interference with sovereignty.

³⁵These areas are examined primarily by reference to developments under the *European Convention on Human Rights* and the United Nations' *International Covenant on Civil and Political Rights*. The implementing bodies established pursuant to the European Convention have developed the most sophisticated body of jurisprudence of any of the existing international human rights systems. These developments are particularly worthy of study. As discussed in chapter 4, from Canada's perspective the impact which the European Convention on Human Rights has had on the United Kingdom can provide some valuable insights. The Human Rights Committee, under the ICCPR, has produced interesting interpretations of various provisions of the Covenant both through General Comments and through Views issued on individual communications alleging violations by states. As discussed in chapter 3, Canada has ratified both the ICCPR and the Optional Protocol allowing individual communications to be heard by the Human Rights Committee.

The Principle of "Subsidiarity"

Most human rights norms set out in international human rights instruments are addressed to states. That is, states parties to the instrument undertake to respect certain rights and secure to the individuals within their jurisdiction those rights which the instrument recognizes. The concept underlying the principle of subsidiarity is that "in a community of societal 'pluralism' the larger social unit should assume responsibility for functions only insofar as the smaller social unit is unable to do so".³⁶ The principle is derived from Christian theological sources concerned with Church governance and appears as a theme in many federal systems.³⁷ The European Union Treaty (Treaty of Maastricht) expressly includes the principle of subsidiarity as a basic Community principle. Article 3(b) of that treaty provides as follows:

...In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community.

One writer has expressed the view that the expression "subsidiary character", when employed to describe a human rights treaty, is incorrect or at least misleading, as the concept - developed

³⁶Herbert Petzold, "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 41.

³⁷Dinah Shelton, "Subsidiarity, Democracy and Human Rights" in Donna Gomien, ed., *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide* (Oslo: Scandinavian University Press, 1993) at 43. And see Philpott, *supra* note 5 at 55: "Through several papal encyclicals, one principle in particular has become prominent, the principle of subsidiarity...(To quote Pius XI in *Quadragesimo anno*), subsidiarity is the principle 'that one should not withdraw from individuals and commit to the community what they can accomplish by their own expertise and industry,' nor 'transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies'".

primarily from Christian teaching on the State - means something else.³⁸ Another has said that “[i]ts meaning... is notoriously vague...”³⁹ Nevertheless, in the context of characterizing a human rights treaty, the notion which the term is intended to convey is that the protection of fundamental rights is primarily the task of the national legal system and that the international human rights system

is not intended to replace this, but intervenes only to supplement and correct; and the ...(international) institutions do not act in place of the protective machinery provided for in domestic law, but exercise their power of review only after domestic remedies have been exhausted (without success)...⁴⁰

While the principle of subsidiarity is not referred to expressly in such human rights treaties as the *European Convention on Human Rights* or the *International Covenant on Civil and Political Rights*, it is evident from various provisions of these treaties that their rules were not designed to take the place of national human rights provisions and procedures but were designed as “supplementary and ultimate” remedies and were intended to be complementary to the remedies provided by national regimes.⁴¹ This can be seen, in particular, in three categories of human rights treaty provisions:

- (i) provisions requiring states to provide an effective remedy before a national authority;
- (ii) provisions requiring individuals to exhaust domestic remedies before resorting to international complaint mechanisms; and
- (iii) provisions allowing for the awarding of compensation at the international level.

Both the Convention and the Covenant bind the States Parties to secure to everyone within

³⁸F. Matscher, “Methods of Interpretation of the Convention” in Macdonald, Matscher and Petzold, eds., *supra* note 36 at 76.

³⁹Philpott, *supra* note 5 at 56.

⁴⁰Matscher, *supra* note 38 at 76.

⁴¹Petzold, *supra* note 36 at 43.

their jurisdiction the rights which the treaties recognize.⁴² It is left to the States Parties to determine the manner in which they will ensure implementation of the provisions of the treaties. Both treaties require the Contracting Parties to afford individuals an effective remedy before a national authority.⁴³ Again, the States Parties are left a certain amount of discretion as to how they will comply with the obligation to provide an effective domestic remedy.

The availability of the optional individual complaint procedures in both regimes is conditional upon the individual having first exhausted domestic remedies.⁴⁴ In both regimes, states are not required to answer before the international institution unless they have first had an opportunity to rectify matters through their own legal systems. It is not always a straight-forward issue as to whether an individual has exhausted available domestic remedies; the matter is determined at a

⁴²Article 1 of the Convention provides that "The Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". The Covenant states that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights and freedoms recognized in the present Covenant, without distinction of any kind..."

⁴³Article 13 of the Convention provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Article 3 of the Covenant contains a similar but more detailed provision: 3. Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.

⁴⁴Article 26 of the Convention provides that "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". Under the First Optional Protocol to the Covenant, the Human Rights Committee will not consider a communication from an individual unless the individual has exhausted all available domestic remedies. The exhaustion of domestic remedies is not required where the application of the remedies is unreasonably prolonged.

preliminary stage by the international treaty body assessing the complaint.⁴⁵

Finally, the Convention, which empowers the European Court of Human Rights to award compensation to the victim of a violation, provides in Article 50 that "just satisfaction" can only be awarded if full redress is not available under domestic law.

The notion of subsidiarity is also evident in the approach adopted by international human rights implementing organs with respect to the scope of their review. The jurisprudence of the European Court of Human Rights and the Human Rights Committee and other treaty-monitoring bodies with complaint mechanisms makes it clear that it is not the role of these international institutions to take the place of the competent national authority with respect to the interpretation of domestic law, nor is it their function to sit as "fourth instance" tribunals. Their task is not to review the correctness of an individual decision but rather to review whether the state's actions or the principles applied in reaching a decision in the domestic forum are compatible with the obligations assumed pursuant to the human rights treaty.⁴⁶

The principle of subsidiarity is also demonstrated in the manner in which the international institutions assess states' regulatory conduct, in particular in relation to rights and freedoms which are subject to limitations. The notion of subsidiarity forms the basis of the doctrine of the "margin of appreciation" which has been extensively applied by the European Court of Human Rights in allowing a certain amount of latitude to the Contracting States in delineating "the boundary between

⁴⁵See Chapter 3 for a discussion of the admissibility conditions in the individual petition procedures of the Human Rights Committee under the International Covenant on Civil and Political Rights and the Committee against Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁴⁶See Petzold, *supra* note 36 at 49 - 50; and see Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon, 1991) at 158.

'primary' national discretion and the 'subsidiary' international supervision".⁴⁷

The Doctrine of the "Margin of Appreciation"

Bodies established under human rights treaties for the purpose of supervising the implementation of international or regional human rights standards constantly deal with issues of law and policy that have traditionally been considered to be matters of domestic jurisdiction. In an effort to balance the object of achieving an effective and uniform standard of protection of human rights, with some recognition of the diversity of political, cultural and social situations in the societies of states parties, the implementing bodies established pursuant to the European Convention on Human Rights have utilized and developed a doctrine known as the "margin of appreciation".⁴⁸ This doctrine

⁴⁷Petzold, *supra* note 36 at 59. It is interesting to note the following comments on the inter-American system, suggesting that different considerations should be taken into account in the application of the principle of subsidiarity depending on the circumstances prevailing in particular regions, e.g., Latin America vs. Europe: "...in the case of ineffective judiciaries, the principle of subsidiarity, by which the primary responsibility for human rights protection is entrusted to domestic courts (with international organs as secondary actors) should be closely evaluated... The principle of subsidiarity should not be applied mechanically to every regional system. Indeed, the democratic and economic development of states should be considered in deciding the level of deference to be given to domestic judicial systems.": Jose Miguel Vivanco and Lisa L. Bhansali, "Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms" in David Harris and Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) at 430-31.

⁴⁸This doctrine has only very rarely been expressly referred to by the ICCPR Human Rights Committee in its jurisprudence under the Optional Protocol, though some of the components of the concept are apparent in some of the Views of the Committee. See Markus G. Schmidt, "The Complementarity of the Covenant and the European Convention on Human Rights - Recent Developments" in David Harris and Sarah Joseph, eds., *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 657. See also Cathal J. Nolan, "The Human Rights Committee" in Matthews and Pratt, eds., *supra* note 10 at 112, where the author refers to the constructive dialogue between the Committee and States, and comments that the "committee has chosen a middle way between confrontational demands and too ready concession to the self-interest of states".

The Human Rights Committee did rely on "margin of appreciation" considerations in the case of *Hertzberg and Others v. Finland* (61/1979) in which the authors of the communication argued that the Finnish authorities had interfered with their right to freedom of expression and information by imposing sanctions against participating in, or censoring, radio and television programmes dealing with homosexuality. The Committee, in its Views, stated that as there was no universally applicable common standard with respect to public morals, "in this respect, a certain margin of discretion must be accorded to the responsible national authorities". See McGoldrick, *supra* note 46 at 160. Deference in respect of state practices concerning such

has provided some flexibility in allowing national authorities an area of discretion or latitude:

[I]n many respects, the task of Commission and Court may be defined as that of finding the tenuous passage between the undue interference with the sovereignty and autonomy of national authorities, in particular supreme and constitutional courts, on the one hand, and the effective protection of the rights guaranteed under the Convention, on the other. One of the main instruments employed in this delicate exercise of navigation is the doctrine of 'margin of appreciation'...⁴⁹

A state's law assessed in the abstract might be seen as violating an international convention on human rights, but when considered in the light of other national matters may not. Jurisprudence in this area has developed on a case-by-case basis and there is a good deal of variation in the application of the margin of appreciation. It has tended to be applied broadly in situations involving complex or controversial political, economic or social issues, and in matters concerning national security and crime control.⁵⁰

Some have recommended that the scope of the margin of appreciation should gradually be narrowed in order to move towards a common European standards approach. Others have argued that it is necessary to retain the concept or a similar concept of deference or discretion, but that the international institution should more clearly articulate its reasons for not intervening.⁵¹ One commentator has warned that the wide margin of appreciation granted in certain cases may reduce

matters may have since changed. See, e.g., the Views of the Human Rights Committee in *Toonen v. Australia* (488/1992): "The Committee cannot accept...that for the purposes of article 17...moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy." (Para. 8.6).

⁴⁹Stefan Trechsel, Preface to Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff Publishers, 1996) at xiii.

⁵⁰J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed. (Manchester: Manchester University Press, 1993) at 158-175; Brice Dickson, ed., *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997) at 221.

⁵¹R.St.J. Macdonald, "The Margin of Appreciation" in Macdonald, Matscher and Petzold, *supra* note 36 at 83-124.

the supervisory machinery to “a mechanism for rubberstamping almost anything a Government wants”, and has expressed the view that the “margin of appreciation” doctrine should be confined to the establishment of the facts, including the interpretation of domestic law, and that once the facts have been established the determination of whether the facts constitute a violation of the Convention should be made without reference to the opinion of the national authorities of the state concerned.⁵² Despite the criticisms of how the doctrine has been applied, it may well be that utilization of the “margin of appreciation” doctrine or approaches based on similar principles will be a significant contributing factor in the ultimate success of an international human rights regime. It provides a mechanism for the careful consideration of the boundaries between the limits of sovereignty and the limits of interference with sovereignty. It provides some flexibility to allow the participating states the time and the space to adjust to the consequences of participation in the international regime and to move gradually towards incorporation of international standards into their domestic laws and procedures and effective internalization of international norms.⁵³

The origins of the “margin of appreciation” doctrine lie in the jurisprudence of the French Conseil d’Etat and other continental institutions in the review of the legality of administrative action and in classical martial law doctrine.⁵⁴ The doctrine has been developed independently in the Convention jurisprudence without reference to its origins.⁵⁵ The concept is not expressly referred to

⁵²P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (Deventer: Kluwer Law and Taxation Publishers, 1990) at 586 and 601-602. See, however, Chapter 4, note 24, regarding a recent position paper of the UK Government, proposing a more flexible margin of appreciation..

⁵³For a discussion of the concept of “internalization” of norms, see Koh, *supra* note 5 at 2646 ff.

⁵⁴van Dijk and van Hoof, *supra* note 52 at 585; Yourow, *supra* note 49 at 14.

⁵⁵R.St.J. Macdonald, “The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights” in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Vol. III (Milan, 1987) at 187.

in the Convention. It was first introduced into Convention jurisprudence in 1958 in the interstate complaint of *Greece v. United Kingdom* ("Cyprus"),⁵⁶ where the Commission considered what its powers were when a state, invoking Article 15 of the Convention, departed from its Convention obligations.⁵⁷ The Commission was prepared to grant the state "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation". The first detailed expression of the doctrine was set out in the Commission's presentation to the Court in the case of *Lawless v. Ireland* which addressed the issue of derogation under Article 15 in relation to emergency measures aimed at the IRA in the Republic of Ireland. The Commission argued that the state should be left a wide discretion in connection with Article 15:

The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.⁵⁸

The Court upheld the Government's discretion in invoking extraordinary detention powers in the circumstances, though it did not expressly rely on the "margin of appreciation" doctrine.⁵⁹

The Commission and the Court gradually applied the doctrine in connection with articles of the Convention other than Article 15, in situations where no emergency or extraordinary situation

⁵⁶Comm. Report 2.10.58, Yearbook 2p. 174 (176).

⁵⁷See below at note 77 ff., for a discussion of derogations.

⁵⁸Series A no. 3, paragraph 56, referred to in Macdonald, Matscher and Petzold, eds., *supra* note 36 at 85-86, and in van Dijk and van Hoof, *supra* note 52 at 586.

⁵⁹Yarrow, *supra* note 49 at 19.

was in issue.⁶⁰ By 1973 the Commission had applied the doctrine to Articles 5, 8, 9, 10, 14 and Articles 1 and 2 of the Fourth Protocol; the Court was somewhat slower to apply the margin of appreciation. A considerable body of case law has developed in which the margin of appreciation has been applied to three main groups of articles: Articles 8 - 11, Article 14 and Article 15.⁶¹

The jurisprudence of the Court has developed in large part through the application of the concept of national discretionary margins in interpreting articles of the Convention which contain limitation or accommodation clauses, specifically Articles 8 to 11.⁶² It was in the case of *Handyside v. The United Kingdom* that the Court first set forth a detailed analysis of the margin of appreciation, and this articulation has remained the basis for many subsequent applications of the doctrine.⁶³ In that case the Court considered the issue of whether the restrictions placed by the British authorities on the publication of the Little Red Schoolbook (declaring an alternative lifestyle for school children) was a violation of Article 10(2) of the Convention.⁶⁴ The Court examined whether the interference with freedom of expression was "necessary". The British Government took the position that it was

⁶⁰van Dijk and van Hoof, *supra* note 52 at 587-88.

⁶¹Macdonald, *supra* note 55 at 189 and 196.

⁶²One commentator has expressed the view that a significant drawback with the way the European Convention on Human Rights is framed is the number of limitations placed on several of the rights and liberties within it. On the basis of the heavy qualifications of the rights of privacy, thought, expression and assembly, governments may lawfully limit the Convention's protection in numerous ways. See Adam Tomkins, "Civil Liberties in the Council of Europe" in C.A. Gearty, ed., *European Civil Liberties and the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 1997) at 8 - 9.

⁶³Macdonald, *supra* note 55 at 191.

⁶⁴Judgment of 7 December 1976, Series A no. 24. Article 10 of the Convention declares that everyone has the right to freedom of expression. The Article contains the following lengthy qualification of the protected right: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

“necessary in a democratic society” for the protection of morals. The Court equated the term “necessary” with “pressing social need”, and determined that a national judge was better equipped than an international judge to assess pressing social need, particularly in the area of national morality.

In coming to its conclusion, the Court stated as follows:

The machinery of protection established by the Convention is subsidiary to the national systems safe-guarding human rights...[T]he Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines...[T]he requirements of morals varies from time to time and from place to place...By reason of their direct and continuous contact with the vital forces of their countries, a State's authorities are, in principle, in a better position than an international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'penalty' or 'restriction' intended to meet them.

The Court held that it was for the national authorities to make the initial assessment of the reality of the pressing social need and that a “margin of appreciation” must be left to the states in that respect. The Court went on to say, however, that “the domestic margin of appreciation...goes hand in hand with a European supervision”. One of the factors which the Court took into consideration in allowing the state a wide margin of discretion in censorship practices was the absence of a prevailing European consensus as to what constituted “morality”. Throughout the Court's jurisprudence the factor of consensus or lack thereof in the laws and practices of the States Parties is “an essential standard which anchors the scope of the supervision”.⁶⁵

The *Sunday Times* case is considered a landmark case in the development of the margin of appreciation.⁶⁶ There, the Court reduced the range of discretion granted to the state in the context

⁶⁵Yourow, *supra* note 49 at 46 and 195.

⁶⁶Macdonald, *supra* note 55 at 197; van Dijk and van Hoof, *supra* note 52 at 590.

of freedom of expression and the press.⁶⁷ The Court reached its decision on the basis of a narrowly defined concept of the margin of appreciation doctrine, stating as follows:

[I]t is in no way [the Court's] task to take the place of the competent national courts but rather to review...the decisions they delivered in the exercise of their power of appreciation...

This does not mean that the Court's supervision is limited to ascertaining whether a respondent state exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention.⁶⁸

In arriving at its decision, the Court again made reference to the concept of a prevailing European consensus or common standard, holding that "...the domestic law and practice of the Contracting States revealed a fairly substantial measure of common ground in this area. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation".

The Court held that the alleged pressing social need of upholding the authority of the judiciary was outweighed by the public interest in freedom of expression and therefore not proportionate.⁶⁹

The points that emerged in the *Sunday Times* case and which have remained the basis for subsequent developments in the jurisprudence are as follows:

- The Court's supervisory role was not limited to determining whether a state had exercised its discretion reasonably, carefully and in good faith. The state's actions had to be justified by reasons "relevant and sufficient".

⁶⁷The House of Lords had upheld an injunction prohibiting the *Sunday Times* from publishing an article concerning a matter that was before the courts. The United Kingdom Government took the position that the injunction did not violate Article 10 because the aim of the injunction was "maintaining the authority and impartiality of the judiciary" which is a permissible limitation on the freedom of expression, as set out in paragraph 2 of Article 10.

⁶⁸Judgment of 26 April 1979, Series A no. 30.

⁶⁹Donna Gomien, David Harris, and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996) at 216. The Court did not accept the state's argument that the same margin of appreciation should apply to both the "protection of morals" and the "authority of the judiciary" clauses of Article 10(2).

- The width of the margin of appreciation varied in accordance with the limitation clause invoked by the state.
- A significant factor in determining the width of the margin of appreciation was whether or not a common standard existed.
- Even if the state's actions could be said to be necessary, its actions must still be proportional to the aims being pursued.
- The width of the margin of appreciation is influenced by the significance of the right interfered with.⁷⁰

It is difficult to define the boundaries of the margin of appreciation. Neither the Court nor the Commission has provided a definition, and the doctrine has developed on an *ad hoc* basis. A core of the "margin of appreciation" test can be discerned from judgments in the *Silver* and *Lingens* cases. The *Silver* case summarized the model test to be applied in the use of the margin of appreciation doctrine:

- (a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'...;
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention...;
- (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'...;
- (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.⁷¹

In the *Lingens* case, the Court added that the Court "cannot confine itself to considering the impugned...decisions in isolation...[and] must look at them in the light of the case as a whole and must determine, among other things, whether the "reasons adduced...to justify it [the interference]

⁷⁰Macdonald, *supra* note 55 at 198-199.

⁷¹Judgment of 25 March 1983, Series A no. 61.

are 'relevant and sufficient'."⁷² Finally, it should be noted that the Court appears inclined to leave the national authorities a very wide margin of appreciation with respect to issues of positive obligations.⁷³

It has been said that there are two principal directions that future developments might take:

On the one hand, the margin of appreciation has the capacity to promote an expanding European human rights consensus through a series of tightly drawn and principled judgments that balance the sovereignty of the Contracting States with the effectiveness of the Convention. On the other hand, the margin has the capacity to limit the reach of the Strasbourg institutions in the interests of protecting traditional powers and responsibilities of the member States. The margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not.⁷⁴

Two writers have likened the use of the margin of appreciation doctrine within the framework of the European Convention to a "spreading disease" with respect to the broadening of the scope of its application and the widening of the ambit of the original concept.⁷⁵ If one reflects on the larger picture, however, the "margin of appreciation" can be seen as a highly useful tool in striking a balance between the sovereignty of the states which have consented to participate in the international regime and the gradual realization of an international system of human rights protection. The pragmatic approach has been described as follows:

⁷²Judgment of July 8, 1986, Series A no. 103. For a discussion of these points, see van Dijk and van Hoof, *supra* note 52 at 589.

⁷³Gomien et al., *supra* note 69 at 217-218.

⁷⁴Macdonald, *supra* note 55 at 207-208.

⁷⁵van Dijk and van Hoof, *supra* note 52 at 604-605. A Canadian scholar, in discussing the practice of Canadian courts making references to the European Court's jurisprudence, has pointed out that the Convention used to be confined to Western European States and therefore applied in a relatively homogeneous context, but now that the Convention has expanded to cover all of Eastern Europe, the "margin of appreciation" is likely to expand. He relies on this speculation to argue that "this militates in favour of increasing caution in the application of the jurisprudence of the Strasbourg organs to the *Canadian Charter*." William A. Schabas, "International Human Rights Law and the Canadian Courts" in Thomas A. Cromwell, Danielle Pinard and Helene Dumont, eds., *Human Rights in the 21st Century: Prospects, Institutions and Processes* (Montreal: Les Editions Themis and the Canadian Institute for the Administration of Justice, 1997) at 36.

[T]he entire legal framework rests on the fragile foundations of the consent of the Contracting Parties. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.⁷⁶

It may be that the Court should more clearly articulate its reasons for determining that intervention in particular cases is or is not appropriate. Critics, however, should keep in mind that the process of acceptance and incorporation by domestic legal/ political systems of international human rights norms is a slow and incremental one, and that an international institution which demonstrates a sensitivity to the diversity of contracting states and a cautious approach to interference with the states' sovereignty may in the end have the best chance of achieving its ultimate goals.

"Derogations" and "Reservations"

Two other areas which are relevant to the scope of international implementation procedures and their relation to state sovereignty are practices in the international human rights arena relating to "derogations" and "reservations". Most of the general human rights instruments provide for the possibility of making derogations from some of their provisions in exceptional circumstances.⁷⁷ They are included in these instruments on the basis that "in view of the stringency of the guarantees of freedoms, a resort to the restrictions intended for normal times would, in the case of an exceptional emergency, not be sufficient to protect the interests of the general public".⁷⁸

⁷⁶Macdonald, *supra* note 51 at 123.

⁷⁷Allan Rosas, "Emergency Regimes: A Comparison" in Gomien, ed., *supra* note 37 at 170.

⁷⁸Torsten Stein, "Derogation from Guarantees Laid Down in Human Rights Instruments" in Irene Maier, ed., *Protection of Human Rights in Europe: Limits and Effects* (Heidelberg: CF. Muller Juristischer Verlag, 1982) at 124 - 125.

In the *European Convention on Human Rights*, for example, Article 15 provides as follows:

The principal elements of the derogation provisions are the existence of a "public emergency" and the prohibition of utilizing derogation with respect to certain protected rights. As well, these instruments contain provisions prohibiting measures aimed at the destruction of any of the rights recognized by the instruments. Derogation provisions recognize that in certain extraordinary circumstances the suspension of guaranteed rights may be necessary. At the same time it must be kept in mind that such provisions may provide an opportunity for abuse by a repressive government regime.⁷⁹ Derogation provisions prescribe very strict standards for states that wish to derogate from human rights instruments,⁸⁰ and a body of case law has developed in respect of derogations which makes it clear that the state's power is not unlimited and will be scrutinized carefully.⁸¹

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1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor...

Article 4 of the *International Covenant on Civil and Political Rights* contains a similar provision:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not discriminate solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons...

⁷⁹One writer has expressed the view that times during which the state perceives there to be a public emergency are precisely those periods when civil liberties are most threatened; thus when it is needed most, much of the human rights treaty unavailable. He views the derogation provisions as one of the major weaknesses of the Convention: See Adam Tomkins, *supra* note 62 at 8.

⁸⁰McGoldrick, *supra* note 46 at 301.

⁸¹The European Commission and Court of Human Rights have interpreted the provisions of Article 15 (1) in several cases. These bodies have formulated conditions for reliance by states on public emergency to restrict rights. The emergency must be actual or imminent; its effects must involve the whole nation; the

Reservations, unlike derogations, come at the time of entering into obligations. One of the recognized attributes of state sovereignty is the right of entering into international engagements. Negotiating a treaty is a complex process which inevitably involves compromises for all of the states parties.⁸² A state which is unable to adopt the whole of a treaty text may have the choice of remaining outside the treaty or participating in it but restricting its commitment to treaty obligations by means of entering reservations.⁸³ Article 2(1)(d) of the Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement” made by a State when signing or ratifying a treaty “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Article 19 provides that a State ratifying a treaty may make a reservation unless it is “prohibited by the treaty” or “is incompatible with the object and purpose of the treaty”.⁸⁴

continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional. *Greece v. The United Kingdom*, *supra* note 56. The Commission and the Court have set forth criteria for evaluating the existence of the conditions. The burden of proof is on the state to establish the existence of these conditions. The Court has made it clear that while the declaration of public emergency which forms the basis of a derogation is a matter for the State to determine, “states do not enjoy an unlimited power in this respect. The Court, which with the Commission, is responsible for ensuring the observance of the states’ engagements...is empowered to rule on whether the states have gone beyond the ‘extent strictly required by the exigencies’ of the crisis...The domestic margin of appreciation is thus accompanied by European supervision.” *Ireland v. The United Kingdom*, Judgment of 18 January 1978, Series A No. 25.

The ICCPR Human Rights Committee, while acknowledging the sovereign right of a State to declare a state of emergency, has also asserted a measure of international supervision over that national determination. There are three separate issues: (i) whether the declaration of the state of emergency is valid (giving rise to the possibility of limiting certain rights); (ii) whether the limitation of rights is necessary in the prevailing circumstances; and (iii) whether the measures taken to limit rights are proportionate to the circumstances. In addition, the onus is on the State party to justify its measures in terms of necessity and proportionality. If the State does not furnish the required justification, the Committee “cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.” See *Silva and Others and Uruguay*, referred to in McGoldrick, *supra* note 46 at 313.

⁸²Chayes and Chayes, *supra* note 24 at 7.

⁸³Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: Institute for International and European Law, 1988) at 10.

⁸⁴This is taken as a statement of customary international law. See Michael O’Flaherty and Liz Heffernan, *International Covenant on Civil and Political Rights: International Human Rights Law in Ireland* (Dublin: Brehon Publishing, 1995) at 15.

Human rights treaties do not have as their object the exchange of reciprocal obligations among the contracting states; rather, these treaties create objective rights with corresponding liabilities.⁸⁵ Some have questioned whether reservations should be permitted at all in the context of human rights treaties, as “[i]t is hard to see how a State can agree to be bound by a treaty on human rights if it is not in a position to honour its obligations in full, and needs a ‘reserved domain’ for its own self-protection...”⁸⁶ One writer, discussing the United States’ habit of making numerous reservations when ratifying human rights treaties, describes the different perspectives on this issue as follows:

Human rights advocates have consistently criticized the practice of attaching numerous RUDs [reservations, understandings and declarations] to U.S. instruments of ratification for human rights treaties, claiming that the conditional nature of U.S. adherence demonstrates that the United States does not take its treaty obligations seriously. The central purpose of human rights treaties, they contend, is for states to assume international legal obligations that augment the domestic protection of human rights to conform to international standards. If every state adopted the U.S. approach, and ratified the treaties subject to the caveat that they would protect human rights only to the extent that such rights are already protected under domestic law, global adherence to human rights treaties would accomplish nothing. The treaty makers have consistently responded to these criticisms by arguing that the RUDs, properly understood, demonstrate that the United States takes its treaty obligations very seriously...[In their view] the RUDs, far from signaling a lack of seriousness about treaty compliance, demonstrate the importance that the United States places on ensuring that it can comply with its treaty obligations.⁸⁷

⁸⁵Matscher, *supra* note 38 at 66.

⁸⁶See Pierre-Henri Imbert, “Reservations and Human Rights Conventions” in Maier, ed., *supra* note 78 at 88.

⁸⁷David Sloss, “The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties” (1999) 24 Yale J. Int’l L. 129 at 177 and 179. The perspective justifying reservations to human rights treaties was expressed clearly by a United States Senator, in defending the RUD package in relation to the ratification of the ICCPR in 1992:

“Others have raised the legitimate concern that the number of reservations in the administration’s package

While there are some human rights treaties that expressly prohibit reservations,⁸⁸ most do not. Some contain express provisions on the subject.⁸⁹ Others are silent on the subject of reservations. The *International Covenant on Civil and Political Rights* contains no provision with respect to the effectiveness of reservations.⁹⁰ The right to make reservations to the Covenant has, however, been restricted by the ICCPR Human Rights Committee which in 1994 adopted General Comment No. 24 on issues relating to reservations.⁹¹ Where human rights treaties are silent on the subject of

might imply to some that the United States does not take the obligations of the covenant seriously...[I]t is possible to place a wholly different interpretation on the administration's package of reservations. The administration has not taken a blanket, or catchall reservation...Rather, it has undertaken a meticulous examination of U.S. practice to insure that the United States will in fact comply with the obligations that it is assuming. This can certainly be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations...": Statement of Senator Daniel Patrick Moynihan, referred to in Sloss at 179.

⁸⁸E.g., *The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery* and the *Convention against Discrimination in Education*. See Imbert, *supra* note 86 at 88-89.

⁸⁹For example, the *European Convention* has the following provision:
Article 64

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

The European Court of Human Rights has asserted jurisdiction to determine the validity of reservations under Article 64: Judgment of 29 April 1988, Series A no. 132 (*Belilos*). It is likely that any far-reaching reservation would be determined to be invalid as being incompatible with the object and purpose of the treaty. See Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975) at 212; van Dijk and van Hoof, *supra* note 52 at 608.

⁹⁰The matter was discussed at great length during the drafting of the Covenant but a reservations clause could not be agreed upon. See Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify And Ruin?* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 186. Note that Article 2(1) of the Second Optional Protocol to the ICCPR prohibits reservations, with the exception of a reservation made at the time of ratification or accession that provides for the application of the death penalty in certain circumstances in times of war.

- ⁹¹ The Committee's General Comment includes the following:
- Article 19(3) of the Vienna Convention on the Law of Treaties offers relevant guidance, and therefore, that article's object and purpose test governs the matter of interpretation and acceptability of reservations.

reservations or expressly provide for the making of reservations, this may well indicate a desire on the part of the negotiators to permit as many states as possible to become parties to the treaty.

Examples of human rights treaties which have come into force too late or are binding on too few States are numerous and show beyond doubt that for such treaties - more than any others - wide acceptance is a precondition for effectiveness. Wide acceptance confers the necessary universality on the principles they enshrine. In order to be widely accepted, the treaty must offer potential signatories a margin of flexibility especially given that treaties relating to human rights confront States with difficulties greater than any encountered in other fields.⁹²

While states are permitted to make reservations in relation to human rights treaties, there are limits to the types of reservations that are acceptable. The key is finding a balance between encouraging states to participate and preserving the integrity of the human rights treaty.⁹³

An examination of these practices in the arena of international human rights demonstrates that

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- Provisions in the Covenant that represent customary international law (and when they have the character of peremptory norms) may not be the subject of reservations. A State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.
 - It falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party; rather, such a reservation will generally be severable.

⁹²Imbert, *supra* note 86 at 90; and see further discussion at 103. For a recent discussion of this issue in relation to the *Convention on the Rights of the Child*, see Jonathan Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law" (1998) 30 Colum. H.R. L.Rev. 159, where he speaks of "the tension between encouraging ratification and establishing a strong legal instrument" (at 191).

⁹³Imbert, *supra* note 86 at 90. In the present practice, the task of determining the acceptability of reservations is not undertaken at the time a State makes a reservation but usually falls, at a later date, to the implementing organs established by the treaty, in the context of proceedings concerning an alleged treaty violation. See van Dijk and van Hoof, *supra* note 52 at 608, where the authors express concern that this may lead to "protracted uncertainty" and suggest setting up a special procedure in the European system by which the Court would judge the admissibility of reservations at the time they are made.

the existing international human rights system accommodates state sovereignty but that there are limits to that accommodation. Some might say that this illustrates one of the major weaknesses in the existing international system, "namely, its statism, that is, its general deference to the position of governments and its overall tendency to allow the balance between the interests of the individual and the state to be weighted in favour of the state."⁹⁴ However, the task of balancing these interests is a delicate one. The present process allows for according respect to the domestic domain of states but at the same time permits gradual progress toward the goal of realizing and protecting fundamental human rights.

Conclusions

While there has been much talk about the demise of sovereignty, "[s]overeign states remain the prime constituent elements of the international system, both politically and legally."⁹⁵ States continue to place great importance on the protection of their polity against various forms of intrusion.⁹⁶ However, "...the simultaneous recognition of the principles of sovereignty and of the international protection of human rights is not theoretically inconsistent."⁹⁷ Sovereignty is not by any means dead, but the notion of sovereignty has evolved. The idea that a state can do what it pleases within its territory with no interference has experienced significant erosion.⁹⁸ Sovereignty has come to be seen as a relative concept, subject to limitations.

⁹⁴Tomkins, *supra* note 62 at 8.

⁹⁵ Delbrueck, *supra* note 13 at 567.

⁹⁶Falk, *supra* note 29 at 153.

⁹⁷ Delbrueck, *supra* note 13 at 572.

⁹⁸One way of expressing this concept is that the "wall of 'domestic jurisdiction' is experiencing an accelerated fission." Sud, *supra* note 22 at 264.

By accepting international conventions on human rights, many states have consented to international scrutiny of their treatment of individuals within their borders. A fair amount of tension exists between the commitment of states to carry out the international obligations they have assumed and their instinct to defend the laws and procedures which they have established internally and which might be perceived as being inconsistent with emerging international norms. The international system, however, is sensitive to that tension and aware of its delicate task of balancing the goal of realizing and protecting international standards of human rights with allowing states some latitude to control matters within their borders.

In 1991, then United Nations Secretary-General Perez de Cuellar recognized this tension, but warned against permitting it to impede ongoing progress: "We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights. The last thing the United Nations needs is a new ideological controversy."⁹⁹ While it is important to be aware of this tension, it is equally important to recognize that the evolution of principles underlying this tension proceeds slowly and that in the past fifty years impressive strides have been taken through a large body of international conventions providing for the protection of human rights and through the development of important institutional capacities to supervise the implementation of those rights.

On the continuum of paradigms of world order, we have set the foundations for a system in which nation-states, international institutions of political authority and transnational organizations play significant roles in making and implementing the rules. There is capacity within the existing system to accommodate sovereign states and at the same time to progress toward the realization and protection of international human rights standards:

⁹⁹Javier Perez de Cuellar, Report of the Secretary-General on the Work of the Organization, 1991 U.N.Y.B. 3, 8 U.N. Sales No. E.92.I.1.

[T]he present international human rights law...mainly focuses on the sovereign states as the key law enforcement agencies. To ask for a new transnational system as a basis for the implementation of human rights would mean, undoing the fabric of international human rights norms that have been so tediously and cumbersomely developed...or at least giving little heed to this impressive body of law...

Humankind is not left without some promising prospects for the implementation of human rights in a world of sovereign states. Attempts to implement these rights need not wait for the establishment of a new world system, possibly better geared to the protection of human rights, nor would postponing the necessary drive for the protection of human rights until such a system is brought about be in the interest of those who need help now.¹⁰⁰

Change in a world order system proceeds slowly and incrementally.¹⁰¹ The process of developing international norms which, over time, come to be accepted by a large number of states is complex. Terms such as "internalization" or "incorporation" are sometimes used to describe the process by which states come to obey international norms which are primarily sanctionless. Harold Koh has emphasized the "power of transnational legal process to promote interaction, generate and reinforce norms, and to embed those norms into domestic legal systems":

As transnational actors interact, they create patterns of behavior that ripen into institutions, regimes, and transnational networks. Their interactions generate both general norms of external conduct (such as treaties) and specific interpretation of those norms in particular circumstances...which they in turn internalize into their domestic legal and political structures through executive action, legislation, and judicial decisions..Judicial decision-making becomes 'enmeshed' with international legal norms, as institutional arrangements for the making

¹⁰⁰Delbrueck, *supra* note 13 at 575 and 578.

¹⁰¹"[T]he size of the task confronting human rights efforts and the difficulty of bringing law to bear on powerful actors -- should serve to keep our expectations appropriately restrained...the obligations are so broad and apparently demanding that it is more reasonable to view them as goals to be achieved over considerable time than as governmental policy that can be implemented tomorrow": Forsythe, *supra* note 21 at 198. At the same time, it must be kept in mind that while these positive changes are slowly being entrenched over time, it is essential that the international community address pressing concerns and focus and act upon priority situations where serious abuses are occurring. Development of the capacity for quick response to urgent circumstances must proceed alongside the incremental realization of lasting change.

and maintenance of an international commitment become entrenched in domestic legal and political process.¹⁰²

Koh postulates that the key factor in moving from "one-time grudging compliance with an external norm to habitual internalized obedience" is repeated participation in the transnational legal process.

Others have used terms such as "interpenetration" or "interdependence" to emphasize that the relationship between the state and the international system is one of constant multi-directional interaction, rather than one in which the state merely receives or internalizes norms from an external source. Murray Hunt has written that "the language of 'interpenetration' and 'interdependence' better reflects the partially overlapping and interacting nature of today's national and international legal orders."¹⁰³

Regardless of what language is utilized to describe the process, what emerges as one of the most important elements in the process is wide participation by states in the international human rights arena. Once states are committed to participation, it is also necessary to ensure their continued participation. This requires that the international system -- however it is composed -- acquire and retain credibility among the participants. A significant factor in establishing the necessary credibility will be the capacity to find the appropriate balance between allowing states a degree of latitude in their actions and limiting states' actions. With wide participation in the process, continual dialogue among all the players and enlightened judgment by those who are requested by the players to perform

¹⁰²Koh, *supra* note 5 at 2654. [Note: Mr. Koh has recently been appointed by the U.S. Government as assistant secretary of state for human rights, democracy and labour: Paul Knox, "Mr. Koh goes to Washington" *The Globe and Mail* (1 February 1999) A12.

¹⁰³Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998) at 6. See also Daniel Bethlehem, "International Law, European Community Law, National Law: Three Systems in Search of a Framework" in Martti Koskenniemi, ed., *International Law Aspects of the European Union* (The Hague: Kluwer Law International, 1998) at 195: "Just as a web, or net, is made up of numerous strands criss-crossing at various points while, at the same time, going in different directions, so is the relationship between international law, Community law and national law; interacting constantly even though the focus may be slightly different".

supervisory functions, the objectives can be achieved without radical transformation of the present system.¹⁰⁴ Rather than proceed on the assumption that state sovereignty is an impediment to attaining human rights, efforts should be concentrated on persuading states to join in the dialogue, to participate meaningfully in the evolution of international human rights norms, to assume human rights obligations and eventually to incorporate human rights norms into the domestic sphere. By taking this approach, the realization and protection of fundamental human rights and state sovereignty can be characterized as being complementary rather than conflicting, and energies can be focussed on developing further and improving the institutional capacities that have been set into motion during the past half century.

¹⁰⁴Those who advocate radical transformation of the existing state-centric system should bear in mind the risks inherent in moving toward a centralized world polity in which less and less deference is paid to the smaller units in the system: As Richard Falk has stated, "The centralization of power, nonterritoriality, and the decline of the state do not necessarily entail any normative promise. The outcome could well be tyrannical, chaotic, exploitative, technocratic, demeaning, and unstable.": See Falk, *supra* note 29 at 182.

CHAPTER 2

DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: WHAT IS CANADA UP TO?

Canada prides itself on its image as a nation which values and promotes fundamental human rights, and "enjoys an excellent reputation internationally with respect to human rights law."¹ On the international front, it has signed on to numerous international human rights treaties.² It has acceded to mechanisms which allow individuals to take human rights complaints against Canada to international human rights treaty bodies.³ It has obediently and enthusiastically participated in the reporting process required by these international bodies and has gone to great lengths to demonstrate

¹William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996) at 234.

²The six "core" human rights treaties, all of which Canada has ratified, are the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD); the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); the *Convention on the Rights of the Child*; and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

³Three of the six core treaties (the ICCPR, CERD and CAT) have provisions which, if accepted by a State party, allow the treaty body to adjudicate upon individual communications alleging violations by the State party of its obligations under the treaty. On March 12, 1999, the 43rd session of the UN Commission on the Status of Women recommended to the General Assembly adoption of an Optional Protocol to the CEDAW, establishing an individual complaint mechanism. See Chapter 3 for a discussion of the views of the treaty bodies established under the ICCPR and the CAT, and Canada's responses to the views and requests of those treaty bodies. It should be noted that Canada has not made a declaration under article 14 of the CERD recognizing the Committee's competence to deal with complaints from individuals. For a discussion of this, see the Summary record of the 1044th meeting of the Committee (02/08/96); Canada's representatives informed the Committee that Canada was currently considering making the declaration, but that the Study on the implementation of article 4 of the Convention, adopted by the Committee at its 27th session, raised some difficulties for Canada. Canada also pointed out to the Committee that Canada is a party to the individual complaint mechanisms under the Optional Protocol to the ICCPR and under the CAT, and that individuals were also able to file complaints with the Inter-American Commission on Human Rights pursuant to the *American Declaration on the Rights and Duties of Man*. (See <http://www.unhchr.ch/tbs/doc.nsf>).

to these bodies the ways in which it is complying domestically with its international human rights obligations through legislation, administrative practices, and judicial determinations.⁴

There are those who say, however, that Canada's rhetoric is not always matched by its performance. One writer referred, some years ago, to the "rhetoric gap" in Canadian human rights policy.⁵ Some human rights activists and critics of the government still find reason to refer to Canada as a human rights violator and point out that "[o]ur talk is not always matched by actions."⁶ In some cases in which international treaty bodies have made requests of Canada, Canada has ignored those requests. Before domestic courts the Government of Canada has "regularly argued that international instruments have no force in law unless expressly incorporated."⁷ While technically this legal principle is well-established, it is not unreasonable to conclude that by placing repeated reliance on

⁴William Schabas writes: "...the State may also be obliged to render account on human rights matters to international bodies, to justify the conformity of its legislation with international human rights law, to explain how individuals are protected against violations of their rights and freedoms, and to report on what legislative changes have been made in response to international criticism. Canada is undoubtedly one of the world's best examples of this synergy between international and domestic law." (Schabas, *supra* note 1 at 55). The seriousness with which Canada takes its obligations to report periodically to the Human Rights Committee is illustrated by Canada's fourth periodic report, covering the period from January 1990 to December 1994, which was submitted, along with an update, in 1997. The report consists of 820 paragraphs and includes reports on measures adopted to implement the ICCPR by the Government of Canada, the Governments of the Provinces and the Governments of the Territories. On April 6, 1999, the Committee issued its concluding observations based on its consideration of Canada's report. It consisted of a mere 21 paragraphs (<http://www.unhchr.ch/>).

⁵Margaret Doxey, referred to in Kim Richard Nossal, "Cabin'd, Cribb'd, Confin'd?: Canada's Interest in Human Rights, in Robert O. Matthews and Cranford Pratt, eds., *Human Rights in Canadian Foreign Policy* (Kingston and Montreal: McGill-Queens University Press, 1988) at 48. Nossal queries, "How can we best understand what Margaret Doxey has called the 'rhetoric gap' in Canadian human rights policy -- that distance between expression of concern and actual government behaviour? Why has Ottawa, for all its rhetorical commitment, consistently refused to use all the available tools of statecraft?"

⁶Francisco Rico-Martinez, President of the Canadian Council for Refugees, "Our immigration policies do not meet international human rights standards" *National Post* (5 April 1999) A14.

⁷*Ibid.*

this proposition before the courts Canada is in effect attempting to minimize its international human rights obligations. What accounts for the apparent inconsistencies in Canada's behaviour? In order to understand this, it is instructive to examine the history of international human rights in Canada, the process by which Canada assumes international human rights obligations, and how issues involving the relationship between international human rights law and domestic law have unfolded before the Canadian courts.

Canada's Entry Into the International Human Rights Arena

Canada's foray into the international human rights arena came in 1919 when Canada attended the Paris Peace Conference, signed the *Treaty of Versailles* and joined the League of Nations.⁸ In November, 1945, Canada ratified the *Charter of the United Nations* which had been adopted a few months earlier at the San Francisco Conference.⁹ Two years later work began on drafting the *Universal Declaration of Human Rights*. The stance which Canada took on the international stage with respect to the adoption of the *Universal Declaration* reveals the contradictory sentiments within Canada at the time regarding Canada's venture into international human rights. It also demonstrates the difficulties which a state faces in dealing with divergent domestic and international political pressures.

In light of the recognition and respect that the *Universal Declaration of Human Rights* is afforded today, many are surprised to learn that Canada abstained in the vote on the adoption of the

⁸W.A. Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights" (1998) 43 McGill L.J. 403 at 407. These "undertakings...comprised some limited human rights obligations, specifically in the areas of labour standards and minority rights".

⁹*Ibid.* at 408.

Universal Declaration in the Third Committee of the United Nations General Assembly. In so abstaining, Canada found itself in association only with the Soviet bloc, and this “embarrassing association...caused a mild sensation.”¹⁰ At the plenary meeting of the General Assembly Canada changed its position and voted in favour of the *Declaration*, and fifty years later what occurred in the Third Committee vote is perceived as a blemish on Canada’s otherwise honourable record in international human rights.¹¹ It is instructive to examine what one writer has described as this “bizarre prologue”.¹² Viewed from some perspectives, it is not so bizarre at all; and some of the concerns which led to the instructions to the Canadian delegation to abstain in the vote are factors which, though perhaps not so necessary for consideration in relation to the *Declaration*, might well be afforded greater consideration by decision-makers today in relation to the ratification of human rights treaties.

Lester Pearson, the Canadian representative (then serving as Secretary of State for External Affairs), in an address to the General Assembly, offered the following explanation for Canada’s actions:

The Draft Declaration, because it is a statement of general principles, is unfortunately, though no doubt unavoidably, often worded in vague and imprecise language. We do not believe in Canada that legislation should be placed on our statute books unless that legislation can indicate in precise terms the obligations which are demanded of our citizens, and unless those obligations can be interpreted clearly and

¹⁰R.A. Spencer, *Canada in World Affairs, 1946-1949* (Toronto: Oxford University Press, 1959) at 162-63, cited in Schabas, *supra* note 8 at 436. And see Schabas, *supra* note 8 at 406: “The international community was astonished by Canada’s puzzling and isolated position, so clearly out of step with that of its traditional allies, notably the United Kingdom and the United States”.

¹¹Schabas, *supra* note 8 at 403.

¹²Schabas, *supra* note 8 at 406.

definitively in the courts. Obviously many of the clauses of this Draft declaration lack the precision required in the definition of positive obligations and the establishment of enforceable rights...

Pearson explained that while Canada had some reservations on details in the Draft Declaration, the "Canadian Delegation...approves and supports the general principles contained in the Declaration and would not wish to do anything which might appear to discourage the effort, which it embodies, to define the rights of men and women..."

Canada's less-than-enthusiastic support for the *Declaration* can be attributed in large part to the prevailing domestic socio-political climate. It has been said that the *Declaration* was "greeted with considerable hostility by the majority of mainstream forces in Canada", including the political right, the business community and the legal fraternity.¹³ Some within these groups "claimed that the United Nations human rights programme was an attempt to establish state socialism, if not communism."¹⁴ There was some discomfort within the Federal Cabinet with some of the human rights norms set out in the *Declaration*. A particular concern, as expressed by the then acting Prime Minister St. Laurent, was the "uses which could be made of the text of articles...[relating to] freedom of speech, freedom of association, freedom of assembly, and the right to employment in the public service...as an undertaking not to discriminate against communists because of their political views..."¹⁵

¹³A.J. Hobbins, "Eleanor Roosevelt, John Humphrey and Canadian opposition to the Universal Declaration of Human Rights: looking back on the 50th anniversary of UNDHR" (1998) 53:2 Int'l J. 325 at 325-26.

¹⁴*Ibid.* at 331. This sentiment was in part a response to the inclusion in the drafts of the *Declaration* of social and economic rights in addition to civil and political rights. And see Walter S. Tarnopolsky, "The Canadian Experience with the International Covenant on Civil and Political Rights Seen From the Perspective of a Former Member of the Human Rights Committee" (1987) 20 Akron L. Rev. 611 at 622, where he states: "...one of the factors in Canada's lukewarm interest was the strong opposition of both the Canadian and American Bar Presidents who considered the Universal Declaration to be 'pink' and too 'revolutionary'".

¹⁵Hand-written memo to file by St. Laurent, cited in Schabas, *supra* note 8 at 427-28.

The Federal Government also expressed concerns regarding the articles relating to economic and social rights, emphasizing the principle that certain human rights matters were not within federal government powers and the federal government would not invade the field of provincial jurisdiction.¹⁶ The Canadian Bar Association adopted a resolution that the draft declaration should be examined “with the utmost care in all its juridical aspects before further action is taken, so that there may be no misunderstanding as to the meaning and effect thereof.”¹⁷

J.P. Humphrey has stated that he knew at the time that “the international promotion of human rights had no priority in Canadian foreign policy.”¹⁸ At the same time, the United Kingdom and the United States, among others, were intent on having the *Declaration* adopted at the next scheduled session of the General Assembly. While Canada would have preferred to delay the vote on the *Declaration* in order to further study and polish the provisions, international pressures prevailed; and the *Declaration* was adopted in December, 1948, with Canada voting in favour.

While some may legitimately question the motivations of the Government and influential groups such as the Canadian Bar Association and suggest that the concerns they expressed were pretexts for underlying substantive opposition to international human rights, it is important not to dismiss out of hand some of the reservations which accompanied Canada’s venture into the arena of

¹⁶Canada abstained in the vote on all of the economic and social rights. See Schabas, *supra* note 8 at 422. Schabas is of the view that provincial jurisdiction was “little more than a pretext for federal politicians who wanted to avoid international human rights undertakings and commitments” (at 440).

¹⁷The 1948 C.B.A. Y.B., cited in Schabas, *supra* note 8 at 418.

¹⁸J.P. Humphrey, *Human Rights, A Great Adventure* (Dobbs Ferry, N.J.: Transnational Publishers, 1984) cited in Schabas, *supra* note 8 at 437. Note: Humphrey, first director of the United Nations Division of Human Rights, is credited with authorship of the first draft of the *Universal Declaration*. Though Humphrey was a Canadian, he had not been nominated for the job by Canada and his role does not reflect any Canadian government interest.

international human rights. This is particularly so in relation to the concern with vague and imprecise terminology, the desire to ensure a thorough understanding of the uses to which the language might be put, and the realization that such international instruments, even if non-binding, will influence the course of future international treaties, domestic legislation, and interpretation of obligations. It is, of course, understandable that Canada wishes to avoid risking embarrassment on the international stage, as it experienced in relation to the initial abstention on the *Universal Declaration*. However, it is equally important that Canada approach the actions which it takes internationally with some caution and with a thorough understanding of the consequences that flow from those actions.

It has been said that hostility within Canada towards the United Nations human rights programme continued during the 1950's and that it took a radical change in the Canadian Liberal party leadership of the late 1960's before there was any acceptance.¹⁹ "[B]y the 1970's, Canada began a period of exceptional activism in international human rights that continues to this day."²⁰ In its 1970 White Paper, Pierre Trudeau's Liberal government made a commitment to a "positive and vigorous" approach to human rights.²¹ In 1977, Don Jamieson, Secretary of State for External Affairs stated, "Canada will continue to uphold internationally the course of human rights, in the legitimate hope that we can eventually ameliorate the conditions of our fellow man."²² Since then, both major political

¹⁹Hobbins, *supra* note 13 at 341-42.

²⁰Schabas, *supra* note 1 at 57.

²¹Nossal, *supra* note 5 at 47.

²²*Ibid.* Nossal goes on to say that the rhetoric at that time still reflected the concerns of sovereignty, but that shortly thereafter Canada's position changed. Don Jamieson, in a speech in 1978, stated: "No country can contend with any justification that its performance is a purely domestic matter in which the international community has no right to intercede." (at 51).

parties have taken up this "rhetorical commitment".²³ During the 1980's and 1990's, Canada's participation in the international human rights arena greatly increased. This was in part the result of individual communications brought before international treaty bodies, alleging violations by Canada of international covenants which Canada has ratified.²⁴ There is now an increased focus of attention, both publicly and within government circles, on Canada's international human rights obligations. The question no longer arises whether Canada will participate in a significant way in the international human rights arena. However, the extent of the international obligations which Canada has assumed and the impact of those obligations, is a matter which will only be clarified through much legal and political debate in the years to come.

Assuming International Human Rights Obligations: The Treaty-Making Process in Canada

In Canada treaty-making (including ratification which perfects the obligations created by a treaty) is an executive act derived from the Royal Prerogative. The power is exercised by the Governor General on the advice of ministers, and pursuant to statute the minister principally responsible is the Minister of Foreign Affairs and International Trade.²⁵ The formal legal authority for the execution of all international treaties takes the form of an order-in-council. Such approval is

²³*Ibid.*

²⁴See Chapter 3.

²⁵Maurice Copithorne, "National Treaty Law and Practice: Canada", article to appear in forthcoming volume of Monroe Leigh and Merritt R. Blakeslee, eds., *National Treaty Law and Practice: Studies in Transnational Legal Policy* (American Society of International Law). The statute referred to is the *Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, s. 10.

needed prior to signature and to ratification.²⁶ Some treaties, namely those which require legislative amendment or that deal with matters of national importance or that cut across the jurisdictions of several government departments, require policy approval from Cabinet prior to signature.²⁷ Parliamentary approval is not required for Canada to enter into an international treaty.²⁸ However, a practice has developed of submitting "the more important treaties" to the House of Commons for approval.²⁹ Sometimes a treaty is referred to a Standing Committee of the House of Commons or the Senate or a joint committee; public sessions might be held inviting representations; but the extent to which recommendations of such committees is taken into consideration varies.³⁰

²⁶Correspondence dated March 3, 1999, to the writer from Jean Fredette, Deputy Director, United Nations, Human Rights and Humanitarian Law Section, Foreign Affairs and International Trade.

²⁷*Ibid.* See also Copithorne, *supra* note 25. Query: What type of international treaty does not deal with matters of national importance?

²⁸Irit Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation" (1998) Can. Council Int'l L. Proc. 132 at 133. See also Copithorne, *supra* note 25.

²⁹Copithorne, *supra* note 25. Examples cited by Copithorne are the U.N. Charter and the North Atlantic Treaty. Copithorne points out that the resulting Parliamentary resolution is not in the form of a statute and does not receive Royal Assent. See also Anne E. Bayefsky, "International Human Rights Law in Canadian Courts" in Irwin Cotler and F. Pearl Eliadis, eds., *International Human Rights Law Theory and Practice* (Montreal: The Canadian Human Rights Foundation, 1992) at 145, where the author states that a form of Parliamentary "approval" has become traditional for certain agreements in Canada. Bayefsky quotes from a 1985 letter of the Legal Bureau of the Department of External Affairs, as follows: "On occasion...international agreements may be brought directly to the attention of Parliament and the approval of the House of Commons and the Senate may be sought by joint resolution before Canada commits itself to treaties which involve military or economic sanctions, political or military commitments of a far-reaching character, or the large expenditure of public funds. The decision on whether Parliamentary approval should be sought is made, in each instance, by the Government of the day. In some instances the Government will table a treaty in Parliament to bring it to the attention of the House of Commons and the Senate, before or after the treaty is signed but without seeking formal approval by joint resolution".

³⁰Copithorne, *supra* note 25. Copithorne states that this form of consultation is the result of the Government becoming aware that "public opinion has become more sensitive to the potential impact of treaties and in particular, to the absence of a public debate of the type the law making process is usually subjected to in Parliament".

Only the federal executive has the power to enter into international treaties. Canada traditionally took the position, internationally, that it could not enter into treaty arrangements which would infringe on provincial areas of jurisdiction, which included human rights.³¹ At both the UN and the ILO Canada promoted a "federal clause" which would have permitted federal states to ratify treaties only in their areas of jurisdiction,³² but Canada was unsuccessful in obtaining support for such a clause. Canada initially explained its reluctance to participate in the international human rights arena on the basis that it did not wish to interfere with matters that fell within provincial legislative competence.³³ In 1975 a framework was established for consultation with the provinces on ratification of human rights treaties.³⁴ It was agreed that provinces were to be consulted before Canada acceded to future international human rights covenants.³⁵

³¹Philippe Leblanc, "Canada's Experience with United Nations Human Rights Treaties", Issue No. 3 of *The Agendas for Change Series* (Ottawa: United Nations Association in Canada and the Canadian Committee for the Fiftieth Anniversary of the United Nations, November 1994) at 2.

³²*Ibid.*

³³*Ibid.* Leblanc points out that this explanation was given by Canadian delegate Lester B. Pearson with respect to Canada's abstention from voting in committee on the *Universal Declaration of Human Rights*.

³⁴Leblanc, *supra* note 31 at 3.

³⁵At the first Federal-Provincial Ministerial Conference on Human Rights held in December 1975, and called in respect of Canada's ratification of the international human rights covenants, the Ministers approved a set of mechanisms for implementing the Covenants, which, among other things, proposed a continuing federal-provincial committee of officials responsible for human rights. This committee was established and continues to meet regularly. *Ibid.*, at 3-4 and 16-18. The "Modalities and Mechanisms" accepted by the Ministers for use by Canada in the implementation of the Covenants included procedures for consultation between the federal government and the provinces with respect to such matters as acceding to future international human rights Covenants, denunciation of Covenants, supporting amendments to Covenants, preparation and submission of reports to international bodies and responding to criticism by international bodies. See Noel A. Kinsella, "Some Dimensions of Human Rights Standards and the Legislative Process" (1998) 47 U.N.B.L.J. 147 at 151 ff. It should, however, be noted that when Canada ratified the *Convention on the Rights of the Child*, it did so without the consent of Alberta. Alberta was concerned that the Convention rights might infringe on the rights of parents. Leblanc writes that "[t]he action of the government was contrary to the intent and spirit of the 1975 agreement which had created the framework of federal-provincial

It is a well-established principle that once a treaty is entered into, it is not self-executing, that is, it does not automatically become part of Canadian law. "Where a change in the law is required to implement a treaty obligation, legislative action is required either by the Parliament or by provincial legislatures, depending on which level of government has general legislative competence in the relevant field as set out in the constitution."³⁶ As stated by the Privy Council in the *Labour Conventions* case:

It will be essential to keep in mind the distinction between (1) the formation and (2) the performance of the obligations constituted by a treaty... Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes...³⁷

This principle has been repeated by Canadian courts in numerous cases.³⁸

'concertation' for ratifying human rights treaties": Leblanc, *supra* note 31 at 13.

³⁶See Copithorne, *supra* note 25.

³⁷*A.-G. Canada v. A.-G. Ontario (Labour Conventions Case)*, [1937] A.C. 326.

³⁸Schabas, *supra* note 1 at 21. Some years ago the late Judge L. Erades of the Netherlands exhorted Canada to consider whether the principle of English constitutional law which forms the basis of the rule that treaties cannot be applied as such but must be incorporated into Canadian legislation, should be changed. "If the said principle of constitutional law had any *raison d'être* in England of the past, here we are concerned with Canada... It must be shameful for a court to be obliged to admit... 'We are very sorry, but we cannot give judgment in your case as we should do, for the sole reason that our country did not live up to its obligations.' ... I would like to give the following advice: Consider whether that old English rule should not be substituted by one more in harmony with the present state of international law." L. Erades, *Interactions between International and Municipal Law: A Comparative Case Law Study*, edited by Malgosia Fitzmaurice and Cees Flinterman (The Hague: T.M.C. Asser Instituut, 1993) at 718.

Domestic practice prior to ratification has evolved to take into account the nature of Canada's federal system of government, including the federal-provincial division of powers, and Canada's "dualism".³⁹ "Typically, as a prelude to ratification, provincial, territorial and federal department of justice officials consult among themselves and within their respective jurisdictions to determine:

- whether existing domestic laws and programs already conform with a treaty's legal requirements;
- if there are inconsistencies, whether new legislation/programs should be adopted or whether existing legislation/programs should be amended;
- alternatively, whether it is appropriate to maintain the domestic position even though it is inconsistent with a treaty provision, and enter a reservation or statement of understanding."⁴⁰

It has been stated by the current director of the Human Rights Law Section of the Department of Justice, that while various approaches are adopted, depending on the provisions of the treaty and the jurisdiction within Canada, "by far the most common conclusion reached by officials is that neither legislative changes, nor reservations are required, as the Canadian situation accords with the treaty obligations."⁴¹ This statement leads one to question how comprehensive the discussions typically are that result in these conclusions and to what extent consideration is given to the potential practical consequences of assuming specific international human rights obligations. One writer, addressing the issue of the consideration of treaties by domestic institutions, describes the common methods for incorporating a treaty, and then comments as follows:

To these two means of incorporation could be added a third 'method', viz. the conclusion by the government and/or legislature that domestic law is already in line with the treaty and that, therefore, no further

³⁹With respect to dualism, see Chapter 4 at note 2.

⁴⁰Weiser, *supra* note 28 at 133.

⁴¹*Ibid.* Note: Weiser states in her paper that the views expressed are those of the author and are not to be attributed to the Department of Justice.

measures are needed. This comfortable attitude - '*passive incorporation*' (or, perhaps '*incorporation by complacency*') - implies a greater risk for neglecting difficultly foreseen situations, so that domestic law does not meet the international standard.⁴²

As the government faces an increasing number of challenges to its legislation and administrative decisions, based in part on an analysis of its international human rights obligations, and as domestic courts, not just international treaty bodies, become more open to such challenges, perhaps the government will recognize the need for changes to its treaty-making practices. Such changes might include public debate and an increased Parliamentary role, as well as a more comprehensive examination of existing legislation and policies and the potential impact of assuming future international obligations.

The Place of International Human Rights Law in the Canadian Courts

Since treaties which the executive has entered into do not automatically have the force of law in Canada and since there has been little direct incorporation of treaties through Canada's domestic legislation, the issue of how Canada's international human rights obligations are

⁴²Jonas Ebbesson, *Compatibility of International and National Environmental Law* (London: Kluwer Law International, 1996) at 206. Weiser has made the following comment: "The current situation is one of almost total uncertainty when a treaty is ratified on the basis of existing conformity with domestic law. The Government cannot know whether the legal analyses on which it based its decision to ratify will be given meaning in litigation before the courts. More importantly, Canadians cannot know what significance is to be given to treaty obligations in domestic litigation": Weiser, *supra* note 28 at 139. There is, in addition, uncertainty of treaty obligations created as a result of their interpretation by a treaty's supervisory organs. See Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 79: "The interpretation of a treaty in the discussion of the state reports, the interpretation of a treaty by the Committees in an individual complaint procedure, and the interpretation of a treaty through the formulation of general comments and general recommendations all compose what is known as the *acquis*, the system created through the human rights convention. The legal nature of the *acquis* cannot be determined in detail...In a way, the existence of a supervisory organ, and its practice, undermine the certainty about the obligations that parties to a treaty have. Attempts to restore certainty through reservations are therefore understandable".

implemented domestically, as reflected through judicial determination, is not a simple matter.⁴³ Increasingly individuals are challenging government actions and legislation, basing those challenges on human rights principles. Most of these challenges are based on the *Canadian Charter of Rights and Freedoms*. As awareness about international human rights principles has grown in the legal community and as references in judicial decisions to international human rights norms have increased, these challenges are more frequently including arguments based on Canada's international human rights obligations either by way of interpretation of the *Charter* or as an independent ground for challenge.

Prior to the proclamation of the *Canadian Charter of Rights and Freedoms* in 1982, references by the courts to international human rights instruments were "rare and perfunctory".⁴⁴

⁴³This discussion is limited to conventional international law. It should be noted that the place of customary international law is different from that of conventional international law, and while it is generally agreed that "[c]ustomary international law may be applied by Canadian courts without any need for an express legislative act, unless there is a clear conflict with statute law or common law," (Schabas, *supra* note 1 at 16), the principle that customary international law automatically becomes part of Canadian law is by no means clear. (Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 5 ff.) What norms are recognized as customary international law is also not a simple matter. Perhaps in the future some of the human rights norms which today are said to be established only by conventional international law will attain the status of customary international law. One writer has stated that "multilateral conventions are nowadays one of the key evidences of general customary international law. Of course, one has to take a cautious and prudent approach and to study all of the relevant circumstances before coming to the conclusion that a particular provision in a convention reflects a customary rule, either because it codifies a pre-existing custom or because it has given rise to a new State practice which has in turn generated a new customary rule." Peter Tomka, "Major Complexities Encountered in Contemporary International Law-Making" in *United Nations Colloquium on Progressive Development and Codification of International Law, Making Better International Law: The International Law Commission at 50* (New York: United Nations Publication, 1998) at 209. In any event, whether this would facilitate their application by Canadian courts is not clear. To date, "there have been no Canadian cases in which...a right of action based on customary international human rights law has been explicitly recognized", though the Supreme Court of Canada has recognized that customary law is relevant in interpreting and applying the *Charter*. See Bayefsky at 17 and 21.

⁴⁴Schabas, *supra* note 1 at 12.

With the advent of the *Charter*, there has been a rapid expansion of jurisprudence focussing on fundamental human rights, and the Supreme Court of Canada has clearly recognized the significance of international human rights law for the interpretation of the *Charter*'s provisions.⁴⁵ In an address by Chief Justice Antonio Lamer, delivered in June, 1997, the Chief Justice spoke about "the growing tendency of national courts to rely on international human rights treaties, and by implication, on the decisions that interpret those treaties, as aids to interpreting and applying the human rights which are protected under national law." He stated as follows::

Unlike the recently adopted South African Constitution, the *Charter* does not contain a provision requiring or even encouraging Canadian courts to look at international law as an aid to construing its provisions. Nevertheless, the Supreme Court of Canada has frequently looked to the provisions of international human rights treaties to which Canada is a signatory as an aid to interpreting the *Charter*.

Chief Justice Lamer went on to discuss why the Supreme Court of Canada has been prepared to rely in various ways, in defining the content and scope of *Charter* rights, on international human rights law as an aid to *Charter* interpretation. He identified three rationales:

- The adoption of the *Charter* is understood as part of the international human rights movement. "...the *Charter* can be understood to give effect to Canada's international legal obligations, and should therefore be interpreted in a way that conforms to those obligations."
- International human rights law assists the Court to fulfill an important purpose of the *Charter*,

⁴⁵However, while international authorities are cited with some frequency in Supreme Court of Canada judgments, many lower courts have yet to demonstrate much interest in international human rights instruments and jurisprudence. "...with the exception of Ontario Court of Appeal, the Federal Court, and Quebec Human Rights Court, the Supreme Court of Canada's enthusiasm for international sources has yet to arouse very much interest among Canadian appellate courts and courts of first instance." Schabas, *supra* note 1 at 13.

i.e., "to secure for individuals the full benefit of the *Charter*'s protection."⁴⁶ "...international human rights treaties serve as a benchmark against which to measure the protection provided by *Charter* rights."

- "Finally, and most importantly, Canada's international human rights obligations are relevant to *Charter* interpretation because they reflect the values of free and democratic societies...International human rights law, as a reflection of what it means to live in a free and democratic society, is part of the background of principle which informs the interpretation of *Charter* rights and their limitation."⁴⁷

These issues were also addressed by the Honourable Mr. Justice G.V. La Forest at a conference of the Canadian Council on International Law in October 1996:

[P]erhaps the most interesting development has been in relation to issues that some may perceive as being simply domestic law, but which relate in substance to structural issues concerning the international order -- namely, the limitations placed on states in the exercise of their sovereign authority. The most obvious of these limitations are the general documents of the United Nations relating to human rights...It is fair to say that the international implementation mechanisms for these norms are still weak, and direct enforcement as customary law in Canada raises difficult problems. But the limitations on the power to enforce international human rights standards in Canada seem to have diminished in importance since the enactment of the Canadian Charter..., given the manner in which the courts, particularly our Court, has chosen to approach this constitutional

⁴⁶Quoting from Supreme Court of Canada jurisprudence: See Dickson C.J.C.'s reasons in *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at pp. 348-50, referring to *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295 at p. 344.

⁴⁷The Rt. Hon. Antonio Lamer, Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century" (Address delivered at the Centre for Refugee Studies, York University, Toronto, Ontario, June 22, 1997) [unpublished].

document.⁴⁸

Mr. Justice La Forest went on to make assurances that the Supreme Court of Canada is doing much more than paying lip service to these international human rights instruments:

[W]e do not confine ourselves to polite references to the international agreements themselves, but examine with care the interpretations given to them by international institutions and the domestic courts of many countries, as well as the writings of learned authors...What is happening, then, is that we are absorbing international legal norms affecting the individual through our constitutional pores...

Nor is this development confined to constitutional issues. Increasingly, through general conventions and treaties, the international community is creating institutions and norms governing transnational activities and concerns. But these initiatives cannot be successful unless those international norms are applied with sophistication and understanding by the various national decision-makers before whom they are invoked. Unless these norms are integrated into the various national governmental processes, the rule of law cannot expand to adequately protect individuals throughout the world.⁴⁹

In an earlier speech to the Canadian Council on International Law, Mr. Justice La Forest also referred to former Chief Justice Brian Dickson's comments on the Court's use of international law, stating that although the comments were made in dissent they reflect what the Court does.⁵⁰ Those comments, in the reasons of Dickson C.J.C. in *Re Public Service Employee Relations Act*, include the following:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the

⁴⁸The Hon. Mr. Justice G.V. LaForest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int'l L. 89 at 97.

⁴⁹*Ibid.* at 98.

⁵⁰See Schabas, *supra* note 1 at 35, referring to an address of Mr. Justice La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada", XVIIth Annual Conference, Can. Council Int'l L. Proc., October 22, 1988, 230-241 at 232.

Charter's protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.⁵¹

William Schabas has stated, however, that despite frequent references to international instruments and cases, "the promise of Chief Justice Dickson's doctrine in terms of the role of such authorities in *Charter* interpretation has simply not been fulfilled. Almost a decade after his famous pronouncement, there are few examples where international human rights law has played a significant role in the determination of a *Charter* case."⁵² He goes on to say that in subsequent case law "[t]here has been little analysis of Chief Justice Dickson's comments" and "judges have tended to make what are often quite perfunctory references to international human rights law with little concern for the theoretical underpinnings".⁵³ In a separate work, Schabas states that the Supreme Court of Canada appears to have sent the message to the Canadian judicial community that "international human rights law never binds the courts, that its sources are eclectic, contradictory and confusing, that erudite judges are of course welcome to invoke it, but that at the end of the day its significance is secondary and marginal".⁵⁴

⁵¹Reference *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 348-50.

⁵²Schabas, *supra* note 1 at 232-33.

⁵³Schabas, *supra* note 1 at 47.

⁵⁴William A. Schabas, "International Human Rights Law and the Canadian Courts" in Thomas A. Cromwell, Danielle Pinard and Helene Dumont, eds., *Human Rights in the 21st Century: Prospects, Institutions and Processes* (Montreal: Les Editions Themis and the Canadian Institute for the Administration

Anne Bayefsky has expressed the view that the place of international law in Canadian courts is precarious. She attributes this to the "failure of...many...Supreme Court of Canada judgments containing references to international law, to adequately articulate the justification for its use."⁵⁵

Bayefsky concludes that

...while the legitimacy of introducing international legal obligations of Canada into problems of interpretation of Canadian law is established, the impact of these international laws in any given case will apparently depend on the proclivities of a result-oriented decision-maker rather than on their inherent usefulness in the interpretative problem at hand.⁵⁶

A Recent Illustration: The Convention on the Rights of the Child and Domestic Immigration Practices

The Supreme Court of Canada recently had an opportunity to address squarely the question of the impact of international human rights law on Canada's domestic law in the case of *Mavis Baker v. Minister of Citizenship and Immigration*.⁵⁷ This judgment reiterates certain basic principles which are well-settled in relation to the domestic status of international instruments, in particular, the principles that an international treaty does not form part of Canada's domestic law unless it is implemented by legislation and that if it is not so implemented it can have no direct application within Canadian law. Beyond that, the articulation of the impact of international human rights law on

of Justice, 1997) at 44.

⁵⁵Bayefsky, *supra* note 43 at 93.

⁵⁶Bayefsky, *supra* note 43 at 95. And also see Weiser, *supra* note 28 at 136, where she states that the Court has tended to examine the content of international human rights instruments in a superficial manner, and that "[w]hile it is evident that international human rights conventions rightly play some role in determining the meaning and scope of domestic and constitutional laws, the extent of that role has yet to be crystallized".

⁵⁷S.C.C. File No. 25823, July 9, 1999.

domestic law remains less than clear. However, the *Baker* judgment can be read as signifying an increased willingness of the Court to use creative means to ensure that domestic law is interpreted in conformity with international human rights obligations. It is useful to examine in some detail the various submissions put forth in the case, to illustrate how arguments are unfolding before Canada's courts today with respect to the impact of international human rights law on domestic law.⁵⁸

Ms. Baker is a citizen of Jamaica. She came to Canada as a visitor in 1981, and has remained in Canada ever since. She had four Jamaican children before leaving there, and during her time in Canada gave birth to four more children who are Canadian citizens. In 1992, Ms. Baker was ordered deported from Canada on the basis that she had worked without authorization in Canada and had overstayed her visitor's visa. She then applied for an exemption, based on humanitarian and compassionate considerations, under section 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. An immigration officer rejected her application, finding that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence from within Canada and that it would not cause undue hardship for Ms. Baker to submit that application in the normal manner at a visa office outside Canada. Ms. Baker applied to the Federal Court of Canada for judicial review of the decision. The Federal Court Trial Division dismissed the judicial review application, concluding, *inter alia*, that the *Convention on the Rights of the Child* had not been incorporated into Canada's domestic legislation, that even if the *Convention* were part of domestic law, its Articles 3

⁵⁸Numerous court challenges to orders deporting both female and male adults have been brought in Canada based on the concept that the children these adults have brought into the world since their arrival in Canada, and who are therefore by birth Canadian citizens having the right to remain in Canada, also have the right to have their parents remain in Canada to take care of them.

and 9 were inapplicable, as a deportation of a parent is not an action concerning children and does not require a separation of parent and child, and that the doctrine of legitimate expectations does not operate to require that domestic decisions be based upon principles in international treaties which have been ratified by Canada but not adopted by statute into domestic law. The Court, however, certified the following question: "Given that the *Immigration Act* does not expressly incorporate the language of Canada's international obligations with respect to the *International Convention on the Rights of the Child*, must federal immigration authorities treat the best interests of the child as a primary consideration in assessing an application under s. 114(2) of the *Immigration Act*?"⁵⁹ The Federal Court of Appeal answered the question in the negative, concluding as follows:

[T]he *Convention on the Rights of the Child*, not having been adopted into Canadian law, cannot constitutionally give rise to rights and obligations as to how the discretion given by subsection 114(2) of the *Immigration Act* is to be exercised. That is, the Convention cannot prescribe, in a manner enforceable by the courts, the obligation to give the best interests of children, of an alien who is under order of deportation, superior weight to some other factors....Further, articles 3 and 9 of the Convention...do not by their terms purport to prescribe a priority for the best interests of the child in a proceeding under subsection 114(2) which involves the deportation of the parent and not of the child.⁶⁰

One of the issues raised by the appellant before the Supreme Court of Canada was whether the Federal Court of Appeal erred in holding that a treaty such as the *Convention on the Rights of the Child* made by the executive branch of government does not have legal effect over the exercise of

⁵⁹There is not an automatic right of appeal of a judgment of the Federal Court - Trial Division on an application for judicial review with respect to a matter arising under the *Immigration Act*. Section 83(1) of the *Immigration Act* provides that such a judgment "may be appealed to the Federal Court of Appeal only if the Federal Court - Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question".

⁶⁰[1997] 2 F.C. 127 at 151.

discretion under Canada's immigration legislation. The appellant argued that Canada's signature to the *Convention* necessarily requires it to be guided by principles of the *Convention* in the exercise of discretion that affects the rights and interests of family in general and children in particular.⁶¹

The respondent Minister of Citizenship and Immigration took the position on this issue that the *Convention on the Rights of the Child* does not apply in the case, as it has not been adopted into Canadian law; that even if it is applicable, the *Convention* has not been violated; and that Canada's ratification of the *Convention* does not create a legitimate expectation that immigration officers are required by law to give more weight to the best interests of the children when considering whether to exempt their parents from the requirements of the *Immigration Act*.⁶² The Respondent made the following points in written argument with respect to the question of whether the *Convention* should be treated as forming part of Canadian law:

- As the *Convention* is not embodied by statute into Canadian law, it is not part of domestic law and cannot give rise to legal rights and obligations.
- Although courts should generally interpret legislation so as to avoid, if possible, interpretations which would put Canada in breach of her international obligations, this general principle cannot be applied to bring about unconstitutional results.
- It would be unconstitutional in the absence of implementing legislation to treat the *Convention* as if it had been incorporated into domestic law and thereby create rights and obligations because of (i) the separation of powers between the executive and Parliament, and between the executive and the judiciary; and (ii) the division of powers between the federal

⁶¹Appellant's factum, paragraph 101, filed in the Supreme Court of Canada Registry.

⁶²Respondent's factum, paragraphs 25 and 26, filed in the Supreme Court of Canada Registry.

government and the provinces.

- By ratifying the *Convention*, the executive cannot indirectly alter s. 114(2) of the *Immigration Act* to interfere with the Minister's broad discretion so that the Minister is obligated to rank first the best interests of Canadian children of persons who are seeking to be landed in Canada.
- To presume that Parliament intended an immigration officer acting under s. 114(2) to limit his discretion by being bound to apply a treaty which has not been adopted by Parliament, would necessarily lead to the result that all exercises of statutory power under legislation would be amenable to judicial review for inconsistency with any of Canada's numerous treaty obligations. Canada has ratified many treaties in the field of human rights. The lawfulness of administrative decisions would therefore be judged not according to statutes but according to treaties not implemented by Parliament.
- For the Court to add as a limit to the exercise of the Minister's discretion a requirement to act in conformity with an unimplemented treaty would usurp the role of Parliament.
- The executive branch of the Government of Canada cannot by international arrangement alter rights and obligations within the jurisdiction of provincial legislatures, e.g., in areas of property and civil rights.⁶³

A number of parties intervened in the hearing before the Supreme Court of Canada. Three separate factums were filed on behalf of the interveners, and each addressed the issue of the effect

⁶³Respondent's factum, paragraphs 55 to 65.

of international human rights treaty law on Canada's domestic law.⁶⁴ The Charter Committee on Poverty Issues took the position that the Minister acted outside the jurisdiction granted by s. 114(2) of the *Immigration Act* (a) by failing to exercise her discretion so as to avoid violating ss. 7 and 15 of the *Charter*, as informed by Canada's obligations under the *Convention on the Rights of the Child* and related international human rights treaty obligations, and (b) by failing, in any event, to exercise that discretion in accordance with the relevant international human rights treaties, regardless of whether the *Charter* is violated.⁶⁵ The Charter Committee on Poverty Issues argued that international human rights treaties to which Canada is a party structure administrative decision-making by two routes, the *Charter* route and the treaty route. With respect to the "*Charter* route", the Charter Committee on Poverty Issues relied on the principles established in the *Slaight Communications* case⁶⁶ to argue (i) that there is a double presumption, the "international human rights presumption", that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified; and the "*Charter* compliance presumption", that statutes must be interpreted as far as possible so as not to empower administrative actors to violate *Charter* rights; and (ii) that this double presumption requires the Minister's discretion pursuant to s. 114(2) of the *Immigration Act* to be exercised, to the extent the statutory language permits, in compliance with ss. 7 and 15 of the *Charter*, which provides at

⁶⁴The interveners were the Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues. Of the three factums, the factum of the Charter Committee on Poverty Issues makes the interveners' points with the greatest clarity and sophistication of argument.

⁶⁵Factum of Charter Committee on Poverty Issues, paragraph 6, filed in the Supreme Court of Canada Registry.

⁶⁶*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

least as much protection as the rights contained in the *Convention on the Rights of the Child* and other relevant treaties.⁶⁷ With respect to the “treaty route”, the Charter Committee on Poverty Issues made the following points, *inter alia*, in written argument:

- The courts have adopted a rule of statutory interpretation that statutes be interpreted, to the fullest extent possible, to comply with international treaty obligations. This principle is based on the presumption that the legislature intends to act in compliance with international law.⁶⁸
- This presumption of compliance with international law applies to all international law and to all treaties, regardless of the extent to which they have been “incorporated” through domestic legislation.⁶⁹
- Where a treaty requires that it be given legal effect in the domestic order and the state ratifies the treaty but does not modify any law, it should be presumed that a state, interpreting its treaty obligations in good faith, views its law as already conforming to the obligations.⁷⁰
- Reliance on the *Convention* is based on a presumption of statutory interpretation and not on invoking the *Convention* as a direct source of rights. Interpreting provisions in a statute, including the terms by which an executive power is granted, is statutory interpretation, and if the statute is capable of being interpreted to conform with Canada’s international obligations, then such an interpretation should be adopted. This is an interpretive reception

⁶⁷Factum of Charter Committee on Poverty Issues, paragraphs 8 and 9.

⁶⁸*Ibid.*, paragraph 45.

⁶⁹*Ibid.*, paragraph 46.

⁷⁰*Ibid.*, paragraph 47. In this regard, see Weiser’s statement at note 41 *supra*.

of international treaty law rather than direct application of a treaty.⁷¹

- The presumption of conformity of statutes with international law is a “rule of law” doctrine tied to the institutional role of the courts in promoting fundamental legality.⁷²
- Parliament can legislate contrary to international law, but must enact provisions that clearly and unavoidably conflict with international law to rebut the presumption of compliance with international law. Where it has not done so, courts must interpret domestic statutes and the constraints on discretionary decision-making in compliance with international law.⁷³

Ms. Baker was successful in her appeal, and the Court ordered that the matter be returned to the Minister for redetermination by a different immigration officer. The Supreme Court of Canada concluded that the notes of the immigration officer demonstrated a reasonable apprehension of bias. While this finding was sufficient to dispose of the appeal, the Court went on to consider whether, as a substantive matter, the humanitarian and compassionate decision under s. 114(2) of the *Immigration Act* was improperly made. In addressing this question, the Court examined the approach to review of discretionary decision-making; the standard of review; and whether the decision was unreasonable. The Court’s analysis of whether the decision was unreasonable included comments on the relationship between international human rights law and domestic law which may well have a considerable impact, in future cases, in determining the extent of the influence of international human rights norms on statutory interpretation and judicial review of administrative decisions. The following comments are of note:

⁷¹*Ibid.*, paragraph 51.

⁷²*Ibid.*, paragraph 52.

⁷³*Ibid.*, paragraph 53.

- **Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach.** [emphasis added]
- A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in ministerial guidelines for making H & C decisions.
- An indicator of the importance of considering the interests of children in making an H & C decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada.
- International treaties and conventions are not part of Canadian law unless they have been implemented by statute. The *Convention* has not been implemented by Parliament, and its provisions therefore have no direct application within Canadian law.
- Nevertheless, **the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.** The legislature is presumed to respect the values and principles contained in international law. These constitute a part of the legal context in which legislation is enacted and read. **In so far as possible, interpretations that reflect these values and principles are preferred.** [emphasis added]
- **The principles of the Convention and other international instruments** place special importance on protections for children and childhood, and on particular consideration of their

interests, needs and rights. They **help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.** [emphasis added]⁷⁴

The Court went on to hold that “because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned”.⁷⁵

A brief minority judgment was delivered by Mr. Justice Iacobucci (concurring in by Mr. Justice Cory), dissenting solely on the issue of the impact of international law on domestic law:

I agree with L’Heureux-Dube J.’s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*...It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation...**I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system.** In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague’s confidence that the Court’s precedent in *Capital Cities, supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. **Instead, the result will be that the appellant is able**

⁷⁴*Baker v. Minister of Citizenship and Immigration*, paragraphs 67-71.

⁷⁵*Ibid.*, paragraph 73.

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. The primacy accorded to the rights of the children in the Convention...is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament...**I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the Canadian Charter of Rights and Freedoms. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*..., and confirmed in subsequent jurisprudence, that administrative discretion involving Charter rights be exercised in accordance with similar international human rights norms.**⁷⁶ [emphasis added]

The minority judgment bring into focus the potential impact of the approach adopted by the majority with respect to the use of international human rights law in statutory interpretation and judicial review. One writer has made the following comments on the *Baker* decision:

The Court can be read as having embraced a cosmopolitan conception of the rule of law one feature of which being that Canadian courts should show fidelity to the international legal order by seeking to harmonise domestic law with international law as much as interpretive space allows. The Court found...that the presumption of compliance with international law indeed includes to [sic] Canada's legal obligations under unincorporated treaties...Endorsement in these terms of the presumption of compliance with international law is especially relevant to the interaction of international human rights treaty law and Canadian domestic law given that the Court situates its invocation of the presumption within a broader value-laden web of 'values and principles' which frame what is and is not reasonable administrative decision-making.⁷⁷

⁷⁶*Ibid.*, paragraphs 78 - 81.

⁷⁷Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?", Forthcoming in (1999) 10:4 Constitutional Forum. Note: Mr. Scott acted as one of the counsel for the Charter Committee on Poverty Issues before the Supreme Court of Canada in the

While the Court did not undertake an in-depth analysis or elaboration of the domestic status of international human right instruments, the principles adopted by the majority have potentially far-reaching implications. The judgment may come to be seen as an important step in the direction of establishing a presumption that delegated power must be exercised in conformity with international human rights treaty law.⁷⁸ The Court did reiterate the principle that an unimplemented international treaty has no direct application within Canadian law, and the reasoning in the decision did not go beyond establishing that the exercise of a delegated power might be unreasonable if international convention norms are not taken into consideration as an important factor in making the decision. However, the judgment may signal that it is not unreasonable to speculate that over time the law will evolve in such a way that international human rights treaty law will be accepted in its own right as a ground on which the exercise of administrative discretion can be challenged in Canadian courts. To what extent this direction is taken will be determined, in part, by how the courts apply this aspect of the *Baker* decision in future cases.

The Positions the Government Advances Before the Courts

One of the questions that arises from cases such as *Baker* is how does one make sense of Canada taking a position before domestic courts which appears to be inconsistent with the international human rights obligations Canada has assumed and with the stance which Canada has taken before international bodies regarding domestic implementation of its international obligations.

Baker case.

⁷⁸For a discussion of legislation (in the UK) which requires the acts of domestic public authorities to be compatible with rights set out in a regional human rights instrument, see chapter 4, text accompanying note 80 ff.

In *Baker*, the Government of Canada relied on the nature of its federal system of government, including the separation of powers between the executive and the legislature and the division of powers between the federal government and the provinces. The Government argued that even though it had (by its executive) ratified a treaty, the treaty could not give rise to legal rights and obligations domestically because it had not been expressly incorporated by legislation into the domestic law.⁷⁹ The federal government has taken this position in other cases, in particular in immigration matters, and the position has found some favour in the Federal Court of Canada where most immigration cases are heard. Craig Scott writes as follows:

[T]he federal government's lawyers, especially those serving the Department of Immigration, have been zealous in marching into court on almost a daily basis and going so far as to argue that the Canadian Charter of Rights and Freedoms cannot be read to prohibit deporting someone where there is a substantial risk that the person will face torture after arrival at his destination -- in the face of clear textual provisions and case law laying down such a prohibition emerging from the UN Convention Against Torture regime.⁸⁰

Mr. Scott may be overstating the case. However, it is not surprising that in a number of cases involving applications for stays of execution of deportation orders, where applicants raise the argument that Canada will, by deporting them, be in breach of its obligations under the *Convention Against Torture*, the federal government has taken the position that the *Torture Convention*, though ratified by Canada, does not form part of Canada's domestic law and therefore cannot be applied to limit the Minister's discretion under the *Immigration Act*. After all, this is an argument based on

⁷⁹One writer has stated that "[d]espite a duty to fulfill treaty obligations in good faith, it seems states are willing to hide behind the non-self-executing shield...": Jonathan Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law" (1998) 30 Colum. H.R. L. Rev. 159 at 188.

⁸⁰*Ibid.*

well-settled principle, and at least some of the cases in which these arguments are raised involve known terrorists or criminals convicted of other serious crimes who are making last-minute bids, through the courts, to put a stop to their removal from Canada. The stay applications often follow a number of immigration proceedings and judicial reviews afforded the individuals by domestic legislation.⁸¹ It is not astonishing in these circumstances that those responsible for the enforcement of domestic immigration legislation are eager to utilize all arguments available to them to ensure that removal is not thwarted. Neither is it surprising that judges have leaned toward affording the administrative decision-makers a good deal of deference and have adopted reasoning, in dismissing stay applications, which allows for conclusions such as the following: "I agree with my colleague, Muldoon J., that 'Canada is not intended to be a haven for terrorists.' The public's interest in executing deportation orders of individuals found to be a danger to the security of the country clearly outweighs the private interests of the Applicant."⁸² Many Canadians would applaud such a decision and would be appalled if the court ruled otherwise based on relatively unknown provisions in

⁸¹This is also the case in some of the "Canadian-born children cases", where Canada's immigration officials have taken steps to deport individuals on the basis of criminal convictions and the individuals, at the last minute, argue that they cannot be removed from Canada because their children, who are Canadian citizens and therefore entitled to remain in Canada, need their on-going parenting.

⁸²*Manickavasagam Suresh v. The Minister of Citizenship and Immigration*, IMM-117-98. Federal Court of Canada Trial Division, Tremblay-Lamer J. Cf. *Re Suresh and Regina et al.* (1998) 38 O.R. (3d) 267. The applicant, having unsuccessfully applied to the Federal Court for an order staying his deportation, made an application to the Ontario Court (General Division) seeking, inter alia, an interlocutory injunction to stop his removal from Canada. He was, therefore, asking the superior court of the province to do what the Federal Court had just refused to do. Lane J. granted the application pending determination by the Federal Court of Suresh's application for leave to commence a judicial review of the Minister's s. 53(1)(b) decision. On June 28, 1999, the Federal Court dismissed the judicial review and constitutional challenge to the s. 53(1)(b) decision but certified a number of questions. An appeal was commenced in the Federal Court of Appeal (A-415-99), and on July 23, 1999, the Federal Court of Appeal granted a stay of removal pending the appeal. The appeal was heard in October 1999, and judgement was reserved. In the meantime, an appeal by the Crown of the decision of Lane J. to the Ontario Divisional Court was dismissed: (1999), 42 O.R. (3d) 797.

international conventions. Yet, is it defensible for the government to present positions to domestic courts which appear to be inconsistent with the obligations the government has assumed pursuant to international human rights instruments?

One writer has pointed out that both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have commented on conduct of Canada that "draws into question the good faith of Canada's commitment to doing what is necessary to implement Covenant rights within the Canadian legal order", and points specifically to the following comment of the Committee on Economic, Social and Cultural Rights: "The Committee urges the federal, provincial, and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognised in the Covenant."⁸³

This question brings into focus some complex underlying issues which the Government is going to have to address, issues ranging from the procedure the Government has put into place for decision-making regarding the ratification of human rights treaties and optional protocols providing for individual complaint mechanisms, to the positions the Government takes when faced with practical consequences of assuming international obligations, which it has not foreseen and does not like. Frequently, the state is faced with making decisions in circumstances where there are competing interests to be taken into account. In discussing this in relation to the rights of the child, one writer has stated as follows:

States will insist on their sovereignty and will claim that they must have the right to control their own borders. They will maintain that they must ensure national security by deporting certain individuals. However, states must reconsider whether in some cases their actions are in fact in violation of the CRC, and whether a different approach

⁸³Scott, *supra* note 77.

can be found to ensure national security while not exposing children to unnecessary hardships.⁸⁴

It appears from the majority judgment in the *Baker* case, that the Supreme Court of Canada is endorsing such sentiments, and that the Government will have to take a more serious look at practices and policies that lead to these present-day dilemmas.

Canada Is Not Alone in Facing These Issues

Other jurisdictions with similar legal systems are struggling with the same issues which Canada is facing in this regard. This is illustrated in immigration cases in other countries in which individuals have attempted to rely on the *Convention on the Rights of the Child* in order to avoid deportation. What has occurred in Australia in recent years is a good example. In 1995, the High Court of Australia held that there was a legitimate expectation that administrative decision-makers would act in conformity with the *Convention on the Rights of the Child*, even though the Parliament had not yet passed implementing legislation to give effect to the provisions of the *Convention*. Chief Justice Mason C.J. and Deane J. explained this expectation in the following terms:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by the courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention.⁸⁵

⁸⁴Todres, *supra* note 79 at 197.

⁸⁵*Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 at 291. This was an argument which did not find favour in the *Baker* case, but the Supreme Court of Canada left open "whether

This decision prompted a flurry of activity and a great deal of debate. Following the decision, the Minister for Foreign Affairs and the Attorney General issued a joint statement to the effect that "Australian law was to be interpreted according to precedent prior to the *Teoh* decision." Legislation was then introduced into Parliament in 1995 to reinforce this statement.⁸⁶ Although the bill lapsed when Parliament dissolved, a new bill dealing with this matter was introduced into Parliament in June, 1997. Entitled the *Administrative Decisions (Effect of International Instruments) Bill 1997*, the proposed legislation provided as follows:

Clause 5:

The fact that (a) Australia is bound by, or a party to, a particular international instrument; or (b) an enactment reproduces or refers to a particular international instrument; does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision.⁸⁷

Some of the views expressed against enactment of the bill emphasized the "unfortunate hypocrisy" of the Australian government which the proposed legislation revealed:

an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation." (paragraph 29).

⁸⁶*Administrative Decisions (Effect of International Instruments) Bill 1995.*

⁸⁷See *Todres*, *supra* note 79 at 187. See also Respondent's Factum filed in the Supreme Court of Canada in the *Baker* case, at paragraphs 80 - 85, cited in support of the argument that Canada's ratification of the Convention does not create a legitimate expectation that immigration officers are required by law to give more weight to the best interests of children when considering whether to exempt their parents from the requirements of the *Immigration Act*. On June 26, 1997, the Senate referred the bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report, and in October, 1997, the Committee recommended that the Senate pass the bill without amendment. The Committee was of the view that "the bill restores the roles of the executive and the Parliament to that which was in place prior to the *Teoh* decision; confirms the fundamental role of the Parliament to change the law to implement treaty obligations and to decide whether entry into a treaty gives rise to domestic rights, be they procedural or substantive; ensures administrative certainty without preventing or discouraging an administrative decision maker from taking international obligations into account; and complements the recent changes to treaty making procedures." (<http://www.apf.gov.au/index.htm>).

To override *Teoh* will send an unfortunate message to the international community about Australia's attitude to our treaty obligations. This legislation is saying, in effect, that Australians should not reasonably expect the government to adhere to our treaty obligations. If that is what we are saying to Australians then the international community will receive the same message...the legislation is an admission that the Australian government only wishes to adhere to those treaty obligations which it thinks convenient from time to time, and tends to suggest an unfortunate hypocrisy.⁸⁸

Others suggested that the bill might place Australia in breach of its international obligations. The Attorney General's Department, on the other hand, relied on the concept of the "margin of appreciation" to argue that the bill's enactment would not result in such a breach: "There is a margin of appreciation involved in the interpretation and implementation of treaties. Each country, including Australia, has a discretion in the manner in which it interprets and implements most of the treaties to which it is a party."⁸⁹

This bill, too, lapsed, but on October 13, 1999, the *Administrative Decisions (Effect of International Instruments) Bill 1999* was introduced into Parliament; the text of the 1999 Bill is identical to the 1997 Bill.⁹⁰ The discussion surrounding the *Teoh* case and the *Administrative Decisions (Effect of International Instruments) Bill 1997* reveals the awkward position in which the government finds itself, in attempting to reconcile its international human rights obligations and its domestic concerns, as well as the difficulties the domestic courts face in trying to make sense of the situation. One Parliamentary researcher put it aptly:

⁸⁸Submission No. 2, by Kristen Walker, to the Senate Legal and Constitutional Legislation Committee, *ibid.*

⁸⁹For a discussion of the "margin of appreciation", see Chapter 1.

⁹⁰Debate is expected in the House of Representatives before the end of the year: E-mail correspondence to the writer dated November 15, 1999, from Sama Payman, A/g Principal Legal Officer, Government of Australia.

While the Teoh case has added to the Australian jurisprudence on the relationship between international law and domestic law, it has not provided clear guidance on how this relationship will develop in the future. Questions will abound as to the extent to which unincorporated treaties can affect the domestic law of Australia... The case is indicative of the uneasy relationship between globalisation and national sovereignty and the competing pressures these place on the development of law within Australia.⁹¹

In New Zealand, the High Court in rejecting an appeal from a deportation order held, “[the CRC’s] obligations are stated in broad and relative terms and that in respect of the child it is ‘a’ not ‘the’ primary consideration and is not ‘the’ or ‘a’ paramount consideration”.⁹²

When the United Kingdom ratified the *Convention on the Rights of the Child*, it entered the following reservation:

The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.

This reservation has “had a decisive impact on two immigration cases in particular, in which the Court of Appeal concluded that the United Kingdom’s reservations meant that the CRC did not apply.”⁹³

It is interesting to note that prior to ratification of the *Convention on the Rights of the Child*, Canada reviewed existing federal legislation to determine whether any reservations were necessary and concluded that only two reservations were required in the areas of aboriginal adoption and youth

⁹¹Ann Twomey, Parliamentary Research Service, statement referred to by Mr. Taylor, in Parliamentary debate: <http://www.aph.gov.au/ParlInfo>.

⁹²*Patel v. Minister of Immigration* [1996] 1 N.Z.L.R. 252 (referred to in Todres, *supra* note 79 at 195, cited as “yet another example of a domestic court exploiting loopholes in the language of the CRC”).

⁹³Todres, *supra* note 79 at 196.

detention.⁹⁴

Conclusion

In the past few decades developments in international human rights law have proceeded at a rapid pace and will likely continue to do so. The reluctance which Canada displayed in its initial venture into the international human rights arena was replaced some years ago by an enthusiasm which resulted in the assumption of a myriad of international obligations. While Canada was successful for some time in separating its international commitments from its domestic, the Government finds itself facing increasing demands that it reconcile the actions it takes on the international stage with the decisions it makes in the domestic sphere. In the years to come, there will no doubt be a marked increase in challenges to government action and legislation, which are based in part on Canada's international human rights obligations. In dealing with these challenges, both the government and the courts will find it necessary to come to grips with some difficult underlying issues raised by these challenges.

⁹⁴Respondent's Factum filed in the Supreme Court of Canada in the *Baker* case, at paragraph 54.

CHAPTER 3

INDIVIDUAL COMPLAINTS TAKEN TO INTERNATIONAL TREATY BODIES: HOW HAS CANADA FARED BEFORE THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE?

As discussed in Chapter 2, "Canada has long had the reputation internationally of being a 'good joiner'",¹ and in addition to having ratified numerous international human rights treaties has signed the optional provisions allowing individual communications to be heard by the treaty bodies established under the ICCPR (the Human Rights Committee) and under the CAT (The Committee against Torture).² This chapter examines the conclusions (the "views") which the Human Rights Committee and the Committee against Torture have adopted concerning communications by individuals in respect of alleged violations by Canada of its obligations under the ICCPR and the CAT respectively,³ and the responses of Canada to views and requests of these treaty bodies. Under the individual communication provisions of both Committees, a communication must first be declared admissible before it can be considered on its merits. The conditions of admissibility are set out in the articles of the First Optional Protocol to the ICCPR and in the articles of the CAT, and elaborated

¹John W. Holmes, *No Other Way: Canada and International Security Institutions* (Toronto: Centre for International Studies, 1986) at vii. And see Stephen J. Toope, "Canada and International Law" (1998) Can. Council Int'l L. Proc. 33 at 39: "Canada is a compulsive joiner".

²Canada acceded to the ICCPR and the ICESCR (as well as the Optional Protocol to the ICCPR) on May 19, 1976. "In international law, this bound Canada to ensure the respect of the two *Covenants* three months later, on August 19, 1976." See William Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996) at 8 - 9.

³In addition to the global or UN-sponsored human rights arrangements, a number of regional human rights regimes have developed, e.g., the European system established under the Council of Europe (See Chapter 4), the Inter-American system set up under the Organization of American States, and the African system created under the Organization of African Unity. "[A]t the end of this century, only the Asian countries outside the Arab League lack a regional human rights convention." Antonio Augusto Cancado Trindade, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century" (1998) 30 Colum. H. R. L. Rev. 1 at 3-4 This chapter is restricted to an examination of two of the United Nations- sponsored human rights arrangements.

on in rules of procedure. Communications have been declared inadmissible on numerous grounds.⁴ While a comprehensive discussion of the “jurisprudence” developed by these treaty bodies would benefit from an analysis of the admissibility decisions, particularly those which are based on whether the issues raised in the communications come within the scope of the treaties, this chapter will be limited to an examination of the cases which have been declared admissible by the treaty bodies and have then been considered on their merits.

The Human Rights Committee

The Human Rights Committee was established pursuant to Article 28 of the *International Covenant on Civil and Political Rights*, as a permanent human rights body to implement the Covenant.⁵ Article 28 provides that the Committee shall consist of eighteen members composed of nationals of the States Parties to the Covenant, who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. The members of the Committee are

⁴These include the following grounds: that the author had failed to exhaust available domestic remedies: e.g., *K.C. v. Canada*, Communication No. 486/1992; *M.A.B., W.A.T. and J.-A.Y.J. v. Canada*, Communication No. 570/1993; *M.A. v. Canada*, Communication No. 22/1995 - CAT; that the author's claims did not come within the scope of the treaty: e.g., *S. v. Canada*, Communication No. 68/1980; that the author was an association and not an individual: e.g., *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981; that the author had not substantiated his allegation of a violation: e.g., *R.B. v. Canada*, Communication No. 236/1987; *Lacika v. Canada*, Communication No. 638/1995; that the facts did not raise issues under any provision of the treaty: e.g., *Dr. J.P. v. Canada*, Communication No. 446/1991; *A.R.S. v. Canada*, Communication No. 091/1981; *A.S. v. Canada*, Communication No. 068/1980; that the alleged violation occurred before the entry into force of the treaty: e.g., *Atkinson v. Canada*, Communication No. 573/1994; that the author had failed to show that he himself was a victim of a violation: e.g., *A.D. on behalf of the Mikmaq Tribal Society v. Canada*, Communication No. 078/1980; that the submission constituted an abuse of the right of submission: e.g., *J.J.C. v. Canada*, Communication No. 367/1989; and that the matter was being examined under another procedure of international investigation or settlement: e.g., *Mbulu v. Canada*, Communication No. 26/1995 - CAT. Note: The current rules regarding admissibility are found in Rule 90 of the *Rules of Procedure of the Human Rights Committee*, August 11, 1997, CCPR/C/3/Rev.5.

⁵Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) at 13, 44.

elected and serve in their personal capacity.

The First *Optional Protocol* to the ICCPR establishes a mechanism by which individuals may submit communications to the Human Rights Committee alleging violations by States Parties of individual rights enumerated under the Covenant. The Optional Protocol, along with the ICCPR, entered into force on March 23, 1976.⁶ Under its terms, States Parties agree to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of any of the rights set forth in the Covenant.

Canada became a party to the *Optional Protocol* in 1976.⁷ There was very little public awareness of this decision and no public debate. Since then, there have been numerous communications brought to the Human Rights Committee by individuals alleging that Canada has violated their rights under the Covenant.⁸ Of these communications, views have been adopted only in sixteen cases.⁹ The complaints which have formed the basis for the communications that have been declared admissible and in which views have been adopted, have related to the following issues:

- (i) extradition by Canada to a state in circumstances where the fugitive will potentially face

⁶*Ibid.*, at 29, fn. 92.

⁷Canada's accession to the Optional Protocol was "despite reluctance by parts of the federal bureaucracy. Officials in the Department of Justice questioned the ability of the country's legal system to absorb demands made by protocol cases. Early apprehensiveness was eventually overcome, however, and any lingering reluctance dissolved as officials became more experienced with the procedure. Since then, Canada has co-operated fully and enthusiastically with the committee...": Cathal J. Nolan, "The Human Rights Committee" in Robert O. Matthews and Cranford Pratt, eds., *Human Rights in Canadian Foreign Policy* (Kingston and Montreal: McGill-Queens University Press, 1988) at 107.

⁸Schabas, *supra* note 2 at 71: "Canada was among the first countries to subscribe to the *Optional Protocol* and, within months, petitions from aggrieved Canadians were being filed at the Geneva or the New York offices of the Human Rights Committee".

⁹Review of the Official Records of the Human Rights Committee.

the death penalty (*Kindler*¹⁰, *Ng*¹¹, *Cox*¹²);

(ii) deportation by Canada of long-time permanent residents (*Stewart*¹³, *Canepa*¹⁴);

(iii) prisoners' rights: the right to be tried without undue delay; and treatment during detention (*Pinkney*¹⁵);

(iv) the right of an individual convicted of a criminal offence to benefit from legislation which is enacted subsequent to the commission of the offence and which provides for a lighter penalty (*Alexander MacIsaac*¹⁶; *Gordon C. VanDuzen*¹⁷);

(v) freedom of religion and reasonable accommodation requirements: the dismissal from employment of a Sikh for refusing to wear a hard hat at the worksite (*Bhinder*¹⁸);

(vi) laws promoting or requiring the use of a particular language: restrictions against the use of English for commercial purposes (Quebec legislation -- Bill 101 as amended by Bill 178) (*Ballantyne* and *McIntyre*¹⁹; *Singer*²⁰);

(vii) the right of persons belonging to ethnic minorities to enjoy their own culture in

¹⁰Communication No. 470/1991.

¹¹Communication No. 469/1991.

¹²Communication No. 539/1993

¹³Communication No. 538/1993.

¹⁴Communication No. 558/1993.

¹⁵Communication No. 27/1978.

¹⁶Communication No. 55/1979.

¹⁷Communication No. 50/1986.

¹⁸Communication 208/1986.

¹⁹Communication Nos. 359/1989 and 385/1989, joined together for consideration by the Committee.

²⁰Communication No. 455/1991.

community with other members of their cultural group (*Lovelace*²¹);

(viii) political and economic status of indigenous communities (*Denny and the Mikmaq Tribal Society*²²; *Ominayak and the Lubicon Lake Band*²³); and

(ix) the availability of public funding for religious schools (*Waldman*²⁴).

While the submissions tendered to the Human Rights Committee have until recently been confidential, the views adopted by the Committee are made public.²⁵ The views summarize the claims of the authors and the observations made by the States Parties.²⁶

(i) *Issue: Extradition by Canada to a state in circumstances where the fugitive will potentially face the death penalty*

Canada is a party to numerous treaties governing the extradition of fugitives to foreign states.²⁷ Canada's treaty obligations are implemented into domestic law by the *Extradition Act*.²⁸ The issue of the treatment a fugitive may receive if extradited to the requesting state has arisen in a

²¹Communication No. 24/1977.

²²Communication No. 205/1986.

²³Communication No. 167/1984.

²⁴Communication No. 694/1996.

²⁵The rules regarding confidentiality were amended in 1997. See Rule 96 of the Rules of Procedure of the Human Rights Committee, August 11, 1997, CCPR/C/3/Rev. 5: All working documents issued for the Committee shall remain confidential unless the Committee decides otherwise. This does not affect the right of the author of a communication or the State party concerned to make public any submission or information bearing on the proceedings; however, the Committee may, as deemed appropriate, request the author or the State party to keep confidential the whole or part of any such submissions or information.

²⁶The summaries of the views in this chapter are derived from the published views of the Committee. See Appendix for relevant provisions of the ICCPR.

²⁷Anne Warner La Forest, *LaForest's Extradition to and from Canada*, 3rd ed. (Aurora, Ontario: Canada Law Book Inc., 1991) at 9.

²⁸R.S.C. 1985, C. E-23, s. 3.

number of cases in Canada, in particular where individuals have challenged decisions of the Minister of Justice to surrender them for extradition to the United States. Whereas Canada has abandoned the death penalty for all civilian cases, many states in the United States have retained the death penalty.²⁹

In three cases, the Human Rights Committee has adopted views concerning communications alleging that Canada's decision to extradite individuals to the United States violated various articles of the Covenant, including articles 6, 7, 9, 14 and 26. These cases are *Kindler v. Canada*, *Ng v. Canada*, and *Cox v. Canada*. In all three of these cases, the allegations were based in part on the possibility that the death penalty would be imposed.

Kindler v. Canada: Views adopted July 30, 1993

The author of the communication in the *Kindler* case was a citizen of the United States. Mr. Kindler had been convicted in the State of Pennsylvania of first degree murder, conspiracy to commit murder, and kidnapping. As stated by Mr. Justice LaForest of the Supreme Court of Canada, the "crime of which Kindler has been convicted can only be described as a brutal, premeditated murder. The extradition report shows that after beating the victim about the head with a baseball bat, Kindler allegedly dragged him to a nearby river, tied a cinder block to his neck and threw him into the river while he was still alive."³⁰ The jury had recommended imposition of the death penalty. Prior to sentencing, Mr. Kindler had escaped from custody, illegally entered Canada and was subsequently arrested in Quebec. The United States requested extradition, which was ordered by the Superior Court of Quebec. Mr. Kindler's appeals from the extradition order to the Federal Court and to the

²⁹Paul Michell, "Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter" (1998) 23 Yale J. Int'l L. 141 at 146-47.

³⁰*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 835.

Supreme Court of Canada were unsuccessful. Under the Extradition Treaty between Canada and the United States, Canada is entitled to refuse extradition unless the U.S. provides assurances that the death penalty will not be imposed or if imposed will not be executed.³¹ The Minister of Justice of Canada decided not to seek such assurances from the United States. The Minister's reasons for surrendering fugitives without seeking assurances that the death penalty would not be imposed or if imposed, not carried out, have been summarized as follows:

1. There was no merit in the suggestions that a fugitive would not receive a fair trial or sentence hearing in the United States (Ng);
2. There was no merit in the so-called 'death-row phenomenon' argument; the state's method of execution was accepted by the American courts (Kindler);
3. The provision in Article 6 of the Treaty should not be routinely applied: '[i]f it was intended that assurances should be sought other than for special reasons, that intent could have been clearly and simply expressed in the Treaty' (Ng);
4. Those who commit murder in a foreign state, particularly one with a long common border with Canada, should be discouraged from seeking haven in Canada as a means of reducing or limiting the severity of the penalty that might be exacted under the laws of the state in which the crime was committed (Ng and Kindler); and
5. The United States and Canada must work together to support law enforcement in the two nations (Ng).³²

Mr. Kindler was extradited to the United States despite his having made a submission to the Human Rights Committee, and despite a request from the Committee to stay the extradition pending the

³¹*Extradition Treaty Between Canada and the United States of America*, in force March 22, 1976, Article 6: "When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed." S. 25 of the *Extradition Act* provides that the Minister of Justice *may*, not *must*, order a fugitive to be surrendered to the requesting state. Canada has stated before the Human Rights Committee that it does not routinely seek assurances with respect to the non-imposition of the death penalty, that the right to seek assurances is held in reserve for use only where exceptional circumstances exist: See *Cox v. Canada* discussed below, Views of the Committee, para. 5.6.

³²See McLachlin J.'s judgment in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 841-42.

Committee's examination of Kindler's communication.

In his communication to the Committee, Mr. Kindler claimed that the death penalty *per se* constituted cruel and inhuman treatment or punishment, and that conditions on death row were cruel, inhuman and degrading. He also alleged that the judicial procedures in Pennsylvania relating to capital punishment did not meet basic requirements of justice. The Committee observed that what was at issue was not whether Mr. Kindler's rights had been or were likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States Canada exposed him to a real risk of a violation of his rights under the Covenant. It stated that if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. The Committee concluded that the facts of the case did not reveal a violation by Canada of any article of the Covenant. The Committee specifically examined articles 6 and 7 of the Covenant.

The Committee found that the obligations arising under article 6, paragraph 1, did not require Canada to refuse Mr. Kindler's extradition. In coming to this conclusion, the Committee noted the following: that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; that Mr. Kindler was convicted of premeditated murder, and that he had not claimed that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant; and that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. The Committee noted that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 if the decision to extradite without assurances had been taken arbitrarily or summarily;

however, the Committee accepted Canada's evidence that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee also took into consideration Canada's reasons not to seek assurances, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder. It should be noted that the "safe haven" concern is one of great significance for Canada, and was referred to several times by the Supreme Court of Canada in the *Kindler* and *Ng* cases.³³

With respect to article 7, the Committee concluded that capital punishment as such does not *per se* violate article 7. The Committee stated that in determining whether in a particular case the imposition of capital punishment could constitute a violation of article 7, consideration is given to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this case there were no

³³[1991] 2 S.C.R. 779. Mr. Justice LaForest stated as follows: "The possible significance of the temptation of an accused to escape to Canada should not be overlooked...the two countries have a long, relatively open border and similar cultures, which makes the possibility of an escape over the border much more likely." (at 836). McLachlin J. had this to say: "Another relevant consideration in determining whether surrender without assurances regarding the death penalty would be a breach of fundamental justice is the danger that if such assurances were mandatory, Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty. This is not a new concern. The facility with which American offenders can flee to Canada has been recognized since the nineteenth century...Given our long undefended common border with the United States, it is not unreasonable for the Minister, in deciding whether to seek the assurance that the death penalty will not be imposed, to consider the danger of encouraging other fugitives to do what Ng and Kindler did." (at 853).

With the ease of cross-border movement, there is also a fear of U.S. political matters being exported to Canada. One example is the Leonard Peltier case. One of the grounds set out in the *Extradition Act*, on which the Minister may refuse to surrender is when he determines that the offence is one of a political character or where the proceedings are being taken with a view to try to punish the fugitive for an offence of a political character. Peltier was a member of the American Indian Movement who had been committed for surrender to the United States on charges including murder of F.B.I. agents. The Minister agreed to receive submissions concerning the conduct of the FBI and the U.S. Bureau of Indian Affairs and allegations that members of the American Indian movement were subject to persecution by the U.S. Government. The Minister concluded that there was no evidence that the offences were of a political character: Anne La Forest, *supra* note 27 at 199-200. In this regard, see also the case of Satiacum in which Chief Satiacum from Washington State fled the United States following conviction on numerous counts but before sentencing, and pursued a Convention refugee claim in Canada: *Satiacum v. Minister of Employment and Immigration* (1989), 99 N.R. 171 (FCA).

specific submissions made regarding prison conditions in Pennsylvania, the effects of prolonged delay in the execution of sentence or the specific method of execution.

Before concluding with the finding that the facts before the Committee did not reveal a violation by Canada of any provision of the Covenant, the Committee expressed its regret that Canada had not acceded to the Special Rapporteur's request under rule 86 to defer surrender of Mr. Kindler until the Committee had examined the merits of his communication.

Ng v. Canada: Views adopted November 5, 1993

The author of the communication in the *Ng* case was a resident of the United States whose extradition had been requested by the United States to stand trial in California on nineteen criminal charges arising from multiple and brutal killings. With respect to the nature of the crimes alleged to have been perpetrated by Ng in the State of California, Madam Justice McLachlin of the Supreme Court of Canada had this to say: "The crimes...are among the worst imaginable. If the state's contention is correct, these were deliberate, cold-blooded murders of a series of random and innocent victims for no motive other than personal gratification."³⁴ On twelve of the charges, Ng, if convicted, could receive the death penalty. The Alberta Court of Queen's Bench ordered Mr. Ng's extradition. Mr. Ng's *habeas corpus* application was denied, and the Supreme Court refused Mr. Ng's application for leave to appeal. Again, the Minister of Justice decided not to seek assurances from the United States that the death penalty would not be imposed or executed. Mr. Ng filed an application for review of the Minister's decision in the Federal Court. The issues in the case were referred by the Governor in Council to the Supreme Court of Canada, which heard the case at the same time as the

³⁴*Kindler v Canada*, [1991] 2 S.C.R. 779 at 855. Note: McLachlin J. chose to deal with the Ng and Kindler cases together in the reasons for the *Kindler* decision, as the two cases raised the same issues.

appeal by Mr. Kindler. The Supreme Court of Canada held that Mr. Ng's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights or the standards of the international community. Mr. Ng was extradited, again in spite of a request by the Committee to stay his extradition pending examination by the Committee of Ng's communication.

Mr. Ng claimed that the decision to extradite him violated articles 6, 7, 9, 10, 14 and 26 of the Covenant. He submitted that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constituted cruel and inhuman treatment or punishment *per se*; that the conditions on death row were cruel, inhuman and degrading; and that the judicial procedures in California relating to capital punishment did not meet basic requirements of justice. He alleged that in the United States racial bias influenced the imposition of the death penalty.

The Committee concluded, as in the *Kindler* case, that in the circumstances Canada's obligation under article 6, paragraph 1 of the Covenant, did not require it to refuse Mr. Ng's extradition, and that Mr. Ng was not a victim of a violation by Canada of article 6 of the Covenant. In arriving at this conclusion, the Committee considered the same factors which it had taken into account in the *Kindler* case, namely, that if sentenced to death, that sentence would be based on a conviction in respect of very serious crimes; that nothing before the Committee supported the contention that Mr. Ng's trial in California would not meet the requirements of article 14; that Mr. Ng was extradited to the United States after extensive proceedings in the Canadian courts; and that the Minister of Justice reached his decision after hearing extensive arguments in favour of seeking assurances. Again, the Committee took note of the reasons advanced by the Minister of Justice for not seeking assurances, in particular, the absence of exceptional circumstances, the availability of due process and of appeal against conviction, and the importance of not providing a safe haven for those

accused of murder.³⁵

Where the conclusion of the Committee in the *Ng* case differed from that in the *Kindler* case was in respect of article 7 of the Covenant. The key issue was the manner in which execution of the death penalty was carried out in California, i.e., by gas asphyxiation. Mr. Ng presented detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible. The Committee found that Canada "had the opportunity to refute these allegations on the facts; (but) it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, 'it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation'." The Committee concluded as follows:

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

The Committee does not cite any scientific or other evidence in support of its reason for finding a violation of article 7. Rather, it appears to base its conclusion on its perception that the State party failed to refute the author's allegations on the facts. This is described as an incorrect view

³⁵In its submissions to the Committee, Canada stated that the Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

by one Committee member³⁶ in a dissenting opinion (one of eight individual opinions appended to the views) in which the member concluded that the Committee's finding that the specific method of judicial execution applied in California is tantamount to cruel and inhuman treatment and that accordingly Canada violated article 7 by extraditing Mr. Ng to the United States, is without a proper basis.

In August of 1992 the State of California enacted legislation (effective January 1, 1993) that enabled an individual under sentence of death to choose lethal injection as the method of execution in lieu of gas asphyxiation. This was pointed out in another individual opinion.³⁷ The views of the Committee, which were adopted subsequent to this legislation coming into force, make no reference to this legislation.

When the Committee finds that the facts of a case reveal a violation by a State party of an article of the Covenant, what are the consequences for the State party? In this case, what followed from the Committee's finding was merely a request and an appeal to the State party:

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

Finally, it should be noted that in its admissibility decision the Human Rights Committee again "expressed its regret" that Canada had not acceded to the Committee's request to stay Mr. Ng's extradition. In one of the dissenting opinions appended to the views, Canada received a reprimand with respect to its having carried out Mr. Ng's extradition so rapidly once it was known that the

³⁶Individual opinion by Kurt Herndl (dissenting): "No scientific or other evidence is quoted in support of this dictum. Rather, the onus of proof is placed on the defendant State which, in the majority's view, had the opportunity to refute the allegations of the author on the facts, but failed to do so. This view is simply incorrect." (Para. 13).

³⁷Bertil Wennergren.

author had submitted a communication to the Committee. The dissenting member stated as follows:

12. ...On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Ng without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

13....Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints...³⁸

One final note on this case: On February 24, 1999, a California jury convicted Charles Chitat Ng of eleven counts of first-degree murder. The Ng case has been described as "one of history's horrific serial killing cases."³⁹ On May 3, 1999, the jury recommended that Charles Ng be executed. Ng was sentenced to death on June 30, 1999.⁴⁰

Cox v. Canada: Views adopted October 31, 1994

Mr. Cox was a citizen of the U.S. in detention in Quebec. The U.S. requested his extradition. Mr. Cox was wanted in the State of Pennsylvania on two charges of first-degree murder. If convicted, he could face the death penalty, although two accomplices were tried and sentenced to life terms. The Superior Court of Quebec ordered Mr. Cox's extradition. Mr. Cox filed a *habeas corpus* application which was dismissed by the Superior Court of Quebec. Mr. Cox appealed to the Court

³⁸Jose Aguilar Urbina.

³⁹"It takes a killer to create a victims' gallery" *National Post* (25 February 1999) A15.

⁴⁰"Charles Ng sentenced to death for killing 11 people" *The Globe and Mail* (1 July 1999) A8.

of Appeal of Quebec, but later abandoned his appeal. The Minister of Justice ordered Mr. Cox surrendered without assurances. Mr. Cox claimed that the order to extradite him violated articles 6, 7, 14 and 26 of the Covenant. He alleged that the manner in which death penalties are pronounced in the U.S. generally discriminates against black people. He submitted that if extradited and sentenced to death, he would be exposed to the "death row phenomenon", years of detention under harsh conditions while awaiting execution. While the author had not exhausted domestic remedies, Canada did not contest admissibility on this ground.⁴¹

With regard to a potential violation by Canada of article 6 if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the U.S., the Committee referred to the criteria set forth in its views in the *Kindler* and the *Ng* cases, and concluded that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition without assurances that the death penalty would not be imposed. The Committee also concluded that the extradition would not entail a violation of article 7.⁴² In arriving at this conclusion, the Committee considered that while confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition were presented; Canada had submitted specific information about the current state of prisons in Pennsylvania which would not appear to violate article 7; Mr. Cox had not yet been convicted nor sentenced; the trial of two accomplices had resulted in life imprisonment as opposed to the death sentence; and Mr. Cox had not adduced evidence to show that persons confined to death row in Pennsylvania were not afforded avenues of appeal within a reasonable time. In regard to the

⁴¹Mr. Cox argued that an attempt to further exhaust domestic remedies in Canada would be futile in light of the decisions of the Supreme Court of Canada in the cases of *Kindler v. Canada (Minister of Justice)* and *Re Ng*. Canada stated that it did not wish to express a view as to whether the author had exhausted domestic remedies. (Views of the Committee, para. 10.2).

⁴²Perhaps in the *Cox* case Canada paid increased attention to the evidence it adduced in support of its position, having considered the comments of the Committee in the *Ng* case concerning Canada's failure to refute Mr. Ng's allegations on the facts.

method of execution, the Committee stated that it had already had the opportunity of examining the *Kindler* case in which the potential judicial execution by lethal injection was not found to be in violation of article 7.

The range of opinions held by members of the Human Rights Committee on the issues arising in these cases is readily apparent from the numerous individual opinions appended to the Committee's views. Two of the members⁴³ would have found that Canada had violated both articles 6 and 7. In their dissenting opinion they state that a State party that has abolished the death penalty is under a legal obligation not to reintroduce it, and that this obligation includes an obligation not to indirectly reintroduce it by extraditing or expelling an individual within its territory to another State where he may be exposed to capital punishment. The dissenting opinion goes on to state that a violation of the provisions of article 6 that may make the execution of a death sentence permissible entails necessarily and irrespective of the way in which the execution may be carried out, a violation of article 7.⁴⁴

The principles which have been established in these three cases in relation to extradition, in particular extradition by Canada to the United States, may be summarized as follows:

(i) If a State party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.⁴⁵

(ii) Article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not

⁴³Jose Aguilar Urbina and Fausto Pocar.

⁴⁴There were numerous individual opinions appended to the views of the Committee in the *Kindler* and the *Ng* cases as well as in the *Cox* case, many of them dissenting.

⁴⁵See, e.g., views of the Committee in the *Kindler* case, at para. 13.1: "If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself *may* be in violation of the Covenant." (emphasis added) This wording is repeated in the *Ng* case, at para. 14.2; see also the *Cox* case at para. 16.1.

prohibit the imposition of the death penalty for the most serious of crimes. If the person is exposed through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, this would entail a violation by Canada of its obligations under paragraph 1. The requirements of article 6, paragraph 2, must be met, i.e., that capital punishment is imposed only for the most serious crimes, under circumstances not contrary to the Covenant and other instruments, and that it is carried out pursuant to a final judgment rendered by a competent court.

(iii) While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the terms of article 6 of the Covenant do not necessarily require Canada to refuse to extradite or to seek assurances.

(iv) Extradition would violate Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances were taken summarily or arbitrarily.

(v) In determining whether in a particular case the imposition of capital punishment constitutes a violation of article 7, the relevant factors include personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.

(vi) Whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7. The execution of the sentence must be carried out in such a way as to cause the least possible physical and mental suffering. While execution by lethal injection meets this test, execution by gas asphyxiation does not.⁴⁶

⁴⁶In its fourth periodic report to the Human Rights Committee, Canada states, at paragraph 44: "Following the decisions of the Committee in Kindler v. Canada, Ng. v. Canada and Cox v. Canada, which raised articles 6 and 7 of the Covenant, the Minister of Justice takes into consideration the protection afforded by the Covenant in decisions on extradition requests that raise the issue of the death penalty." In concluding observations adopted by the Human Rights Committee on April 6, 1999, in relation to Canada's fourth periodic report, the Committee states, at paragraph 13: "The Committee is concerned that Canada takes the position

(ii) *Issue: Deportation from Canada of long-time permanent residents*

The issue of whether the deportation from Canada of a long-time permanent resident violates the ICCPR has been the subject of two cases in which the Committee has adopted views, *Charles E. Stewart v. Canada* and *Giosue Canepa v. Canada*.

Stewart v. Canada: Views adopted November 1, 1996

Mr. Stewart was a British citizen born in Scotland in 1960. At the age of seven he emigrated to Canada with his mother. Almost all of Mr. Stewart's relatives resided in Canada. He had two young children who lived with their mother from whom Mr. Stewart was divorced. Mr. Stewart's parents never requested Canadian citizenship for him during his youth. Mr. Stewart was convicted of numerous criminal offences. In 1990 an immigration inquiry was initiated, and Mr. Stewart was ordered deported on the basis of his criminal convictions. An appeal from the deportation order was dismissed by the Immigration Appeal Division of the Immigration and Refugee Board of Canada. Mr. Stewart's application for leave to appeal to the Federal Court was dismissed. There were no further judicial proceedings available.

Mr. Stewart claimed that the facts revealed violations of articles 7, 9, 12, 13, 17 and 23 of the Covenant. In particular, he asserted that Canada had failed to provide for clear legislative recognition of the protection of the family. He argued that he must be considered a *de facto* Canadian citizen, given his long residence in Canada, and that enforcement of the deportation order would amount to cruel, inhuman and degrading treatment.

that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk".

The Committee declared the communication admissible in so far as it might raise issues under articles 12 (4), 17 and 23 of the Covenant. With respect to article 12, paragraph 4, the Committee examined whether Canada qualified as being Mr. Stewart's "country". The concept of "his own country" is broader than the concept of country of nationality or citizenship. The Committee stated that "his own country" applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens' within the meaning of article 13. The Committee concluded that "when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become 'his own country' within the meaning of article 12, paragraph 4 of the Covenant." The Committee went on to state that individuals who do not take advantage of the opportunity to become nationals and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada, and to bear the consequences thereof.

In regard to articles 17 and 23, the Committee stated that the question was whether the interference, by deportation, with Mr. Stewart's family relations in Canada could be considered either unlawful or arbitrary. The Committee concluded as follows:

[T]he interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the Covenant.

While the Committee found that the facts before it did not disclose a violation of any of the provisions of the Covenant, it should be noted that once again there were several dissenting opinions.

One dissenting opinion⁴⁷ illustrates the disparity of views held by Committee members on significant issues that have been raised before the Committee. For example, the dissenting opinion expresses the following principles:

(i) If a State party is under an obligation to allow entry of a person it is prohibited from deporting that person.

(ii) The author has been deprived of the right to enter Canada, whether he remains in Canada awaiting deportation or whether he has already been deported. Individuals cannot be deprived of the right to enter 'their own country' because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or with the web of relationships that form his or her social environment.

(iii) For the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it.

(iv) The grounds relied on by the State party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course.

(v) While the deportation proceedings were not unfair procedurally, the onus was on the author to show reasons against his deportation, not on the State to demonstrate that there were grounds for taking away his right to enter "his own country". In these circumstances the decision to deport the author was arbitrary.

The concepts expressed in this dissenting opinion are diametrically opposed to those contained in the views adopted by the Committee, and to some basic principles enshrined in Canada's immigration legislation.⁴⁸

Canepa v. Canada: Views adopted April 3, 1997

Mr. Canepa was a citizen of Italy by birth. At the age of five he emigrated to Canada with his parents. He never acquired Canadian citizenship. Mr. Canepa was convicted of a number of criminal offences in Canada, and was ordered deported on the basis of those convictions. Mr. Canepa's appeal

⁴⁷By Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco Jose Aguilar Urbina.

⁴⁸The *Immigration Act* sets out circumstances in which a "permanent resident" may be issued a removal order which, if not quashed or stayed, may result in the cessation of his permanent resident status.

to the Immigration Appeal Board was unsuccessful. His application to the Federal Court for leave to appeal the decision of the Immigration Appeal Board was granted, but his appeal was dismissed. An application to the Supreme Court of Canada for leave to appeal was dismissed. Mr. Canepa claimed to be a victim of a violation of articles 7, 12, 17 and 23 of the Covenant. As in the *Stewart* case, Mr. Canepa alleged, among other things, that Canada had failed to provide for clear legislative recognition of the protection of privacy, family and home life of persons in the author's position; that his right to family life was violated by his deportation; that deportation of long-term, deeply-rooted and substantially-connected resident aliens who have already been duly punished for their crimes was not related to a legitimate State interest; and that enforcement of the deportation order amounted to cruel, inhuman and degrading treatment.

The Committee found that the facts before it did not disclose a violation of any of the provisions of the Covenant. In particular, the Committee relied on its views in the *Stewart* case that except in limited circumstances a person who enters a State under the State's immigration laws cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The Committee found that the interference with the author's family life was not arbitrary; the separation from his family and its effects on him were not disproportionate to the objectives of removal which is seen as necessary in the public interest and to protect public safety from further criminal activity by the author. Again, there were a number of dissenting individual opinions appended to the views, specifically in relation to the Committee's narrow interpretation of the application of article 12, paragraph 4 of the Covenant, linking "own country" to "nationality". Two of the dissenting members expressed the view that "there are factors other than nationality which may establish close and enduring connections between a person and a country" and that in such cases the individual "has a strong claim to the protection of article 12,

paragraph 4.”⁴⁹

It is interesting to note that in the *Stewart* and *Canepa* cases, the Human Rights Committee has given more leeway to the state in respect of decisions to remove long-time permanent residents than the European Court of Human Rights has given in cases where there has been a finding that the deportation of an alien would interfere with the individual’s right to respect for his family life.⁵⁰

Two years after the Human Rights Committee adopted views in the *Canepa* case, the Committee expressed concern in relation to Canada’s policies on expulsion of long-term alien residents. In concluding observations adopted April 6, 1999, in relation to Canada’s fourth periodic report, the Committee states, at paragraph 15: “The Committee remains concerned about Canada’s policy in relation to expulsion of long-term alien residents, without giving full consideration in all cases to the protection of all Covenant rights, in particular under articles 23 and 24.”

(iii) Issue: The right to be tried without undue delay; treatment during detention

Larry James Pinkney v. Canada: Views adopted October 29, 1981

Mr. Pinkney was a citizen of the United States serving a prison sentence in Canada. He entered Canada as a visitor in 1975, and in May 1976 he was arrested on charges of extortion. In December 1976 he was convicted by the County Court of British Columbia and in January 1977 was sentenced to a term of five years’ imprisonment. He sought leave to appeal his conviction and

⁴⁹Elizabeth Evatt and Cecilia Medina Quiroga.

⁵⁰See, e.g., the case of *Beldjoudi v. France*, No. 55/1990/246/317. The Court held that although it is for the contracting state to maintain public order by exercising its right to control the entry, residence and expulsion of aliens, the state’s decision must, in so far as it may interfere with a right protected under Article 8 (1) of the Convention, “be necessary in a democratic society” and “justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued”.

sentence to the British Columbia Court of Appeal, and in December 1979 the B.C. Court of Appeal granted leave to appeal, but dismissed Mr. Pinkney's appeal against conviction and adjourned his appeal against sentence *sine die*.

Mr. Pinkney claimed violations of article 14, paragraphs 1, 3(b), 3(c), and 5 of the Covenant. His allegations were that he was denied a fair trial because evidence was withheld which would have proven that he had no intent to commit the crime of extortion, that he was denied the right to produce those documents and that the hearing of his appeal was unduly delayed. Mr. Pinkney also alleged that his rights under article 10, paragraphs 1 and 2(a) and article 17, paragraph 1 of the Covenant were violated, by his ill-treatment while in detention. He alleged in particular that prison guards insulted him, humiliated him and physically ill-treated him because of his race; that during his pre-trial detention he was not segregated from convicted persons; and that his correspondence was arbitrarily interfered with.

With respect to the allegations concerning missing evidence, the Committee stated that it had been established that the question whether the missing evidence existed and, if so, whether it would be relevant, had been considered by both the trial judge and the Court of Appeal. The Committee observed that it was not its function to examine whether the assessment by the courts was based on errors of fact, or to review the courts' application of Canadian law, but only to determine whether it was made in circumstances indicating that the provisions of the Covenant were not observed. The Committee did not find any support for the allegation that material evidence was withheld by Canadian authorities, depriving Mr. Pinkney of a fair hearing or adequate facilities for his defence.

Regarding the question of undue delay, however, the Committee stated that the B.C. authorities must be held responsible for the delay of two and a half years in the production of the transcripts of the trial for the purpose of the appeal. The Committee concluded as follows:

22. ...Even in the particular circumstances this delay appears excessive and might have been prejudicial to the effectiveness of the right to appeal. At the same time, however, the Committee has to take note of the position of the Government that the Supreme Court of Canada would have been competent to examine these complaints. This remedy, nevertheless, does not seem likely to have been effective for the purpose of avoiding delay. The Committee observes on this point that the right under article 14, paragraph 3(c), to be tried without undue delay should be applied in conjunction with the right under article 14, paragraph 5 to review by a higher tribunal, and that consequently there was in this case a violation of both of these provisions taken together.

With respect to the claims based on alleged wrongful treatment during detention, the Committee found as follows: (i) it did not have before it any verifiable information to substantiate Mr. Pinkney's allegations of violations of articles 10, paragraph 1 and 17, paragraph 1 of the Covenant; (ii) the requirement of article 10, paragraph 2(a) regarding segregation of accused persons from convicted persons means that they shall be kept in separate quarters but not necessarily in separate buildings and that the practice of having convicted persons work as food servers and cleaners in the remand area of the prison was not incompatible with the Covenant, provided that contacts between the two classes of prisoners were kept strictly to a minimum necessary for the performance of those tasks; and (iii) the law in force at the time Mr. Pinkney was detained, governing control and censorship of prisoners' correspondence, did not in itself provide satisfactory legal safeguards against arbitrary application, but there was no evidence to establish that Mr. Pinkney was himself the victim of a violation of the Covenant as a result; the Committee observed that section 42 of the Correctional Centre Rules and Regulations that came into force in 1978 had made the relevant law considerably more specific in its terms.

The Committee's conclusion, that the delay in producing the transcripts of the trial for the purpose of the appeal was incompatible with the right to be tried without undue delay, was not accompanied by any reference to any remedy which ought to be provided to Mr. Pinkney. The

conclusion reads simply as follows:

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the communication discloses a violation of article 14, paragraph 3(c) and 5, of the Covenant because the delay in producing the transcripts of the trial for the purpose of the appeal was incompatible with the right to be tried without undue delay.

(iv) Issue: The right of an individual convicted of a criminal offence to benefit from legislation which is enacted subsequent to the commission of the offence, and which provides for a lighter penalty

Issues regarding the alleged violation by Canada of article 15 of the Covenant have been considered by the Human Rights Committee in two cases, *Van Duzen v. Canada* and *MacIsaac v. Canada*.

Gordon C. Van Duzen v. Canada: Views adopted April 7, 1982

In 1967 and 1968 Mr. Van Duzen was sentenced upon conviction of different offences to combined terms which were to expire on June 11, 1978. He was released on parole in 1971, and while on parole was convicted (in December 1974) of an indictable offence and sentenced to imprisonment for a term of three years. Pursuant to section 17 of the *Parole Act 1970*, his parole was treated as forfeited as of the date of his conviction for the offence committed while on parole, and he was required to re-serve that time. As a consequence his combined terms were calculated to expire on January 4, 1985. In 1977, section 17 of the *Parole Act* was repealed and was replaced by provisions in the *Criminal Law Amendment Act 1977*. Under the new legislation, forfeiture of parole was abolished and the penalty for committing an indictable offence while on parole was made lighter for offences committed on or after October 15, 1977. Mr. Van Duzen alleged that by not making the "lighter penalty" retroactively applicable to persons who had committed indictable offences while on

parole before October 15, 1977, the Parliament of Canada had enacted a law which deprived him of the benefit of article 15 of the Covenant.

The parties made extensive submissions with respect to the meaning of the word "penalty" and relevant Canadian law and practice. The Committee concluded that it was not necessary to examine the complex issues raised regarding the interpretation and application of article 15, paragraph 1, as Mr. VanDuzen had been released even before the date when he claimed he should be released and therefore for practical purposes he had received the benefit he claimed. The Committee was of the view that the case did not disclose a violation of the Covenant.

The Committee noted that its conclusion was without prejudice to the correct interpretation of article 15, paragraph 1. It stated that its interpretation and application of the Covenant "had to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning." The Committee went on to say that the interpretation of the Covenant, in this case the terms of article 15, paragraph 1, is not determined by the meaning of terms like "penalty" in Canadian law, and that apart from the text, regard must be had to such matters as the Covenant's object and purpose.

Alexander MacIsaac v. Canada: Views adopted October 14, 1982

Mr. MacIsaac, too, claimed to be a victim of a breach by Canada of article 15, paragraph 1. In 1968 he was sentenced to a term of imprisonment of eight years. In 1972, he was released on parole from a federal penitentiary, and in 1975, while on parole, he was convicted of an indictable offence and sentenced to a term of fourteen months imprisonment. Pursuant to the *Parole Act 1970*,

the time which he had spent on parole (some three years and three months) was automatically forfeited. He was released again in May 1979, to serve the remaining part of his sentence under mandatory supervision.

Like Mr. VanDuzen, Mr. MacIsaac claimed that section 31(2) of the *Criminal Law Amendment Act 1977*, in providing that time spent on parole after October 15, 1977 was not to be re-served in prison upon revocation of that parole, constituted a lighter penalty within the meaning of article 15 of the Covenant, and by providing that the legislation was not to be retroactive the Government of Canada had contravened article 15, paragraph 1.

Mr. MacIsaac stated that the object of his submission to the Committee was to obtain an amendment of s. 31(2)(a) of the Canadian *Criminal Law Amendment Act 1977*, so as to make it compatible with article 15 of the Covenant. The Committee noted that while this matter appeared to be of interest as affecting hundreds of inmates in Canadian prisons, this fact alone was not a reason for the Committee to consider the general issue, and that it was not its task to decide in the abstract whether or not a provision of national law was compatible with the Covenant but only whether there was or had been a violation of the Covenant in the particular case.

The Committee examined the relevant provisions of the *Criminal Law Amendment Act*, compared to the previous legislation, and in what way Mr. MacIsaac's position was affected by the change in the system. The Committee noted that the system for dealing with recidivists was changed by the 1977 Act to make it more flexible, replacing automatic forfeiture of parole with a system of revocation which was at the discretion of the National Parole Board and sentencing for the recidivist offence which was at the discretion of the judge. The Committee noted that the offence which Mr. MacIsaac was convicted of while on parole carried with it a maximum sentence of fourteen years, but that the judge imposed a sentence of 14 months, explicitly mentioning that Mr. MacIsaac's parole had

been forfeited. That is, the sentence was directly linked with the forfeiture of parole. Mr. MacIsaac had not established that if parole had not been forfeited, the judge would have imposed the same sentence of 14 months and that he would therefore have been actually released prior to May of 1979. The Committee stated that Mr. MacIsaac had the burden of proving that in 1977 he had been denied an advantage under the new law and that he was therefore a victim, and concluded that he had not discharged this burden and that therefore the facts of the case did not disclose any violation of article 15, paragraph 1.

(v) Issue: Freedom of religion and "reasonable accommodation" requirements: Dismissal from employment of a Sikh for refusal to wear a hard hat at the worksite

Karnel Singh Bhinder v. Canada: Views adopted November 9, 1989

Mr. Bhinder was a nationalized Canadian citizen born in India. He was a Sikh by religion and wore a turban in his daily life. In 1974 he was employed by the Canadian National Railway Company as a maintenance electrician on the night shift at a site which the company declared, in 1978, to be a "hard hat area". All employees working in that area were required to wear safety headgear. The relevant federal legislation at the time was the *Canada Labour Code* which contained specific provisions requiring a federal employer to adopt and carry out reasonable procedures and techniques to prevent or reduce the risk of employment injury; and to ensure that each employee exposed to certain dangers including working on an electrical facility wear or use protective equipment. Mr. Bhinder refused to comply with the new hard hat regulations, on the basis that it is a fundamental tenet of the Sikh religion that men's headwear should consist exclusively of a turban. He also refused a transfer to another post. As a result of his refusal, his employment was terminated. Mr. Bhinder filed a complaint with the Canadian Human Rights Commission, alleging that his employer had

discriminated against him on the basis of his religion. The Canadian Human Rights Commission found a violation of the *Canadian Human Rights Act* on the ground that the hard hat regulation had the effect of denying a practicing Sikh employment with the CNR because of the employee's religion. The CNR appealed to the Federal Court of Appeal, which reversed the decision of the Commission on the ground that the *Canadian Human Rights Act* prohibited only direct and intentional discrimination and that it did not encompass the concept of reasonable accommodation. Mr. Bhinder's appeal to the Supreme Court of Canada was dismissed. The Supreme Court of Canada held that while unintentional or indirect discrimination was prohibited by the *Canadian Human Rights Act*, the policy of the CNR was reasonable and based on safety considerations and therefore constituted a *bona fide* occupational requirement. The majority took the position that if a working condition is established as a *bona fide* occupational requirement, the effect of the application of the requirement is not discriminatory.

In his communication to the Human Rights Committee, Mr. Bhinder claimed that his right to manifest his religious beliefs under article 18, paragraph 1 of the Covenant had been restricted by the enforcement of the hard hat regulations, and that this limitation did not meet the requirements of article 18, paragraph 3.

The Committee examined the case both with respect to article 18 and to article 26. The Committee concluded that the facts did not disclose a violation of any provision of the Covenant. With respect to article 18, the Committee found that if the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds set out in article 18, paragraph 3. With respect to the issue of discrimination against persons of the Sikh religion under article 26, the Committee referred to well-established criteria in the Committee's jurisprudence and concluded that legislation requiring workers in federal employment

to be protected from injury and electric shock by the wearing of hard hats is “to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant”.

It is interesting to note that the *Bhinder* case before the Supreme Court of Canada turned on a consideration of the relationship between the characterization of a workplace rule as a *bona fide* occupational requirement and the duty of an employer to accommodate an individual employee’s requirements, e.g., religious beliefs. In the case before the Human Rights Committee, in summarizing the State party’s comments and observations the Committee states that the State party considers that article 18 of the Covenant “does not impose a duty of ‘reasonable accommodation’, that the concept of freedom of religion only comprises freedom from State interference but no positive obligation for States parties to provide special assistance to grant waivers to members of religious groups which would enable them to practise their religion.” (paragraph 4.5). The Committee, in its brief views, makes no mention of the concept of the duty of reasonable accommodation. In a subsequent Supreme Court of Canada decision, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,⁵¹ the Supreme Court of Canada considered its previous decision in *Bhinder* and suggested that it was wrongly decided.⁵² Four of the justices held that “where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.” Three justices held that “an employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer.” The continuing discussion of this matter before

⁵¹[1990] 2 S.C.R. 489.

⁵²See judgment delivered by Wilson J.: “It seems to me in retrospect that the majority of this Court may indeed have erred in concluding that the hard hat rule was a BFOR.” (page 512).

the Canadian courts took place without the benefit of any guidance from the Human Rights Committee.

(vi) Issue: Laws promoting or requiring the use of a particular language: Bill 101 as amended by Bill 178 -- Restrictions against the use of English for commercial purposes

Issues concerning the *Charter of the French Language*, Bill 101, have been considered by the Human Rights Committee in three cases, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (joined for consideration) and *Allan Singer v. Canada*.

Ballantyne, Davidson, McIntyre v. Canada: Views adopted March 31, 1993

Mr. Ballantyne, Ms. Davidson and Mr. McIntyre were Canadian citizens residing in the Province of Quebec. Their mother tongue was English. They were business people, many of whose customers were English speaking. They alleged that they were victims of violations of articles 2, 19, 26 and 27 of the Covenant by the Federal Government of Canada and by the Province of Quebec, because they were forbidden to use English for purposes of advertising, e.g., on commercial signs outside business premises or in the name of a business.

The legislation which the authors were challenging was section 58 of the *Charter of the French Language*, as amended by Bill 178, section 1. Section 58, as modified in 1989, provided that public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Bill 178 was enacted after the Supreme Court of Canada declared provisions of the initial language legislation unconstitutional. The authors claimed that the "notwithstanding" clause contained in section 10 of Bill 178 overrode the safeguards contained in the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*, and that the clause contained in section 10 of Bill No. 178, as well as section 33 of the Canadian Charter and its

counterpart section 52 of the Quebec Charter violated Canada's obligations under the Covenant by allowing for the suspension of protection against human rights violations.

With respect to article 27 (the "minority rights" provision), the Committee observed that this article refers to minorities within ratifying States, and not minorities within any province of a State. The Committee concluded that English speaking citizens of Canada cannot be considered a linguistic minority, i.e., in the State. Accordingly, the authors had no claim under article 27.

The Committee also concluded that there had been no violation of article 26 (the "equality before the law" provision), as the prohibition of the use of English in commercial advertising applied to French speakers as well as English speakers.

The Committee concluded, however, that there had been a violation of article 19 of the Covenant. In considering whether the challenged legislation violated article 19, the Committee was of the opinion that article 19, paragraph 2 must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others (which are compatible with article 20 prohibiting propaganda for war and advocacy of hatred that constitutes incitement to discrimination, hostility or violence) and that this included commercial activity such as outdoor advertising. The Committee expressed the view that any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and it must be necessary to achieve a legitimate purpose. The Committee concluded that it was not necessary, in order to protect the position in Canada of the Francophone group to prohibit commercial advertising in English, and that "[a] State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice." Therefore, there had been a violation of article 19, paragraph 2 of the Covenant. The Committee called upon the State party to remedy

the violation of article 19 of the Covenant by an appropriate amendment to the law, and stated that it would wish to receive information, within six months, on any relevant measures taken by the State party in connection with the Committee's views.

Following the publication of the Committee's views, the Quebec government amended its legislation. This case is regarded as an excellent example of compliance with the Committee's views. It might appear ironic that the Quebec government complied with the Committee's views when it defied the same opinion from the Supreme Court of Canada.⁵³ However, it was perhaps less difficult for Quebec to comply with the neutral international Human Rights Committee. It has been pointed out that the Committee's views "provided the rationale for the Quebec government to reform its language legislation, something the provincial government wanted to do, but had felt blocked by provincial politics."⁵⁴

While this chapter is limited to an examination of the views of the Committees on their merits, it should be noted that in the *Ballantyne* and *MacIntyre* cases there was substantial consideration, in relation to its decision on admissibility and a review of that decision, of whether the authors had exhausted their domestic remedies. The authors took the position that following the enactment of Bill No. 178 there were no effective remedies which they could pursue, that the Supreme Court of Canada decision which struck down the initial language legislation had no effect in view of the subsequent Quebec legislation which made any further challenge of section 1 of Bill No. 178 futile,

⁵³Schabas, *supra* note 2 at 73-74.

⁵⁴Professor Douglas Sanders, "Implementing the Human Rights Covenants: Stories from the West" (Paper presented at "Human Rights and the Twenty First Century" held by the Law Institute, Chinese Academy of Social Sciences, Beijing, April 12-14, 1999) [unpublished], at 21. Sanders explains that the provincial Liberal Party Government had promised in its party platform to ease the language law in respect of signs, but had feared that a concession on the language issue would bolster the separatist party, and that to avoid giving the language issue to the opposition the provincial government reinstated the law that the Supreme Court of Canada had struck down.

and that the very existence of the “notwithstanding” clause rendered Bill No. 178 immune to challenge. Despite Canada’s submission that the legislation in question was the subject of at least two legal proceedings before the courts of Quebec and that under Quebec law the authors could challenge the validity of Bill No. 178 by applying for a declaratory judgment, and that a legislative override could never be invoked to permit acts clearly prohibited by international law,⁵⁵ the Committee concluded that there were no further effective remedies available to the authors in the circumstances of their cases. It noted that despite the fact that some of the relevant statutory provisions had been declared unconstitutional by the Courts, the only effect of this had been the replacement of these provisions by ones that were the same in substance as those they replaced, but reinforced by the “notwithstanding” clause of section 10 of Bill No. 178; that the cases being challenged before the Quebec courts were in relation to issues that were different from those before the Committee; and a declaration of invalidity would still leave the *Charter of the French Language* operative and intact and enable the Quebec legislature to override any such judgment by replacing the provisions struck down by others substantially the same. This issue was the subject of one dissenting opinion⁵⁶ which stated that it would be open to the author, under the Quebec Code of Civil Procedure, to apply for a declaratory judgment holding Bill No. 178 and the “notwithstanding” clause in section 10 thereof

⁵⁵“Lastly the Government affirms that the existence of Section 33 *per se* is not contrary to article 4 of the Covenant, and that the invocation of Section 33 does not necessarily amount to an impermissible derogation under the Covenant: ‘Canada’s obligation is to ensure that Section 33 is never invoked in circumstances which are contrary to international law. The Supreme Court of Canada has itself stated that “Canada’s international human rights obligations should [govern]...the interpretation of the content of the rights guaranteed by the Charter”.’ Thus, a legislative override could never be invoked to permit acts clearly prohibited by international law. Accordingly, the legislative override in Section 33 is said to be compatible with the Covenant.”: Views of the Committee, para. 8.4. It is difficult to make any sense out of this statement when the very effect of invoking section 33 is to permit the government to continue the status quo despite a judicial determination that has interpreted the content of Charter rights in such a way to find that there has been a breach of fundamental justice. And see Schabas, *supra* note 2 at 225 -29, where he expresses the view that s. 33 is flagrantly incompatible with Canada’s international obligations.

⁵⁶Waleed Sadi.

to be invalid, and that the Canadian judicial system should have the opportunity to pronounce upon the constitutionality of Bill No. 178 and its "notwithstanding" clause before the Committee proceeded with a finding on the merits of the communications.

Singer v. Canada: Views adopted July 26, 1994

Mr. Singer was a Canadian citizen and resident of Montreal, Quebec. He claimed to be a victim of language discrimination by Canada. He ran a stationery and printing business in Montreal, and his clientele was predominantly anglophone. Starting in 1978, Mr. Singer received numerous summonses from the Quebec authorities requesting him to replace commercial advertisements in English outside his store by advertisements in French. Mr. Singer appealed against those summonses on the ground that the *Charter of the French Language* (Bill No. 101) discriminated against him by restricting the use of English for commercial purposes. The Court of Sessions of Montreal found against him, as did the Superior Court of Quebec and the Court of Appeal of Quebec. As mentioned above, the Supreme Court of Canada decided that an obligation to use French only in outdoor advertising was unconstitutional and struck down several provisions of the Quebec *Charter of the French Language*. The Quebec legislature then passed Bill No. 178. The compulsory use of French in advertising outside business premises remained. As in the *Ballantyne* and *McIntyre* cases, the author in this case argued that any challenge to the contested legislation would be futile. The Committee again disagreed with the State party's contention that there were still effective remedies available to the author. Although Mr. Singer had challenged only Bill No. 101, the Committee found that it was not precluded from examining the compatibility of both Bill No. 101 and Bill No. 178 with the Covenant. The Government of Quebec advised the Committee that sections 58 and 68 of the *Charter of the French Language* had been amended by Bill No. 86, *An Act to amend the Charter of*

the French Language, which came into force on December 22, 1993. Section 58 of the *Charter of the French Language*, as modified by section 18 of Bill No. 86, provided that public signs and posters and commercial advertising must be in French, but may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine by regulation the circumstances where advertising must be in French only, where French need not be predominant, or where such advertising may be in another language only. The *Quebec Regulations on the Language of Commerce and Business* were enacted, setting out the specific circumstances referred to in the amending legislation. There are only two situations in which the commercial advertising of a firm must be exclusively in French, advertising having an area of 16 square metres or more and visible from a public highway, and commercial advertising on a public means of transportation and on or in the accesses thereto. Mr. Singer argued that the Quebec legislature could repeal Bill No. 86 and reimpose Bill No. 178 at any time.

The Committee observed that its views on the Ballantyne/McIntyre communications applied to the case of Mr. Singer, and found that with respect to s. 58 of Bill No. 101, amended by Bill No. 178, there had been a violation of article 19, paragraph 2. The Committee noted, however, that under Bill No. 86 Mr. Singer had the right, albeit under specified conditions and with exceptions, to display commercial advertisements outside his store in English. The Committee concluded that the State party had provided Mr. Singer with an effective remedy.

(vii) Issue: The right of persons belonging to ethnic minorities to enjoy their own culture in community with other members of their cultural group

Lovelace v. Canada: Views adopted July 30, 1981

Sandra Lovelace was a woman living in Canada who had been born and registered as an Indian but had lost her rights and status as an Indian in accordance with section 12(1)(b) of the *Indian Act*

as a result of having married a non-Indian. She claimed that the *Indian Act* was discriminatory on the grounds of sex and contrary to articles 2(1), 3, 23(1) and (4), 26 and 27 of the Covenant.

The Committee was of the view that the provision of the Covenant which was most directly applicable to Sandra Lovelace's complaint was article 27. It observed that since Lovelace was ethnically a Maliseet Indian and had only been absent from her home reserve for a few years during the existence of her marriage which had since broken up, she was entitled to be regarded as belonging to this minority and to claim the benefits of article 27. The Committee stated that because Lovelace had been denied the legal right to reside on the Tobique reserve where a community composed of other members of her group existed, her right to have access to her native culture and language "in community with the other members" of her group had in fact been and continued to be interfered with. It was of the view that "statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole." The Committee concluded as follows:

Whatever might be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe...[T]o prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

The Committee saw no need to examine whether the same facts also revealed separate breaches of the other rights invoked.⁵⁷

As referred to in the views, at the time the *Lovelace* case was being considered by the

⁵⁷The Committee did not explore general issues regarding the legitimacy of the *Indian Act* and the reserve system, but restricted its analysis to what it regarded as the essence of the complaint, i.e., the denial of the legal right to reside on the Tobique Reserve: views of the Committee, para. 13.1. An individual opinion consisting of one paragraph was appended to the views, stating that not only article 27 but also articles 2 (1), 3, 23 (1) and (4) and 26 had been breached.

Committee, Canada was in the process of considering amendments to the *Indian Act* which would, among other things, end discrimination on the basis of sex. Subsequent to the views being adopted, Canada diligently reported to the Committee that steps were being taken to comply with the Committee's views:

[A]s a result of the decision of the Human Rights Committee...Canada is anxious to amend the Indian Act so as to render itself in fuller compliance with its international obligations pursuant to article 27 of the *International Covenant on Civil and Political Rights*.⁵⁸

Subsequently, the *Indian Act* was amended in this regard.⁵⁹

The Lovelace case is often cited as an example of the effectiveness of the individual communication mechanism established under the *Optional Protocol*. The "standard version" of the Lovelace story is that "Lovelace took her case to the Committee and won" and Canada obediently amended the *Indian Act*. "The story fails to note that the Canadian government was committed to changing the law well in advance of the case, and said that to the Committee."⁶⁰ It is interesting to note that some two decades after the Committee's adoption of views in the *Lovelace* case, the Committee has included the following as a principal area of concern in its concluding observations, adopted April 7, 1999, in relation to consideration of Canada's fourth periodic report under article 40 of the *Covenant*:

⁵⁸U.N. Doc. CCPR/C/OP/2, p. 224, [1984-85] C.H.R.Y. 373, referred to in Schabas, *supra* note 2 at 30.

⁵⁹One writer has stated that while it is clear that the amending legislation was a response to the Committee's views, Canadian courts "have had difficulty identifying the provision of the *Covenant* that the 1985 amendment is meant to implement: Schabas, *supra* note 2 at 30.

⁶⁰ Sanders, *supra* note 54 at 19. See also Hugh M. Kindred, ed., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Canada: Emond Montgomery Publications Limited, 1993) at 625, where the writer states that the equality provisions of the Canadian *Charter*, which had just come into force, provided the main reason for Canada's amending the *Indian Act*; "Canada's outstanding international human rights violation was of secondary importance".

19. The Committee is concerned about ongoing discrimination against aboriginal women. Following adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.

(viii) Issue: political and economic status of indigenous communities

Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada: Views adopted March 26, 1990

Chief Ominayak, leader and representative of the Lubicon Lake Band, alleged violations by the Government of Canada of the Band's right of self-determination; its right to determine freely its political status and pursue its economic, social and cultural development; the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. In particular, he alleged that the Lubicon Lake Band's land had been expropriated for commercial interest and destroyed, thus depriving the Band of its means of subsistence and enjoyment of the right of self-determination, that the Band's existence was seriously threatened, and that by these violations Canada had contravened its obligations under article 1 of the Covenant.

Despite the Government of Canada's submission that the Band had not pursued to completion domestic remedies commenced by it (two legal actions initiated by the Lubicon were still pending) and that responsibility for any delays in the application of such remedies did not lie with the Government (extensive delays in having the proceedings heard on the merits had resulted from steps taken by the Lubicon on interlocutory matters), the Committee found that in the circumstances of the case there were no effective domestic remedies still available to the Band. With respect to the issue of the right of self-determination, the Committee reaffirmed that the Covenant recognizes and

protects a people's right of self-determination and its right to dispose of its natural resources as an essential condition for the effective guarantee and observance of individual human rights; however, the Committee observed that an individual could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1. The Committee decided that the communication was admissible insofar as it might raise issues under article 27 or other articles of the Covenant. The Committee requested Canada to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

Canada requested that the Committee review its decision on admissibility, submitting that effective domestic remedies had not been exhausted by the Band, and that a trial on the merits before Canadian courts and the negotiation process proposed by the federal Government constituted both effective and viable alternatives. The Government submitted that consensus had been reached on the majority of issues, and that the Band had withdrawn from negotiations in January 1989 when the federal Government presented its formal offer. The authors of the communication submitted that the Government's formal offer did not constitute a serious attempt at settlement of the Lubicon issues and that no agreement had been reached on any major issues.

The Committee upheld its decision on admissibility, stating that at issue was the question whether the road of litigation would have represented an effective method of "saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which at the material time, was allegedly at the brink of collapse."

On the merits, the Committee stated that there was no doubt that many of the claims presented raised issues under article 27 which includes the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. The Committee noted that sweeping allegations concerning serious breaches of other

articles (6, 7, 14, 17, 23 and 26) had not been substantiated to the extent that they deserved serious consideration. After summarizing at some length the extensive submissions of the parties on extremely complex issues, the Committee simply offered the following conclusion:

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.⁶¹

Two brief individual opinions were appended to the Committee's views. One expressed a reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27, though the member did not oppose the adoption of the Committee's views "as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations."⁶² The other would have found the communication inadmissible on the basis that an international investigation or settlement must refrain from considering issues pending before a national court until such time as the matter is adjudicated upon by the national court.⁶³

The Lubicon Lake Band has frequently relied on the views of the Human Rights Committee

⁶¹In its fourth periodic report to the Human Rights Committee, covering the period 1990 to 1994, Canada states, at paragraph 309: "The Committee...stated that the settlement offer made by the Government of Canada to the Lubicon Lake Band constituted an appropriate remedy within the terms of article 2 of the Covenant. This offer was not accepted by the Band, and after prolonged negotiations with the Band, in 1994, the Government of Canada announced that it would appoint a negotiator to assist in the resolution of the dispute." The Lubicon Lake land claim has not yet been resolved; negotiations between the Federal Government and the Lubicon are ongoing, and in November, 1999, the Province of Alberta will join in the negotiations. (Public Information Document provided to the writer by Joanne Bury, Assistant Negotiator, Indian and Northern Affairs).

⁶²Nisuke Ando.

⁶³Bertil Wennergren.

in support of the Band's position that they cannot obtain justice in Canada.⁶⁴ The Lubicons withdrew from all legal proceedings pending in Canada in 1988. A lawyer for the Lubicon Band made the following statement in the Alberta Court of Appeal, on October 6, 1988:

From this day, [the band] will no longer participate in any court proceedings in which the Lubicons are presently a party, whether in this court, the Court of Queen's Bench of Alberta, the Federal Court of Appeal or the Federal Court of Canada.⁶⁵

Marshall v. Canada: Views adopted November 4, 1991

Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, officers of the Grand Council of the Mikmaq tribal society in Canada, submitted a communication to the Human Rights Committee both as individually affected alleged victims and as trustees for the welfare and the rights of the Mikmaq people as a whole. The authors sought to be invited to attend, as representatives of the Mikmaq people, constitutional conferences on aboriginal matters convened by the Prime Minister of Canada. By the *Constitution Act 1982*, the Government of Canada recognized the existing aboriginal and treaty rights of the aboriginal peoples of Canada. The *Constitution Act 1982* provided that the government of Canada and the provincial governments are committed to the principle that before constitutional amendments are made in respect of matters directly affecting the aboriginal peoples, conferences will be convened by the Prime Minister to discuss such amendments and the Prime Minister will invite "representatives of the aboriginal peoples of Canada to participate in the discussions...". Certain national associations had been invited to such conferences, specifically, representatives of the Native Council of Canada (now Congress of

⁶⁴Interview with John J.L. Hunter, Q.C., Counsel for Daishowa in *Daishowa Inc. v. Friends of the Lubicon et al* (1998), 158 D.L.R. (4th) 699, 39 O.R. (3rd) 620 (Ont. Ct. - Gen. Div.).

⁶⁵John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991) at 170.

Aboriginal Peoples), the Assembly of First Nations, the Metis National Council, and the Inuit Committee on National Issues.⁶⁶ The refusal of Canada to allow specific representation for the Mikmaq at the constitutional conferences was the basis of the complaint to the Committee. The authors claimed that the refusal denied them the right of self-determination, in violation of article 1 of the Covenant, and also infringed their right to take part in the conduct of public affairs, in violation of article 25(a).

With respect to article 1, the Committee simply stated in its views that it had already determined in the Lubicon case that a claim of an alleged violation of article 1 cannot be brought under the Optional Protocol. The Committee, however, did examine the claim in relation to article 25 of the Covenant.

Canada informed the Committee that constitutional conferences in Canada generally are attended only by the elected leaders of the federal and provincial governments, and that the conferences on aboriginal matters constituted an exception to that rule. The Committee concluded, in light of the composition, nature and scope of activities of constitutional conferences in Canada, as explained by Canada, that constitutional conferences constitute a conduct of public affairs. However, the Committee was deferential toward the role of the State in providing for the modalities of citizen participation in the conduct of public affairs. It expressed the view that "article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That...would be an

⁶⁶The issue of who was represented by what organization and which organizations should have seats at the conference table was not simple. For example, the NCC was originally supposed to represent both the non-status Indians and the Metis of Canada. The distinction between the two groups depends on how Metis is defined. In March, 1983, the Metis organizations of the three Prairie provinces broke away from the NCC and formed the MNC. After much discussion, both organizations were permitted seats at the table. For a detailed treatment of this and other aspects of the constitutional conferences on aboriginal issues, see Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal, Quebec: The Institute for Research on Public Policy, 1986).

extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a)."

In the result the Committee concluded that in the specific circumstances of the case the failure of Canada to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters did not infringe the right of the authors or other members of the Mikmaq tribal society to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, and that the communication did not disclose a violation of the Covenant.

(ix) *Issue: The availability of public funding for religious schools*

Arieh Hollis Waldman v. Canada: Views adopted November 3, 1999

Mr. Waldman, a Canadian citizen residing in the province of Ontario, claimed to be a victim of a violation of articles 26, and articles 18(1), 18(4) and 27 taken in conjunction with article 2(1). As the father of two school-age children and a member of the Jewish faith who enrolled his children in a private Jewish day school, the basis of Mr. Waldman's claim was that the province of Ontario, by providing full and direct public funding to Roman Catholic schools but not to schools of his religion, violated his rights under the Covenant. Under the *Education Act* of Ontario, every separate school ("separate schools" being defined as Roman Catholic schools) is entitled to full public funding. This statutory provision has as its basis a Constitutional guarantee of denominational school rights, which was included in the Canadian Constitution at the time of Confederation to protect the rights of Ontario's Roman Catholic minority. Roman Catholic schools are the only religious schools in Ontario entitled to the same public funding as the public secular schools. In 1985 the Ontario government amended the *Education Act* to extend public funding of Roman Catholic schools, which had since 1800 been funded from kindergarten through grade 10, to include grades 11 to 13. The

Ontario Government referred the issue of the constitutionality of this law (Bill 30) to the courts, in light of the equality rights provision of the *Charter of Rights and Freedoms*. In 1997 the Supreme Court of Canada upheld the constitutionality of the legislation, holding that section 93 of the *Constitution Act 1867* and the rights and privileges it accorded were immune from *Charter* scrutiny.

Before the Committee, Mr. Waldman argued that when a State party recognizes a right to publicly financed religious education, no differentiation should be made among individuals on the basis of the nature of their particular beliefs, and that the provision of full funding exclusively to Roman Catholic schools cannot be considered reasonable. Canada argued, among other things, that a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26, that the differentiation is between private and public schools as opposed to private Roman Catholic schools and private schools of other denominations, that apart from its obligations under the *Constitution Act 1867* the State party provides no direct funding to religious schools, and that in deciding to refuse funding for other religious schools the State party seeks to achieve the creation of a tolerant society where there is respect and equality for all religious beliefs.

The Committee began by noting that "the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective." Having found that the material before it did not show that members of the Roman Catholic community are now in a disadvantaged position compared to those members of the Jewish community who wish to educate their children in religious schools, the Committee rejected Canada's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation. The Committee concluded as follows:

[T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party

chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, ...the material...does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.⁶⁷

The Committee noted that the State party is under an obligation to provide an effective remedy that will eliminate this discrimination, and requested Canada to inform the Committee, within ninety days, as to the measures taken to give effect to the Committee's views. Anne Bayefsky has pointed out that since the Human Rights Committee did not prescribe a specific remedy, "in theory the discrimination can end in one of two ways. Either equal funding can be extended to all religious schools on the same basis as Roman Catholics, or the 1867 Constitution can be amended to withdraw funding from Catholics."⁶⁸

⁶⁷The Committee was of the opinion that in view of its conclusions in respect of article 26, no additional issues arose for its consideration under articles 18, 27 and 2(1) of the Covenant.

⁶⁸Anne Bayefsky, "A sharp lesson for Ontario at the UN" *The Globe and Mail* (8 November 1999) A19. Professor Bayefsky goes on to point out that in both Quebec and Newfoundland bilateral constitutional amendments altering entrenched rights to denominational school funding have been adopted, but that in Ontario, "[e]xtension of equal treatment for other religions is far more realistic" due to the expectations of Ontario's large Roman Catholic community. It should be noted that in Canada's submissions to the Committee, Canada emphasized that the recent constitutional amendments affecting education in Quebec and Newfoundland do not bring about the remedy sought by Mr. Waldman of equivalent funding for all religious schools.

In regard to the treatment of this issue by the Human Rights Committee, see also *Grant Tadman v. Canada* (Communication No. 816/1998), where the Committee found the communication inadmissible on the ground that the authors, who were not seeking publicly funded religious schools but were seeking the removal of the public funding of Roman Catholic separate schools, could not claim to be victims of a violation of the Covenant.

The Committee against Torture

The second treaty body which contains optional procedures to which Canada has acceded, for adjudicating individual complaints is the Committee against Torture. *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted by the General Assembly of the United Nations on December 10, 1984, and came into force on June 26, 1987 for the first twenty States which ratified it.⁶⁹ The Committee against Torture was set up in accordance with article 17 of the Convention, which provides as follows:

1. There shall be established a Committee against Torture...which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

The Committee's function is to monitor the implementation by States Parties of the obligations they have assumed under the Torture Convention.⁷⁰ The Committee's functions, powers, and procedures are primarily modelled on those of the Human Rights Committee.⁷¹

Article 22 of the Convention against Torture contains an optional procedure enabling the Committee to consider communications from or on behalf of individuals who claim to be victims of a violation of the Convention by a State Party. The procedure applies only to those States Parties which have declared explicitly that they recognize the competence of the Committee to consider such

⁶⁹J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988) at v.

⁷⁰Philip Alston, *The United Nations and Human Rights: a Critical Appraisal* (Oxford: Clarendon Press, 1992) at 509.

⁷¹*Ibid.* at 510.

communications. The procedure is modelled on the individual communication procedure contained in the First Optional Protocol to the ICCPR, but the procedures under the CAT differ in several respects from those under the ICCPR. Under the CAT, communications may be submitted not only by but “on behalf of” individuals (article 22, paragraph 1). The wording of the requirement concerning the exhaustion of domestic remedies differs. Under the CAT, the requirement is qualified by not requiring exhaustion of domestic remedies if the process is unlikely to bring the person alleging the violation effective relief (article 22, paragraph 5(b)). While the Optional Protocol under the ICCPR provides that the Human Rights Committee shall take into account written information made available to it, under the CAT the term “written” is omitted (article 22, paragraph 4), leaving open the interpretation that the Committee against Torture could hold oral hearings and examine witnesses.⁷²

Since the CAT came into force, there have been only two communications by individuals in respect of Canada which the Committee against Torture has considered on the merits.⁷³ These two cases are *Tahir Hussain Khan v. Canada*⁷⁴ and *P.Q.L. v. Canada*.⁷⁵ These cases did not concern allegations of incidents of torture or inhumane treatment within Canada, but rather the obligation of States Parties under Article 3 of the Convention against Torture not to return anyone to another State where there is substantial reason to believe that the individual would be in danger of being subjected to torture.

⁷²*Ibid.* at 537-538.

⁷³Department of Justice of Canada, Human Rights Law. The Committee is scheduled to consider a third case, that of Tejinder Pal Singh, at its November 1999 session.

⁷⁴Communication No. 15/1994.

⁷⁵Communication No. 57/1996.

Khan v. Canada: Views adopted 1994

Mr. Khan was a citizen of Pakistan who entered Canada in 1990 and made a claim to Convention refugee status under the *Immigration Act*. The Convention Refugee Determination Division of the Immigration and Refugee Board of Canada determined, after an oral hearing, that Mr. Khan did not come within the definition of "Convention refugee", i.e., he had not established that by reason of a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion, he was outside the country of his nationality and, by reason of that fear, unwilling to avail himself of the protection of that country.⁷⁶ In arriving at its decision the Refugee Division found that Mr. Khan had fabricated his oral evidence. In 1992, the Federal Court denied Mr. Khan's application for leave to appeal the decision of the Refugee Division. A deportation order was issued later that year. In 1993 the Minister of Citizenship and Immigration refused Mr. Khan's application for permanent residence based on humanitarian and compassionate grounds. In submissions made to the Committee, Canada stated that in none of these proceedings did Mr. Khan refer to ill treatment or torture during the claimed periods of detention in Pakistan, or to his fear of future torture. In his submissions to the Committee, however, Mr. Khan alleged that he left Pakistan in 1990 out of fear for his personal security, that while in Pakistan he had been tortured while in detention on two occasions, and that should he be returned to Pakistan he would be immediately arrested, detained and tortured. He provided the Committee with a letter from a medical doctor in Montreal affirming that Mr. Khan had marks and scars on his body which corresponded with the alleged torture. After having been informed that Mr. Khan had submitted a communication to the Committee against Torture, Canada arranged for a review of Mr. Khan's case

⁷⁶The CRDD consisted of a two-member panel. Had either of the panel members found in favour of Mr. Khan, his claim to Convention refugee status would have been successful: *Immigration Act*, s. 69(10); see now s. 69.1(10).

by a post-claim determination officer. The post-claim determination provisions of the *Immigration Act* provide an additional risk-assessment in cases where the Refugee Division determines an immigrant not to be a Convention refugee. Under this assessment, a post-claim determination officer examines whether the individual, if removed to a country to which he could be removed "would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country, including risk to the immigrant's life, extreme sanctions against the immigrant, or inhumane treatment of the immigrant."⁷⁷

Canada stated in its submissions to the Committee that the PCDO evaluated all the materials presented on behalf of Mr. Khan including the materials submitted to the Committee. The PCDO reached a negative decision, concluding that Mr. Khan was one of thousands of residents in Northern Pakistan who advocate a change in the status of Kashmir and that there was no reason to conclude that Pakistani authorities would be interested in Mr. Khan. The officer also doubted the credibility of Mr. Khan's story, in particular because he had commenced his refugee claim in 1990 but did not allege torture until 1994.

Mr. Khan argued that the real circumstances of his case had never been fairly examined by Canada. He claimed that as a student leader of the Kashmiri independence movement and as its representative in Canada, he had substantial grounds to fear that he would be subjected to torture if returned to Pakistan.

Canada did not raise any objection to the admissibility of Mr. Khan's communication, and requested the Committee to proceed to an examination of the merits. In considering the merits, the Committee observed that it was not called upon to review the prevailing system in Canada in general,

⁷⁷See *Immigration Regulations*, s. 2, definition of "member of the post-determination refugee claimants in Canada class". While the definition applies only in cases where the Refugee Division has determined, on or after February 1, 1993, an immigrant not to be a Convention refugee, a post-claim risk-assessment process of this nature was conducted with respect to Mr. Khan.

but only to examine whether in the present case Canada complied with its obligations under the Convention. It stated that the issue before it was whether the forced return of Mr. Khan to Pakistan would violate the obligation of Canada under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Committee concluded that substantial grounds existed for believing that a political activist like Mr. Khan would be in danger of being subjected to torture, and consequently that the expulsion or return of Mr. Khan to Pakistan would constitute a violation of article 3 of the Convention. The Committee expressed the view that Canada had an obligation to refrain from forcibly returning Mr. Khan to Pakistan.

Canada requested that the Committee revisit its views in the *Khan* case.⁷⁸ The Committee rejected the request. In its response to Canada's request, the Committee made the following comments:

National courts and tribunals have the primary responsibility to evaluate facts and evidence, to hear witnesses and to decide thereon. The Committee must always give due weight to the determinations of national courts and tribunals. At the same time, it must retain the competence to make its own evaluation of the risk of being subjected to torture and, in certain cases, to make a finding different in this respect from that of national courts and tribunals. In this connection the Committee observes that while national courts and tribunals have a recognized competence in examining refugee claims, the Committee has specialized knowledge and experience in evaluating the risk of torture. In paragraph 4 of its note verbale, Canada contends that 'Committees do not normally reject findings of fact made by national tribunals unless there is a clear indication that the national proceedings were tainted by abuse of process, bad faith, manifest bias or serious irregularities, such as a failure to take into account relevant facts.' While the Committee against Torture agrees that bad faith and manifest bias on the part of national courts and tribunals would justify

⁷⁸Note verbale, March 3, 1995.

a renewed evaluation and a different conclusion on the part of the Committee, it cannot agree that these are the only grounds justifying reevaluation of risk.

The Committee went on to offer its opinion that reexamination of a case would be "theoretically and exceptionally" possible upon presentation of new facts or evidence which would have substantially changed the situation since the time of adoption of the Committee's views, but that this was not the case in this instance. The Committee's final comment indicates disappointment with Canada's criticism of the Committee:

The Committee has taken note with concern of the tenor and the tone of the note verbale of the Government of Canada, as well as the attempt to impose Canada's perspective on the Committee's methods of work. Nonetheless, the Committee takes this opportunity to express appreciation for Canada's cooperation and welcomes the renewed expression of Canada's commitment to the ideals embodied in the Convention.⁷⁹

No public statements have been made by the Government, subsequent to the Committee's views, as to Mr. Khan's status in Canada.

P.Q.L. v. Canada: Views adopted November 17, 1997

The author, P.Q.L., born in Vietnam, lived for some time in China, then at the age of 14, came to Canada with his family. Following several criminal convictions in Canada for theft, he was ordered deported on the basis that he constituted a danger to the public in Canada. The Department of Citizenship and Immigration reviewed his case, and concluded that there was no risk of torture or other inhumane treatment should the author be returned to China. He appealed his deportation order. (Such an appeal would normally be to the Immigration Appeal Division of the Immigration and Refugee Board; the Committee states that his appeal was to the Immigration Commission.) His

⁷⁹May 8, 1995.

appeal was denied in 1995. The Department of Citizenship and Immigration reviewed the author's situation, and concluded that there was no risk that he would be tortured or be accorded inhumane treatment upon his return to China.

Before the Committee, P.Q.L. claimed that his life would be in danger if he were returned to China, that he would be punished excessively for having committed crimes in another country, and that he would be persecuted by the Chinese authorities as a result of his Vietnamese origin. In support of his claim he relied on the existence of systematic human rights violations in China, the fact that China was not a party to any international human rights treaty, and provisions of the Chinese Criminal Code which he alleged could subject him to life imprisonment or even to the death penalty for crimes committed outside of China.⁸⁰ Canada submitted that there was no link between the general human rights situation in China and the particular situation of the author, that the Chinese Criminal Code provided that punishment would not be applied or would be mitigated if the individual had already been punished, and that imprisonment for life or the death penalty would not be imposed unless there were aggravating circumstances, that the risk to the author had been examined by a special officer on behalf of the Minister of Citizenship and Immigration, and that there was no proof of bad faith, manifest error or a denial of justice warranting the intervention of the Committee with the conclusions of the Department.

The Committee noted with satisfaction that the author had not been deported by Canada pending the examination of this communication, in compliance with the interim request of the Committee. On the merits, the Committee examined the case in relation to article 3 of the Convention, and stated that the object of the examination was to determine whether there was any

⁸⁰China is a party to the *Convention Against Torture* (signature date: 12 December 1986; ratification date: 4 October 1988). However, China has not recognized the competence of the Committee against Torture and does not consider itself bound by the Convention's arbitration provisions.

personal risk of torture to the author and that the existence of human rights violations in China was not sufficient to find that the author was at risk. The Committee noted that the author was not part of a professional, political or social group which would be subject to repressive acts or torture by the Chinese authorities, that there was no indication that the author would be arrested and detained because of his conviction, and in any case there were not sufficient grounds for believing that he would risk torture. The Committee noted that it was not up to them to determine whether the author was entitled to stay in Canada; that the author had not proved his case that he personally risked being subjected to torture, and that the facts did not reveal a violation of article 3 of the Convention.

The Committee in the *P.Q.L.* case, in contrast to the *Kahn* case, appears to afford a good deal of deference to the decisions made by domestic tribunals in Canada. However, the *P.Q.L.* case was one where the individual did not claim to have been tortured in the past in the country to which he was to be returned and had not been politically active on sensitive issues.

Observations

The treaty bodies which have individual complaint mechanisms to which Canada has acceded have thus far adopted views only on a handful of issues raised by communications alleging violations by Canada of its international human rights obligations. Of these, there have been findings of violations in seven cases by the Human Rights Committee and in one by the Committee against Torture. An examination of the views adopted by the Human Rights Committee and the Committee against Torture raises a number of questions and concerns.

Confidentiality rules

An in-depth analysis of how cases are developing in this arena is limited by the confidentiality of the process. The submissions made by the individuals in support of their complaints and by the States parties in response have not been available for public scrutiny. This may change to some extent in the future as a result of the 1997 amendment to the Rules of Procedure of the Human Rights Committee, though the amendment appears to leave the matter of confidentiality to the discretion of the Committee. The views of the Committees contain summaries of the positions taken; however, without access to the material on which the Committees based their views one must rely on the Committees' summaries alone and it is not possible to ascertain the accuracy or completeness of the summaries or to distinguish evidence from interpretation by the Committees. The concept of the open court is of fundamental importance in the Canadian legal system. "[T]he scrutiny and vigilance which arise out of the publicity of proceedings held in our courts are regarded as essential in ensuring the preservation of justice and in ensuring public acceptance, confidence and credibility in our courts as vital institutions in society."⁸¹ There may be a need for some rules of confidentiality in order to protect complainants. However, in establishing the rules, it must borne in mind that a treaty body whose "legal" process offers only limited accessibility to its proceedings will have great difficulty in establishing itself as a credible decision-making institution.

Lack of meaningful analysis

There is a tendency for the treaty bodies to express their views without providing any meaningful analysis or reasons for their conclusions. Frequently, the views follow the format of setting out the positions of the parties at length, followed by a statement of the conclusions in one or two brief paragraphs with little or no analysis. The clearest example of this is the *Ominayak* case

⁸¹Gerald L. Gall, *The Canadian Legal System*, 4th ed. (Toronto: Carswell, 1995) at 152.

which contains no reasons at all in support of the views adopted by the Human Rights Committee. One scholar has expressed the view that the Committee "was not able to figure out the story", and that "the decision did nothing to advance resolution of the issue within Canada."⁸² Another writer has put it in this way: "After considering the Lubicon case for six years, the committee had rendered a decision that was all but meaningless."⁸³

The *Bhinder* case, which was the first case in which the Committee employed a newly adopted format designed to achieve greater precision and brevity,⁸⁴ is another example of shallowness of analysis. The Committee states its conclusions with no elaboration; the Committee says that it is applying well-established criteria established in its previous "jurisprudence", but makes no reference to the particular jurisprudence to which it is referring or what the specific relevant criteria are. In addition, the decision is completely silent on the key concepts discussed by the domestic courts in proceedings which preceded the communication to the Committee. While it is true that the terms of the Covenant are different from the relevant provisions of the Canadian legislation which were considered by the Canadian courts, and that the Committee does not sit as an appellate body, a decision which ignores issues which are fundamental to the relevant preceding litigation plays no useful role in the evolving jurisprudence on the subject.

⁸²Sanders, *supra* note 54 at 20.

⁸³Goddard, *supra* note 65 at 210.

⁸⁴In the 14th Annual Report of the Committee to the General Assembly, the Committee stated that the Committee had deemed that the format which it had employed up to that time sometimes led to considerable overlap and a general loss of clarity, and that for this reason the Committee considered it appropriate, at its 37th session, to introduce a new format for decisions, "aimed at greater precision and brevity". Following this new format decisions would be divided into four parts -- the background, the complaint, the State party's observations, and issues and proceedings before the Committee. The Committee reported that the first case in which this method was employed was *Bhinder v. Canada*: See Official Records of the Human Rights Committee, 1989/90, Volume II, 14th report, paragraph 602, pages 358-59. Perhaps the goal of achieving brevity obscured the need to articulate its reasoning with sufficient elaboration in order to contribute meaningfully to the discussion of significant and complex issues.

Other cases offer little more in the way of helpful analysis, and demonstrate a lack of understanding of the Canadian legal and political system. The views of the Committee in the *Ballantyne* case, in relation to article 27 (i.e., English speaking citizens of Canada cannot be considered a linguistic minority) and article 26 (The prohibition on use of English applies to French speakers as well as English; therefore English speakers are not discriminated against on the ground of their language) are stated as though they are common-sense propositions which require no discussion or explanation. These statements are anything but common-sense propositions. The view has been expressed that for Canadians the Committee's opinion regarding article 27 was a "stunningly stupid analysis" and that "[p]erhaps it reflected the inability of most members of the Committee to appreciate the principles of federalism (and a failure to appreciate the seriousness with which federalism is taken in Canada)."⁸⁵

The reasoning in the *Stewart* case with respect to the "obligations" of citizenship makes little sense when one begins to examine the issue. In the *Stewart* case, the Committee attaches a good deal of significance to the decision of an individual not to become a citizen, thereby avoiding the obligations of citizenship. The Canadian legal and political system does not appear to attach much significance at all, in terms of imposing obligations, to whether an individual becomes a citizen or not.⁸⁶ The Committee's reasoning in this regard is lacking in logic.

⁸⁵Sanders, *supra* note 54 at 20. With respect to the views on article 27, Sanders states, "Again, Canadians found this analysis a mockery of equality principles. It is almost a parody of 'formal equality' denying 'substantive equality'".

⁸⁶What constitutes the duties of citizenship varies from country to country. A citizen of Canada, by the Oath of Allegiance, undertakes to bear true allegiance to the Crown, to faithfully observe the laws of Canada, and to "fulfil my duties as a Canadian citizen". What those duties are is not specified, and it is by no means clear whether there are obligations of citizenship that are not shared by permanent residents. One writer has put it this way: "While the Citizenship Act identifies the formal criteria for gaining and losing citizenship, its silence on a number of issues is quite deafening...Perhaps the most significant omission is the failure of the Citizenship Act to identify the responsibilities and rights which attach to the status. Consequently, it does not offer any hint on how the life of a citizen will differ from that of other persons who may participate in the

In short, most of the cases involve extremely complex issues, but the treatment of the issues is cursory and not particularly useful. While there is usually much to be said for succinctness, where issues of great significance are involved, and where a good deal of analysis in the domestic courts has preceded the case coming before the treaty body, it is simply not adequate for the treaty body to outline the positions which have been presented and to offer a conclusion consisting of a few lines with little or no elaboration.⁸⁷

Lack of understanding of the domestic legal process

Each of the Committees has taken inconsistent approaches with respect to its consideration of the domestic proceedings which have preceded the international communications. In some cases, the Committees appear to have little regard for the domestic legal process. The *Khan* case is an illustration of this. While the Committee against Torture explicitly stated that it was not reviewing the general prevailing system in Canada, the Committee came to its conclusion in the case despite considerable submissions regarding the extensive system of reviews provided to Mr. Kahn as a refugee claimant in Canada. The Committee appears to have based its conclusions on the evidence as submitted by Mr. Khan regarding what would happen to him should he be returned to Pakistan, without paying much heed at all to the reviews accorded to him pursuant to Canada's immigration legislation and the findings of the Canadian tribunals which had considered his claim including the findings that Mr. Kahn had fabricated his evidence. The decisions of the domestic tribunals turned

political, cultural, and social life of Canada.” J. Donald Galloway, “The Dilemmas of Canadian Citizenship Law” (1999) 13 *Georgetown Imm L.J.* 201 at 205. Mr. Galloway further comments that “...it is difficult to identify any formal means by which Canadians are today required to show their loyalty (perhaps other than refraining from committing a criminal offense against national interest.” (at 217).

⁸⁷William Schabas has attributed the “summary” nature of the views to the fact that the Committee, like many other United Nations bodies, operates by consensus. He has expressed the view that the recent tendency for individual members to draft their own views “has considerably enriched the jurisprudence of the Committee”: Schabas, *supra* note 2 at 72.

to a large extent on findings with respect to Mr. Kahn's credibility. It has often been said that the assessment of credibility is a matter for the trier of fact who has had the benefit of observing the witness and assessing not only matters such as inconsistencies in testimony but also factors such as demeanor. In the *Kahn* case the CRDD had the benefit, in assessing Mr. Khan's credibility, of his personal appearance at the hearing. In contrast, the Committee against Torture came to its conclusions based only on a paper review.⁸⁸

Some of the comments contained in the views of the Committee in the *Van Duzen* case regarding the appropriate method of interpreting provisions of the Covenant raise further concerns regarding the extent to which the Committee has regard to relevant domestic laws and practices in arriving at its interpretation. While interpretation of the Covenant cannot turn solely on traditional legal interpretation applied by domestic courts, it is important that the analysis employed by the Committee does not become too remote from the realities of the domestic situation.

In some cases, however, the Committees demonstrate an understanding of the domestic legal process and afford it some deference. A good example of this is the *MacIsaac* case, where the Human Rights Committee based its conclusions on an examination of the Canadian criminal law system as it applies to the individual concerned. Despite the Committee's comments in the *Van Duzen* case which appeared to be leaning in the direction of interpreting the terms of the Covenant with little regard to explanations concerning any national system of law, in this case the Committee took a close look at the workings of the Canadian system and arrived at its conclusions based on a

⁸⁸In regard to the issue of Mr. Khan's credibility, the Committee had only this to say: "The Committee notes that some of the author's claims and corroborating evidence have been submitted only after his refugee claim had been refused by the Refugee Board and deportation procedures had been initiated; the Committee, however, also notes that this behaviour is not uncommon for victims of torture. The Committee, however, considers that, even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered".

very practical analysis of the application of that system to the individual.

It is essential that a treaty body considering an individual communication, where the subject matter of that communication has necessarily been dealt with previously by the domestic legal system, have a thorough understanding of the domestic legal process as it relates to the particular case. It might be useful for the treaty bodies to give greater consideration to the "margin of appreciation" doctrine employed frequently by the European Court of Human Rights. An analysis which includes some consideration of this doctrine might result in a more consistent approach to the treatment of prior domestic proceedings.

Rules regarding exhaustion of domestic remedies

While there are rules of procedure requiring domestic remedies to be exhausted before consideration by the Committees of individual communications, these requirements contain qualifications. In the case of the Human Rights Committee, the rule does not apply where the application of domestic remedies is "unreasonably prolonged". In the case of the Committee against Torture, exhaustion of domestic remedies is not required if the process is "unlikely to bring the person alleging the violation effective relief". While some qualification of the requirement to exhaust domestic remedies is understandable in order to ensure that victims of violations can bring their cases to an international forum without unreasonable delay, the lifting of the requirement for admissibility decisions must be approached with the utmost caution. Allowing cases to proceed before final adjudication by national courts could substantially reduce the integrity of the domestic legal system. The fact that the Lubicon withdrew from all legal proceedings in Canada in 1988, while their case was pending before the Human Rights Committee, demonstrates that this concern is not merely theoretical.

Lack of enforcement mechanisms

In some cases where a violation of an international obligation is found, the finding is not accompanied by any remedy at all. The *Pinkney* case is an example. In other cases where there is a remedy suggested, there is no penalty attached to non-compliance, except for a possible expression of dissatisfaction by the Committees. This raises the question whether a mere expression of opinion by a treaty body is sufficient to have a significant impact on the behaviour of states, and whether the Committees should develop some sort of enforcement mechanism even if that consists only of a more effective system of follow-up and prodding states into action.⁸⁹

Disparity of opinions among Committee members on significant issues

A great disparity of opinions on significant issues is apparent among members of the Human Rights Committee. This is seen in the numerous individual opinions that are appended to the views of the Committee in some cases. Some of these opinions are diametrically opposed to the views adopted by the Committee and to fundamental principles enshrined in current Canadian legislation, which have a potentially wide impact in Canada. An example is the *Stewart* and the *Canepa* cases dealing with deportation from Canada of long-time permanent residents. This serves to underscore the fact that provisions of international human rights conventions are subject to varying interpretations and applications. With changing membership of the treaty bodies and shifting attitudes in various jurisdictions, provisions which were perhaps considered only as abstract general principles at the time of drafting and negotiating a convention may over time be put to unforeseen uses in their

⁸⁹At its thirty-ninth session the Human Rights Committee adopted measures to monitor compliance with its views. These measures include the following: the State party will be asked to inform the Committee of what action it has taken; if no reply is received or the reply shows that no remedy has been provided, this will be noted in the Committee's annual report; if the State party fails to include in its periodic report what measures have been adopted in respect of a finding of a violation, the Committee will pursue the matter with the State; and a Special Rapporteur will be appointed for follow-up of views. Official Records of the Human Rights Committee, 1989/90, Volume II.

application. This is something that states should have regard to in making decisions on ratification and should monitor closely as the "jurisprudence" of treaty bodies evolves.

While the cases in relation to Canada which the Committees have considered on the merits have been few in number, it is evident from a perusal of the Committees' views that there are deficiencies in the process which minimize the credibility of these bodies as decision-making institutions. In order to encourage states to continue to participate in the international human rights process, enhancement of the credibility of the process is essential and increased efforts should be directed toward assisting the treaty bodies to make improvements in this regard.

Canada's Responses to the Views and Requests of International Treaty Bodies

Weaknesses, and resulting lack of credibility, in the treaty body process may account in part for states' reluctance to comply with those bodies' views and requests. Although international treaty bodies such as the Human Rights Committee and the Committee against Torture are not called "tribunals" or "courts" and do not issue "judgments" but rather views, the states which have acceded to their individual complaints mechanisms are expected to comply with their views and to respond to their interim measures requests. While Canada has a good record of compliance generally, the one area in which Canada has demonstrated an unwillingness to comply with requests made by international treaty bodies is with respect to the issue of removal of individuals from Canada either by way of extradition or deportation.⁹⁰

⁹⁰A background paper prepared in 1996 by the Human Rights Law Section of the Department of Justice "to assist the discussion of the Deputy Ministers of Immigration, Justice and Foreign Affairs" on immigration cases before international bodies, states: "Historically, the government of Canada has complied with formal interim measures requests. (Canada did not heed the interim measures requests of the Human Rights Committee in two extradition cases: Kindler and Ng.) However, the various Committees are being encouraged to develop more transparent criteria for interim measures requests. In recent submissions to the Human Rights Committee under the ICCPR in the Stewart case, Canada requested that the Committee clarify upon what basis interim measures requests are made. In a less than complete response, the Committee replied

Extradition

Pursuant to Rule 86 of the rules of procedure of the Human Rights Committee, the Committee's Special Rapporteur on New Communications requested Canada to defer the surrender of both Mr. Kindler and Mr. Ng to the United States until the Committee considered Mr. Kindler's and Mr. Ng's communications. Canada ignored these requests. Kindler's and Ng's petitions were filed with the Committee by fax within minutes of the Supreme Court of Canada's judgment in their cases and the Committee delivered its request for a stay before the two could be removed from Canada.⁹¹ Canada's actions have been described by William Schabas as follows: "Within hours of the judgment the two outlaws were back in the United States, safely behind bars...Impatient officials of Canada's Department of Justice flouted a request from the United Nations Human Rights Committee that would stay the extradition..."⁹² Mr. Schabas concludes that Canada's refusal to stay extradition in these two cases pending examination of the cases by the Human Rights Committee "is a terrible blemish on what had been an honourable, even exemplary, record in the international arena."⁹³

How has Canada, as a signatory to the *Optional Protocol to the International Covenant on Civil and Political Rights* justified its decision to ignore these requests of the Special Rapporteur? On October 15, 1991, Canada filed a "Response...to the Request of the United Nations Human Rights Committee's Special Rapporteur on New Communications dated September 26, 1991". The Government stated that it "recognizes that requests for interim measures...are an important feature

that the essential criterion is 'the irreversibility of the consequences, in the sense of the author to secure his rights, should there later be a finding of a violation of the Covenant on its merits.' " (Document obtained in response to *Access to Information* request, on file with the writer).

⁹¹William A. Schabas, "Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion" (1991) 51:4 *Revue du Barreau* 673 at 675 and 687-88.

⁹²*Ibid.*

⁹³*Ibid.* at 689.

of the effective discharge of the Committee's responsibilities." Canada informed the Committee of the reasons why Canada could not accede to the requests:

These cases presented Canada with very serious and exceptional circumstances, which led Canada to conclude that further delay in the extradition of the two fugitives would have the most serious adverse consequences for the proper administration of criminal justice, would discredit it and bring it into disrepute in the public mind...Requests for delay in cases involving the surrender of fugitive offenders to another state is the source of concern for the states involved. In Canada, extradition is subject to a lengthy and well-defined judicial process in which human rights claims are fully addressed. A request for a further and undetermined period of delay has serious implications for the administration of criminal justice and for the integrity of the extradition process.

The Government emphasized that in making its decision it had addressed the importance of bringing the serious criminal charges to trial in a timely way, the damage to the ability to bring the fugitives to justice if further delay were granted, and the fact that the fugitives would be afforded all the rights, protections and due process accorded by a sophisticated justice system in the receiving state. Canada also expressed its concern that "its ability to return fugitives accused of the most serious crimes to the United States not be impaired because of the very real risk that Canada become a haven for fugitives..." The Government referred, in this regard, to the "long and common border" and Canada's obligations under its extradition treaty with the United States. Canada concluded its response as follows:

Canada takes its obligations under the International Covenant on Civil and Political Rights as well as under the Optional Protocol to the Covenant very seriously and gave very careful consideration to them in these cases. The procedures followed throughout the extradition process have respected the safeguards provided for in the Covenant...The Supreme Court of Canada has determined that in surrendering the fugitives, Canada has accorded them all their rights and has acted in accordance with its domestic and international

obligations.⁹⁴

Government officials had addressed their minds to these issues in advance of the Supreme Court of Canada rendering its judgment. A memorandum to the Minister dated August 16, 1991, states that the Human Rights Section has confirmed that in death penalty cases an interim request is rather standard procedure, and that complying with such a request would mean deferring surrender of the fugitives to the United States, which has not ratified the Covenant on Civil and Political Rights or the Optional Protocol,⁹⁵ until such time as the Human Rights Committee decides whether such surrender violates the terms of the U.N. instruments. The memorandum lists the following considerations:

- Canada is accountable before the United Nations and its Human Rights Committee, although the expression of 'views' on a communication is neither enforceable domestically nor binding in international law.
- ...information received from the Committee Secretariat indicates that in no case has a State Party failed to conform to a request for interim measures emanating from the Committee. Compliance in the hundred or so cases in which such a request has been made has been invariable, including on the part of such states as Zambia, Uruguay, Jamaica and Trinidad and Tobago.
- Because of the implications for Canada's foreign relations, it will be important to consult with the Secretary of State for External Affairs concerning whether to comply with a request for interim measures. Such consultation should probably also include whether it is even open to contemplate refusing to comply with an ultimate decision of the U.N. Committee...
- In the domestic context, ignoring a Committee request for interim measures would obviously have the potential for criticism of the government, as well as some applause.
- While there is some prospect of proposing, in the case of a request for interim measures, that the Committee consider the matter on a precise and expedited basis, in reality, Committee proceedings...must be seen to have the potential to delay the surrender of the fugitives for at least a year and perhaps more.

⁹⁴Government document obtained through Access to Information request. The Human Rights Committee did not request a response, but Canada felt that it should submit a response outlining its reasons for not deferring extradition: Memorandum dated October 8, 1991, from General Counsel, Human Rights Law Section to Deputy Minister. (These two documents were obtained through Access to Information requests, and are on file with the writer).

⁹⁵While the United States had signed the ICCPR on 15/10/77, its Entry Into Force date was not until 08/06/92. ([Http://www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)). The United States has not ratified either the First Optional Protocol or the Second Optional Protocol.

The memorandum also makes reference to concerns with respect to delay resulting in prejudice to the trial; whether a preemptive surrender might have a negative impact for the issue ultimately considered by the Human Rights Committee; and whether if Canada were to comply with the request California authorities might prefer to take Ng back for prosecution on a non-capital basis. The memorandum concludes with several recommendations including the following:

- 1) Consultations should be undertaken with External Affairs and perhaps the Privy Council Office, at a very senior level concerning whether Canada should comply with any request for interim measures emanating from the U.N. Committee...
- 2) In order to keep all options open, steps should be taken to enable Ng and Kindler to be surrendered within hours of the release by the Supreme Court of its decisions in these cases. This would allow for such surrender if upon examination of the court decisions and other factors, this course of action is considered appropriate and is authorized by you.⁹⁶

As discussed above, the Human Rights Committee, in its views adopted on the merits of the Ng communication, requested Canada "to make such representations as might still be possible to avoid imposition of the death penalty" and appealed to Canada "to ensure that a similar situation does not arise in the future". As noted previously, the State of California had, prior to the adoption of the views of the Committee, enacted legislation to enable a person under sentence of death to choose lethal injection in lieu of gas asphyxiation as the method of execution, but no reference is made to this in the views of the Committee. With respect to these views, Canada responded to the Human Rights Committee as follows:

- The Government of Canada had transmitted the Committee's views to the Government of the United States and had requested information concerning the method of execution currently in use in the State of California;
- The Government of the United States had informed Canada that the law of the State of California provides that an individual sentenced to capital punishment may choose between gas asphyxiation and lethal injection as to method of execution,⁹⁷ and

⁹⁶Memorandum dated August 16, 1991, from Douglas Rutherford to the Minister of Justice (Government document obtained by Access to Information request, on file with the writer).

⁹⁷According to one source, the change in the California law was made because of the belief that offering a choice might avoid a constitutional challenge in the U.S. on the ground of cruel and unusual punishment. (Government document, May 19, 1994, obtained by Access to Information request, on file with

- In the future, should Canada receive a request for extradition which raises the possibility of the death penalty, the views of the Committee in the Ng communication will be taken into consideration in the extradition process.⁹⁸

In a briefing note to the Minister of Justice prior to the adoption of views by the Committee, government officials discussed the issue of extradition in death penalty cases. The background section of the note includes the following:

The Committee's decisions are not legally binding on Canada in the sense that the Committee has no means to enforce them. However, the Committee's decisions set the international law standard for the interpretation of the Covenant. They have a political impact and attract considerable publicity at both the domestic and international levels.

With respect to further action, the officials state: "We must assess the impact of these decisions both on domestic law and on our international obligations, particularly with respect to our extradition policy. A full analysis is dependent upon receipt of the written decisions... We need to develop press lines for your consideration in order to be prepared, once these decisions are made public, to discuss how Canada will reconcile the protection of society with its human rights obligations."⁹⁹

Shortly after the Human Rights Committee transmitted a copy of its views in the Ng case to Canada, Canadian officials, in internal discussions, expressed concern regarding the lack of guidance in the Committee's views regarding, for example, the compatibility of other methods of execution with article 7 of the Covenant: "I share your concern with the decision of the Human Rights Committee. The test as outlined by the Committee gives us very little guidance in dealing with cases

the writer).

⁹⁸"Response of the Government of Canada to the Views of the United Nations Human Rights Committee on the Merits of Communication No. 469/1991 (Charles Chitat Ng v. Canada)", October 3, 1994 (Government document obtained by Access to Information request, on file with the writer).

⁹⁹Briefing note dated November 18, 1993 (Government document obtained by Access to Information request, on file with the writer).

where the method of execution is neither lethal injection nor cyanide gas asphyxiation.”¹⁰⁰

The debate on the death penalty and on extradition to a country where the individual may face execution continues around the world and within Canada. The issue has recently been before the Supreme Court of Canada in a slightly different context, that is, with respect to the extradition of Canadian citizens. In 1996 the B.C. Supreme Court ordered two young Canadians to be extradited to Washington State to stand trial for the murders of the parents and sister of one of the accused. In June, 1997, the B.C. Court of Appeal ruled that it would violate s. 6(1) of the *Charter of Rights and Freedoms* (the right of every citizen of Canada to enter, remain in and leave Canada) for Canada to return these Canadians to Washington State to face charges of aggravated first degree murder, without first seeking an assurance that they would not face the death penalty.¹⁰¹ The Crown appealed the decision, and the Supreme Court of Canada heard the appeal in the spring of 1999. Amnesty International was granted intervener status in the case. Amnesty asked the Court to revisit its decisions in the *Kindler* and *Ng* cases in light of international trends toward abolition of the death penalty and widespread condemnation of the practice of the death penalty in the United States. Amnesty also requested that should the Court allow the appeal, the Court order a stay of extradition pending determination of any petition the respondents might make to the Human Rights Committee. This request was made in light of Canada's past actions in extraditing Ng in the face of a request by the Human Rights Committee to stay extradition.¹⁰² In its Reply Factum, Canada took the position

¹⁰⁰Memorandum dated January 18, 1994, from John Scratch, Senior General Counsel, Human Rights Law Section to the Deputy Minister of Justice (Government document obtained by Access to Information request, on file with the writer).

¹⁰¹*Glen Sebastian Burns and Atif Ahmad Rafay v. Minister of Justice for Canada and United States of America*, Doc. CA022183/CA022191.

¹⁰²Factum submitted to the Supreme Court of Canada of behalf of the Intervener Amnesty International, in *The Minister of Justice v. Burns and Rafay*, Court No. 26129, filed in the Supreme Court of Canada Registry.

that while there may be a move among some members of the international community to abolish the death penalty, there is no international "norm" to this effect, and that international law does not prohibit the imposition of the death penalty on adults, without mental disability, who are found guilty of murder. In support of its position, Canada pointed out that the Human Rights Committee has consistently expressed the view that the imposition of the death penalty for serious offences such as murder does not violate the International Covenant on Civil and Political Rights. Canada quoted from the views of the Human Rights Committee in *Kindler v. Canada* and *Ng v. Canada*, and referred, as well, to the Committee's views in the *Cox* communication. Canada also reviewed other international conventions and international judicial pronouncements, and concluded its argument as follows: "Having regard to the laws and practices of the substantial number of jurisdictions in the world which continue to impose the death penalty, it cannot be said that an international norm [prohibiting capital punishment] presently exists. This is particularly so with respect to the type of offence with which the Respondents are charged (i.e., three counts of aggravated murder in the first degree)." The Minister of Justice also reminded the court of the continuing "safe haven" concerns. In respect of the Intervener's request for a stay of extradition, Canada took the position that the Respondents themselves have not sought such an order and that in any event a stay of extradition is beyond the jurisdiction of the Supreme Court of Canada; that once the Court determines that all the requirements of Canadian law have been met, there can be no basis on which to enjoin the Minister.¹⁰³ On October 25, 1999, the Supreme Court of Canada issued an Order in this case. The Order simply states: "A re-hearing is ordered." It also states that Cory J. took no part in the judgment.¹⁰⁴ Presumably, this Order was issued because Mr. Justice Cory, having retired, will not be participating

¹⁰³ Appellant's Reply Factum dated January 6, 1999, submitted to the Supreme Court of Canada in *Minister of Justice v. Burns and Rafay*, filed in the Supreme Court of Canada Registry.

¹⁰⁴ Press release of October 25, 1999 (<http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>).

in the decision and there is concern that the remaining eight justices might be evenly split.¹⁰⁵ It may be some time before the case is re-heard and judgment rendered. When this occurs, it will be interesting to examine, among other things, the treatment that the international conventions and jurisprudence receives in the Supreme Court of Canada's judgment and how the Court will deal with the request for an Order for a stay of extradition. Should the appeal be allowed and a stay of extradition not be ordered, it will also be of interest to see whether the Respondents request the Human Rights Committee to ask Canada to stay their extradition and should the Committee make such a request, how Canada will respond. Will Canada's actions differ from the actions it took in the *Kindler* and *Ng* cases?¹⁰⁶

Deportation

In 1997, Canada deported Tejinder Pal Singh to India, despite a request by the United Nations Committee against Torture to stay his removal. In 1981 Mr. Singh was involved in the hijacking of an Indian passenger jet to Pakistan. He was convicted under the Pakistan Penal Code of hijacking and sentenced to a term of life imprisonment. He was released from prison in Pakistan in 1994. He entered Canada in 1995, presenting a Pakistani passport in a false name, and made a Convention refugee claim on the basis that he feared persecution in India. Tejinder Pal Singh was found by an immigration adjudicator to be a member of an inadmissible class of persons on the basis

¹⁰⁵ An article in the *National Post* on November 9, 1999, states that "[t]he court has been badly divided in the area of extradition in the past, and the justices fear they could have a tie vote if their ninth and newest member, Justice Louise Arbour, does not take part." Janice Tibbetts, "High court retirements forcing delays, rehearings" *National Post* (9 November 1999) A6.

¹⁰⁶ In its concluding observations in relation to Canada's fourth periodic report, adopted April 6, 1999, the Human Rights Committee states, at paragraph 14: "The Committee expresses its concern that the State party considers that it is not required to comply with requests for interim measures of protection issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that all such requests are heeded in order that implementation of Covenant rights is not frustrated".

that there are reasonable grounds to believe that he engaged in terrorism.¹⁰⁷ On December 8, 1997, the Minister of Citizenship and Immigration issued an opinion, pursuant to s. 46.01 (1) (e) (ii) of the *Immigration Act* that it would be contrary to the public interest to have Mr. Singh's refugee claim determined under the *Act*. In the meantime, Tejinder Pal Singh had submitted a communication to the Committee against Torture, and on December 18, 1997, the Committee reported to Mr. Singh's solicitors that a copy of the communication had been sent to Canada, requesting that information or observations in respect of admissibility be sent to the Committee within two months, and also requesting Canada not to expel Mr. Singh to India, while his communication was under examination by the Committee.¹⁰⁸ Tejinder Pal Singh applied to the Federal Court of Canada to quash the Minister's opinion and to stay the execution of his deportation order. The Court noted, in its Reasons for Decision, that counsel for the Minister took the position that UN rules required that ex parte correspondence be kept confidential at that stage, but that she was "not instructed by the government to desist in opposing Mr. Singh's application to stay execution of his deportation order." The Court characterized Mr. Singh as follows:

The applicant, Tejinder Pal Singh was and is a member and supporter of Dal Khalsa, a Sikh political group which aims to establish a separate and independent Khalistan in India through violent means. On September 29, 1981, in a viciously dangerous and egotistically stupid effort to promote the establishment of that Sikh homeland, the applicant Mr. Singh, with four others, committed a terrorist act by the piracy of hijacking an Indian aeroplane, diverting it from its scheduled course and into Pakistan at Lahore Airport. Pakistani commandos overwhelmed the Dal Khalsa hijacker pirates and arrested them...

The basis of the application to quash was that the Minister did not take into account the treatment Mr. Singh would receive if deported to India. The Court dismissed the application:

¹⁰⁷Reasons for decision of Immigration Adjudicator P. Kyba, May 30, 1997.

¹⁰⁸*Tejinder Pal Singh v. The Minister of Citizenship and Immigration*, IMM-5294-97, Federal Court of Canada Trial Division, Muldoon J., December 22, 1997.

This Court is not persuaded that the Minister's review of danger to Mr. Singh (a danger, if any, into which he fanatically put himself) was in any way deficient, much less perverse...If Mr. Singh be at risk, it is because he is the persecutor by terrorism past and still intended and he willingly undertook the risk. Actually, the evidence shows that the world's largest democracy has no policy or encouragement of police brutality, and the high profile of publicity of Mr. Singh's case is probably his best protection against any risk of brutal treatment, since the Government of India will wish to avoid dishonour by the unofficial abusive treatment of a returning deportee from Canada...[S]ince there is no refugee claim, because the applicant is no refugee, the deportation order is no longer conditional. Mr. Singh is illegally in Canada, he is a terrorist, and is subject to deportation. These conclusions arise, because the Minister has correctly opined that it would be contrary to the public interest to permit a terrorist, a non-refugee, and engage the Refugee Determination Division in a fatuous refugee claim.¹⁰⁹

Pursuant to the provisions of the *Immigration Act*, there is no appeal of a judgment of the Trial Division with respect to a matter arising under the Act unless the Trial Division has certified that a serious question of general importance is involved. In this case, the applicant requested certification of a question as follows: "In cases where there is a reasonable possibility that an individual will be subject to torture, persecution, or death in his or her country of citizenship, is there an infringement of that individual's rights under sections 7 and/or 12 of the *Canadian Charter of Rights and Freedoms* if that individual is removed from Canada pursuant to the issuance of an opinion by the Minister of Citizenship and Immigration that it would be contrary to the public interest to have that individual's refugee claim heard?" The Court declined to certify a question. Mr. Justice Muldoon, in Supplementary Reasons, stated that Mr. Singh fell far short of discharging the onus of demonstrating that there was a probability that he would be subjected to police brutality. He also stated that "No country's deportation laws or extradition laws could ever operate if such a deplorable but everyday risk stopped their enforcement." Finally, Muldoon J. held:

¹⁰⁹*Ibid.*

Also the *Canadian Charter of Rights and Freedoms* constrains only the federal and provincial governments and their controlled emanations, in Canada. The constitution makers in 1982 never intended to impart to it, and did not impart to it any extra-territorial reach. Canada can not, in the execution of Canadian laws, be responsible to see that other countries' governments suppress police brutality in their own territories...It must be remembered...*Singh et al v. The Queen* [1985] 1 S.C.R. 177 revealed the Supreme Court of Canada to be concerned with the proper application of the *Charter* and the *Canadian Bill of Rights* within Canada, in the on-shore application, operation and enforcement of the then current version of the *Immigration Act*. The Supreme Court did not purport to interfere with the execution of that law of Canada for some possibility of what might happen abroad, but sought to make fairer the application of a law of Canada, in Canada.¹¹⁰

With the exception of the brief mention of the pending communication to the Committee against Torture, referred to above, there is no reference in the judgment to Canada's international obligations under the *Torture Convention*.

Tejinder Pal Singh's communication to the Committee against Torture is scheduled to be considered at the Committee's fall 1999 session. The proceedings of the Committee are considered to be confidential until a final decision is taken. This requirement of confidentiality is interpreted by the Government as including internal government documents with respect to the decision to deport Mr. Singh in the face of the Committee's request to stay deportation.¹¹¹ Until the Committee adopts views on the merits, one can only speculate as to the nature and substance of the discussions within the government regarding the decision to deport despite the Committee's request. It is reasonable to assume that the decision was based on the following concerns, among others: the individual in question was a convicted terrorist; there was evidence, as referenced in the Federal Court judgment,

¹¹⁰*Tejinder Pal Singh v. The Minister of Citizenship and Immigration*, IMM-5294-97, Federal Court of Canada Trial Division, Muldoon J., Supplementary Reasons and Order, December 23, 1997.

¹¹¹Response from the Department of Justice dated July 21, 1999, to *Access to Information* request, on file with the writer.

that he had pledged to continue his struggle for Khalistan through militant action; the issue of the danger which Mr. Singh might face on return to India was considered by the Minister in issuing her opinion and Mr. Singh had been unsuccessful in his bid to the Federal Court to stay his deportation; consideration by the Committee against Torture of the admissibility of the communication and, if admissible, the merits of the case would likely take years (and in fact, if views are adopted in the fall of 1999, it will have been almost two years since Tejinder Pal Singh was deported); the consequence, then, of complying with the Committee's request would be that Mr. Singh would be permitted to remain in Canada, for a considerable period of time; it would be unlikely that if Mr. Singh were permitted to remain in Canada, he would be kept in custody (At his initial detention review hearing, an immigration adjudicator released him from detention on posting a \$10,000 cash bond, together with terms and conditions¹¹²); complying with the request might be perceived as facilitating the admission to Canada of terrorists and thus encouraging the creation of a haven for them; and, finally, the sentiment of the Canadian public would be against Government action which might give the impression that Canada harbours terrorists.

The basis on which Canada justified its non-compliance with the request of the Committee against Torture is not yet public knowledge. In May, 1999, there were twelve cases alleging violations by Canada of the *Torture Convention* pending before the Committee against Torture. In ten of those cases, the Committee requested Canada not to remove individuals. Those individuals have not been removed.¹¹³

Decisions concerning extradition and deportation go to the heart of one aspect of state

¹¹²Decision of Adjudicator Daphne Shaw Dyck, September 26, 1995.

¹¹³Letter to the writer from Department of Justice dated June 11, 1999. The letter states that it has not been necessary in all ten cases for Canada to face squarely the issue whether to comply with the Committee's request. For example, there may have been an Order by a Canadian court staying deportation, or there may have been a decision not to deport pending the making of an administrative decision domestically.

sovereignty, the right of the state to exercise control over its borders and to protect its own citizens. In the case of extradition of individuals to countries where they may face the death penalty, serious criminality as well as the state's extradition agreements with other countries, are involved. In the case of deportation, the basis for the decision to deport is also often a finding of serious criminality. It is understandable that Canada has balked at abiding by the requests of international treaty bodies not to remove in cases that involve murderers and terrorists. However, it is important that Canada develop a clear policy in regard to responding to requests of international treaty bodies, and follow practices which are consistent with the obligations Canada has chosen to undertake in the international arena.

CHAPTER 4

THE UNITED KINGDOM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LESSON FOR CANADA?

As Canada continues to make decisions relating to its participation in the arena of international human rights, whether on the global or the regional level, it will be particularly instructive for Canada to examine closely how the United Kingdom, a country with similar legal and political traditions, has been affected by its participation in a regional human rights regime. There are, to be sure, differences between the Canadian and the United Kingdom systems which have some bearing on the comparison. The UK has not enacted a comprehensive charter of rights, as has Canada. There is, as well, a greater emphasis in the UK on the principle of Parliamentary sovereignty. Differences also flow from the United Kingdom's membership in the European Union.¹ There are, however, striking similarities to be found in the difficulties that have, up until the present time, flowed from a lack of direct legislative incorporation of treaty obligations, and in the legal and political traditions which fuel the tension between the commitment to implement international obligations and the desire to retain control over certain matters which the state regards as being more

¹The analogy between the UK vis-a-vis the European Convention and Canada vis-a-vis the ICCPR is referred to in William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Carswell, 1996) at 33: "The position of the *European Convention* in English law would appear to be analogous to that of the *International Covenant on Civil and Political Rights* in Canadian law. Both are multilateral treaties and in both cases a binding petition procedure exists. But there is one important difference. Westminster has not seen fit to follow Canada's lead by entrenching its own internationally-inspired charter of rights and freedoms. Parliamentary sovereignty remains untarnished in the United Kingdom, whereas in Canada it has made way for a charter of rights with constitutional status."

The different approach in the UK to the principle of Parliamentary sovereignty is evident in the recently enacted *Human Rights Act, 1998*. (Chapter 42, enacted November 9, 1998.) See below at note 78 ff.

properly within the domestic domain.²

The tension that exists between a state's commitment to carry out the international human rights obligations it has assumed, particularly as those obligations become defined by the jurisprudence of an international tribunal, and that state's desire to protect its own domestic legal process from what it perceives as interference can be observed by examining the impact which ratification of the *European Convention on Human Rights* has had on the United Kingdom.³

At the time of ratifying the *European Convention on Human Rights*, the United Kingdom, which had been actively involved in formulating the principles contained in the Convention, had serious misgivings when it came to submitting its laws and procedures to scrutiny by an unknown foreign adjudicative body. Those misgivings continue to this day and it has been a continuing challenge for the United Kingdom to accept the findings of a "supranational" tribunal concerning

²Canada shares with England a "dualist" tradition; an international treaty does not give rise to rights which individuals can enforce in domestic courts unless it is incorporated by legislation into the domestic law. See Chapter 2 at note 36. There are numerous discussions about the classifications of "dualism" and "monism". See, e.g., Jonas Ebbesson, *Compatibility of International and National Environmental Law* (London: Kluwer Law International, 1996) at 211. Ebbesson points out that it is an oversimplification to say that in dualist states international rules, unless incorporated by legislation, do not have any impact on the domestic courts or administrative authorities. "Hence, in practice, the bulkheads between international and national law are not so watertight." (p. 212). See also Daniel Bethlehem, "International Law, European Community Law, National Law: Three Systems in Search of a Framework" in Martti Koskenniemi, ed., *International Law Aspects of the European Union* (The Hague: Kluwer Law International, 1998) at 169 ff., where he discusses this traditional dichotomy and the various arguments that have been advanced to escape from it. He suggests that "[i]n practice, the relationship between the systems is characterised by constant interaction such that to focus only on the manner of the reception of obligations derived from one system into the *corpus* of rules of another is to focus only on one small element of that interaction." (at 195).

³One writer has aptly described the fundamental difficulty a state faces in becoming a participant in an international human rights regime which includes an adjudicative function as part of its implementing machinery: "It is all very well to pay lip service to human rights treaties, all too easy to accept their provisions at a theoretical or aspirational level, but it is quite a different, infinitely more difficult, matter to actually submit one's laws and procedures to the detailed scrutiny of international tribunals staffed largely by foreign judges." John Kidd, "'Twas Easier Said than Done': Britain and the European Convention on Human Rights" (1983) 14 Melbourne U. L.Rev. 104.

Convention violations by the UK and to carry out the obligations it has assumed through participation in the European human rights regime, while at the same time attempting to preserve its own legal system from what it views as interference.

The United Kingdom's ratification of the European Convention

At the end of World War II, when United Nations bodies were debating such matters as the creation of a declaration of rights, a convention or covenant imposing legal obligations on states and mechanisms for implementing those obligations, discussions concerning a Charter of Human Rights were also beginning within Europe.⁴ In 1949 the Council of Europe was established by the Brussels Treaty States which included the United Kingdom.⁵ The mission of this institution was to establish a new European order founded on the principles of democracy, the rule of law and respect for human rights.⁶ A major achievement of the Council of Europe was the adoption, on November 4, 1950, of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, usually referred to as the *European Convention on Human Rights*.⁷ This Convention was the foundation of what has become the most comprehensive and well-developed of the regional human rights regimes that have emerged alongside the global or "universal" (United Nations-sponsored) human rights arrangements.⁸

⁴Geoffrey Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950" (1993) 42 Int'l & Comp. L.Q. 796.

⁵The United Kingdom, France, Belgium, Luxembourg and the Netherlands.

⁶R.St.J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) at xi.

⁷*Ibid.* at 15.

⁸The other two major regional human rights regimes are the Inter-American system established under the Organization of American States and the African system created under the Organization of African Unity.

The United Kingdom was one of the first Member States of the Council of Europe to sign the Convention on November 4, 1950, and was the first country to deposit an instrument of ratification, on March 8, 1951.⁹ While these actions might indicate an enthusiastic endorsement of the Convention on the part of the UK, documentation of the discussions that took place within the UK during the drafting of the Convention and leading up to ratification, reveal that the Government preferred to regard the Convention as a statement of general principles rather than as an internationally binding instrument, and that there were serious misgivings regarding the Convention's implementation provisions. The following comment, made in correspondence referring to a Cabinet meeting held in August, 1950, reflects the prevailing attitude within the Government toward the draft Convention which contained provisions for the right of individual petition to an international human rights court.¹⁰

We all came to the conclusion...that we were not prepared to encourage our European friends to jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme to be administered by some unknown court.¹¹

⁹M.P. Furmston, R. Kerridge, and B.E. Sufrin, eds., *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 1983) at 247; A. Glenn Mower, Jr., *Regional Human Rights: A Comparative Study of the West European and Inter-American Systems* (New York: Greenwood Press, 1991) at 53. No amending legislation was adopted to implement the Convention, nor were any reservations entered. This "serves to reinforce the view that at the time there was thought to be little or no discrepancy between the substance of the Convention and English law, and therefore that the Convention was merely a restatement of principles already enshrined in the common law." Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998) at 33.

¹⁰Ultimately the right of individual petition became an optional term of the Convention, which became effective in 1955.

¹¹Correspondence from the Lord Chancellor, Jowitt, to Hugh Dalton, August 3, 1950, referred to in Marston, *supra* note 4 at 813. In a recent address, Professor Sir William Wade, Q.C. referred to "one of the curiosities of the British attitude at home" being "the 'passionate intensity' with which it [the Convention] was

The minutes of the Cabinet meeting record that ministers agreed that "[i]t was intolerable that the code of common law and statute law which had been built up in this country over many years should be made subject to review by an International Court administering no defined system of law."¹² The United Kingdom succeeded in persuading the Committee of Ministers that acceptance of the jurisdiction of the proposed Commission and Court should be left to the discretion of each member state.¹³ The UK did not initially accept the right of individual petition or the jurisdiction of the European Court of Human Rights. It was not until January 14, 1966, that the United Kingdom recognized the right of individual petition. This recognition was initially for a period of five years, but was renewed on a regular basis for varying periods of time.¹⁴ From time to time there has been speculation that the Government would not issue a renewal notice because it did not like some of the judgments against it rendered by the Court.¹⁵ This is no longer an issue as the United Kingdom has

originally opposed by the Lord Chancellor, Lord Jowett". Sir William Wade went on to say that Lord Jowett was "apparently unaware that he was an eminent official in the Home Office": Professor Sir William Wade, Q.C., "Opinion: Human Rights and the Judiciary" (1998) 5 E.H.R.L.R. 520.

¹²Marston, *Ibid.*

¹³Brice Dickson, ed., *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997) at 6.

¹⁴The right of individual petition was last renewed by the UK in January 1996, for a period of five years.

¹⁵Dickson, *supra* note 13 at 9; Kidd, *supra* note 3 at 110. The idea of a nation withdrawing its participation in an individual petition procedure of an international human rights regime is not unheard of. In October, 1997, Jamaica became the first country to denounce the Optional Protocol to the International Covenant on Civil and Political Rights and withdrew the right of individual petition to the United Nations Human Rights Committee under the ICCPR. In May, 1998 Trinidad and Tobago became the second state to withdraw from the Optional Protocol and the first state ever to withdraw from the American Convention on Human Rights. David Petrusek, "Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights" (1998) 92 Current Developments 563. A recent newspaper report states that Caribbean justice chiefs are urging withdrawal from human rights pacts that they claim delay executions, and that attorneys general of twelve countries have signed a statement advising their governments to withdraw from two agreements, then reaffirm all parts except those dealing with capital punishment."Ex-

now ratified Protocol 11 to the Convention which provides for automatic access to the European Court of Human Rights by individuals.¹⁶ Ratification of the Convention, including acceptance of both the right of individual petition and the compulsory jurisdiction of the Court, are now perceived as conditions of membership in the Council of Europe.¹⁷

An overview of the European human rights regime

The European Convention entered into force on September 3, 1953. The rights protected by the Convention are primarily civil and political.¹⁸ The Convention requires the states parties to secure

colonies fight UK over death sentences" *The Vancouver Sun* (1 February 1999) A5.

¹⁶Protocol 11 came into force November 1, 1998. It should be noted that although the UK ratified the International Covenant on Civil and Political Rights in 1976, it has not accepted the Covenant's Optional Protocol permitting the Human Rights Committee to receive and consider individual petitions alleging human rights violations by the UK. Some commentators have noted that the influence of the ICCPR on English law has been slight, no doubt due to the UK's failure to ratify the Optional Protocol: See Hunt, *supra* note 9 at 2.

¹⁷Donna Gomien, David Harris, and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996) at 18.

¹⁸The Convention does not protect economic, social and cultural rights. The authors of the Convention decided that it was more important to emphasize guarantees of respect for human rights, the rule of law, and political democracy. As well, not all European countries were in a position to fully implement economic and social rights. (See Gomien et al., *ibid.* at 14) Economic and social rights were subsequently recognized in the European Social Charter of 1961 which entered into force in 1965. This division between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, is paralleled in the separation of these two strands of rights in the two international human rights covenants drafted in 1966 by the UN Commission on Human Rights, the International Covenant on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights. In discussing the nature of rights, some refer to three generations of human rights: the first generation being personal, civil and political rights, the second generation being the 'socialistic contribution' to international human rights, and the third generation of human rights termed 'solidarity' rights including the right to a clean environment, the right to peace, and the right to development. See Kenneth W. Hunter and Timothy C. Mack, eds., *International Rights and Responsibilities for the Future* (Westport: Praeger Publishers, 1996) at xviii - xix. The Convention does not address rights such as the right to sustainable development, to a healthy environment, and to peaceful coexistence. It has been suggested that the Convention, now nearing its fiftieth birthday, is beginning to show its age, and that there is a need to modernize it by enlarging the range of rights and the degree of protection afforded them. See Dickson, *supra* note 13 at 212-213.

the protected rights to everyone within their jurisdiction, and to provide an effective remedy before a national authority for everyone whose rights are violated. The rights set out in the Convention are defined in some detail; the statement of a right is generally followed by the restrictions seen as necessary to qualify that right.¹⁹

The significance of the Convention is that it not only defines the rights to be protected but that it also establishes sophisticated machinery for enforcing those rights. The European Convention provided for the first international complaints procedure and the first international court for determination of human rights matters. The control machinery comprises a highly developed supranational adjudicative system whose decisions have a far-reaching impact on the states parties to the Convention.²⁰

The original control machinery established by the Convention has recently been radically restructured by Protocol 11 to the Convention. As stated in one of the preambles to the Protocol,

¹⁹For example, Article 8, after stating that everyone has the right to respect for his private and family life, his home and his correspondence, goes on to provide as follows:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10, providing that everyone has the right to freedom of expression (which includes freedom to hold opinions and to receive and impart information and ideas without interference), continues as follows: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

²⁰While there are provisions for petitions by one state concerning alleged human rights violations by another state, this discussion will focus on the individual petition mechanisms. It should be noted that though Canada cannot be a party to the European Convention, the Convention has been cited repeatedly by Canadian courts in *Charter* interpretation. See Schabas, *supra* note 1 at 87.

this restructuring was necessary in order to maintain and improve the efficiency of the protection of human rights and fundamental freedoms, "mainly in view of the increase in the number of applications and the growing membership of the Council of Europe". The new system establishes a single, permanent court, replacing the two bodies, the part-time Court and the Commission of Human Rights, which have up until now been the major decision-making bodies in the enforcement machinery.²¹ The Court's jurisdiction extends to all cases which are referred to it concerning the interpretation and application of the Convention and its Protocols. Any High Contracting Party may refer to the Court any alleged breach of the Convention, and the Court may receive applications from "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties". The Court also has the power to give advisory opinions, when requested to do so by the Committee of Ministers, on legal questions concerning the

²¹The third implementing body in the system was the Council of Europe's Committee of Ministers. Under the old system, the Commission decided whether registered petitions should be declared admissible. The grounds of admissibility are comparable to the conditions of admissibility set out in the First Optional Protocol to the International Covenant on Civil and Political Rights and in the articles of the Committee against Torture. If the petition was declared admissible and no friendly settlement was reached, the Commission proceeded with an in-depth examination of the case, and prepared a report in which it provided an opinion on whether the facts found disclosed a breach by the state of its Convention obligations. Within three months of the Commission's report, the case could be referred to the European Court of Human Rights, if the state concerned had accepted the jurisdiction of the Court. Referral could be either by the Commission or by the state concerned. For those states having ratified Protocol No. 9 to the Convention (now repealed by Protocol 11) the individual applicant could also refer the case to a three-member panel of the Court who made a decision as to whether to hear the case. If the state concerned had not accepted the jurisdiction of the Court, or the case was not referred to the Court, or the Court on an individual referral decided not to examine the case, the Committee of Ministers decided whether there had been a Convention violation. The Commission of Human Rights continued to sit until October 1999 to complete the examination of cases declared admissible. Under the new system, the Committee of Ministers does not have any decision-making power on applications but retains its role of supervising execution of judgements.

Under the provisions of Protocol 11, the European Court of Human Rights consists of one judge for every High Contracting State. Judges are elected by the Parliamentary Assembly of the Council of Europe for a period of six years, and may be re-elected up to the retirement age of 70. Prior to Protocol 11, the Court consisted of one judge for every member state of the Council of Europe. Judges were elected for a period of nine years.

interpretation of the Convention and its Protocols, but this power has never been exercised.²²

The European human rights system is the most developed of any of the international human rights systems. It has been described as a unique system, constituting an "international common law" system and a "self-referential system". The Court usually follows and applies its own precedents. The system's implementing bodies operate independently from the courts of the states parties and interpret domestic laws or practices exclusively for their compatibility with the Convention. The Commission and the Court have developed a sophisticated body of jurisprudence, and a more extensive jurisprudence than any other part of the international human rights system, over the past several decades based on concrete cases rather than abstract issues.²³

In these cases the Court constantly deals with issues of law and policy that have traditionally been considered to be matters of domestic jurisdiction. As discussed in Chapter 1, the Court has developed a concept known as the "margin of appreciation" in an effort to balance the object of achieving an effective and uniform standard of protection of human rights in the region, with some recognition of the diversity of political, cultural and social situations in the societies of states parties. Developments in this area, which reflect the ability of the supranational institution to achieve the right balance between intervention and deference, between international obligations and national

²²Dickson, *supra* note 13 at 20. Now see Protocol 11, Articles 47 to 49, regarding requests for advisory opinions.

The Court will sit in committees of three judges, Chambers of seven judges and a Grand Chamber of seventeen judges reserved for hearing exceptionally important cases including a re-hearing of exceptional cases. The admissibility determination and friendly settlement functions formerly performed by the Commission will now be carried out by the Court. There is an appeal available in exceptional cases from a judgment of the Court to the Grand Chamber. The case must raise a serious question affecting the interpretation or application of the Convention or the protocols, or a serious issue of general importance.

²³Gomien et al., *supra* note 17 at 18.

sovereignty, may in large measure determine the ultimate success of this regional human rights regime.²⁴

How the UK has fared before the European Court of Human Rights and how it has responded to judgments of the Court

It has been said that the "United Kingdom Government does not seem to complain about Strasbourg whenever decisions go in its favour. What it does object to, in a way that seems not to be mirrored in any other Council of Europe state, is 'interference' in its legal system by a European body."²⁵

While the initial purpose of the Convention was the prevention of large scale infringements of human rights by states parties, it is the right of individual petition that has given rise to most of the jurisprudence of the Convention's implementing organs, and the Convention has come to be seen as the foundation of a system providing protection against specific infringements of human rights.²⁶ Individual applications against the United Kingdom exceed those against many of the other states

²⁴In 1996, the Home Secretary, Lord Mackay L.C. proposed reforms to the Convention's enforcement machinery. The proposed reforms included having the Court adopt a more flexible margin of appreciation doctrine. The position paper of the UK Government suggested "a resolution in the Committee of Ministers drawing on the following point: (a) account should be taken of the fact that democratic institutions and tribunals in Member States are best placed to determine moral and social issues in accordance with regional and national perceptions..." See Hunt, *supra* note 9 at 321. One writer has suggested that this position flowed from a number of test cases in which the European Court found violations by the UK in areas concerning the confiscation of assets of convicted drug dealers, the Home Secretary's power to have the final say over when a person should be released from an indefinite jail sentence, and a judge's power to order a journalist to disclose his sources. See Dickson, *supra* note 13 at 224.

²⁵ Dickson., *supra* note 13 at 225.

²⁶Sue Farran, *The UK Before the European Court of Human Rights* (London: Blackstone Press Limited, 1996) at 2.

parties to the Convention.²⁷ By 1996, there had been over sixty substantive decisions in cases brought against the UK Government, and, in over half, there were findings of one or more breaches of the Convention.²⁸

While the UK government may react to decisions adverse to it with something less than enthusiasm, its position is that it “complies meticulously with every adverse decision of the Court...”²⁹ The UK’s record of responding to the Court’s judgments is relatively good,³⁰ though some analysts have described its record of compliance as “patchy”.³¹ One writer has put it as follows:

Adverse decisions of that court [The European Court of Human Rights] do not have full legal force; in that respect they are different in status from judgments of the European Court of Justice. However, in practice, British governments have not wanted to be seen to be flouting too often the judgment of the court, and a good many have

²⁷*Ibid.* at 389.

²⁸Michael Zander, “A Bill of Rights for the United Kingdom -- Now” (1997) 32 *Texas Int’l L.J.* 441. The first decision of the Court made in a case against the UK was in 1975. Of the first fourteen decisions with respect to the UK, all but two held that Britain had violated human rights. In the next five years sixteen more decision were made with respect to the UK and violations were found in nine of those cases. See A.W. Bradley, “The United Kingdom, the European Court of Human Rights, and Constitutional Review” (1995) 17 *Cardozo L. Rev.* 233 at 244. The provisions of the Convention that the Court has most often found the United Kingdom to have violated are Article 8 (protecting privacy and family life) and Article 6 (due process requirements). There have also been a number of findings of violations of Article 5 (right to liberty and security of person), Article 10 (freedom of expression), Article 13 (the right to an effective remedy before a national authority) and Article 3 (freedom from torture or degrading treatment or punishment), as well as single instances of violations found with respect to Article 2 (right to life), Article 7 (protection from retroactivity of criminal laws), Article 11 (freedom of association), and Article 14 (discrimination, in conjunction with Article 8).

²⁹Bradley, *ibid.* at 250.

³⁰Conor Gearty, “The United Kingdom” in C. A. Gearty, ed., *European Civil Liberties and the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 1997) at 85 ff.

³¹Dickson, *supra* note 13 at 220; see also R. Churchill, “Aspects of Compliance with Findings of the Committee of Ministers and Judgments of the Court with Reference to the United Kingdom” in J.P. Gardner, ed., *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) at 103.

been complied with.”³²

Findings of Convention violations have resulted, in a number of cases, in changes to primary or subordinate legislation or to administrative practices.³³ An examination of some of the Court decisions which have led to such changes provides some insight into the extent of the impact of the Court’s jurisprudence on the UK’s domestic legal process. There have been a number of Court decisions concerning the rights of prisoners, beginning with the *Golder* case³⁴ which held that a prisoner was entitled to have access to a lawyer for advice on whether he had a claim in damages against a prison officer. Following *Golder*, the *Prison Rules* were amended. Subsequent cases on issues concerning prisoners resulted in further amendments to the *Prison Rules and Standing Orders*.³⁵ Several decisions of the Court have addressed issues concerning freedom of expression, in particular press freedom. In the *Sunday Times* case,³⁶ the Court found that a ban on publication which had been upheld by the House of Lords was an excessive restriction on the press and violated the right to freedom of expression guaranteed by Article 10. Following the judgment in the *Sunday Times* case, the Government drafted the *Contempt of Court Bill*, which became the *Contempt of Court Act 1981*. In a case on wire-tapping, the *Malone* case,³⁷ the Court found that the domestic law was lacking in the sufficient clarity required to give the individual adequate protection against

³²R.L. Borthwick, “What Has Happened to the Sovereignty of Parliament” in Laura Brace and John Hoffman, eds., *Reclaiming Sovereignty* (London: Pinter, 1997) at 37.

³³See Farran, *supra* note 26 at 387-388.

³⁴Series A, No. 18.

³⁵Gearty, *supra* note 30 at 90-91.

³⁶Series A, No. 30.

³⁷Series A, No. 82.

arbitrary interference. In response to this judgment, the United Kingdom enacted the *Interception of Communications Act 1985*.

One of the best known decisions internationally is *Ireland v. The United Kingdom*,³⁸ which is the only interstate application that has reached the European Court. The Court found that methods of interrogation used against suspected terrorist detainees constituted inhuman and degrading treatment in breach of Article 3 of the Convention. Even before the case reached the Court, in the course of the Commission's consideration of the case the UK government provided an undertaking not to permit or condone the use of the techniques complained of in the future.³⁹ In *Young, James and Webster*,⁴⁰ the Court found a violation of the right to freedom guaranteed by Article 11, where legislation sanctioned dismissal from employment for refusal to join a trade union under a "closed shop" agreement between the employer and the unions. Amendments of the closed shop regulations by the *Employment Act 1980* and the *Employment Act 1982* were enacted following the *Young* decision. Corporal punishment in state schools was abolished under the *Education (No. 2) Act 1986*, following the *Campbell and Cosans* case⁴¹ in which the Court found the applicants to be victims of violations of Article 2 of Protocol No. 1. In the *Dudgeon* case,⁴² the law on male homosexuality in Northern Ireland was found to violate Article 8 of the Convention guaranteeing the right to a private life. As a consequence of the judgment the *Homosexual Offences (NI) Order 1982* was passed,

³⁸Series A, No. 25.

³⁹Anne F. Bayefsky, "The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada" (1981) 13 Ottawa L. Rev. 507 at 516.

⁴⁰Series A, No. 44.

⁴¹Series A, No. 48.

⁴²Series A, No. 45.

bringing the law on male homosexuality in Northern Ireland into line with the law in the rest of the UK.

In other cases, however, judgments of the Court have prompted somewhat different responses by the UK Government. One response was to amend legislation to take away previously accorded rights in order to avoid findings of discrimination. In the case of *Abdulaziz, Cabales and Balkandali*,⁴³ the Court found a breach of Article 8 and Article 14 in immigration rules which allowed the wives of immigrants to join them in Britain but denied the same right to the husbands of women immigrants. Following the judgment, rather than extend the right to immigrants' husbands the government amended the immigration rules to remove from women the right they had previously been accorded.⁴⁴ Another response by the Government was to issue a notice of derogation from its Convention obligations. The *Brogan* case⁴⁵ held that a law which allowed a person to be held for questioning for up to seven days on the authority of the Secretary of State, was a breach of Article 5 because the individual was not brought before a court or other officer authorised by law to exercise judicial power. Following this judgment the British Government entered, under Article 15 of the Convention, a derogation from the right of liberty extending to this form of detention, on the ground that the power was essential to security forces, that is, it was warranted by the public emergency threatening the life of the nation.⁴⁶ In a subsequent case (*Brannigan & McBride*)⁴⁷ this derogation

⁴³Series A, No. 94.

⁴⁴Gearty, *supra* note 30 at 94.

⁴⁵Series A, No.145B.

⁴⁶Dickson, *supra* note 13 at 221; Bradley, *supra* note 28 at 243.

⁴⁷Series A, No. 258-B.

was upheld by the Court as being in conformity with Article 15.⁴⁸

On the whole, the UK Government has, in response to the Court's rulings, generally fulfilled its treaty obligations. At the same time, however, the European Court's judgments in respect of the United Kingdom have been the subject of continuing criticism within the UK from the time of the Court's first intervention in UK domestic law in the *Golder* case in 1975.⁴⁹ In 1979, one critic had this to say about the *Sunday Times* case:

[I]t is probably no exaggeration to say that the gravest blow to the fabric of English law that has ever occurred has been dealt by the majority of eleven judges coming from Cyprus, Denmark, Eire, France, Germany, Greece, Italy, Portugal, Spain, Sweden and Turkey.⁵⁰

In an article published the previous year, the same critic of the Court made the following comment, which has been echoed many times since in the continuing debate concerning the enactment of a Bill of Rights and incorporation of the European Convention into domestic law:

[T]he English lawyer will have to ask himself whether it would not be sounder policy to entrust judicial review in the light of a Bill of Rights to a tribunal imbued with the spirit and history of English fundamental law rather than to a tribunal that is predominantly foreign in nationality, training and standards, that includes judges from nineteen countries...and that displays little inclination to seek guidance from comparative material or, in particular, from the wealth of American learning and its English ideological base.⁵¹

It appears that in some ways such attitudes have changed little in the last twenty years.

⁴⁸The Court held that the Government had not exceeded its margin of appreciation in deciding against judicial control. This derogation is still in effect. See *Human Rights Act 1998*, section 14 and Part 1 of Schedule 3.

⁴⁹Gearty, *supra* note 30 at 68 and 102.

⁵⁰(1979) 95 L.Q. Rev. 348, referred to in Gearty, *supra* note 30 at 68.

⁵¹(1978) 94 L.Q. Rev. 512 at 530, referred to in Gearty, *supra* note 30 at 68.

The uneasy place the European Convention has had in the domestic law of the United Kingdom; how the UK courts have treated the Convention

While the record of executive and legislative responses to judgments of the European Court of Human Rights has been relatively positive, the manner in which the jurisprudence in this area has developed in the courts of the United Kingdom is a different matter. The courts have been slow to reflect in their judgments the international human rights developments that have occurred within the European human rights system. This is due in large part to the doctrine of Parliamentary supremacy, the lack of incorporation of the *European Convention on Human Rights* into the domestic law of the United Kingdom and the absence of a domestic bill of rights.⁵²

In the United Kingdom, as in Canada, the powers of negotiation and ratification of treaties or Conventions are exercisable by the Crown by virtue of the Royal Prerogative. These powers are usually exercised by means of executive acts of Ministers of the Crown.⁵³ There was no Parliamentary approval sought or required for ratification of the European Convention on Human Rights, and no consultation or debate in Parliament ever took place. This was also the case with respect to the UK government's ratification of the International Covenant on Civil and Political Rights in 1976 and with respect to Protocol 11 to the European Convention.⁵⁴

In accordance with the doctrine of Parliamentary supremacy, ratification of a Convention

⁵²The courts' approach to these matters in the years to come will no doubt be significantly different, due to the enactment in the UK of the *Human Rights Act 1998*.

⁵³Dickson, *supra* note 13 at 95. See Chapter 2 for a discussion of similar principles in Canadian law.

⁵⁴Professor Robert Blackburn, "Current Topic: A Human Rights Committee for the U.K. Parliament - The Options" (1998) 5 E.H.R.L.R. 534 at 540. According to Professor Blackburn, there is now "widespread agreement that Parliament should be involved in the process of human rights treaty-making and amendment." But see Hunt, *supra* note 9 at 23, where he points out that ratification of a treaty does not proceed until the text of the treaty has been laid before Parliament for 21 days during which time there is an opportunity, in theory, to challenge the terms of the treaty.

cannot alter the substance of English law.⁵⁵ If a treaty is to change English law, and to give rise to rights which individuals can enforce in domestic courts, it must be incorporated into the domestic law by legislation.⁵⁶

[T]he stipulations of a treaty duly ratified do not ... by virtue of the

⁵⁵It has been pointed out that parliamentary supremacy has been greatly diminished by Britain's membership in the European Union. The role of the European Court of Justice has "had a major impact on Parliament's ability to decide what laws apply within the UK": Borthwick, *supra* note 32 at 41. And see Vaughan Lowe, "Can the European Community Bind the Member States on Questions of Customary International Law?" in Koskeniemi, ed., *supra* note 2 at 162: "As is well known, one of the most fundamental principles of the Community legal order is that it is considered to be based upon a pooling of sovereignty, or at least pooling of governmental authority. (Fn: At least, well known everywhere in the Community except the United Kingdom, where Parliament and the media seem to have been surprised to discover this, after twenty years in the Community." See also Lawrence Collins, *European Community Law in the United Kingdom*, 4th ed. (London: Butterworths, 1990) at 42: "Whether the United Kingdom courts will come to accept, as the courts of the other member states have come to accept, the full implications of the supremacy of Community law remains open. They have certainly not yet accepted them, and the indications are that the orthodox view of Parliamentary supremacy will prevail for some time to come."

The importance attached to Parliamentary sovereignty in the UK is also evident in the recently enacted *Human Rights Act 1998*. Under that legislation a court, if satisfied that a provision of domestic legislation is incompatible with a right under the European Convention, may make a declaration of that incompatibility; however, unlike the Canadian model, such a declaration does not affect the validity, continuing operation or enforcement of the provision in respect of which the declaration is given. The UK considered, but did not adopt, the Canadian *Charter of Rights and Freedoms* model. In the White Paper *Rights Brought Home* the Government stated: "The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty... To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament." There are those who say, however, that the *Human Rights Act* has resulted in the transfer of a good deal of power from Parliament to the courts. See, e.g., K.D. Ewing. "The Human Rights Act and Parliamentary Democracy" (1999) 62 Mod. L. Rev. 79 at 92: "...we should be careful about distinguishing form from substance, principle from practice. As a matter of constitutional legality, Parliament may well be sovereign, but as a matter of constitutional practice it has transferred significant power to the judiciary." Mr. Ewing goes on to say that despite conferring a significant political power on the courts, the legislation has left it open for Parliament to "assert its political and legal authority over the courts", thus preserving Parliamentary sovereignty "both in principle and in practice". He muses, however, that "[i]t now remains to be seen for how long a wounded Act of Parliament will be able to survive a declaration of incompatibility to which the government and Parliament refuse to respond." (at 99).

⁵⁶Dickson, *supra* note 13 at 95.

treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration in law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.⁵⁷

Parliament has now taken action to alter the domestic law in relation to its general obligations under the European Convention. The *Human Rights Act 1998* was enacted to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights".⁵⁸ The Act received Royal Assent on November 9, 1998, but a substantial portion of the Act is not yet in force.⁵⁹ The Act provides that so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights (section 3); that it is unlawful for a public authority to act in a way which is incompatible with a Convention right (section 6); and that a person who is a victim of an unlawful act may bring legal proceedings against the authority and

⁵⁷*A-G Canada v. A-G Ontario* [1937] A.C. 326 at 347-8, per Lord Atkin. See Chapter 2 for a discussion of the applicability of this principle in Canada.

⁵⁸Enacted November 9, 1998. Recall that the UK ratified the European Convention in March 1951. This is an apt illustration of the proposition, discussed in Chapter 1, that change in a world order system proceeds slowly and incrementally.

⁵⁹The Act provides, in section 22, that sections 18, 20, 21(5) and 22 come into force on the passing of the Act, and that the other provisions of the Act come into force on such day as the Secretary of State may by order appoint. By Statutory Instrument 1998 No. 2882 (C. 71) ("The Human Rights Act 1998 (Commencement) Order 1998"), section 19 of the Act came into force on November 24, 1998. Section 19 requires a Minister of the Crown in charge of a Bill, before Second Reading, to make a statement regarding the compatibility of the Bill with the Convention rights. The remaining sections will come into force on October 2, 2000: Correspondence to the writer from Diana Symonds, Home Office, Human Rights Unit, London, August 9, 1999.

may rely on Convention rights in those proceedings (section 7). Prior to this legislation, an individual could not directly complain of an infringement of the Convention before British courts even though the UK was bound by the terms of the Convention at the international level.⁶⁰

While it is reasonable to assume that the treatment of the Convention by the UK Courts is about to change dramatically, it is instructive, in order to understand the impact of the UK's participation in the regional human rights regime on the domestic legal process, to examine the history of the UK courts' approach to the Convention in the absence of incorporation.⁶¹ For more than twenty years following the entry into force of the Convention, it had no domestic impact. In the mid-1970's, however, awareness of the potential importance of the Convention began to grow, and international human rights arguments appeared with more frequency in arguments before the courts.⁶² In 1974, when the *Golder* case was before the European Court of Human Rights and the *Sunday Times* and *Ireland v. UK* cases were before the Commission, Sir Leslie Scarman, delivering the Hamlyn Lectures "identified the international human rights movement as one of the principal

⁶⁰It should be noted that although the Convention requires each state to secure the rights and freedoms set out in the Convention to everyone within its jurisdiction, and to provide an effective remedy before a national authority, the European Court of Human Rights has found that non-incorporation of the Convention into domestic law does not constitute a violation of the Convention. States are free to choose the manner in which they will implement their international obligations. See Dickson, *supra* note 13 at 96; and see Chapter 1 for a discussion of the principle of "subsidiarity".

⁶¹For a thorough historical analysis of the evolution of the use by UK courts of international human rights law, see Hunt, *supra* note 9. Hunt divides the development of the case law into three phases beginning in the 1970's, a brief Phase I in which the courts assumed that they should interpret domestic law so as to be in conformity with international human rights law; Phase II as a "period of judicial schizophrenia" in which sovereignty and dualism reasserted themselves in an effort to "shore up domestic administrative law against invasion by the international law of human rights"; and Phase III which continues to the present time, in which the courts have gradually accepted "a full interpretive obligation in relation to international human rights standards." (See, particularly, 130-31).

⁶²Hunt, *supra* note 9 at 131- 133.

challenges from overseas which then confronted England's common law system, and to which in his view that system was going to have to adapt if it was to survive."⁶³ In recent years, English judges have demonstrated an increased willingness to entertain arguments based on the Convention and to refer to it in reaching judgments, and some openness to taking into account jurisprudence of the European Court of Human Rights.⁶⁴ However, while references to the Convention in the case law have increased, the way in which the Convention has been considered in the cases reflects a judicial conservatism and a reluctance to engage in what the judges see as "illicit judicial activism".⁶⁵

In English law it is a generally recognized principle of construction that Parliament does not intend to legislate contrary to the United Kingdom's international obligations. The Convention, as an international treaty obligation, is applicable in the interpretation of domestic statute law, and where the law is uncertain can be used to resolve the ambiguity in favour of compatibility with the international obligation.⁶⁶ However, English courts have held that if legislation is unambiguous and does conflict with an international obligation, the Convention cannot be used to override the legislation.⁶⁷ It has, of course, been the English judge who has decided whether or not the English

⁶³*Ibid.*

⁶⁴Dickson, *supra* note 13 at 96. In his 1998 text, Murray Hunt stated that of more than 450 cases in which English courts had made reference to unincorporated international human rights law since ratification of the Convention, well over half had been in the previous five years. See Hunt, *supra* note 9 at 127.

⁶⁵Gearty, *supra* note 30 at 78.

⁶⁶One writer has referred to this as an example of the "pragmatic approach of municipal courts in developing principles of coordination in circumstances in which the incorporation, *simpliciter*, of international law into municipal law does not take place. See Bethlehem, *supra* note 2 at 172.

⁶⁷Zander, *supra* note 28 at 442. See, e.g., *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116: "If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligation, for the sovereign power of the Queen in Parliament extends to breaking treaties". This principle, which has been described as "standard dualist dogma" is based

legislation is clear and unambiguous, and therefore whether the European Convention is applicable to its interpretation.⁶⁸ The courts have also declined to create new law in conformity with the Convention where there is an absence of English legislation, holding that these are matters for Parliament and not for the courts.⁶⁹ Where legislation has been enacted following a finding of a Convention violation by the European Court of Human Rights, the courts have been more willing to presume that Parliament intended the legislation to conform with the Convention and the jurisprudence of the European Court.⁷⁰

Courts have shown a greater willingness to consider the provisions of the Convention and the jurisprudence of the European Court in shaping the development of some areas of the common law, for example, with respect to freedom of expression and Article 10 of the Convention.⁷¹ They have shown less willingness to have regard to the Convention in interpreting the common law in other

on Dicey's concept of Parliamentary sovereignty. "On this view, if domestic legislation clearly conflicts with a treaty obligation which has not been statutorily incorporated into domestic law, the courts are constitutionally bound to give effect to the domestic provision, even though this involves a breach of the state's obligations in international law. Courts cannot hold the statutory provision void, disapply it, ignore it or otherwise render it of no effect on the ground that it contravenes a treaty to which the UK is a signatory or otherwise breaches general principles of international law": Hunt, *supra* note 9 at 7. Hunt points out that in *Salomon*, however, Diplock L.J. qualified this principle by holding that where the terms of the legislation were ambiguous and there was cogent extrinsic evidence that the legislation was intended to fulfil a convention obligation, the convention could be used as an aid to interpreting the legislation. "The case was soon being cited as authority for the legitimacy of judicial resort to unincorporated conventions, notwithstanding the dualist stance to which the courts were theoretically committed." (at 15).

⁶⁸G. Ress, "The Effects of Judgments and Decisions in Domestic Law" in Macdonald, Matscher and Petzold, eds., *supra* note 6 at 816. One writer has recommended that the ambiguity precondition for reference to an unincorporated treaty be abandoned, and suggests that the courts, instead of first construing the domestic legislation in isolation to determine whether it is ambiguous, should be asking whether the domestic legislation can be read in a way which avoids a conflict with international law: See Hunt, *ibid.* at 20 and 39.

⁶⁹Ress, *ibid.* at 817.

⁷⁰Dickson, *supra* note 13 at 98.

⁷¹Dickson, *supra* note 13 at 99-102.

areas such as privacy.⁷² Perhaps the greatest resistance to use of the Convention which English courts have demonstrated over the years is with respect to the Convention becoming a ground of challenge to the exercise of administrative discretion.⁷³ Finally, it should be mentioned that the European Convention has in some instances been made available to the UK courts indirectly as part of European Community law.⁷⁴

Some fifty years after ratification of the *European Convention on Human Rights* by the United Kingdom, the Convention has continued to have an uneasy place in the United Kingdom's domestic law. It has been said that "uncertainty...continues to obscure the status of the Convention in the law of the United Kingdom".⁷⁵ It was this uncertainty, among other factors, which led to repeated calls for the *European Convention on Human Rights* to be incorporated in some manner into UK domestic law. The *Human Rights Act 1998* now purports to accomplish that. This "major constitutional Act" marks the beginning of a new era both in the relationship of the United Kingdom

⁷²Rosalyn Higgins, "The Role of Domestic Courts in the Enforcement of Human Rights: The United Kingdom" in Benedetto Conforti and Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff Publishers, 1997) at 49-51.

⁷³Hunt, *supra* note 9 at 151ff.

⁷⁴See *Halsbury's Laws of England*, 4th, Reissue Vol. 8(2), para. 104, note 22. It should be noted that the European Court of Justice has not held that the European Convention on Human Rights is part of Community law, but the Court has observed that the principles on which the Convention is based must be taken into consideration in Community law: See Collins, *supra* note 55 at 11. For a discussion of the relationship between Community law and United Kingdom law, see Collins at 15 ff. Also, see Hunt, *supra* note 9 at 262 ff. for a discussion of how "developments in the case law of the European Court of Justice and in the attitude of domestic courts to Community law have combined to achieve what is in effect an indirect incorporation of the ECHR and other international human rights instruments into domestic law in those ever-widening subject-matter areas which are within Community competence".

⁷⁵Bradley, *supra* note 28 at 248, 250.

and the European Convention and in the United Kingdom's legal and parliamentary systems.⁷⁶ It will be fascinating to follow developments as the courts in the UK grapple with issues arising in proceedings based directly on Convention rights, as well as the effects on the relationship between Parliament and the judiciary and on cases taken by individuals to the European Court of Human Rights in Strasbourg.⁷⁷

The Human Rights Act: "Bringing Rights Home"

Over the past twenty to thirty years, there has been much legal-political discussion in the United Kingdom on the subject of incorporation.⁷⁸ Up until the early 1990's both political parties in the UK, while accepting Britain's being a party to the Convention, and renewing the rights of individual petition, opposed incorporation of the Convention.⁷⁹ The current Labour party, committed to the policy of incorporating the Convention, on October 23, 1997, introduced into the House of Lords a Human Rights Bill entitled "An Act to give further effect to rights and freedoms guaranteed

⁷⁶Blackburn, *supra* note 54 at 537-38.

⁷⁷ See Blackburn, *ibid.* at 537: "The significance of the Human Rights Act is very great indeed and its effects will usher in what amounts to a new era in our legal and parliamentary systems. The individual rights and freedoms of the ECHR now represent an official code and moral yardstick against which to test not only the principles of the common law and parliamentary statutes but the legitimacy of government in general." And see Jane Fortin, "Rights Brought Home for Children" (1999) 62 Mod. L. Rev. 350: "...Once the Human Rights Act 1998 is fully implemented, matters will change quite radically...the provision which will, in truth, have a 'seismic impact' [quoting Gerald Howarth MP, HC Deb, February 16, 1998] on the law here is the provision making it unlawful for a 'public authority' to act in a way which is incompatible with Convention rights. This means that all arms of government will be forced to consider the human rights of all those affected by their day to day operations." (at 351).

⁷⁸Furmston et al., *supra* note 9 at 248 ff.; Marston, *supra* note 4 at 796.

⁷⁹Zander, *supra* note 28 at 445.

under the European Convention on Human Rights...”⁸⁰ The White Paper accompanying the Bill noted that the UK was bound in international law to observe the European Convention, but that public authorities in the UK were not required as a matter of domestic law to comply with the Convention and that generally speaking there was no means of having the application of Convention rights tested in the UK courts. The Government stated that “these arrangements were no longer adequate...and that the time had come to ‘bring rights home’”. Following extensive debate in Parliament, the proposed Human Rights Bill has now been enacted in the form of the *Human Rights Act*. As discussed above, the Act makes it unlawful for public authorities to act in a way which is incompatible with Convention rights. Although the courts are not able to set aside domestic legislation, they are required to interpret legislation as far as possible in accordance with the Convention. If the courts decide that it is not possible to interpret domestic legislation in a way that is compatible with the Convention, the higher courts can issue formal declarations that legislative provisions are incompatible with the Convention rights. While such declarations will not have the effect of changing the law, a new legislative procedure for enacting “remedial orders” is established for the purpose of amending domestic legislation in response either to a declaration of incompatibility by a higher court or to a finding of a violation of the Convention in Strasbourg, in order to bring it into conformity with the Convention. Section 10 provides that if a provision of legislation has been declared to be incompatible with a Convention right, or if it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of the section in proceedings against the UK, a provision of legislation is incompatible with an obligation of the UK arising from the Convention, and if a Minister of the

⁸⁰Internet, <http://www.parliament.the-stationery-office.co.uk/pa/ld/199798/ldbills/038/97038--a.htm>.

Crown considers that there are compelling reasons for proceeding, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.⁸¹

Parliamentary debate on the Human Rights Bill took place over a period of months in 1997 and 1998. In the course of the debates that took place in February, 1998, the following arguments were made in favour of incorporating the European Convention into domestic law: (i) the Convention has an important symbolic significance, and incorporation of the Convention will ensure that basic constitutional rights will become positive rights; (ii) it is undesirable that individuals who want to pursue rights under the Convention must go to Strasbourg at great cost and with inordinate delays; and (iii) the UK courts, once the Convention is incorporated, will be better able to contribute to jurisprudence on human rights.⁸² The comments made concerning the third of these points reflect the continuing misgivings regarding subjecting domestic laws and procedures to scrutiny by foreign judges, and the desire not only to "bring rights home" but to bring the adjudication of rights home into the hands of domestic tribunals. Remarks concerning the desired role of the UK judiciary in shaping human rights jurisprudence were repeated by several Members of Parliament, alongside references to the number of cases in which the European Court had found that there had been violations of Convention rights by the United Kingdom. For example, Mr. Douglas Hogg (Sleaford

⁸¹It has been pointed out that the fast-track legislative procedure should be regarded as an exception to the normal process of presenting a Bill to Parliament, and should be resorted to only "when speedy action is necessary to redress some individual or minority grievance of a serious nature": See Blackburn, *supra* note 54 at 550. Sir William Wade describes a remedial order as "an exceptionally drastic form of Henry VIII clause"; he points, for example, to the extraordinary powers to include 'such incidental, supplemental, consequential and transitional provisions' as may be thought appropriate by the minister: Wade, *supra* note 11 at 530.

⁸²See, e.g., arguments advanced by Mr. Ross Cranston (Dudley, North), House of Commons Debates for 16 Feb 1998 (pt 26), <http://www.parliament.the-stationery-offi...98/cmhansrd/cm980216/debtext/80216-26.htm>.

and North Hykeham) stated as follows:

I also accept the argument that if we have incorporation, it is likely that the presence of United Kingdom judges in the first instance will have a beneficial effect on our collective national interest because the process will help to inform the Strasbourg court of some of our judicial principles and constitutional practices which it would wish to take fully into account...My hope is that by using the United Kingdom courts as the courts of first instance regarding the convention we will see a greater caution on the part of the Strasbourg Court to intervene in matters that are peculiarly the province of Parliament...The process of gathering evidence is more difficult for the Strasbourg court, and the processes are more convoluted, than would be the case in United Kingdom courts. Furthermore, the UK judiciary can take judicial notice of a range of matters which will be unknown to the Strasbourg judiciary. I conclude that incorporation is, in principle, the least undesirable of the options before the House.

Member of Parliament Mr. Ross Cranston (Dudley, North) commented as follows:

The third argument [for incorporating the Convention] is that the United Kingdom courts, once the convention is incorporated, will be able to contribute to jurisprudence on human rights. Historically...they have already done that through the development of the common law. In recent times they have referred to the convention in decision making. Under the Bill, however, they will be able to proceed directly...The Bill correctly provides that our courts will not be bound by European Court jurisprudence. In my view, some of the decisions of the European Court are based on faulty reasoning. In some instances, I think that it is plain wrong. The Saunders decision falls into that category. That decision did not appreciate the problems of policing corporate misbehaviour. Nor did it appreciate properly the history of insolvency and company law in this country. If our courts had handled that case under the convention, I think that a different decision would have been reached. If our courts can consider these matters, we can contribute to the development of doctrine...

And finally, Mr. Gareth Thomas (Clwyd, West), speaking in support of incorporation, stated as follows:

[T]he incorporation of the convention and its interpretation by British

judges will import an important element of British jurisprudence. In a very real sense, that is a devolution of power from Strasbourg to British courts. One can expect that British judges, versed in the sensitive relationship between Parliament, the Executive and the judiciary, will produce decisions that are inherently more sustainable and plausible.

It should be noted that two years earlier Tony Blair (now Prime Minister), in committing himself to the policy of incorporation, commented as follows:

Some have said that this system takes power away from Parliament and places it in the hands of judges. In reality, since we are already signatories to the Convention, it means allowing British judges rather than European judges to pass judgment.⁸³

It is evident from these comments that the United Kingdom's initial reluctance to accede to an international instrument which would entrust the development of human rights jurisprudence to foreign judges is still present, reinforced by some of the decisions taken by those foreign judges, which are adverse to the United Kingdom.⁸⁴ Incorporating the Convention into domestic law does not, of course, eliminate international scrutiny. Under the right of individual petition resort to the European Court of Human Rights will still be available, subject (as it is now) to first exhausting domestic remedies.⁸⁵ During the second reading debate in the House of Lords in November 1997,

⁸³John Smith Memorial Lecture, February 7, 1996, referred to in Zander, *supra* note 28 at 447.

⁸⁴"...adverse judgments from the court add to the sense of resentment felt in some quarters about the steady encroachment into British life of European rulings. The fact that the rulings are not technically binding matters little if they are likely to be adhered to. In that respect such judgments merely confirm the suspicions of those who see a growing European threat to the freedom of manoeuvre of the British parliament." Borthwick, *supra* note 32 at 37-38.

⁸⁵Some writers have expressed the view that there will likely be less occasion for applications to the European Court of Human Rights after the courts in the UK "assume a parallel jurisdiction". See Sir Gavin Lightman and John Bowers, Q.C., "Incorporation of the ECHR and its Impact on Employment Law" (1998) 5 E.H.R.L.R. 560 at 565-66. A domestic process which allows for judicial declarations of invalidity, might at least give the Government greater opportunities to remedy matters internally and thus to reduce the number of cases going to Strasbourg: "The Government and Parliament would know that unless something were done

Lord Waddington, a former Conservative Home Secretary, commented as follows:

What makes this whole exercise particularly unsatisfactory is that while, through incorporation, we will be running...risks, we will not avoid continuing to be made fools of by the judges in Strasbourg. If British judges are robust and reject large numbers of complaints, the litigants, or a large number of them, will go to Strasbourg anyhow, and we could actually finish up with more decisions against us at Strasbourg than we get now. That of course will mean us finishing up with the worst of all worlds: first, erosion of the sovereignty of Parliament, with the judges rather than the elected representatives of the people making laws to reflect changing social attitudes; and, secondly, foreign judges, brought up in an entirely different tradition, making embarrassingly inappropriate decisions in Strasbourg.

But those reflecting on the impact that participation in the European human rights regime has had on the UK and the likelihood that the UK will not now withdraw from that participation, no doubt have concluded that the best way to influence the development of international human rights jurisprudence which inevitably has a profound effect on the UK is to regain some control over the process by having domestic legal institutions actively involved in shaping that jurisprudence.

In a lecture to the Common Law Bar Association, the Right Honourable Lord Hoffmann discussed his concerns that in some of its decisions the European Court of Human Rights had given an interpretation to the Convention which "it is inconceivable that any domestic court in this country would have adopted", and suggested that with the coming into force of the *Human Rights Act* perhaps it would not be necessary for the UK to continue to bring its domestic laws into line with the Convention as interpreted by the European Court. He expressed the view that the UK has "its own

about the matter very speedily, the applicant would have an unanswerable case in Strasbourg." David Pannick Q.C., "How to judge a human rights Bill" *The Times* (12 August 1997) 33. Cf. Wade, *supra* note 11 at 523: "The White Paper...does not mention the residual Strasbourg jurisdiction, but it will always be there. In fact, to judge from the statistics published by the Commission in Strasbourg, countries which long ago incorporated the Convention into their law still send about as many cases to the Strasbourg court as does Britain".

culturally-determined sense of what is fair and unfair, and...it would be wrong to submerge this under a pan-European jurisprudence of human rights”, and concluded his speech as follows:

I realise that in the present political climate, it would be very difficult for the government to withdraw from the Strasbourg court. When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity. There is still a great need throughout the world for the enforcement of such minimal human rights. But the jurisprudence of the Strasbourg court does create a dilemma because it seems to me to have passed far beyond its original modest ambitions and is seeking to impose a Voltairean uniformity of values upon all the member States. This I hope we shall resist. The White Paper which introduced the Human Rights Bill was called *Rights Brought Home*. Now that they have been brought home, I hope that we shall be able to keep them here.⁸⁶

Future developments are unlikely to unfold along such uncomplicated lines, but at least the UK courts will now see their way clear to participating meaningfully in the dialogue between international human rights bodies and national courts on the development of international human rights norms and on the limits of national discretionary margins.

Lessons for Canada

Canada is not at present a full participant in an individual complaint scheme under a regional human rights regime but, as discussed in Chapters 2 and 3, is a participant in the global United Nations human rights arrangements allowing two treaty bodies to hear individual complaints in respect of Canada and to offer their “views” on alleged Convention violations. Canada may in the future also

⁸⁶A lecture delivered to the Common Law Bar Association on 25 November 1998, “Human Rights and the House of Lords”, reproduced in (1999) 62 Mod. L. Rev. 159.

choose to participate actively in the Inter-American human rights system or some other human rights system that might evolve.⁸⁷

Canada's future decisions regarding its participation in the arena of international human rights should take into account the experience which the United Kingdom has undergone as a result of its participation in the European human rights regime. The similarities are evident. In the United Kingdom, as in Canada, the powers of negotiating and ratifying treaties or conventions resides in the executive. No Parliamentary approval is required for entering into an international treaty. Once a treaty is entered into, it does not automatically become part of the domestic law unless it is incorporated by domestic legislation. When the United Kingdom ratified the European Convention, no amending legislation was adopted to implement it and no reservations were entered. The prevailing view appears to have been that the Convention was a statement of general principles and that there was little or no discrepancy between the English common law and the provisions of the

⁸⁷Canada has not yet ratified the *American Convention on Human Rights*. "[A]lthough the intention was that all OAS member states would ratify the Convention, they have not yet done so. Ten are missing, namely, the United States, Canada, Cuba and a number of English speaking states from the Caribbean and the surrounding areas." See David Harris, "Regional Protection of Human Rights: The Inter-American Achievement" in David J. Harris and Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) at 6. However, as a member of the Organization of American States, which Canada joined in 1990, Canada accepts the jurisdiction of the Inter-American Commission on Human Rights. The effect of this is that people can make individual complaints on the basis of the *American Declaration of the Rights and Duties of Man*.: Correspondence to the writer, dated March 3, 1999, from Jean Fredette, Deputy Director, United Nations, Human Rights and Humanitarian Law Section, Department of Foreign Affairs and International Trade. William Schabas notes that there has been a handful of petitions filed with the Inter-American Commission alleging breaches by Canada of the *Declaration*; and there is no suggestion that Canada has attempted to challenge the competence of the Commission to receive petitions originating in Canada: Schabas, *supra* note 1 at 95-96. And see Christina Cerna, "The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications" in Harris and Livingstone, eds., *op cit.* at 68-69: "The Commission's extra-Convention exercise of jurisdiction over non-Convention parties has not been challenged by OAS member States, since it ante-dates the drafting of the American Convention. Most significantly, the Commission has continued to examine without objection petitions alleging violations of the American Declaration by non-Convention parties..."

Convention. This approach is reminiscent of Canada's apparent attitude toward assuming international human rights obligations. Participation in the individual petition procedure has brought results surprising to the United Kingdom. It has been found in breach of the Convention in numerous cases. In many of those cases it has obediently responded to findings of the international tribunal by amending domestic legislation and changing administrative practices, as it does not wish to be seen as flouting the judgment of the Court. The impact of the Convention on the UK's domestic judicial process has been slow to emerge. For more than twenty years following the entry into force of the Convention, it had virtually no domestic impact. But as awareness of the Convention grew, international human rights arguments began to appear more frequently before the courts, and the government increasingly faced challenges in the domestic courts based on the international human rights obligations which it had assumed. The UK courts have been slow to reflect the developments that have taken place in the European human rights system, but in recent years have demonstrated an increased willingness to entertain arguments based on the Convention and to take into account the provisions of the Convention and the jurisprudence of the European Court of Human Rights in resolving cases which raise issues as to the compatibility of domestic practices with international obligations. Though the focus in cases before Canadian courts has been different, primarily due to the *Charter of Rights*, there has been a comparable pattern in Canada of a growing awareness of international human rights law which is reflected in arguments before domestic courts and an increasing willingness of the courts to have regard to international human rights treaty provisions despite the lack of implementation of those provisions by domestic legislation.

A close inspection of the profound impact that the United Kingdom's participation in the European human rights regime has had on the UK's domestic legal process will improve Canada's

ability to assess the nature and characteristics of any international or regional regime to which it might become a party and to make informed decisions regarding the extent to which it is willing to commit itself to participation. It will also be worthwhile for Canada to consider, from the UK's experience, the potential consequences that flow from national courts failing to have sufficient regard to international human rights instruments and decisions in the development of their own human rights jurisprudence. Regard to these matters might assist in achieving two goals at once: the development of a more sophisticated body of domestic jurisprudence in the area of human rights and the retention of a greater degree of control over the legal process with respect to matters which are perhaps better dealt with in the domestic domain.

CHAPTER 5

CONCLUSIONS: TOWARD A MORE RATIONAL AND EFFECTIVE APPROACH TO CANADA'S ASSUMPTION AND IMPLEMENTATION OF ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Over the past half-century a great number of international human rights instruments have come into force, and an elaborate system of bodies has been created both within regional human rights regimes and in the global or universal United Nations-sponsored arrangements, to supervise the observance of the obligations proclaimed in these instruments. By their acceptance of international conventions on human rights, many states have consented to international scrutiny of their treatment of individuals. States no longer view themselves as being able to do what they please within their borders without limitations. "The modern state no longer finds itself a free actor in the international sphere, nor even unconstrained domestically. Instead, its freedom of action is limited by a vast array of international legal commitments which operate as very real constraints on the policy choices open to a national government."¹

Canada, having signed on to numerous human rights instruments and having acceded to individual petition procedures, now finds itself grappling with these constraints and struggling to reconcile the obligations it has assumed internationally with the desire to retain control over matters which it views as being within the domestic domain. The domestic impact of Canada's international posture on human rights is becoming increasingly evident, as public awareness of Canada's obligations grows. It is essential that the Government of Canada realize that serious issues need to be addressed and find ways to develop a more rational, effective approach to the assumption and

¹Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998) at 5 -6.

implementation of international human rights obligations.

There are four areas which require serious examination: (i) the need for informed public debate; (ii) the ratification process; (iii) the positions advanced before domestic courts; and (iv) the credibility of the international treaty body process.

Informed Public Debate

There is a pressing need for informed public debate on Canada's international human rights obligations and their domestic impact. There is little indication that the public is aware in any meaningful way about these issues or that its views are being sought. Addressing this point over a decade ago in relation to the place of human rights in Canada's foreign policy, two writers stated as follows:

Decision-making in Canadian foreign policy operates on the assumption that international relations should be left to officials: they will do what is best, quietly and behind closed doors, in support of 'national security' and the 'national interest.' The involvement of minister, prime minister, and cabinet is shrouded in secrecy. Decision-making processes themselves change constantly to reflect the priorities of elected officials and civil servants.²

The writers went on to suggest that public and parliamentary interest warranted a more systematic approach to these concerns including establishing a process by which an interested public could gain information.³ These comments are important to take into account in relation to the state's assumption of international human rights obligations which have potential consequences in the domestic forum.

²Victoria Berry and Allan McChesney, "Human Rights and Foreign Policy-Making" in Robert O. Matthews and Cranford Pratt, eds., *Human Rights in Canadian Foreign Policy* (Kingston and Montreal: McGill-Queen's University Press, 1988) at 62.

³*Ibid.* at 75-76.

Not only should the public be aware of the extent of developments in this area and the decisions that the government faces today, but in addition the government might benefit greatly from the input that informed public debate could offer. It is the responsibility of the government to ensure that decisions related to the assumption of international human rights obligations are not made behind closed doors and that a process is put into place that encourages wide public debate on these issues.

The Ratification Process

There is a need for changes to the treaty making process. Two areas in which changes should be considered are the role of Parliament in the process of human rights treaty making, and the scope of the discussions which form the basis of ratification decisions.

At present Parliament has at best a limited role in decisions that are made in relation to human rights treaties and protocols, and there is room for increasing that role without altering the fundamental relationship between the executive and Parliament. Increased Parliamentary involvement in the process of human rights treaty making and amendment has been called for recently in both the UK and Australia.⁴ Assumption of a greater role by Parliament in the treaty making process would

⁴In relation to the UK, see Professor Robert Blackburn, "Current Topic: A Human Rights Committee for the U.K. Parliament – The Options" (1998) 5 E.H.R.L.R. 534 at 540-41: "There is widespread agreement that Parliament should be involved in the process of human rights treaty-making and amendment, and any new scrutiny arrangements that emerge as a result are likely to involve a specialist committee for the purpose". With respect to Australia, there is now a Parliamentary Joint Standing Committee on Treaties. Almost all treaties are tabled in Parliament at least 15 days before the Government takes binding action. All Treaties tabled in Parliament are accompanied by a National Interest Analysis (NIA), which explains why the Government considers it appropriate to enter into legally binding obligations under that treaty. "An NIA typically includes a discussion of the economic, environmental, social and cultural effects of the treaty where relevant; the obligations imposed under the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred and whether the treaty provides for reservations, withdrawal or denunciation. NIAs are intended to facilitate public and parliamentary scrutiny of proposed treaty action...At the conclusion of its inquiries the Committee presents a report to Parliament containing advice on whether Australia should take binding action and on other relevant matters." See Parliament of Australia Web site

provide a desirable increase in scrutiny of executive decisions and would facilitate public debate. It might also eventually play some role in the development of a coherent theory regarding the relationship between international law and domestic law.⁵

The scope of discussions which form the basis of decisions concerning human rights treaties should be expanded, not only to take into consideration the views of Parliament and the public but also to include a more comprehensive examination of the potential domestic effects of international human rights commitments. In some cases, a state, when ratifying an international human rights convention, may view it merely as a general statement of principles or an aspirational declaration. In other cases, the state may think that even if there are practical consequences that flow from ratification, the convention will not affect its own laws because its laws are already in conformity with the standards set out in the instrument. The state may ratify the convention and accede to an individual complaint procedure anyway in order to set an example for other states and to add its endorsement to the promotion and protection of fundamental human rights. At present, the consultations which take place prior to ratification usually result in the conclusion that legislative changes or reservations are not necessary because existing domestic legislation and programs conform with the treaty's requirements. This indicates a rather complacent approach and a lack of

<http://www.aph.gov.au/house/committee/jsct/ppgrole.htm>. See also the recommendations of the European Commission for Democracy through Law in Constantin Economides, *The Relationship Between International Law and Domestic Law* (Strasbourg: Council of Europe Press, 1993) at 11: "a. The extensive participation of Parliament in the State's international treaty-making activity is on the face of it a positive factor which must be approved and encouraged... The even indirect involvement of the general public in the process of concluding treaties is a requirement of democracy. b It lies with each State to strike its own balance in this field - in accordance with its traditions, its needs and the principles of democracy - with regard to the apportionment of responsibilities between the executive and the legislature".

⁵Meaningful participation by Parliament in treaty making might diminish judicial concerns regarding the executive legislating indirectly through a treaty without the consent of Parliament. Cf. *A-G Canada v. A-G. Ontario* [1937] A.C. 326 at 347-48 re: an expression of Parliamentary approval does not operate as law.

vision concerning the uses to which the language of the treaty might be put and the ways in which the treaty obligations might be interpreted in the future. A more cautious approach, with a greater particularity to detail, is called for. The human rights treaty making process might benefit from a greater willingness to consider the use of reservations and understandings.⁶ Finally, deliberations on the assumption of future international human rights obligations should include a thorough examination of the experience other states have undergone as a result of participation in analogous human rights regimes.⁷

Positions Advanced Before the Courts

There are more than a few examples of the federal government taking the position before domestic courts that unimplemented human rights treaties have no direct application within Canadian law. This traditional view of the relationship between international law and domestic law is well-accepted in Canadian jurisprudence and the principle is not to be taken to mean that a court cannot look at the treaty provisions to assist in interpretation of domestic legislation. But by placing emphasis on this principle in arguments before the courts the government is seen by many to be sending the message that its statement of commitment to the international community cannot be

⁶The legitimacy of the state participating in a treaty but restricting its commitment to treaty obligations by means of entering reservations should not be dismissed. Rather than signalling a lack of serious commitment to international human rights, the use of reservations or understandings can show that the state places great importance on ensuring that it can comply with its obligations, and the practice of entering reservations might go a long way toward eliminating ambiguity with respect to how treaty obligations might be interpreted and minimizing the discrepancies between treaty requirements and preexisting domestic law.

⁷For example, Canada's consideration of active participation in the Inter-American human rights regime should include a close look at the experience of the UK vis-a-vis participation in the European human rights regime.

relied upon by individuals domestically. The government might give more serious consideration to presenting arguments which have the appearance of consistency with its international commitments and which assist the courts in reaching determinations which satisfactorily reconcile the international treaty obligations Canada has assumed with the domestic practices Canada has adopted.

The Credibility of International Treaty Bodies

Canada has committed itself to individual complaint procedures pursuant to two international human rights treaties, and it is most unlikely that Canada will opt out of those commitments. The process adopted by these bodies suffers from significant deficiencies which minimize the credibility of these bodies as decision-making institutions. These deficiencies include confidentiality rules that limit public access to proceedings, inadequate evidentiary procedures, shallow analysis of complex issues, and limited understanding of the domestic legal and political systems of states whose behaviour is being reviewed.

It is important that Canada assist these bodies in developing a more sophisticated approach to their process. Without improvement in these areas, it will be difficult to accept the pronouncements of these bodies as legitimate opinions with respect to Canada's implementation of its international human rights obligations. The credibility of these bodies is essential to the continued participation of states in the process.

The time is ripe for Canada to take stock of its international posture on human rights, and to find effective ways to resolve the tensions that exist between its commitments to carry out the international obligations it has assumed and its desire to defend laws and procedures established internally which might be perceived as being inconsistent with emerging international norms. Canada

has some important policy decisions to make. These should be made in the context of the continuing dialogue between national and international systems and with the goal of finding the appropriate balance between participating in the realization and protection of international standards of human rights, and retaining the necessary latitude to control certain matters within the domestic sphere. Canada's experience sheds some light on the broader debate concerning state sovereignty and international human rights and provides some insights into the complexities of the process of defining the limits of sovereignty and the limits of interference with sovereignty. By effectively addressing the issues raised by this debate, Canada's contribution to the evolution of rules regarding the international protection of fundamental human rights could be impressive indeed.

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APPENDIXRelevant Provisions of the *International Covenant on Civil and Political Rights**Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

...

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
...

Article 12

- ...
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...
- ...
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
...
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;...
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.

Article 15

1. ... If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
...

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to lawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
...

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties...undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

...

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order..., or of public health or morals.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have...the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

...

Article 26

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

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ADDENDUM

On May 5, 1999, the Human Rights Committee adopted views on a communication regarding the right of access to the publicly funded media facilities of Parliament. The Committee concluded that the author's exclusion from membership in the Parliamentary Press Gallery, and consequently from full access to the media facilities of Parliament, restricted the author's rights guaranteed under paragraph 2 of article 19 of the ICCPR to have access to information. (*Robert W. Gauthier v. Canada*; Communication No. 633, 1995)

Chapter 3 of this thesis should be amended as follows:

- page 82 should read: "views have been adopted only in seventeen cases";
- page 84 should include "(x) the right of access to the publicly funded media facilities of Parliament";
- page 133 should read: "there have been findings of violations in eight cases by the Human Rights Committee".

R.W.H. 05/2000