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CANADA STANDS ALONE: A COMPARATIVE ANALYSIS OF THE EXTRATERRITORIAL REACH OF STATE HUMAN RIGHTS OBLIGATIONS

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INTRODUCTION

In the spring of 2022, and for the first time since 2008, the Supreme Court of Canada will revisit the question of the extraterritorial application of the *Canadian Charter of Rights and Freedoms*.[1] The case before the court is *Cpl McGregor v The Queen*, an appeal of a decision of the Court Martial Appeals Court of Canada. The case arises from a Canadian Military Police (MP) investigation of Cpl McGregor for voyeurism and other offences committed against fellow members of the Canadian Armed Forces (CAF) while posted in Washington, DC, USA. While investigating those offences, CAF MPs travelled to Washington and searched Cpl McGregor's home in Alexandria, VA, alongside local law enforcement pursuant to a warrant obtained by Alexandria police from a local judge. The question before the Supreme Court is whether the *Charter* applies to the search of a CAF member when they are stationed abroad and whether the application of the *Charter* is permissible in this instance because an international

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

treaty explicitly granted the CAF jurisdiction to investigate offences by CAF members in the US.[2]

This case is important for many reasons, not least of which being that at any given time, thousands of CAF personnel are stationed around the world and subject to Canadian criminal law.[3] In recent years Parliament has also given other Canadian security and intelligence officials increased authority and resources to operate abroad to investigate foreign-based crime and counter foreign threats to national security and defence. Today, the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment (CSE) and the CAF all conduct operations, to some extent, outside of Canada to fulfill their mandates; and in doing so, their actions are both permitted and limited by various legislative authorities and common law powers.[4] Nevertheless, if, how, and to what extent their conduct abroad is governed by the *Charter* remains uncertain.

Presently, the leading case on the extraterritorial application of the *Charter* is the Supreme Court of Canada's 2007 decision, *R v Hape*.[5] In *Hape*, the RCMP partnered with law enforcement in the Turks and Caicos to investigate suspected money laundering by a Canadian businessperson. At trial, counsel for Mr. Hape sought to have the evidence collected abroad excluded under section 24(2) of the *Charter*. To resolve this question, the Court was called on to apply its own precedent interpreting the scope of section 32 of the

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2 *R v McGregor*, 2020 CMAC 8.

3 For a more detailed explanation on the application of the Criminal Code to CAF personnel deployed abroad, see Craig Forcese and Leah West, *National Security Law*, 2nd ed (Toronto: Irwin Law, 2021) at 699.

4 See e.g. *Communications Security Establishment Act*, SC 2019, c 13, s 76, ss 16, 18, 19 [*CSE Act*]; National Defence, "Strong, Secure and Engaged: Canada's Defence Policy" (Ottawa: 2017), online: *Government of Canada* <canada.ca/en/department-national-defence/corporate/reports-publications/canada-defence-policy.html>; RCMP, "The National Cybercrime Coordination Unit (NC3)" (24 September 2021), online: <rcmp-grc.gc.ca/en/nc3>; *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, ss 12, 12.1, 21, 21.1.

5 2007 SCC 26 [*Hape*].

Charter.[6] Section 32 is the *Charter*'s application provision. It stipulates that the *Charter* applies "to the Parliament and the government of Canada in respect of all matters within the authority of Parliament . . . [and] to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."[7]

In previous decisions, the Supreme Court held that the *Charter* would apply abroad unless its application created "an objectionable extraterritorial effect."[8] However, the 5–4 majority in *Hape* deviated from its precedent, finding instead that to comply with Canada's international legal obligations and the principle of comity, the *Charter* could not extend to the extraterritorial actions of Canadian law enforcement without the consent of the host state or "some other basis under international law."[9]

Following *Hape*'s release, leading academics criticized the dubious international legal grounds that formed the basis for the majority's conclusions,[10] specifically the finding that the "extraterritorial application of the *Charter* is impossible."[11] Despite

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6 A trio of cases previously established that the *Charter* could apply extraterritorially. See *R v Cook*, [1998] 2 SCR 597, 57 BCLR (3d) 215 [*Cook* cited to SCR]; *R v Harrer*, [1995] 3 SCR 562, 128 DLR (4th) 98; *R v Terry*, [1996] 2 SCR 207, 135 DLR (4th) 214.

7 *Supra* note 1, s 32.

8 *Cook*¸ *supra* note 5 at para 25.

9 *Hape, supra* note 5 at para 65.

10 See Amir Attaran, "Have Charter Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism", Case Comment on *R v Hape*, (2009) 87:2 Can Bar Rev 515; John H Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can YB Intl Law 55 [Currie, "Weaving a Tangled Web"]; John H Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*", Case Comment on *Canada (Justice) v Khadr*, (2008) 46 Can YB Intl Law 307; Robert J Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 631–39; Scott Fairley, "International Law Comes of Age: *Hape v. The Queen*" (2008) 87:1 Can B Rev 229; Kent Roach, "R. v. Hape Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53:1 Crim LQ 1; Gibran Van Ert, "Canadian Cases in Public International Law in 2007–8" (2009) 46 Can YB Intl Law 633.

11 *Hape*, *supra* note 5 at para 85.

the "impossibility", the majority decision left an opening, noting that deference to foreign sovereignty and comity "ends where clear violations of international law and fundamental human rights begin."[12]

Less than a year later, in *Canada (Justice) v Khadr*,[13] the Supreme Court considered the applicability of the *Charter* to officials from both CSIS and the Department of Foreign Affairs and International Trade (DFAIT) who interrogated Omar Khadr while in US custody in Guantanamo Bay. In *Khadr*, the unanimous Court relied on the findings of the US Supreme Court to conclude that the detention regime the Americans subjected the young Canadian to at the time of CSIS's interrogation was "a clear violation of fundamental human rights protected by international law."[14] The Court held that while international law and comity "might otherwise preclude application of the *Charter* to Canadian officials acting abroad," since the foreign regime violated international law, comity could not preclude the *Charter*'s application in this instance.[15] The Court went on to find that CSIS violated Mr. Khadr's section 7 rights by participating in an American process that violated Canada's international obligations.[16]

Over the past decade, lower courts have struggled to apply both *Hape* and the *Khadr* exception, especially outside of the criminal law context.[17] As Lisa Austin noted in the context of national security programs, the existing legal complexity risks undermining accountability and the rule of law.[18] The Department of Justice

12 *Ibid* at para 52.

13 2008 SCC 28 [*Khadr*].

14 *Ibid* at para 24.

15 *Ibid* at para 26.

16 See *ibid* at para 27.

17 See e.g. *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FC 336 [*Amnesty International*]; *R v Tan*, 2014 BCCA 9; *Slahi v Canada (Minister of Justice)*, 2009 FCA 259.

18 See Lisa M Austin, "Lawful Illegality: What Snowden Has Taught us about the Legal Infrastructure of the Surveillance State" in Michael Geist, ed, *Law, Privacy and Surveillance in Canada in the Post-Snowden Era*, (Ottawa: University of Ottawa Press, 2015) 103 at 110.

website validates the present uncertainty regarding the breadth of *Hape's* application, noting that "[t]he extent of the application of the *Charter* to government acts that occur outside Canada is not entirely clear as the Supreme Court has not dealt with a number of important contexts in which the Canadian government acts outside the territory of Canada."[19]

Fortunately, *McGregor* presents an opportunity for the Supreme Court to clarify when the *Charter* applies to state actors operating in foreign jurisdictions. It also offers the Court the chance to revisit its interpretation of section 32 under the principled framework for using international and comparative law in constitutional interpretation set out in its 2020 decision *Quebec (Attorney General) v. 9147–0732 Québec inc*.[20] Given this opportunity, this author seeks to contribute to the practical and scholarly debate regarding the *Charter*'s reach by, for the first time, situating the Supreme Court's findings in the context of the broader discussion of the extraterritorial reach of state human rights obligations.

To that end, this paper proceeds in two parts. Part 1 engages in a critical analysis of the Supreme Court's application of the principle of sovereignty and the doctrine of jurisdiction in *Hape* and its prior decision, *R v Cook*.[21] This examination considers and expands upon prior criticism of *Hape* by Canadian constitutional and international legal scholars, including my own work published elsewhere.[22] However, the focus of this critique differs in that it singles in on the fact that the Supreme Court used the wrong concept of jurisdiction when analyzing the territorial reach of the *Charter* and the wrong legal regime to interpret the phrase in

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19 Department of Justice, "The Canadian *Charter* of Rights and Freedoms, Section 32(1)—Application of the *Charter*" (last modified 14 April 2022), online: <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art321.html>.

20 2020 SCC 32 [*Québec inc*].

21 *Supra* note 6.

22 See Leah West, "'Within or Outside Canada': The Charter's Application to the Extraterritorial Activities of the Canadian Security Intelligence Services" [forthcoming in 2022], online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3974861>.

section 32 "within the authority of Parliament".[23] Rather than relying on the doctrine of jurisdiction to interpret section 32, this part suggests the Court should have considered the concept of jurisdiction as used and understood in international human rights law instruments, and the law on state responsibility.

Part 2 then looks to international and foreign human rights law to support the argument that the "*Charter* unless approach" adopted in *Cook*, and not the categorical denial of the *Charter*'s extraterritorial application in *Hape*, is the correct interpretation of section 32. It is well recognized that "international human rights law may be a useful interpretative tool to a Canadian court in deciding the meaning to be given to a provision in the *Charter*."[24] Human rights treaties to which Canada is a party, including the *International Covenant on Civil and Political Rights* (*ICCPR*) and regional conventions like the *European Convention on Human Rights* (*ECHR*),[25] played a significant role in the development of the *Charter*.[26] Yet, remarkably, the Supreme Court failed to consider these instruments when interpreting section 32 of the *Charter* in *Hape*.

Moreover, Canada is not the only state who relies on customary international law and international or regional human rights instruments to interpret the scope and reach of its municipal human rights obligations. (The term "municipal" is used throughout this paper to denote human rights obligations imposed on a state by national or local laws rather than international conventions or customary international law.) For this reason, Part 2 looks to not only the interpretation of the *ICCPR* and the *ECHR* by

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23 *Charter*, *supra* note 1, s 32.

24 *R v Demers*, [1999] 176 DLR (4th) 741 at para 84, 137 CCC (3d) 197 (BCSC) , leave to appeal to SCC refused. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight* cited to SCR].

25 *Convention for the Protection of Human Rights and Fundamental Freedom*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*].

26 See John Claydon, "The Use of International Human Rights Law to Interpret Canada's *Charter* of Rights and Freedoms" (1987) 2:2 Conn J Intl L 349 at 349.

international bodies, but five other relevant jurisdictions to explore if, when, and how other states' municipal human rights obligations apply extraterritorially.

The results of this exercise reveal that the extraterritorial application of municipal human rights instruments exists on a spectrum with Australia and Israel falling to the restrictive end (obligations arise in narrow circumstances), while South Africa and New Zealand fall to the permissive end (obligations travel with officials at all times). The UK's exceptional approach, heavily influenced by the European Court of Human Rights (ECtHR), falls at the centre of this spectrum. It is instructive that each of the countries examined in this paper accepts that, at least in some circumstances, their nation's human rights obligations apply to their officials when operating abroad. Canada stands alone in its position that international law prohibits the extraterritorial application of the state's municipal human rights obligations. While not determinative, these case studies offer persuasive support that the principles of sovereignty and comity do not prohibit the extraterritorial application of the *Charter*.

Finally, based on the above, this paper concludes by offering an alternative approach to interpreting section 32 that the Supreme Court could adopt when revisiting the scope of the *Charter*'s extraterritorial application in *McGregor*.

I. THE HAPE APPROACH

A. THE HISTORY

Since 2007, the Supreme Court of Canada's decision in *Hape* has been the starting point for any discussion of Canada's extraterritorial human rights obligations. As explained briefly in the introduction, in *Hape*, the RCMP partnered with law enforcement in the Turks and Caicos to investigate Mr. Hape, search his offices, and ultimately seize business records that were used as evidence against him in criminal proceedings back in Canada. At trial, the defence argued that the RCMP's search violated Mr. Hape's section 8 *Charter* right to be free from unreasonable search and seizure. To resolve whether the *Charter*

constrained the RCMP's actions in the Turks and Caicos, the trial judge, Juriansz J (as he was then), proceeded to apply the Supreme Court's precedent from *Cook*.

In *Cook*, the Court issued three sets of reasons. The disagreement between the judges was not whether the *Charter* applied to Canadian agents abroad, but rather what level of cooperation between Canadian and foreign officials is necessary to oust Canadian law as the legal authority governing the conduct of the investigation.[27] For the majority, so long as the application of the *Charter* did not impose Canadian legal standards on foreign officials or impair any legal proceedings in a foreign state, no conflict arose from extending Canada's prescriptive and adjudicative jurisdiction to the conduct of Canadian officials abroad.[28] Where no conflict exists, the majority held that requiring Canadian officials to comply with the *Charter* when they operate outside of Canada would not violate the territorial state's sovereignty and was, therefore, consistent with international law.[29] The Court's reasoning acknowledged the territorial jurisdiction of the host state but also recognized that Canada might have a lawful basis to exercise concurrent jurisdiction over the conduct of its officials.[30] Karen Knop labelled this approach the "*Charter* unless": the *Charter* applies to the extraterritorial conduct of Canadian agents *unless* its application creates an objectionable extraterritorial effect.[31]

Applying *Cook*, Juriansz J found that the RCMP engaged in a cooperative investigation under Turks and Caicos authorities.[32] He based this ruling on several findings of fact, most notably that the

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27 See West, *supra* note 22 at 15.

28 See *Cook*, *supra* note 6 at para 50.

29 See *ibid* at para 54.

30 See West, *supra* note 22 at 20.

31 See Karen Knop, "The Spectre of Comity" in Jacco Bomhoff, David Dyzenhaus & Thomas Poole, eds, *The Double Facing Constitution* (Cambridge: Cambridge University Press, 2020) 177 at 199; *Cook*, *supra* note 6 at para 25.

32 See *R v Hape*, [2002] OJ No 3714 at para 26, 2002 CarswellOnt 6175 (Ont Sup Ct) [*Hape* Sup Ct]. For a more detailed analysis of the trial judge's decision, see West, *supra* note 22 at 21.

RCMP sought and received permission from local officials to conduct their investigation, and RCMP officers acted under the authority of local Detective Superintendent Lessemun (who was outranked only by the Commissioner and Deputy Commissioner of Turks and Caicos police). As a result, Juriansz J concluded that applying the *Charter* to this cooperative investigation would have an objectionable extraterritorial effect because it would impose Canadian criminal law standards on foreign officials and procedures.[33] Consequently, the *Charter* did not apply. The Ontario Court of Appeal upheld this finding.[34]

The single ground for appeal to the Supreme Court was whether the *Charter* ought to apply to the actions of the RCMP officers, thus necessitating compliance with section 8 when searching Mr. Hape's office and seizing his business records. Unfortunately, rather than assessing whether the lower Courts correctly applied the test in *Cook*, the majority in *Hape* started its analysis with an explanation of how "international law assists in the interpretation of s. 32(1)" of the *Charter*.[35]

This analysis began with two uncontroversial findings.[36] First, the Court explicitly endorsed the adoptionist approach to the reception of customary international law into the law of Canada.[37] Meaning, the Court concluded that prohibitive rules of customary international law are automatically incorporated into Canadian law unless those rules conflict with domestic legislation.[38] Under this approach, direct intervention by Parliament or the Courts is unnecessary to transform these international legal rules into the law of Canada.[39] Next, the majority affirmed that Canadian

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33 See *Hape* Sup Ct, *supra* note 32 at paras 29–31.

34 *R v Hape*, [2005] OJ No 3188 at paras 7–9, 2005 CanLII 26591 (Ont CA).

35 *Hape*, *supra* note 5 at para 34.

36 See *ibid* at para 47.

37 See *ibid* at paras 39, 46.

38 Fairley, *supra* note 10 at 232.

39 Despite widespread acceptance of this finding, there was some early critique. See e.g. Currie, "Weaving a Tangled Web", *supra* note 10 at 59 (Currie has criticized that the majority's choice of language actually dilutes and confuses the doctrine of adoption).

legislation is presumed to comply with international law, be it treaty or customary law, unless the language of the relevant act cannot support such an interpretation.[40] Therefore, Parliament is not only presumed to act in compliance with Canada's international legal obligations, but international law is assumed to form part of the context in which lawmakers create legislation.[41]

This finding led the majority to conclude that Canadian law must comply with the customary international law principle of sovereign equality and the correlative principle of non-intervention.[42] LeBel J explained that sovereignty is "the power of each state freely and autonomously to determine its tasks, to organize itself, and to exercise within its territory a 'monopoly of legitimate physical coercion'".[43] Tied to sovereignty, explained LeBel J, is the concept of comity among nations based on the premise that states should act courteously with one another and show deference and respect for the actions of states within their sovereign territory. While respect for comity is not a binding obligation, the majority affirmed it as a general principle of interpretation. Again, this was not a controversial holding.

B. International Law, a Barrier to Human Rights?

What was novel about the majority's decision in *Hape* was its conclusion that the *Charter* must also be interpreted to conform with international law and the principle of comity.[44] "In interpreting the scope of application of the *Charter*," wrote LeBel J, "the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."[45] This

40 See *Hape*, *supra* note 5 at paras 53–56.

41 See *ibid*.

42 See *ibid* at paras 40, 45.

43 *Ibid* at para 42, citing Luzius Wildhaber, "Sovereignty and International Law" in R St J Macdonald & Douglas M Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory*, (Dordrecht: Martin Nijhoff, 1983) 425 at 436.

44 See Currie & Rikhof, *supra* note 10 at 610.

45 *Hape*, *supra* note 5 at para 56.

assertion was a noteworthy deviation from how the Supreme Court previously relied on international law when interpreting the *Charter*.[46]

Until *Hape*, the Court relied on international human rights law to help identify the content of constitutional protections afforded by the *Charter*. Notably, Chief Justice Dickson notoriously held in *Slaight Communications Inc v Davidson*, that:

> 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 *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.[47]

This passage explains that human rights protections afforded by international law are a baseline, or as John Currie wrote, "a 'floor' of human rights protection below which Charter interpretation should not, 'generally' and absent 'exceptional circumstances', drop".[48] However, in Hape, LeBel J cites this precise quote in support of a different conclusion: that courts must interpret the application and reach of the Charter in a manner that conforms not only with international human rights law but with all of Canada's international treaty obligations, and existing and future customary international law.[49]

Following the release of *Hape*, both John Currie and Amir Attaran raised concerns about the majority's use of a principle of statutory interpretation—the presumption of conformity—to limit the application of the *Charter*.[50] This author shares these concerns. Statutes are intended to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the

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46 See Currie, "Weaving a Tangled Web", *supra* note 10 at 74 onwards.

47 *Slaight*, *supra* note 24 at 1056, citing *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349, 38 DLR (4th) 161.

48 Currie, "Weaving a Tangled Web", *supra* note 10 at 75.

49 See *Hape*, *supra* note 5 at para 56.

50 See Currie, "Weaving a Tangled Web", *supra* note 10; Attaran, *supra* note 10 at 522.

scheme of the Act, the object of the Act, and the intention of Parliament."[51] This is not true of the *Charter*.

The *Charter* is a "purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not an authorization for governmental action."[52] The Supreme Court tells us repeatedly that the *Charter* is to be interpreted "generous[ly]" rather than "legalistic[ally]" and "in the light of the interests it was meant to protect."[53] To constrain the rights and freedoms protected by the *Charter* to comply with all of Canada's international legal obligations (some of which may develop without any positive action by the Government of Canada) stands in sharp contrast with the Court's prior and subsequent jurisprudence.

A recent decision of the Supreme Court illustrates this point. In *Québec inc*, the majority affirmed that the correct approach to interpreting the scope of the *Charter*'s protections is by way of a purposive interpretation as enunciated by the Court in *Big M Drug Mart*.[54] That is, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[55] Brown and Rowe JJ, writing for the majority, emphasized that this analysis "must begin

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51 *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. That said, the Supreme Court has instructed that quasi-constitutional legislation like the *Canadian Bill of Rights* should also be interpreted in a liberal and flexible manner: see e.g. *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1206–08, 75 DLR (4th) 385.

52 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 156, 11 DLR (4th) 641 [*Hunter* cited to SCR].

53 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 [*Big M Drug Mart* cited to SCR].

54 *Québec inc*, *supra* note 20 at para 7.

55 *Ibid* at para 7, citing *Big M Drug Mart*, *supra* note 53 at 344.

by considering the text of the provision."[56] The text of the Constitution must first and foremost have reference to and be constrained by that text.[57]

The majority then considered the role of international and comparative law when interpreting the *Charter*. The Court remarked, without any reference to the majority reasons in *Hape*, that "the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history."[58] The majority accepted that the judiciary may consider international legal norms (like the principle of comity) when interpreting the *Charter*, but only to provide support or confirmation of the result reached by a purposive interpretation "as Canadian courts interpreting the *Charter* are not bound by the content of international norms."[59]

The majority made clear that the weight and persuasiveness of international and comparative legal sources "depends on the nature of the source and its relationship to our Constitution. The reason for this is the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty."[60] The majority also acknowledged that the presumption of conformity with international instruments is now a well-settled principle of interpretation, yet reminds us that those instruments ratified by Canada carry more weight than non-binding instruments, which are merely persuasive.[61]

Brown and Rowe JJ (seemingly ignoring the precedent set in *Hape*) also suggest that while the Court has recognized "a role for international and comparative law in interpreting *Charter* rights[,] . . . . [T]he Court has never relied on such tools to define the scope of *Charter* rights."[62] The majority concludes that "courts must be

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56 *Québec inc*, *supra* note 20 at para 8 [emphasis removed]. For the cases cited by the SCC supporting that statement, see *British Columbia (AG) v Canada (AG)*, [1994] 2 SCR 41, 114 DLR (4th) 193; *R v Grant*, 2009 SCC 32.

57 See *Québec inc*, *supra* note 20 at para 9.

58 *Ibid* at para 20.

59 *Ibid* at para 22.

60 *Ibid* at para 23.

61 See *ibid* at para 38.

62 *Ibid* at para 28.

careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate".[63]

Nevertheless, this is precisely what Lebel J did in *Hape* when interpreting section 32. Rather than looking to existing precedent to refine *Cook* or engaging in any form of purposive interpretation of the text of section 32 as directed in *Big M Drug Mart*, Lebel J begins his analysis with a review of international law. He then explicitly interprets the phrase "within the authority of Parliament" to conform not with the plain meaning of the text, existing Canadian law, nor the *Big M Drug Mart* factors, but with the customary rules of sovereignty and non-intervention, and the non-binding international principle of comity.

Had Lebel J followed the guidance set out in *Big M Drug Mart*, he may have identified that the language of the *Charter* is clear when the rights and freedoms it protects are limited geographically or to a subset of people. Section 23, for example, is explicit that the right to education in English or French is confined to Canada, and other rights, like democratic rights and mobility rights, only apply to Canadians. As Attaran persuasively argues, the drafter's choice not to limit section 32 to the confines of Canada was deliberate, or what he calls an exercise of "meaningful silence".[64]

Instead, LeBel J interpreted this silence as ambiguity and set about resolving the question of "where" the *Charter* applies in a way that complies with international law rather than looking first to the Court's existing jurisprudence on who and what conduct falls within the authority of Parliament. As Currie explains, "because nothing in the *Charter* expressly provides for its extraterritorial reach, the rigid 'presumption of conformity' adopted by the majority in *Hape* gives international law controlling effect in filling this *lacuna*."[65] Regrettably, as I explain in

63 *Ibid* at para 47.

64 Attaran, *supra* note 10 at 523.

65 Currie, "Weaving a Tangled Web", *supra* note 10 at 77 [emphasis in original].

the next section, the majority proceeded to misconstrue the international legal principles it used to interpret the scope of section 32.

C. The Wrong Question

LeBel J begins his interpretation of section 32 by asserting that the principles of jurisdiction are vital to resolving the question of the *Charter*'s extraterritorial reach.[66] He correctly explains that the doctrine of jurisdiction is distinct from but integral to the principle of state sovereignty, as it arises from the concept of sovereign equality.[67] Unfortunately, as the following two sections and the comparative exercise undertaken in Part 2 demonstrate, the doctrine of jurisdiction does not limit the geographical scope of a state's human rights obligations.

The doctrine of jurisdiction is customary international law and defines "a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them".[68] Per the doctrine, the source of a state's jurisdiction varies with the type of jurisdiction at issue. Enforcement jurisdiction (also knowns as executive, implementation, or investigative jurisdiction) is the power to use coercive means to enforce rules, execute commands, or uphold entitlements.[69] This power is distinct from a state's prescriptive jurisdiction, which is a state's authority to prescribe rules. Prescriptive jurisdiction is often divided into legislative and adjudicative jurisdiction, the latter referring to the power of a state's courts to receive, try, and decide cases brought before them.[70] The bases or source for each type of jurisdiction varies.

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66 See *Hape*, *supra* note 5 at paras 57–65.

67 See *ibid*.

68 *Ibid* at para 57, citing Antonio Cassese, *International Law*, 2nd ed, (Oxford: Oxford University Press, 2005) at 49.

69 See Christopher Staker, "Jurisdiction" in Malcolm Evans, ed, *International Law*, 4th ed (Oxford: Oxford University Press, 2014) 309 at 312; *Hape*, *supra* note 5 at para 58.

70 See Staker, *supra* note 69.

As a starting point, a state may assert both enforcement and prescriptive jurisdiction over persons, conduct and events within its territory.[71] This principle is "a corollary of the sovereignty of a State over its territory."[72] Conversely, as a general rule, a state may not take coercive action in the territory of another without the host nation's consent or some other permissive rule deriving from a treaty or customary international law.[73] The use of force in a foreign state in response to an armed attack according to article 51 of the *UN Charter*, is one example where a state may lawfully leverage its enforcement jurisdiction in a foreign state without consent.[74]

Unlike enforcement jurisdiction, international law recognizes five bases for asserting prescriptive jurisdiction: territory or matters connected to state territory; the nationality of the actor; passive personality (the victim of an act is a national); where an act engages the essential economic or security interests of the state (the protective principle); and where an act is governed by the universal jurisdiction of all states regardless of where it is committed or by whom.[75] Thus, under international law, domestic legislation may govern acts that take place extraterritorially if any of the five bases for prescriptive jurisdiction are met. For example, Canada's terrorism offences set out in section 83 of the *Criminal Code* criminalize terrorist activity anywhere in the world (an exercise of legislative jurisdiction). Persons in Canada may be charged and prosecuted in Canadian courts (an exercise of adjudicative jurisdiction) for terrorism offences committed abroad. However, unless officials receive consent from the host state, it is unlawful under international law for Canadian law

71 See John Currie et al, *International Law: Doctrine, Practice, Theory*, 2nd Ed (Toronto: Irwin Law, 2014) at 475.

72 Staker, *supra* note 69 at 316.

73 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 456.

74 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 51 [*UN Charter*].

75 Currie et al, *supra* note 71 at 490.

enforcement to investigate or arrest persons (an exercise of enforcement jurisdiction) for section 83 offences in a foreign state.

International law recognizes that prescribing rules of conduct for persons in a foreign territory (like Canada's worldwide prohibition against terrorist activity) creates situations where two states may have concurrent jurisdiction and, accordingly, that the assertion of jurisdiction by one state may result in an encroachment on the sovereignty of the territorial state.[76] Where there is a conflict between two states with overlapping jurisdiction, the question becomes one of priority.[77]

In *Hape*, LeBel J begins his discussion of jurisdiction by canvassing the principles of territoriality, nationality and universality.[78] He accepts that given these different bases for jurisdiction, "disputes and events commonly have implications for more than one state and competing claims of jurisdiction can arise on grounds other than territoriality, which are of course, extraterritorial in nature."[79] In other words, the majority acknowledges the concept of concurrent jurisdiction: that two states may have legitimate claims of jurisdiction simultaneously.

Next, he acknowledges that "Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada."[80] He also accepts that Parliament has the right to enact legislation that violates international law and the principle of comity by virtue of Parliamentary sovereignty.[81] However, without consent from the host state, LeBel J concludes that the sovereign equality of nations prevents Canada from enforcing its laws in a foreign territory. "As the supreme law of Canada", finds LeBel J, "the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules. Simply put, Canadian law, whether statutory or constitutional, cannot be

76 See *Cook*, *supra* note 6 at para 42.

77 See Evans, *supra* note 69 at 329.

78 See *Hape*, *supra* note 5 at paras 57–65.

79 *Ibid* at para 60.

80 *Ibid* at para 68.

81 See *ibid*.

enforced in another state's territory without the other state's consent."[82]

Unfortunately, the majority confuses what element of Canada's jurisdiction is at issue in *Hape.* The Court was not asked to consider whether the investigation of Canadian officials in Turks and Caicos was a proper exercise of Canada's enforcement jurisdiction under international law. Nor were they asked whether Canadian officials have the authority to travel abroad and enforce the *Charter*. The *Charter* is not a piece of legislation that is *enforced* by Canadian officials on others; it creates a set of limits and obligations on Parliament, the government, and entities controlled by the government when enforcing other laws and providing governmental services.[83] Instead, the questions before the court were: (1) whether a set of Canadian constitutional rules and obligations can extend to Canadian officials operating abroad; and (2) if Canadian courts can adjudicate whether officials complied with those rules and obligations and, if they did not, craft a remedy.

Under international law, the answer to both questions is an unequivocal yes. The nationality principle, the passive personality principle, and the protective personality principle (each arguably at issue in *Hape*) are lawful bases to extend Canada's legislative and adjudicative jurisdiction to the conduct of Canadian officials operating abroad. Certainly, those actions are also subject to the foreign state's prescriptive jurisdiction based on territoriality, but as noted above, both international law and the Supreme Court accept the possibility of concurrent jurisdiction. So long as complying with the *Charter* or adjudicating *Charter* compliance does not create legal obligations on the foreign state or deny the foreign state the right to exercise its jurisdiction, there is no conflict. The *Charter* can apply unless it interferes with the exercise of a foreign state's sovereignty.

Regrettably, the majority's confusion about what type of jurisdiction is engaged in *Hape* is central to its interpretation of

82 *Ibid* at para 69 [emphasis added].

83 See *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 48, 152 DLR (4th) 577 [*Godbout*].

section 32. Lebel J concludes that because the government of Canada may not exercise enforcement jurisdiction over matters in a foreign state, extraterritorial conduct of Canadian officials does not fall "within the authority of Parliament" and thus cannot trigger the *Charter's* application.[84]

D. The Wrong Legal Tests

While this reasoning is problematic in itself, the majority's choice to rely on the doctrine of jurisdiction to interpret the scope of the Charter is troubling for two other reasons. First, the majority fails to recognize the distinction between the doctrine of jurisdiction and the concept of jurisdiction used in international human rights law instruments. Second, it relies on the wrong international legal regime to determine when extraterritorial conduct is attributable to Canada.

1. The wrong concept of jurisdiction

In international human rights law, the scope of a state's human rights obligations is not dependent on the state acting lawfully. States, including Canada, can and do engage in impermissible exercises of enforcement jurisdiction, and those activities may or may not be explicitly authorized by domestic law.[85] Unfortunately, in *Hape*, none of the justices consider whether the *Charter* ought to constrain the actions of Canadian officials that run afoul of international law even if prescribed by Canadian law, or why such conduct would not fall under Parliament's authority as the majority suggests.[86]

Campbell McLachlan raises this point in his subject defining text *Foreign Relations Law.*[87] McLachlan contends that LeBel J's

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84 *Hape*, *supra* note 5 at para 69.

85 See West, *supra* note 22 at 26.

86 *Supra* note 5 (stating "[n]either Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state" at para 105).

87 Campbell McLachlan, *Foreign Relations Law* (Cambridge, UK: Cambridge University Press, 2014).

decision "betrays a confusion of thought between a state's exercise of jurisdiction—its '[p]ower or authority in general'—and the limits imposed by international law on that exercise, not for the state's own benefit, but for the benefit of other states and individuals."[88] He explains that in *Hape*, "[t]he doctrine of jurisdiction is not properly engaged at all . . . . What is at stake is the answerability of the state in its home courts in respect of its own actions abroad at the suit of an individual."[89]

Certainly, if the RCMP dispatched officers to Turks and Caicos to arrest Mr. Hape, search his office, and return him to Canada without notifying local authorities, this would still qualify as an exercise of Canada's enforcement jurisdiction. The difference between this scenario and the one before the Supreme Court in *Hape* is that this hypothetical conduct would violate the sovereignty of Turks and Caicos and, as such, fall afoul of the doctrine of jurisdiction. Finding that the actions of the officers in this scenario are subject to the *Charter* makes Canada's actions no more or less lawful under international law. Why then should the lawfulness of Canada's exercise of jurisdiction be determinative of the human rights protections owed Mr. Hape by the RCMP? Applying the *Charter* in this scenario would at least afford Mr. Hape some measure of human rights protection in Canadian courts, as the extraterritorial actions of the RCMP would not be governed by local human rights law. Without the *Charter*'s protections, Mr. Hape would find himself without any means of seeking a remedy.

The lawfulness of a state's exercise of jurisdiction, be it enforcement or prescriptive, is not a legitimate basis to restrict or extend a state official's *Charter* obligations when operating abroad. Instead, as McLachlan explains, "applying the limits imposed by the doctrine of jurisdiction so as to limit the scope of protection of human rights guarantees would operate so as to licence rather than to control the extraterritorial exercise of state power—the very reverse of the doctrine's purpose." [90]

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88 *Ibid* at 316 [emphasis added, footnotes omitted].

89 *Ibid* at 321.

90 *Ibid*.

The question before the Court was to what extent the *Charter* constrains the conduct of Canadian officials outside their borders. It would have, therefore, been more appropriate for the Supreme Court to consider the concept of jurisdiction under international human rights law. The doctrine of jurisdiction serves a different function than the concept of jurisdiction in human rights treaties. In the latter context, jurisdiction is a synonym for authority, power, and control over people or territory.[91] Thus, the question is not the legality of the exercise of state power but whether a state is, as a matter of fact, exercising sufficient power and authority to trigger its human rights obligations.[92] Under international human rights law, whether a person is under the jurisdiction of a state within the meaning of article 2(1) of the *ICCPR* or article 1 of the *ECHR*, for example, "is a separate question from the legality of state action under the international law of jurisdiction. Application of human rights treaties is definitely not restricted to situations where exercise of jurisdiction is legal under the international law of jurisdiction."[93]

Thus, a more relevant legal test to consider when interpreting section 32 is the "effective control" test. In international human rights law, this test determines whether a state's human rights obligations constrain the conduct at issue because a state exerts "effective control" over persons or places. [94] What degree of control is necessary to trigger human rights obligations and how a state can achieve that level of control in a foreign state's territory

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91 See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press, 2011) at 39. For a more detailed discussion on the difference between "jurisdiction" in general international law versus "jurisdiction" in human rights documents, see *ibid* at 21–40.

92 See Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2009) at 56.

93 *Ibid.*

94 For more on what "effective control" entails, see Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Netherlands: Martinus Nijhoff, 2013) at 55–57 (for the *ICCPR*), 93–253 (for the *ECHR*).

is subject to much debate and disagreement.[95] However, there are two generally recognized means of extending a state's international human rights obligations abroad: (1) when a state exercises physical control over foreign territory (the spatial model), and (2) when a state exercises physical control over an individual (or individuals) in foreign territory (the personal model).[96]

Using the control test to determine whether Parliament is exercising its jurisdiction (aka authority) over a person or place such that those who fall subject to it benefit from the *Charter*'s protection is a much more consistent way of ensuring the *Charter* conforms with international law than the approach taken in *Hape.* As we will see in Part 2, the International Court of Justice (ICJ), the UN Human Right Committee (UN HRC), the ECtHR, and many countries adopt some version of this legal test to determine whether a state's human rights obligations apply extraterritorially in a given situation. Unlike the majority's interpretation in *Hape*, this approach would also help ensure that the *Charter* provides "protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[97]

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95 See Gondek, *supra* note 92; Milanovic, *supra* note 91; Marko Milanovic & Tatjana Papić, "The Applicability of the ECHR in Contested Territories" (2018) 67:4 ICLQ 779; Samantha Besson "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To" (2012) 25:4 Leiden J Intl L 857.

96 See Milanovic, *supra* note 91 at 119.

97 *Slaight*, *supra* note 24 at 1056. The applicants in *Amnesty International*, *supra* note 17, unsuccessfully made this argument, however the Court only considered the ECtHR and UK's precedence which has evolved considerably since 2008 and had to do so within the confines of the Supreme Court's finding that the *Charter* can only apply abroad with the Consent of the host state. The Court of Appeal upheld the Federal Court's decision that Afghan detainees did not fall within Canada's effective control as a finding of fact, see *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 257.

2. THE WRONG DOCTRINE FOR INTERPRETING "AUTHORITY OF PARLIAMENT"

The second weakness in LeBel J's reliance on the doctrine of jurisdiction to interpret section 32 is that at international law, these legal principles do not govern whether certain conduct falls under the authority of a state. Instead, the customary law on state responsibility set out in the International Law Commission's *Draft Articles on State Responsibility* is the body of law used to determine if an act or omission is attributable to a state.[98] LeBel J relied on the wrong international legal principles to interpret the phrase in section 32 "within the authority of Parliament".[99]

The law of state responsibility sets out rules of general application, "meaning that it is of potential relevance in virtually all substantive international legal contexts."[100] The underlying principle of state responsibility is that "[e]very internationally wrongful act of a State entails the responsibility of that State."[101] An international wrongful act exists when an act or omission is "(a) attributable to the state under international law; and (b) constitutes a breach of an international obligation of the State."[102] Therefore, the first question in the law of state responsibility is always whether the conduct in question is attributable to a state. If an act cannot be said to have been undertaken by a party under the state's authority, then the state is not responsible for that conduct. However, if attribution is satisfied, we can determine

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98 Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, UNGAOR, 56th Sess, UN Doc A/RES/56/83 (2001) [*Draft Articles*]. International adjudicative bodies have used the Draft Articles to impute conduct to a state in a variety of legal contexts, such as international humanitarian law and international criminal law. For more on this, see François Delerue, *Cyber Operations and International Law*, (Cambridge, UK: Cambridge Press, 2020) at 112.

99 *Charter*, *supra* note 1, s 32.

100 John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 533. The primary rules being the obligations a state commits itself to uphold by treaty or by virtue of its statehood under customary international law.

101 *Draft Articles*, *supra* note 98, art 1.

102 *Ibid*, art 2.

which international legal obligations apply to that state and if they were violated. Importantly, attribution has nothing to do with whether the state acted lawfully.[103] Regardless of if certain conduct is a lawful exercise of Canada's enforcement jurisdiction, if imputed to the state, that action is recognized by the law of state responsibility as an act of the Government of Canada.

The starting point for attribution is that "the conduct of any state organ shall be considered an act of that state."[104] This rule applies to entities or officials belonging to the executive, legislative, or judicial branches of government operating at the federal, provincial, or municipal level.[105] A person or entity's status under domestic law is the primary basis for ascertaining if they are an organ of the state.[106] The conduct of entities that are not organs of the state but exercise elements of governmental authority is also attributable to the state.[107]

Canadian common law interpreting section 32 aligns with the *Draft Articles* in this regard. In *Godbout v Longueuil (City*), the Supreme Court reiterates that entities other than Parliament, the provincial legislatures and the federal or provincial governments, namely "entities that are controlled by government or that perform truly governmental functions are themselves 'matters within the authority' of the particular legislative body that created them."[108] The same is also true of government officials acting pursuant to a legislative authority subject to the *Charter*.[109] Therefore, according to customary international law and the Supreme Court's jurisprudence, the RCMP is unquestionably an organ of the state. As such, any act or omission carried out by an RCMP officer operating in their official capacity is attributable to

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103 See *ibid*, art 7.

104 *Ibid*, art 4.

105 See *ibid*.

106 See *ibid*, commentary to art 4 at para 6.

107 See *ibid*, art 5.

108 *Supra* note 83 at para 48.

109 See *Slaight*, *supra* note 24 at 1078.

Canada under the law of state responsibility.[110] The same is true for officers of the CAF, CSIS, and CSE officials.

Moreover, under the law of state responsibility, the conduct of any "person or group . . . acting on the instruction of, or under the direction or control of" the state is also attributable to that state.[111] This rule means that the actions of human sources or private contractors who assist the RCMP, the CAF, CSIS, or CSE by carrying out the specific instruction of those agencies are attributable to Canada.[112] Here too, the ILC's *Draft Articles* align with the Supreme Court of Canada's *Charter* jurisprudence, which holds that state agents, like police agents or CSIS human sources, are only subject to the *Charter* when they act as a result of their relationship with the state.[113] The test for *Charter* application set out in *R v Broyles* asks whether the conduct at issue would have taken place "but for" the intervention of the state or its agents.[114] Where the answer is no, the *Charter* applies.

Crucially, on the issue of cooperation, article 6 of the *Draft Articles* stipulates that the "conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."[115] This means that in the very narrow circumstances where a state places its organs or officials at the disposal of another state, their conduct is no longer attributable to their home state.[116] The ILC instructs that to attribute conduct to a receiving state, the loaned organ must act *exclusively* for the borrowing state's purposes and under that state's authority.[117] "[O]rdinary situations of inter-State

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110 See *Draft Articles*, *supra* note 98, commentary to art 4 at para 7.

111 *Ibid*, art 8.

112 See *ibid*, commentary to art 8 at para 1.

113 See *R v Broyles*, [1991] 3 SCR 595 at 608, [1992] 1 WWR 289.

114 *Ibid*.

115 *Supra* note 98, art 6.

116 See *ibid*.

117 See *ibid*, commentary to art 6 at para 2.

cooperation or collaboration" are not sufficient to shift responsibility away from the organ's home state.[118] Merely offering assistance to another state or partnering with an organ of a foreign state is not sufficient to shift attribution from the home state to the receiving state.[119]

This rule and the ILC's guidance could have helped the Supreme Court in *Hape* and *Cook* determine whether, when RCMP officers partner with local law enforcement abroad, their conduct is attributable to either Canada or the host state under international law. Where the potentially *Charter* engaging conduct is attributable to Canada, it would be consistent with international law to find that it falls "within the authority of Parliament" and, by consequence, subject to the *Charter*'s protections.

E. A Chance to Make it Right

The majority in *Hape* failed to follow the Court's guidance in *Big M Drug Mart* when interpreting the scope of section 32 of the *Charter.* Instead, LeBel J engaged in an interpretive exercise reliant on the doctrine of jurisdiction. Not only did LeBel J fail to engage in a purposive analysis of section 32, but he also ultimately asked the wrong legal question and proceeded to apply the wrong international legal tests.

Given the obvious deficiencies in the majority's reasoning, one hopes that the Supreme Court will take the opportunity in *McGregor* to set aside LeBel's reliance on the doctrine of jurisdiction to interpret the reach of the *Charter.* The Court should return to its decision in *Cook* and apply its guidance from *Big M Drug Mart* and *Québec inc* to clarify the geographic scope of the *Charter*'s protections. In so doing, the Court will find that the law of state responsibility, international human rights law and, as discussed next, relevant decisions of foreign courts provide support and affirmation for *Cook*'s "*Charter* Unless" approach to extraterritoriality.

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118 *Ibid*.

119 See *ibid*, commentary to art 6 at para 5.

II. COMPARATIVE EXTRATERRITORIALITY

Since the *Charter*'s inception, Canadian courts have recognized that international human rights instruments are a useful interpretive tool when tasked with deciding what meaning should be given to a particular *Charter* provision, especially where the language of the international clause is similar to that of the *Charter*. Section 1 of the *Charter*, argues John Claydon, explicitly invites the court to engage in a comparative exercise to determine what limits on rights are permissible in a "free and democratic society".[120] In the first five years of the *Charter*'s history, more than 70 reported judgements referred to international human rights law treaties and the judgements of international and regional bodies tasked with their interpretation and enforcement. [121] By 1996, that number was more than 400.[122] By 2002, the Supreme Court of Canada alone invoked human rights law in over 100 cases.[123]

This practice is not unique to Canada. Across the field of human rights, courts around the world are engaging with similar texts and similar matters to uphold freedoms rooted in universal obligations. Courts entrusted with the task of interpreting human rights instruments are, as Judge Lech Garlicki explains, consistently "borrowing" from one another, leading to a "cross-fertilization" of human rights law.[124] To be sure, Canadian

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120 Claydon, *supra* note 26 at 351.

121 *Ibid* at 350.

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

123 See Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002) 16 Sup Ct L Rev (2d) 23 at 42.

124 Lech Garlicki, "The European Court of Human Rights and the Canadian Case Law" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, UK: Cambridge University Press, 2017) 348 at 348. See also Eyal Benvenisti & George W Downs, "Court Cooperation, Executive Accountability and Global Governance" (2009) 41:4 NYUJ Intl L & Pol 931; Erik Voeten, "Borrowing and NonBorrowing among International Courts" (2010) 39:2 J Leg Stud 547;

appellate courts "have exhibited a willingness to cite persuasive decisions of other high courts, whether or not the principles or lessons embraced come from a court with close legal-cultural ties."[125] As Joanna Harrington explains, early *Charter* jurisprudence often cited US case law despite the significant difference between the two constitutional documents, and more recently, the Supreme Court of Canada has considered human rights case law from Australia, France, India, Israel, New Zealand, and the United Kingdom.[126] The same is true for decisions of the Constitutional Court of South Africa.[127] For this reason, just as Canadian jurists have looked to foreign courts to interpret the *Charter's* substantive provisions, the jurisprudence of foreign states that have grappled with the question of extraterritoriality can also advance our thinking about the *Charter's* geographic reach.

Nonetheless, the influence of international human rights law decisions and the depth of the Supreme Court's engagement with human rights law has varied from case to case. Former Supreme Court Justice Thomas Cromwell (writing with Bruno Gélinas-Faucher) explained that "[i]n some cases, international norms are referred to as an additional source of insight, while at other times they are central to the reasoning and outcome."[128] In *Québec inc* the majority acknowledged that "[a]lthough this Court

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Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv Intl LJ 191; Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1304; Joanna Harrington, "Interpreting the *Charter*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution*, (Oxford, Oxford University Press, 2017).

125 Harrington, *supra* note 124 at 9.

126 See *ibid*.

127 See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 217, 263, 329.

128 Thomas Cromwell & Bruno Gélinas-Faucher, "William Schabas, the *Canadian Charter of Rights and Freedoms*, and International Human Rights Law" in Margaret M deGuzman & Diane Marie Amann, eds, *Arcs of Global Justice Essays in Honour of William A. Schabas* (Oxford: Oxford University Press, 2018) 39 at 45.

has been careful to attach the appropriate weight to international and comparative law in *Charter* interpretation, it has not always explained how or why different international sources are being discussed or relied on, while others are not."[129] As a result, the majority found it necessary to set out a "principled framework" to "provide consistent and clear guidance" for how Courts ought to use international and comparative law in constitutional interpretation.[130]

Brown and Rowe JJ explained that international human rights law sources are relevant and persuasive when interpreting the *Charter*; however, not all sources carry the same weight.[131] As a starting point, the *Charter* should be presumed to provide protection at least as great as those afforded similar provisions from international human rights instruments Canada has ratified, such as the *ICCPR*.[132] The Court further instructed that non-binding instruments, like the *ECHR*, are "relevant and persuasive, but not determinative."[133]

Similarly, decisions of foreign courts are also relevant and may be persuasive; they provide "guidance to Canadian courts rather than precedents to be followed."[134] Where courts rely on non-binding instruments or decisions, the majority instructs that courts must describe why they are being considered and the persuasive weight assigned. Thus, in the hope that the Supreme Court will revisit its interpretation of section 32 in *McGregor* (or some other future case) and apply this methodology, the foreign precedence outlined in this part is relevant, persuasive, and offers important guidance.

To date, comparative human rights literature examining the specific question of extraterritoriality focuses primarily on the

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129 *Québec inc*, *supra* note 20 at para 24.

130 *Ibid* at para 27.

131 See *ibid* at para 30.

132 See *ibid* at para 31.

133 *Ibid* at para 35.

134 *Ibid* at para 43, citing Michel Bastarache, "How Internationalization of the Law Has Materialized in Canada" (2009) 59 UNBLJ 190 at 196.

reach of international conventions and their interpretation by international tribunals, namely the ECtHR, the UN HRC, and the Inter-American Commission on Human Rights.[135] Other scholars, like Oona Hathaway, have compared and analyzed domestic courts' interpretations of these international instruments.[136] Thanks largely to the global war on terror, the jurisprudence on this issue rapidly evolved following 9/11. Unfortunately, much of this earlier scholarship is now dated and does not reflect the current state of the law either internationally or across foreign jurisdictions.[137]

This section updates previous comparative efforts, beginning by briefly canvassing the ICJ's and UN HRC's findings concerning the geographic reach of the *ICCPR*. It then describes the leading case from the ECtHR on the extraterritorial application of the *ECHR*. Parts 2.3–2.7 then examine the approach adopted by five countries (the United Kingdom, Australia, New Zealand, South Africa, and Israel) when interpreting the geographic reach of their state's municipal human rights texts.[138] Like Canada, each state automatically incorporates customary international law into its domestic law and accepts that domestic law should be interpreted to comply with customary international law unless explicitly

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135 See e.g. Michal Gondek, *supra* note 92; Milanovic, supra note 91; Sigrun I Skolgy, *Beyond National Borders: State's Human Rights Obligations in International Cooperation,* (Antwerp: Intersentia, 2006); Milanovic & Papić, *supra* note 95; Samantha Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To" (2012) 25:4 Leiden J Intl Law 857.

136 See e.g. Oona A Hathaway et al, "Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extrateritorially?" (2011) 43:2 Ariz St LJ 389.

137 As is the limited literature that engages in a comparative review of domestic human rights abroad, see e.g. Chimène I Keitner, "Rights Beyond Borders" (2010) 36:1 Yale J Intl L 55; Jules Lobel, "Fundamental Norms, International Law, and the Extraterritorial Constitution" (2011) 36:2 Yale J Intl L 308.

138 See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3rd ed, translated by Tony Weir (Oxford: Oxford University Press, 1998) at 34; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (London: Hart Publishing, 2014) at 68; Uwe Kische, *Comparative Law* (Oxford: Oxford University Press, 2019) at 87.

incompatible.[139] Thus, if the majority in *Hape* is correct that the principle of sovereignty and comity prohibit the enforcement and application of the *Charter* to extraterritorial state conduct, other states with similar municipal human rights obligations should come to the same conclusion. However, the practice of the five states examined below rebuts this presumption, calling further into question the majority's findings in *Hape*.

The following comparison of how different states interpret the geographic scope of their municipal human rights obligations begins with a review of the relevant case law or government position of the three other Anglo-Commonwealth countries—the United Kingdom, Australia, and New Zealand—which share a common jurisprudential history with Canada. Next is an examination of South Africa's Bill of Rights, the formation and early interpretation of which was heavily influenced by Canada's law and jurisprudence.[140] Finally, Israel is studied because its Supreme Court has significant experience examining the reach of Israel's human rights obligations into the Occupied Territories of Palestine. For each state selected, this part briefly outlines how human rights are protected municipally and identifies the leading authorities regarding the state's obligations to uphold those rights when operating abroad.

Although the United States has a long and complicated jurisprudential record regarding the extraterritorial application of the writ of *habeas corpus* and the right to due process enshrined in the Fifth Amendment, it is not included in this survey. The United States Bill of Rights has a fundamentally different history than the

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139 Treasa Dunworth, "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2:1 NZJ Public & Intl L 67; Henry Burmester and Susan Reye, "The Place of Customary International Law in Australian Law: Unfinished Business" 21 Austl YB Intl L 39; Roger O'Keefe, "The Doctrine of Incorporation Revisited" (2008) 79 Brit YB Intl L 7; Barak Medina, "Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel" (2017) 50:3 Isr L Rev 331; Dire Tladi, "Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga" (2016) 16:2 Afr Human Rights LJ 310.

140 See Adam M Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism", (2007) 36:2 Sup Ct L Rev (2d) 309.

Canadian *Charter* and the governing human rights law of the other states selected for comparison. The Bill of Right's addition to the US Constitution in 1791 long predates the acceptance of a body of universal human rights, and even the most recent case law relies on precedent from the early 20th century and reflects US imperialism.[141] Moreover, US Courts often adopt an originalist view to constitutional interpretation, while the other states selected for this study embrace what the Supreme Court of Canada calls "a living tree" approach.[142] Finally, unlike the municipal rights instruments in New Zealand, South Africa, Israel, the UK and Canada, the US Bill of Rights does not contain a general limitations clause, setting out rights as absolute instead.[143] The relevance of this distinction is that states with limitations clauses are more likely to adopt an expansive view of protected rights.[144]

Significantly, only the Constitutional Court of South Africa, which relies heavily on the Supreme Court of Canada's decision in *Cook*, questions whether holding its state organs and agents to account in domestic court for violations of their municipal obligations abroad offends the principle of comity or creates some form of objectionable extraterritorial effect. No other court studied for this work concerns itself with matters of comity or the sovereignty of the territorial state when holding their officials to account under municipal law in a domestic court.

Ultimately, this exercise reveals a spectrum of application of municipal human rights obligations to state conduct abroad, starting from the most restrictive application by Australia and

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141 See e.g. *Boumediene v Bush*, 553 US 723 (2008). For more on the relation between US imperialism and the interpretation of the US Constitution's territorial reach, see Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (Oxford: Oxford University Press, 2009).

142 *Hunter*, *supra* note 52 at 156, citing *Edwards v Attorney-General for Canada*, [1930] AC 124 at 136, 1 DLR 98.

143 See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 48. Australia is the only country studied without a national bill of rights but nevertheless offers an important comparator because of its shared jurisprudential history with Canada.

144 See Claydon, *supra* note 26 at 351.

Israel to the most permissive interpretation by the courts of South Africa. The United Kingdom, relying directly on the jurisprudence of the ECtHR, takes an exceptional approach that falls between the two extremes.[145]

Despite the divergent approaches, each of the states examined accepts that, at least in some circumstances, its agents and organs are bound by the state's municipal human rights obligations when operating abroad. None of the countries studied adopt the categorical position offered by the majority in *Hape* that customary international law prohibits the application of municipal human rights instruments to state conduct outside its territory without host state consent. This finding further reinforces that the principle of sovereignty and the doctrine of jurisdiction, legal principles governing each of these states in their conduct of international relations, are not a bar to the extraterritorial application of the *Charter*.

A. ICCPR

The *ICCPR* is a near-universally adopted treaty that obligates all parties to preserve fundamental human rights and take administrative, judicial and legislative measures to protect the rights enshrined in the treaty.[146] Put simply, the Convention sets a floor for protection by establishing "a basic enforceable minimum standard for the respect of human rights around the world."[147] The Charter reflects Canada's obligations under the *ICCPR*[148] and was

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145 The terms "restrictive", "permissive", and "exceptional" are not found in the literature or the case law. They are used here to distinguish how restrictive or how permissive Courts are in extending their municipal human rights law extraterritorially.

146 See *ICCPR*, *supra* note 25, art 2. The United States is a notable exception, not having ratified the first optional protocol of the *ICCPR*.

147 Christopher Harland, "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents" (2000) 22:1 Hum Rts Q 187 at 189.

148 United Nations International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: Canada*, UNGAOR, 1998, 143, UN Doc HRI/CORE/1/Add.91.

drafted with the Covenant in mind, although it would be wrong to suggest that it serves as implementing legislation.[149]

Like section 32 of the *Charter*, the *ICCPR* has an application provision. Article 2(1) stipulates: "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."[150] Recall that in the context of international human rights law, the term "jurisdiction" is used in reference to a state's exercise of power, authority and control, rather than the limits prescribed by the doctrine of jurisdiction on a state to regulate or enforce persons or conduct.

Article 2(1) is somewhat ambiguous regarding the Covenant's geographic reach, and states and scholars have generally advanced two competing interpretations. The first is a conjunctive interpretation, mainly pursued by the US and Israel.[151] This approach advances that article 2(1) requires that individuals be both within a state's territory and subject to that state's jurisdiction for the Covenant to apply, effectively limiting a state's obligations under the *ICCPR* to its territory. The second disjunctive approach advances that states must respect and ensure *ICCPR* rights to all persons either within the state's territory or subject to the state's jurisdiction. The ICJ and the UN HRC support this reading of article 2(1).[152]

The UN HRC is the primary intergovernmental body within the United Nations system responsible for promoting the protection of human rights and for addressing human rights violations. In 2004, the UN HRC published *General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the*

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149 Harland, *supra* note 147 at 194. See also Gib Van Ert, *Using International Law in Canadian Court* (Toronto: Irwin, 2008) at 333.

150 *ICCPR*, *supra* note 25, art 2 [emphasis added].

151 See Gondek, *supra* note 92 at 132.

152 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: *Advisory Opinion of July 9 2004* [2004] ICJ Rep 136 [*Wall Case*]; UNHRC, Communication No 1539/2006, *Mohammad Munaf v Romania*, UN Doc CCPR/C/96/D/1539/2006 (2009) at 14.2.

Covenant.[153] This document sets out the Committee's views on the interpretation of article 2(1). Specifically, the UN HRC expressed its opinion that 2(1) requires states to "respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[154] Moreover, the Committee found that this principle applies "regardless of the circumstances in which such power or effective control was obtained."[155] In other words, the exercise of a state's power or control need not be consistent with international law for its obligations under the *ICCPR* to attach.

The ICJ affirmed the disjunctive interpretation of article 2(1) in 2004 in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[156] In its opinion, the ICJ explicitly acknowledged the conjunctive and disjunctive interpretations of article 2(1) and made clear that it did not subscribe to a strict conjunctive reading of the Covenant. The Court considered the travaux préparatoires of the Covenant and found that:

> in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence[157]

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153 UNGAOR, 59th Sess, Supp no 40, vol 1 at 175, 177, UN Doc A/59/40 (2004) [*General Comment No 31*].

154 *Ibid* at para 10. This interpretation is consistent with the UN HRC's finding in *Lopez v Uruguay*, where it unanimously rejected Uruguay's argument that its obligations under the *ICCPR* did not apply abroad. The UN HRC found that the key to a state's obligations was not where an act occurred but the "relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred": UNHRC, Communication No 52/1979, *Delia Saldias de Lopez v Uruguay*, UN Doc CCPR/C/OP/1 at 88 (1984).

155 *General Comment No 31*, *supra* note 153.

156 *Wall Case, supra* note 152.

157 *Ibid* at para 109.

As such, the ICJ concluded that the *ICCPR* "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[158] The ICJ also relied on the previous work of the HRC to conclude that the provisions of the *ICCPR* benefit populations in the territories over which security forces exercise effective jurisdiction by virtue of their occupation.[159] This finding was reinforced by the ICJ a year later in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.[160]

B. ECHR

While not binding on Canada, the *ECHR* predates the *Charter* and the *ICCPR* and has a rich jurisprudential history.[161] As Abella J noted in her concurrence in *Québec inc*, the *ECHR* is the second most cited international treaty by the Supreme Court of Canada. Moreover, the case law of the ECtHR, which interprets and applies the Convention, made up one-third of the total number of all of the Supreme Court's international court citations.[162] As such, the *ECHR* and the ECtHR's interpretation of the Convention can offer persuasive guidance to Canadian courts tasked with interpreting similar provisions of the *Charter.*

Article 1 of the *ECHR* is the Convention's application provision. It stipulates, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined

158 *Ibid* at para 111.

159 See *ibid* at paras 110–11.

160 [2005] ICJ Rep 168 at para 216 [*Armed Activities*].

161 See Claydon, *supra* note 26 at 354; Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989); Maxwell Cohen & Anne Bayefsky, "The Canadian *Charter* of Rights and Freedoms and Public International Law" (1983) 61 Can Bar Rev 265; Robin Elliott, "Interpreting the *Charter*: Use of the Earlier Versions as an Aid" [1982] *Charter* Edition UBC L Rev 11; Walter Tarnopolsky, "A Comparison Between *the Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*" (1982) 8 Queen's LJ 211.

162 See *Québec inc*, *supra* note 20 at para 101.

in Section I of this Convention."[163] The leading judgment from the ECtHR on the territorial scope of this provision and the extraterritorial reach of the Convention is *Al-Skeini and Others v The United Kingdom*, decided by the Grand Chamber in 2011.[164]

The issue in *Al-Skeini* was whether the UK violated the right to life protected under article 2 of the *ECHR* by failing to conduct adequate investigations into the deaths of five Iraqi civilians killed by British soldiers during a military operation in that country.[165] In its decision, the Grand Chamber sought to bring some coherence to its previously conflicting case law on the extraterritorial application of the *ECHR*. In so doing, it enunciated several key principles to apply when considering whether extraterritorial conduct triggers the Convention's application. To begin, the Grand Chamber reiterated that the exercise of jurisdiction is a necessary condition to hold a state responsible for acts or omissions attributable to it,[166] and a state is customarily presumed to exercise jurisdiction throughout its territory.[167] However, acts of the state "performed or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of s 1 in exceptional cases."[168] The Grand Chamber held that a number of exceptional circumstances had been found to constitute an exercise of jurisdiction beyond a state's territory, and the specific facts in those cases required and justified a finding that the state engaged in an extraterritorial exercise of jurisdiction.[169] Crucially, however, the term "exceptional" is not synonymous with a high threshold; it merely denotes a deviation from the normal

163 *ECHR*, *supra* note 25, art 1 [emphasis added].

164 *Al Skeini and Others v United Kingdom* [GC], No 55721/07, [2011] IV ECHR 99, 53 EHRR 18 [*Al Skeini*].

165 For a more comprehensive review of the case, see Marko Milanovic, "*Al-Skeini* and *Al-Jedda* in Strasbourg" (2012) 23:1 EJIL 121; Marek Szydło, "Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*" (2012) 12:2 Intl Crim L Rev 271.

166 See *Al Skeini*, *supra* note 164 at paras 130–31.

167 See *ibid*.

168 See *ibid* at Summary.

169 *Ibid*.

presumption of territoriality.[170] Finally, the Court made clear that the list of exceptional circumstances where extraterritorial jurisdiction may arise is not finite nor a closed list.[171]

The Grand Chamber in *Al-Skeini* also identified three categories of exceptions upon which jurisdiction had already been found to arise extraterritorially. First, where a state's diplomatic or consular agent, present on foreign territory in accordance with the provisions of international law, exerts authority and control over others.[172] Second, when, through the consent, invitation or acquiescence of the territorial government, the foreign state exercises all or some of the public powers usually exercised by the territorial government.[173] The underlying question to trigger this category is whether the state exerts authority and control over an area beyond its borders, thereby activating the foreign state's obligations to secure within it the rights and freedoms set out in the Convention.[174] The area under the control of a contracting party need not be within the territory of a party to the Convention for the *ECHR* to apply. Third, where a state's agents use force against an individual, bringing that person under the power and control of the state, and thus its jurisdiction.[175] In this category,

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170 *Ibid* at para 30.

171 *Ibid*.

172 See *ibid* at para 134. For examples of conduct falling into this category, see *Drozd and Janousek v France and Spain* (1992), 240 ECHR (Ser A), 14 EHRR 745 at para 91 [*Drozd*]; *Loizidou v Turkey* (1996), 26 ECHR (Ser A) 2216, 23 EHRR 513 at para 52; *Bankovic v Belgium* [GC] (dec), 52207/99, [2004] 44 EHRR SE5 at para 69 [*Bankovic*].

173 See *Al Skeini*, *supra* note 164 at para 135. Cases where jurisdiction was found on the basis of effective control over territory include: *Drozd*, supra note 172; *Gentilhomme v France*, Application No 48205 [2002] ECHR 441; *X and Y v Switzerland* (1977) 9 Eur Comm'n HR DR 57.

174 See *Al Skeini*, *supra* note 164 at para 138.

175 See *ibid* at para 136. For examples stemming from taking custody over individuals in a foreign state include, see *Jamaa v Italy* [GC], 27765/09, [2012] II ECHR 97, 55 EHRR 21; *Al-Saadoon and Mufdhi v United Kingdom,* 61498/08, [2010] II ECHR 63, 49 EHRR SE11; *Medvedyev v France* [GC], 3394/03, [2010] III ECHR 61, 51 EHRR 39; *Öcalan v Turkey,* 46221/99, [2005] IV ECHR 131, 41 EHRR 45; *Issa v Turkey*, 31821/96 (16 November 2004), 41 EHRR 27.

jurisdiction does not arise because the state exercises control over the "buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."[176]

The examples supporting the existence of this third category in *Al-Skeini* all stem from situations where states detained persons abroad. However, this class was expanded by the ECtHR in *Al-Skeini*, which found that agents of the UK exercised control over the applicant's relatives when British soldiers killed them in an exchange of gunfire.[177] Significantly, the Grand Chamber also deviated from its previous precedent to find that:

> whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".[178]

This passage plainly disavows the ECtHR's previous ruling in *Bankovic.* For years, *Bankovic* stood for the proposition that where a state was in the position to afford all of the rights guaranteed by the *ECHR* to persons within their area of control, it was obligated to do so. If not, that state was obliged to afford them none.[179] Notably, this position has recently been called into question by the Grand Chamber's decision in *Georgia v Russia (II)*,[180] but only in a limited way in the context of active military conflict.

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176 *Al Skeini, supra* note 164 at para 136.

177 *Ibid* at para 150.

178 *Ibid* at para 137 [emphasis added]. The ECtHR has also held that the text of the Convention does not "provide any support for the applicants' suggestion that the positive obligation in Art 1. to secure 'the rights and freedoms defined in Section 1 of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question": *Bankovic*, *supra* note 172 at para 73.

179 See McLachlan, *supra* note 87 at 326.

180 [GC], no. 38263/08, 21 January 2021. For a full discussion on this point, see Marco Milanovic, "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos" (25 January 2021), online (blog): *EJIL:*

C. UNITED KINGDOM

The UK does not have a single codified written constitution. Human rights are protected by the *Human Rights Act of 1998*,[181] which incorporated the 16 basic rights and freedoms set out in the *ECHR* into UK law (defined in section 1 of the *HRA* as "Convention rights"). The *HRA* applies to all public authorities, including courts, and any person or body whose functions are of a public nature.[182] The *HRA* requires that public authorities act in a manner compatible with Convention rights unless primary legislation requires them to act otherwise.[183] Section 3 of the *HRA* also requires that UK law be interpreted and given effect in a way that is compatible with the *ECHR*. Should a UK court declare that primary legislation is incompatible with the *ECHR*, the law remains operative unless Parliament decides to amend the impugned legislation. However, a court may strike down or disapply subordinate legislation, such as regulations and statutory instruments and orders.[184]

Section 2 of the *HRA* stipulates that domestic courts must consider the jurisprudence of the ECtHR when interpreting the scope or application of Convention rights, but Strasbourg's decisions are not binding precedent. As such, the jurisprudence of the ECtHR has materially and directly influenced the development of UK human rights law. However, under the Convention, only decisions of the ECtHR that directly rule on the UK's compliance with the *ECHR* are binding on the UK Government.[185]

Talk! <ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.>

181 *Human Rights Act* 1998 (UK), c 42 [HRA].

182 See *ibid*, s 6.

183 See *ibid*.

184 See *ibid*, s 4. For a more detailed discussion on the history and application of the HRA, see David Hoffman & John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998*, 4th ed (London: Pearson, 2013); Paul Arnell, *Law Across Borders: The Extraterritorial Application of United Kingdom Law* (London: Routledge, 2012) at 98–140.

185 See *ECHR*, *supra* note 25, art 46(1).

The leading case in the UK on the extraterritorial reach of the *HRA* is *Smith and others v Ministry of Defence.*[186] At issue in *Smith* was whether proceedings could be brought against the Ministry of Defence for negligence and violations of the right to life (protected under article 2 of the *ECHR*) stemming from the deaths of three British service members while deployed in Iraq. The UK Supreme Court needed to determine whether the soldiers were within the UK's jurisdiction per article 1 of the *ECHR* to decide this matter.

To resolve this question, the Court relied heavily on the ECtHR's decision in *Al Skeini*. In reviewing the Grand Chamber's findings, the UK Supreme Court accepted that Strasbourg's comprehensive statement of general principles regarding the issue of jurisdiction under article 1 of the Convention should guide their decision making. The UK Supreme Court also seized on the importance of the European Court's disavowal of *Bankovic*.[187]

In light of ECtHR's findings in *Al-Skeini*, the UK Supreme Court accepted that "[t]he extra-territorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents' authority and control, and it does not need to be more than that."[188] The implication of "dividing or tailoring", or what Campbell McLachlan calls the disaggregated approach to human rights,[189] is "that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual."[190]

A subsidiary point raised in *Smith* is that "authorized agents of a state . . . remain under its jurisdiction when abroad."[191] The UK

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186 *Smith and others v Ministry of Defence*; *Ellis v Ministry of Defence; Allbutt and others v Ministry of Defence*, (2013) UKSC 41 [*Smith*]. (There were three opinions issued in the case, one written by Lord Hope with 3 judges concurring, a dissenting opinion by Judge Mance with whom Lord Wilson agreed, and a separate opinion by Lord Carnworth. All seven justices were in explicit agreement on the issue of jurisdiction.)

187 *Ibid* at para 48.

188 *Ibid* at para 38 [emphasis added].

189 McLachlan, *supra* note 87 at 326.

190 *Smith*, supra note 186 at para 49.

191 *Ibid* at para 51, citing *Al Skeini*, *supra* note 164.

Supreme Court examined this point in the context of the armed forces and concluded that the state exercises authority and control over military members through the chain of command wherever they are deployed. As such, it was not "possible to separate them, in their capacity as state agents, from those whom they affect when they are exercising authority and control on the state's behalf. They are all brought within the state's article 1 jurisdiction by the application of the same general principle."[192]

Applying these principles to the facts, the UK Supreme Court easily found that the three service members killed in Iraq were subject to the UK's jurisdiction and that the UK was obligated to protect their right to life.[193] Ultimately, the extent of what is required to fulfill the UK's obligations under article 2 of the *ECHR* in a foreign war zone was the more complicated question, best determined by the trial judge.[194]

D. New Zealand

Like the UK, New Zealand does not have a single unified constitutional document.[195] Its current constitution is comprised of several statutes, common law, and constitutional conventions. The *New Zealand Bill of Rights Act 1990* is a legislative document and therefore presumed to be territorial in application and read in a manner that is consistent with New Zealand's international legal obligations.[196]

Like section 32 of the Canadian *Charter*, section 3 of the *NZBORA* stipulates that the law "applies only to acts done (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or (b) by any person or body in the performance of

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192 *Smith*, *supra* note 186 at para 52.

193 See *ibid* at para 55.

194 See *ibid* at para 81.

195 See *New Zealand Constitution Act 1852* (UK), 15 & 16 Vict, c 72 (an act of the UK government that established New Zealand's parliament).

196 (NZ), 1990/109 [*NZBORA*]. See also Ella Watt, "The Application of the New Zealand Bill of Rights Act 1990 to New Zealand State Actors Overseas" (2013) 11:3 NZJ Public & Intl L 661 at 665.

any public function, power, or duty conferred or imposed on that person or body by or pursuant to law."[197] The *NZBORA* does not articulate its geographical reach, but the long title is explicit that its purpose is "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" and "to affirm [the country's] commitment to the International Covenant on Civil and Political Rights."[198]

Given this clear link to the Covenant, one might expect that the legislation's geographical scope would be assessed in light of relevant jurisprudence interpreting the *ICCPR*. However, in the 2018 case *Young v Attorney General*, the New Zealand Court of Appeal turned to the UK's domestic case law for guidance instead.[199] The Court of Appeal cited *Smith* to support the proposition that a state may be obligated to secure rights and freedoms to persons outside its territory in exceptional cases.[200] As in *Smith*, the Court concluded that the applicant, a New Zealand Naval Officer serving in the UK, was subject to New Zealand's jurisdiction while deployed overseas. The real issue was whether the conduct at the centre of the case (sexual assault on board a Royal Navy ship) was attributable to New Zealand.

In answering this question, the Court of Appeal quoted from the text *The New Zealand Bill of Rights* by Paul Rishworth and others,[201] which identifies two grounds for extending the NZBORA beyond the territorial state. The first is that rights are conferred on every person in the world but will only take hold or have "practical 'bite'" when a person interacts with the Government of New Zealand, wherever that may be.[202] The second, narrower approach, is that everyone has rights *vis à vis* the Government of New Zealand where it acts as such in New Zealand or where it

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197 *Supra* note 196.

198 *Ibid* [emphasis added].

199 [2018] NZCA 307, 3 NZLR 827, leave to appeal to the NZSC dismissed [*Young*]

200 See *ibid* at paras 28–30.

201 Paul Rishworth et al, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003).

202 *Young*, *supra* note 199 at para 41, citing Rishworth et al, *supra* note 201 at 114.

asserts a territorial or personal jurisdiction.[203] The Court of Appeal found that the applicant was attempting to bring her claim under the second prong, mirroring the UK Supreme Court's finding of jurisdiction in *Smith*.

"Assuming for the purpose of analysis the adoption in New Zealand of the extraterritorial jurisdiction recognized in *Smith*," remarked the Court of Appeal, "it would follow that, if while on active service abroad Ms. Young's NZBORA rights were infringed there by a person to whom the NZBORA applies, then she would be entitled to bring a proceeding in New Zealand and to obtain an effective remedy in the courts of New Zealand."[204] However, the Court of Appeal found that the actions underlying Ms. Young's claim were attributable to the UK Ministry of Defence because they were undertaken by British military personnel acting under the UK's authority, and as such, the relevant conduct was not captured by section 3 of the NZBORA.

While this case does not definitively decide the question of the NZBORA's geographical scope, the Court of Appeal went out of its way to articulate "that there is no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore."[205] The New Zealand Supreme Court refused to hear an appeal of this case.

Two years later, in an extradition case, the Court of Appeal reiterated these remarks from *Young* and affirmed that the question of whether the "NZBORA applies to acts of the New Zealand state performed abroad has yet to be authoritatively explored."[206] The Court accepted for the sake of that case that the Act may have extraterritorial application but ultimately found that there was no basis for finding that the accused's rights were violated by his extradition.

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[203] See *Young*, *supra* note 199.

[204] *Ibid* at para 43.

[205] *Ibid* at para 40.

[206] *Smith v R*, [2020] NZCA 499 at para 92.

E. AUSTRALIA

Australia's domestic courts have never directly engaged with the question of whether its municipal human rights obligations apply abroad. However, the Australian government accepts that its human rights obligations apply extraterritorially in the limited circumstances where it exercises effective control over foreign territory. This position is a much more restrictive approach than that adopted by the UK Supreme Court, the New Zealand Court of Appeal, and enunciated in *Cook*, but it is still more permissive than *Hape.*

Australia does not have a national bill of rights, but the state is a party to and is therefore bound to uphold its obligation under the *ICCPR*. Additionally, Australia's constitution, dating back to 1900, sets out five explicit individual rights: the right to vote (section 41), freedom of religion (section 116), the prohibition on discrimination on the basis of which Australian state a person lives (section 117), protection against the unjust acquisition of property (section 51), and the right to a trial by jury (section 80).[207] The Australian High Court also found that the Constitution implicitly protects the right to vote[208] and the right to freedom of political communication.[209] Four separate federal statutes prohibit discrimination on the grounds of race,[210] sex,[211] disability,[212] age,[213] and sex and gender.[214] These statutes contain explicit provisions about their territorial application. Australian common

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[207] *See Commonwealth of Australia Constitution Act 1900* (UK), 1900, 63 & 64 Vict, c12.

[208] See *Roach v Electoral Commissioner*, [2007] HCA 43, 233 CLR 162.

[209] See *Australian Capital Television Pty Ltd v Commonwealth*, [1992] HCA 45.

[210] See *Racial Discrimination Act 1975*, 1975/52 (Cth).

[211] See *Sex Discrimination Act 1984*, 1984/4 (Cth).

[212] See *Disability Discrimination Act 1992*, 1992/135 (Cth).

[213] See *Age Discrimination Act 2004*, 2004/68 (Cth).

[214] See *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, 2013/98 (Cth).

law also recognizes fair trial rights, freedom of movement, and the rules of natural justice.[215]

There is no reported jurisprudence concerning the geographical scope of the state's obligation under the *ICCPR*, but the Australian government has considered its extraterritorial human rights obligations. In 2014, the Senate Standing Committees on Legal and Constitutional Affairs published a report following their inquiry into incidents arising at an Australian offshore immigration detention centre. The centre is located in Manus Province, Papua New Guinea. In February 2014, there were a series of riots at the detention facility that resulted in the death of one asylum seeker and injuries to dozens more.[216] In its report, the Senate Committees concluded:

> Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia over whom Australia is exercising "effective control", or who are otherwise under Australia's jurisdiction.[217]

In coming to this conclusion, the committees referenced Australia's 2009 submission to the UN HRC, which acknowledged that there may be exceptional circumstances in which the rights and freedoms set out under the *ICCPR* are relevant beyond the territory of a state party.[218] However, Australia asserted that this would only arise in cases where a state exercises a high degree of authority and control such that it can afford all of the rights under

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[215] Chief Justice Robert French, "Protecting Human Rights Without a Bill of Rights" (26 January 2010), online (pdf): <hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>.

[216] See Austl, Commonwealth, Standing Senate Committee on Legal and Constitutional Affairs, *Report: Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) [Report].

[217] *Ibid* at para 7.20.

[218] See UNHRC, *Replies to the List of Issues To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (2009) at 4.

the Covenant. The state rejected the notion that the *ICCPR* would apply in "cases in which Australian officials may be operating beyond Australia's territory from time to time."[219]

A major issue in the Manus Island inquiry was, therefore, whether Australia exercised effective control over the refugee processing and detention centre in Papua New Guinea. Based on the evidence presented and the findings of the ICJ in the *Wall Case*, the Senate Committees concluded that Australia was unequivocally exercising effective control over the facility at the time of the riots.[220] As such, Australia had a duty to "respect, protect and fulfil the human rights of individuals detained at the centre"[221] in accordance with the state's obligations under the *ICCPR*.

F. ISRAEL

Like Australia and the United Kingdom, Israel does not have a single written constitution. In 1992, the Knesset (Israel's legislative body) enacted the *Basic Law: Human Dignity and Liberty*, which protects a range of fundamental rights, and limits the ability of the Knesset to pass laws that violate those rights.[222] In 1995, the Supreme Court of Israel found that the Basic Laws (there are numerous Basic Laws addressing a variety of issues) stand above ordinary legislation, and in so doing, recognized their constitutional status.[223] As a result, the Supreme Court held that it had the power to judicially review government action and invalidate legislation inconsistent with the Basic Laws.[224]

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219 *Ibid*.

220 See Report, *supra* note 216 at para 8.33.

221 *Ibid* at para 8.32.

222 See *Basic Law: Human Dignity and Liberty*, 1992, SH 150 (Isr) online (pdf): <m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLaw Liberty.pdf>.

223 *Bank Mizrahi v Migdal Cooperative Village* (1995), CA 6821/93 (Isr) (translation available, online: <versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>).

224 See *ibid*.

Like section 32 of the *Charter*, the application provision in the *Basic Law: Human Dignity and Liberty* does not specify its territorial reach. Israel's jurisprudence examining this question arises in the context of the Occupied Palestinian Territories (OPT) where, unlike the other cases examined in this study, there is no competing sovereign state and the geographical proximity means "the separation between internal and external fades, and the clear-cut territorial and constitutional questions become blurred."[225] Nonetheless, the starting presumption for Israel's Basic Laws is that they only apply inside Israel.[226]

In the *Gaza Coast* case, however, the Supreme Court of Israel affirmed that Israeli citizens benefit from the *Basic Law: Human Dignity and Liberty*'s protection both within Israel and in an area subject to its occupation.[227] There are also a handful of cases where the Court extended constitutional protections to the OPT in a way that benefited both Palestinians and Israelis, "but only because separating the two groups would have led to charges of discrimination and would have made the legal framework much more difficult to disentangle. The Palestinians thus 'benefitted' from having the Israelis on their side, as they enjoyed a constitutional rights spillover, which, on their own, they would not have received."[228]

However, in cases where the Court had the opportunity to explicitly extend the same rights to non-Israeli citizens in the OPT, it did not do so.[229] *Adalah v Interior*[230] is perhaps the clearest

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225 Smadar Ben-Natan, "Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights" (2017) 50:2 Isr LR 139 at 170.

226 See *Adalah Legal Center for Arab Minority Rights in Israel v Minister of Defense* (2006), HCJ 8276/05, [2006] 2:1 IsrSC 352 (Isr) [*Adalah v Defence*].

227 *Hof Azza Regional Council v The Knesset* (2005), HCJ 1661/05, [2005] 59:2 IsrSC 481 (Isr) [*Gaza Coast*].

228 Adam Shinar, "Israel's External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction" (2018) 57 VA J Intl L 735 at 750–51.

229 For a detailed description of Israel's jurisprudence on this issue, see *ibid* at 748–50.

example. In that case, a couple living in the OPT challenged the constitutionality of a law that barred citizenship and resident status to Palestinians living in the occupied territories who married Israelis. The Court recognized the right of the Israeli citizen to bring a challenge on the ground that the law violated their right to dignity, equality, marriage and family, but found that their Palestinian spouse did not have standing.

In *Adalah v Defense*, the applicants argued that an amendment to tort legislation was a violation of the *Basic Law: Human Dignity and Liberty* because it barred the filing of claims for damages for death or injury arising from actions of the Israeli Defence Force in the OPT if they occurred within "declared conflict zones"'.[231] In particular, they claimed that the amendment violated the right to life and physical integrity, property, and equality.[232] In making their argument, the applicants asserted that the constitution "applies to all organs of government, and therefore every soldier carries in his knapsack not only the principles of administrative law but also the *Basic Law*: *Human Dignity and Liberty*."[233] The court ultimately found the amendment unconstitutional, without engaging with the application question conclusively:

> Should it not be said that wherever the official goes, the Basic Law goes with him? Should it not be said that this approach is particularly appropriate when the act of the official is done in a place that is subject to Israel's belligerent occupation (see A. Barak, *Legal Interpretation: Constitutional Interpretation* (vol. 3, 1994), at p. 460)? These questions are good ones .... It is also our opinion that there is no reason to consider the question of the territorial application of the *Basic Law: Human Dignity and Liberty*, since the rights that amendment 7 violates are rights in Israel, not rights outside Israel.[234]

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230 *Adalah Legal Center for Arab Minority Rights in Israel v Minister of Interior* (2006), HCJ 7052/03, [2006] 61:2 IsrSC 202 (Isr) [*Adalah v Interior*].

231 *Adalah v Defence, supra* note 226 at para 10.

232 See *ibid* at para 11.

233 *Ibid*.

234 *Ibid* at para 22.

The Court found instead that the *Basic Law: Human Dignity and Liberty* applied because the Palestinians sought to file their tort claim in an Israeli Court:

> The rights of the residents of the territories which are violated by amendment 7, are rights that are given to them in Israel. They are their rights under Israeli private international law, according to which, when the appropriate circumstances occur, it is possible to sue in Israel, under the Israeli law of torts, even for a tort that was committed outside Israel . . . [t]his application is not extra-territorial. It is territorial.[235]

Thus, the Supreme Court held, the deprivation arising from the legislative amendment occurred in Israel.

Adam Shinar writes that the Supreme Court of Israel has ducked the question of the *Basic Law*: *Human Dignity and Liberty's* extraterritorial application to non-citizens every time by relying on international or administrative law to decide the matter instead.[236] That said, unlike the Supreme Court of Canada, the Israeli court has never suggested that, per international law, the extraterritorial application of its constitution is impossible.

G. South Africa

The South African Constitution came into effect in 1997. Like the Canadian *Charter*, it entrenched the state's *Bill of Rights* within the constitution.[237] The *Bill of Rights* also has nothing that "stipulates that the binding-ness of the Constitution on public authorities is limited to acts committed within South African territory."[238] Article 8 of the Constitution specifies that the *Bill of Rights* "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[239]

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235 *Ibid* at para 23.

236 Shinar, *supra* note 228 at 753.

237 *Constitution of the Republic of South Africa, 1996*, No 108 of 1996.

238 Max du Plessis, "The Extra-Territorial Application of the South African Constitution" (2003) 120:4 SALJ 797 at 799.

239 *Supra* note 237, s 8.

The leading case on the scope of the South African *Bill of Rights* is the 2003 decision *Kaunda and Others v President of the Republic of South Africa*.[240] That case raised questions regarding the obligations of the South African government to ensure the release or extradition of 69 South African citizens from detention in Zimbabwe and seek assurances regarding their treatment while in foreign custody.

The Constitutional Court of South Africa looked first to the text of the *Bill of Rights*, noting that it provided the framework for the governance of South Africa and vests rights in everyone within South African territory. The Constitution states explicitly in section 233 that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." The majority noted that consistent with this requirement, section 39(1)(b)—the *Bill of Rights*' interpretation provision—requires consideration of international law.[241]

The Court then looked to the Supreme Court of Canada's decision in *Cook* and agreed with the majority that "[t]here may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states."[242] However, the case before them was not such an instance. The South African court determined that the *Bill of Rights* could not place requirements on Zimbabwe's officials, as to do so would be a violation of Zimbabwe's sovereignty.

This finding is somewhat remarkable given the clear text of the *Bill of Rights*. Yet, O'Reagan and Mogoro JJ went further (they dissent, but not on this point):

> It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions

[240] *Kaunda v President of the Republic of South Africa*, [2004] ZACC 5; 2005 4 S Afr LR 235.

[241] *Ibid* at para 33.

[242] *Ibid* at paras 41–44.

> of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the *Bill of Rights* wherever it may act.[243]

The *Kaunda* decision remains the binding precedent in South Africa.

H. SUMMARY

This review of the leading authorities from five states reveals that foreign application of municipal human rights obligations exists on a spectrum. The Supreme Court of Israel and the Government of Australia take a position on the restrictive end of this spectrum, asserting that human rights protections are only applicable where their state maintains effective control of an area. The UK takes an exceptional approach to the *HRA*, accepting Strasbourg's position that the *ECHR* binds a state's agents under at least three circumstances: where agents exercise jurisdiction in a foreign state in accordance with international law; where states maintain effective control over a foreign area; and where state agents exert control over persons in a foreign territory. Finally, South Africa, and in principle New Zealand, fall to the permissive end of the spectrum, finding that a state's municipal human rights obligations travel with its officials wherever they go. None of the Courts examined found that enforcing their state's municipal human rights obligations on *their own agents or organs* would violate customary international law rules of sovereignty nor the doctrine of jurisdiction.

It must also be noted that international human rights scholar Marko Milanovic proposes a fourth approach.[244] In his text,

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[243] *Ibid* at paras 228–29.

[244] Milanovic, *supra* note 91.

Extraterritorial Application of Human Rights Treaties, Milanovic argues for an interpretation that distinguishes between positive and negative human rights obligations; negative referring to a state's obligation to refrain from infringing upon a person's rights without justification, and positive referring to a state's duty to secure human rights for its citizens and residents.[245] Milanovic's model limits a state's positive obligations territorially, such that they are owed only to those within a state's territory or a physical area under its effective control, while negative obligations are "territorially unbound."[246] Milanovic accepts that states may not be in "the same position with respect to its negative obligations when it acts outside its territory in conditions of normalcy".[247] However, he suggests that the best way to address the difficulties in their extraterritorial application is not to impose some artificial threshold, but to take into account all considerations of effectiveness and apply the substance of the state's negative obligations "to the facts at hand with a greater degree of flexibility."[248]

Milanovic's bifurcated approach is intriguing from an international human rights perspective and municipally for states like South Africa, whose *Bill of Rights* includes several positive rights, or the UK, which incorporated the *ECHR* into its domestic law.[249] However, applied in the context of Canada's municipal human rights obligations, Milanovic's proposed model essentially collapses into the permissive model of universal application wherever extraterritorial conduct is attributable to Canada. This is because the *Charter* contains a single positive right, section 23,

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245 See *ibid* at 209.

246 *Ibid* at 210.

247 *Ibid*.

248 *Ibid*.

249 The ECtHR recognizes that articles 2 (right to life), 3 (prohibition on torture) and 11 (freedom of assembly) of the Convention impose positive obligations on state parties. See ECtHR, "Research Report: Positive Obligations on member States under Article 10 to protect journalists and prevent impunity" (December 2011) at 4, online (pdf): *ECtHR* <echr.coe.int/Documents/Research_report_article_10_ENG.pdf>.

which guarantees minority language rights within Canada. While the Supreme Court of Canada has recognized that the *Charter* may impose positive obligations in some circumstances, they remain exceedingly rare and typically arise in cases where a statutory regime is underinclusive in its protection of a subgroup's section 2 rights.[250]

CONCLUSION

Sovereignty does not bar the application of the *Charter* to state conduct outside of Canada. The ICJ, the ECtHR, and the UN HRC have found, and appellate courts of the UK, South Africa, New Zealand, and Israel accept (at least in principle) that a state's human rights obligations may govern the actions of state officials when they operate in a foreign state. In reaching this conclusion, none of these adjudicative bodies were concerned that holding their officials accountable for human rights violations perpetrated abroad in their domestic courts would fall afoul of international law. This uniformity exists because such an exercise of a state's prescriptive jurisdiction is not inconsistent with the principle of sovereignty. Therefore, the principle of sovereignty does not demand a strictly territorial interpretation of section 32 and the *Charter's* reach.

Instead, the effective control test and the customary law rules on state responsibility provide helpful guidance for the Court regarding the meaning of "within the Authority of Parliament." Per international law, the actions of a state organ, like the RCMP, are attributable to the Government of Canada except in very narrow circumstances. This finding is wholly consistent with the Supreme Court's interpretation of section 32 in *Godbout*. Thus, except in those narrow circumstances, when Canadian officials act abroad where Canada exerts effective control over a foreign person or place, international human rights law supports a finding that those

[250] See *Dunmore v Ontario (Attorney Genera*l), 2001 SCC 94; *Baier v Alberta,* 2007 SCC 32 at paras 21–30. For more discussion, see Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Const Forum Const 41.

subject to Canada's jurisdiction benefit from the *Charter*'s protections and can seek a remedy in Canadian courts.

McGregor presents an opportunity for the Supreme Court to revisit and reconsider its reliance on international law to interpret the geographic reach of the *Charter*. Should the Court take on this issue and apply its guidance from *Québec inc*, it is unlikely to find any support for the conclusion that the *Charter* cannot apply extraterritorially when Canadian officials operate abroad. Without the principle of sovereignty and the doctrine of jurisdiction serving as an artificial barrier, the Court should return to the test laid out in *Big M Drug Mart* and start its analysis afresh by examining the text of the provision. Should they, the Court may conclude, as the majority did in *Cook*, that there is nothing in the text of section 32 or the broader text of the *Charter* that suggests that it ceases to govern the conduct of government authorities when they travel beyond Canada's borders. Nor, for that matter, is there any textual basis for concluding that the conduct of Canadian officials operating overseas falls outside the adjudicative jurisdiction of Canadian courts. The Court's reasoning in *Cook* and the text of the *Charter* supports a permissive approach to the *Charter*'s extraterritorial application.

Such a finding would have important implications for the CAF, CSIS, CSE, and the RCMP. It would finally provide legal clarity for these agencies who are increasingly operating overseas to investigate crime, enhance Canada's national security, and defend Canadian interests from foreign threats. When they embark on operations, be it within Canada or abroad, Canadian officials would know that their conduct must be consistent with the *Charter*.

That said, what the *Charter* demands should depend on the context in which officials operate. While this approach may pose challenges at first, Canada's national defence, security and intelligence agencies routinely engage in contextual analysis and have significant experience interpreting and applying *Charter* jurisprudence arising predominantly in a law enforcement context to their operations. Moreover, as this paper revealed, many of Canada's closest allies take their human rights obligations with them when they travel overseas. We should trust that just as their

security officials, law and policymakers, and courts have found ways to ensure compliance, so too will Canada's.