

International Human Rights Law and the Canadian Courts

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Canadian courts now make frequent reference to international human rights law sources in their decisions. These sources include international treaties to which Canada is a party, international treaties to which Canada is not a party, and various "soft law" or non-binding sources of international law such as General Assembly resolutions, as well as the decisions of the European Court of Human Rights, the United Nations Human Rights Committee and other international adjudicative bodies. What may once have been viewed as somewhat of a Canadian eccentricity, this interest in international human rights law is now spreading, and courts around the world make increasing reference to such materials. It is clear that in many cases they consider Canada to be somewhat of a model in this respect. Because various national and international courts find themselves examining the same general points of law, and because their references are legal texts that are similar if not identical because of their common origins, a form of international and comparative law human rights jurisprudence is now developing. This paper will examine three aspects of the phenomenon: the basis of reference to international human rights law by Canadian courts, the practice of Canadian courts, and the emergence of a truly international body of human rights case law.

I. BASIS OF REFERENCE TO INTERNATIONAL HUMAN RIGHTS LAW BY CANADIAN COURTS

Even prior to the coming into force of the *Canadian Charter of Rights and Freedoms*,¹ Canadian courts made occasional reference to international human rights sources, such as the *Universal Declaration of Human Rights*.² The Supreme Court of Canada made it clear from its earliest decisions under the Charter that reference to international human rights law sources was an essential part of its Charter methodology.³ Since 1985, it has referred to international human rights law in fifty-seven judgments.

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
 2. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948). See: *Gagnon v. The Queen*, [1971] R.J.Q. 454 (C.A.), 14 C.R.N.S. 321; *Nissan Automobile Co. (Canada) Ltd. v. Pelletier*, [1976] R.J.Q. 296 (C.S.), 77 D.L.R. (3d) 646 (Que. S.C.); *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 R.C.S. 181.
 3. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1, 14 C.R.R. 13, 12 Admin. L.R. 137; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, [1985] 3 W.W.R. 481, 60 A.R. 161, 37 Alta. L.R. (2d) 97, 58 N.R. 81; *Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 63 N.R. 266, 24 D.L.R. (4th) 536, 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 18 C.R.R. 30; *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 64 N.R. 161, 23 D.L.R. (4th) 321, 52 O.R. (2d) 799, 17 Admin. L.R. 89, 9 C.C.E.L. 185, 82 C.L.L.C. 17,002, 12 O.A.C. 241, 7 C.H.R.R. D/3102; *Valente v. R.*, [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161, 23 C.C.C. (3d) 193, 49 C.R. (3d) 97, 52 O.R. (2d) 779, 37 M.V.R. 9, 64 N.R. 1, 19 C.R.R. 354, 14 O.A.C. 79; *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 26 D.L.R. (4th) 200, 65 N.R. 87, 19 C.R.R. 308, 14 O.A.C. 335; *R. v. Mills*, [1986] 1 S.C.R. 863, 16 O.A.C. 81, 29 D.L.R. (4th) 161, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 67 N.R. 241; *R. v. Beaugard*, [1986] 2 S.C.R. 56; *Jones v. R.*, [1986] 2 S.C.R. 284; 69 N.R. 241, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 73 A.R. 133, 25 C.R.R. 63.

Some had thought that its early enthusiasm would falter, that the Court had drawn on international law in its early Charter judgments because of a lack of domestic authority, and that as Canadian precedents were developed, the interest in international law would decline. But this has not proven to be the case, and in 1995 alone, for example, such materials appeared in six decisions of the Court.⁴ By and large, however, the Court's persistent interest in international law has not been matched by other jurisdictions, with three notable exceptions, the Federal Court of Canada, the Quebec Human Rights Tribunal and the Refugee Determination Division of the Immigration and Refugee Board.

The classic formulation of the sources of international law is article 38 of the *Statute of the International Court of Justice*. It sets out the three principal sources:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations.⁵

The list is not exhaustive. For example, a source of international law that is of growing importance is decisions of the United Nations Security Council, adopted pursuant to article 25 of the *Charter of the United Nations* and binding upon all Member States. Unilateral acts, such as a declaration of support for legal principles comprised in a resolution of the General Assembly, or a reservation or objection to a multilateral treaty, may also create legal rights and obligations. *The Statute of the International Court of Justice* indicates that legal scholarship and judicial decisions are "subsidiary means for the determination of rules of law".

Customary international law binds States even though there is no act of ratification. Nevertheless, these remain consensual norms, because the State must show that it accepts the norm through overt and objectively verifiable acts. The *Criminal Code*, in its provision dealing with "crimes against humanity",⁶ refers explicitly to "customary international law". The Code gives jurisdiction to Canadian courts in cases of crimes against humanity, as defined by customary international law, even when the crime was committed outside Canada and there is no personal jurisdictional link. In prosecutions under this provision, the courts have been required to interpret norms of customary

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- 4. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, 176 N.R. 161; *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693; *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, 95 C.L.L.C. 210-025, 29 C.R.R. (2d) 79, 12 R.F.L. (4th) 201, 182 N.R. 161; *RJR-Macdonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; *R. v. O'Connor*, [1995] 4 S.C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, [1996] 2 W.W.R. 153, 112 W.A.C. 1, 191 N.R. 1.
 - 5. Cited in *R. v. Finta* [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513, 165 N.R. 1, at p. 762 (S.C.R.).
 - 6. *Criminal Code*, R.S.C. 1985, c. C-46, s. 7 (3.76).

international law.⁷ The *Deschênes Commission of Inquiry on War Criminals Report*⁸ considered that section 11(g) of the Charter, which prohibits retroactive criminal offenses unless they constituted an offence under Canadian or international law or were "criminal according to the general principles of law recognized by the community of nations", formally incorporated customary international law into Canadian law.⁹

Aside from the specific context of the *Criminal Code*, Canadian lawyers have rarely attempted to invoke customary human rights norms before the courts.¹⁰ Yet the common law suggests that these rules are binding upon the courts, even in the absence of any domestic legal provisions upon which to attach them.¹¹ As a result, customary rules of international law, such as the guarantee provided to individuals belonging to ethnic, religious or linguistic minorities, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language; or the right of groups to enjoy their own culture, to profess and practise their own religion, or to use their own language; or the right of peoples to self-determination, are part of the law of Canada and justiciable before our courts despite the fact that they are not incorporated in the Charter or in specific legislation.¹²

Recently, the Human Rights Committee, which was created in order to implement the *International Covenant on Civil and Political Rights*,¹³ proposed a list of customary international human rights norms: the prohibition of slavery, torture and cruel, inhuman or degrading treatment or punishment, the right to life, protection against arbitrary arrest and detention, freedom of thought, conscience and religion, the presumption of innocence, the right to a fair trial, prohibition of execution of pregnant women or children, prohibition of advocacy of national, racial or religious hatred, the right of persons of marriageable age to marry, the right of minorities to enjoy their own culture, profess their own religion or

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7. *Supra* note 5 at 731 (S.C.R.). Also: *Rudolph v. Canada (Minister of Employment and Immigration)*, 91 D.L.R. (4th) 686 (F.C.A.), at 690-692.
 8. Deschênes J., *Commission of Inquiry on War Criminals, Part I* (Ottawa: Supply and Services Canada, 1986) at 132.
 9. *Supra* note 5 at 734 (S.C.R.).
 10. For examples (unsuccessful), see: *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta*, 120 D.L.R. (3d) 590, 81 C.L.L.C. 14,089 (Alta Q.B.), at 621 (D.L.R.); *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.) at 598-599, 607-608 (per Mahoney J.A.).
 11. *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 (H.L.). See also: M. Cohen, A. F. Bayefsky, "The Canadian Charter of Rights and Freedoms and International Law" (1983) 61 Can. Bar Rev. 265 at 275.
 12. See: *Montana Band of Indians v. Canada*, [1990] 2 F.C. 198 (T.D.) at 203.
 13. *International Covenant on Civil and Political Rights* (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47.

use their own language.¹⁴ The United States courts have also declared certain human rights norms to be customary law.¹⁵ In an objection filed protesting a reservation by Yemen to the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁶ Canada implied its recognition of a customary norm when it said that it "believes that the principle of non-discrimination is generally accepted and recognized in international law and therefore is binding on all states".¹⁷

General principles of law recognized by civilized nations are listed in the Statute of the International Court of Justice as another of the three principal sources of rules of international law, although in practice they have taken a back seat to customary and conventional norms. Examples of such general principles would be the rule of *res judicata*,¹⁸ the doctrine of estoppel¹⁹ and the obligation to make reparation for breach of an undertaking.²⁰ In the Statutes of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, the judges are authorized to accord pardon or commutation based on the "interests of justice and the general principles of law".²¹ Because, by definition, such rules are derived from domestic law, most, if not all of them, are already recognized by Canadian courts. There is also a suggestion that certain criminal infractions form part of this body of international law. Section 11(g) of the Charter uses wording that is remarkably close to that of article 38 of the *Statute of the International Court of Justice* when it refers to "general principles of law recognized by the community of nations". The Deschênes Commission believed that prosecutions for war crimes could be taken before Canadian courts on the grounds that there had been a violation of such general principles of law.²² The Commission did not favour such an option, however,

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14. General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), A8. Some States parties have challenged the accuracy of the list: "Observation by the United States of America on General Comment No. 24 (52)", U.N. Doc. A/40/40, 16 H.R.L.J. 422; "Observations by the United Kingdom on General Comment No. 24", U.N. Doc. A/50/40, 16 H.R.L.J. 424; U.N. Doc. A/51/40 (observations by France).
 15. *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir.1985); *Filartega v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir.1981).
 16. *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) 660 U.N.T.S. 195, [1970] C.T.S. 28.
 17. "Multilateral Treaties deposited with the Secretary-General", U.N. Doc. ST/LEG/SER.E/13 (1995).
 18. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal Case*, Advisory Opinion, [1954] I.C.J. Rep. 47 at 53.
 19. *Canada v. U.S.*, [1984] I.C.J. Rep. 246 at 129-148.
 20. *Chorzow Factory Case (Germany v. Polish Republic)* (1928), P.C.I.J. Ser. A, No. 17 at 29.
 21. *Statute of the International Criminal Tribunal for the former Yugoslavia*, S.C. Res. 827, Annex, art. 28; *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, Annex, art. 27.
 22. *Supra* note 8 at 132.

which it considered to be "too esoteric".²³ Mr. Justice La Forest of the Supreme Court of Canada has stated that the Deschênes Commission's hypothesis of prosecution under general principles was "not self-evident" and "by no means clear".²⁴

Canadian judges are generally rather devout positivists, and the more than 500 reported Canadian cases that refer to international human rights law eschew customary law and general principles in favour of more familiar black letter territory. Where international legal instruments — treaties, conventions, protocols, declarations, pacts — have been expressly referred to in Canadian statutes, the proposition that some or all of the norms they comprise are directly incorporated, is not particularly controversial. There are, however, few examples of such direct incorporation, and most of the explicit references to international law are to be found in the preambles, and not the substantive texts, of Canadian statutes.²⁵ To take a recent example, Bill C-27, proposed in mid-1996, will add provisions dealing with child prostitution, child sex tourism and female genital mutilation to the *Criminal Code*. It includes the following preambular paragraphs:

WHEREAS the 9th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Cairo, 1995) urged Member States to adopt measures to prevent, prohibit, eliminate and impose effective sanctions against practices harmful to women and children;

WHEREAS the United Nations Declaration on the Elimination of Violence against Women (General Assembly resolution 48/104, 20 December 1993) and the Platform for Action of the Fourth World Conference on Women (Beijing, 1995) recognize that violence against women both violates, and impairs or

23. *Ibid.* at 133.

24. *Supra* note 5 at 734 (S.C.R.).

25. Two Canadian statutes refer to the International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47 in their preambles: *Emergencies Act*, S.C. 1988, c. 29; *Canadian Multiculturalism Act*, S.C. 1988, c. 31. *The Immigration Act*, R.S.C. 1985, c. I-2, ss. 2(1), 3(g) refers to the *Convention Relating to the Status of Refugees*, (1954) 189 U.N.T.S. 137, [1969] C.T.S.29. The preamble of Part V of the *Canada Labour Code*, S.C. 1972, c. 18 refers to I.L.O. *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* (1950), 68 U.N.T.S. 17, [1973] C.T.S. 14. *The Geneva Conventions Act*, R.S.C., 1985, ch. G-3 incorporates the four Geneva Conventions and their two Protocols Additional (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1950), 75 U.N.T.S. 31, [1965] C.T.S. 20; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (1950), 75 U.N.T.S. 85, [1965] C.T.S. 20; *Geneva Convention Relative to the Treatment of Prisoners of War* (1950), 75 U.N.T.S. 135, [1965] C.T.S. 20; *Geneva Convention Relative to the Protection of Civilians Persons in Time of War* (1950), 75 U.N.T.S. 287, [1965] C.T.S. 20; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I)* (1979), 1125 U.N.T.S. 3, [1991] C.T.S. 2; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II)* (1979), 1125 U.N.T.S. 3, [1991] C.T.S. 2.

nullifies, the enjoyment by women of their human rights and fundamental freedoms;

[...]

*WHEREAS, by ratifying the United Nations Convention on the Rights of the Child, Canada has undertaken to protect children from all forms of sexual exploitation and sexual abuse, and to take measures to prevent the exploitative use of children in prostitution or other unlawful sexual practices;*²⁶

Regrettably, because such preambles are not incorporated in the *Criminal Code* itself, they are almost inevitably consigned to obscurity.

The suggestion that international human rights norms have been introduced into Canadian law, including the Charter itself, by implication presents the greatest interest for litigants. Several examples of adoption of international human rights norms by implication may be found in the *Criminal Code*.²⁷ The prohibition of hate propaganda, set out in section 319 of the Code, is clearly inspired by the *International Convention on the Elimination of All Forms of Racial Discrimination*,²⁸ even though the provision may not adequately give effect to the obligations set out in article 5 of that instrument. The incorporation thesis was enthusiastically advanced by scholars in the early years of Charter interpretation, who argued that enactment of the *Canadian Charter of Rights and Freedoms* constituted the incorporation of the *International Covenant on Civil and Political Rights* and perhaps other human rights norms,²⁹ although this position never received more than the most lukewarm reception from the courts.

Chief Justice Brian Dickson, in his reasons in *Re Public Service Employee Relations Act*, rejected the "implicit incorporation" position, and concluded that international human rights law was limited to the status of an important interpretative aid in Charter litigation:

26. *Bill C-27, An Act to amend the Criminal Code* (child prostitution, child sex tourism, criminal harassment and female genital mutilation), 2d Sess., 35^e Parl., 1996.

27. *Supra* note 6.

28. *Supra* note 16. The *Convention* inspired amendments to the *Criminal Code* creating the new infraction of hate propaganda: *Act to Amend the Criminal Code*, S.C. 1969-70, c. 30. The *Conventions* is referred to specifically in the preamble to the *Multiculturalism Act*, S.C. 1988, c. 31.

29. J.E. Claydon, "The Application of International Human Rights Law by the Canadian Courts", (1981) 30 *Buffalo L.R.* 727; J.E. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 *Supreme Court L. R.* 287; E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights", (1982) 20 *Alta L. Rev.* 383; D. Turp, «Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel», (1984) 18 *R.J.T.* 353; M.A. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications", (1985) 23 *U.W.O.L. Rev.* 9.

[...] *the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in Charter interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. As the Canadian judiciary approaches the often general and open textured language of the Charter, "the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel".*³⁰

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar to identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. As this Court stated in R. v. Big M Drug Mart Ltd.,³¹ interpretation of the Charter must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection". 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.

*In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.*³²

30. *Ibid.* J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" at 293.

31. *R. v. Big M Drug Mart Ltd.*, *supra* note 3 at 344.

32. *Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1, 87 C.L.L.C. 14,021, at 348-50 (S.C.R.). For discussion of the legal underpinning of this decision, see: W.A. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed., (Toronto: Carswell, 1996); A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation*, (Toronto: Butterworths, 1992); M. Le Bel, «L'interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne — Critique de la démarche suivie par la Cour suprême du Canada» (1988) 48 *R. du B.* 743.

In this seminal passage, which can be considered to state the law in Canada even though it is included in a dissenting opinion,³³ the Chief Justice made a distinction between two categories of international law instruments, those which, while not necessarily binding upon Canada as a question of law, fit generally into the category of contemporary international human rights law, and those that actually bind Canada as a matter of law. In the first category can be found such important treaties as the *Convention for the Protection of Human Rights and Fundamental Freedoms*³⁴ and the *American Convention on Human Rights: "Pact of San José, Costa Rica"*,³⁵ as well as a range of declarations and other inherently non-binding norms,³⁶ such as the *Universal Declaration of Human Rights*,³⁷ the *Helsinki Final Act* and the other documents of the Organization

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33. "Though speaking in dissent, his comments on the use of international law generally reflect what we all do", according to La Forest, J. of the Supreme Court of Canada, in a speech to the Canadian Council on International Law, October 22, 1988: La Forest, J. "The Use of International and Foreign Material in the Supreme Court of Canada", Proceedings, XVIIth Annual Conference, Canadian Council on International Law, 1988, at 230-241, at 232. The "Dickson doctrine" has since been cited in a number of Canadian cases: *International Fund for Animal Welfare Inc. v. Canada*, [1989] 1 F.C. 335, 83 N.R. 303, 35 C.R.R. 359, 45 C.C.C. (3d) 457, 19 F.T.R. 159 (C.A.), at 348 (F.C., per MacGuigan J.A.); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, 26 C.C.E.L. 85, 93 N.R. 183, 89 C.L.L.C. 14,031, at 1056 (S.C.R., per Dickson C.J., in reasons supported by La Forest, L'Heureux-Dubé and Wilson JJ.); *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1, [1991] 2 W.W.R. 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 117 N.R. 1 at 750 (S.C.R.); *Commission des droits de la personne du Québec v. Commission scolaire de Saint-Jean-sur-Richelieu*, [1991] R.J.Q. 3003 (H.R.T.), at 3025; *New Brunswick Broadcasting Co. v. Donahoe*, 71 D.L.R. (4th) 23, 97 N.S.R. (2d) 365 (S.C.), at 49 (D.L.R.); *Gould v. Yukon Order of Pioneers*, (1991) 14 C.H.R.R. D/176 (S.C.Y.T.), at D/188; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)*, (1991) 80 D.L.R. (4th) 11 (N.S.S.C., A.D.), at 35; *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202, 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, at p. 811 (S.C.R.); *Dufour v. Centre hospitalier St-Joseph-de-la-Malbaie*, [1992] R.J.Q. 825 (H.R.T.), at 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, (1995) 24 O.R. (3d) 109 (O.C.(G.D.)); *Charran v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 243 (T.D.); *B. (K.A.) (Re)*, [1994] C.R.D.D. No. 308; *Kelly v. Canada (Minister of Employment and Immigration)*, [1993] I.A.D.D. No. 739.
34. *Convention for the Protection of Human Rights and Fundamental Freedoms*, (1955) 213 U.N.T.S. 221, E.T.S. 5.
35. *American Convention on Human Rights: "Pact of San José, Costa Rica"*, (1979) 1144 U.N.T.S. 123, O.A.S.T.S. 36.
36. On non-binding norms, see: C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", (1989) 38 I.C.L.Q. 850; A. Aust, "The Theory and Practice of Informal International Instruments", (1986) 35 I.C.L.Q. 787; O. Schachter, "The Twilight Existence of Nonbinding International Agreements", (1977) 71 A.J.I.L. 296.
37. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810. It can be argued that at least some of the norms contained in the Universal Declaration represent in reality codified provisions of customary human rights law: R. Bilder, "The Status of International Human Rights Law: An Overview", (1978) *International Law and Practice* 1, at 8; J. Humphrey, "The Canadian Charter of Rights and Freedoms and International Law", (1985-86) 50 *Sask. L. Rev.* 13; J. Humphrey, "The Universal Declaration of Human Rights:

for Security and Cooperation in Europe, the *Standard Minimum Rules for the Treatment of Prisoners*,³⁸ the *Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities*³⁹ and the *Draft Declaration on the Rights of Indigenous Peoples*.⁴⁰

In the second category are such instruments as the *International Covenant on Civil and Political Rights*,⁴¹ the *International Covenant on Economic, Social and Cultural Rights*,⁴² *International Convention for the Elimination of All Forms of Racial Discrimination*,⁴³ the *Convention for the Elimination of Discrimination Against Women*,⁴⁴ the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*,⁴⁵ and the *Convention on the Rights of the Child*.⁴⁶ The provisions of these

Its History, Impact and Judicial Character", in B.G. Ramcharan, ed., *Human Rights: Thirty Years After the Universal Declaration*, (The Hague: Martinus Nijhoff, 1984); H. Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", (1996) 25 *Georgia J. Int'l & Comp. L.* 289. The issue has been addressed by the courts: Advisory Opinion on the continued presence of South Africa in Namibia (S.W. Africa), [1971] I.C.J. Rep. 16, at 76 (per Ammoun J.); see also the dissent of Judge Tanaka in South West Africa Cases, (*Ethiopia v. South Africa; Liberia v. South Africa*) Second Phase, [1965] I.C.J. Rep. 6, 37 I.L.R. 1, at 288-293 (I.C.J.); and case concerning United States Diplomatic and Consular Staff in Tehran, Judgment, (*United States of America v. Iran*) [1980] I.C.J. Rep. 3, 61 I.L.R. 530, at 42 (I.C.J.); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (1980).

38. E.S.C. Res. 663 C, amended by E.S.C. Res. 2076 (LXII). On the Standard Minimum Rules, see: R.S. Clark, *The United Nations Crime Prevention and Criminal Justice Program*, (Philadelphia: University Press of Pennsylvania, 1994) at 145-179. *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46.
39. U.N. Doc. E/CN.4/1992/48 + Corr.1, U.N. Doc. A/RES/48/138, G.A. Res. 48/138. See: A. Phillips, A. Rosas, *The U.N. Minority Rights Declaration*, (Abo: Abo Akademi University Institute for Human Rights, 1993); N. Lerner, "The 1992 UN Declaration on Minorities", (1993) 23 *Israel Y.H.R.* 111.
40. U.N. Doc. E/CN.4/L.62. See: C.M. Brodmann, M.Y.A. Zieck, "Some Remarks on the Draft Declaration on the Rights of Indigenous Peoples", (1995) 8 *Leiden J. Int'l L.* 103; R.T. Coulter, "The Draft U.N. Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?", (1995) 13 *Netherlands Q.H.R.* 123.
41. *Supra* note 13.
42. *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46.
43. *Supra* note 16.
44. *Convention on the Elimination of All Forms of Discrimination Against Women* (1981) 1249 U.N.T.S. 13, [1982] C.T.S. 31.
45. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/39/51, at 197.
46. *Convention on the Rights of the Child*, [1992] C.T.S. 3. See: E. Verhellen, ed., *Monitoring Children's Rights*, (Dordrecht: Martinus Nijhoff, 1996); P.E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, (Dordrecht: Martinus Nijhoff, 1992);

instruments are often similar to those of the Charter, and they have been ratified or acceded to by Canada. According to Chief Justice Dickson, Canada is bound to protect such rights within its borders. Interestingly, he did not specifically base his conclusion on the classic rule of interpretation by which domestic legislation is presumed to be consistent with international obligations, which Parliament is deemed to wish to respect. Rather, "general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation". Significantly, Chief Justice Dickson did not cite precedents concerning statutory interpretation and international treaties, but rather he relied upon a Charter case, *R. v. Big M Drug Mart Ltd.*, which is an authority for purposive interpretation.⁴⁷ In identifying the purpose of the Charter's provisions, he said that international obligations to which Canada is bound provide an "important indicia" to this effect. He concluded 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".⁴⁸

Chief Justice Dickson's insistence on a teleological approach does not freeze Charter interpretation with respect to the state of international human rights law at the year 1982, when the Charter came into force. Indeed, an undue emphasis on the specific role of international law in the drafting of the Charter may tend to focus the attention of judges on the state of international human rights law on April 17, 1982. There have been many significant innovations since 1982, such as the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty*,⁴⁹ the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*,⁵⁰ and the *Convention on the Rights of the Child*.⁵¹ Had Chief Justice Dickson insisted upon an historical perspective, as some scholars had invited him to do, these new international instruments might have been condemned to insignificance as aids to Charter interpretation.

M. Freeman & P. Veerman, *The Ideologies of Children's Rights*, (Dordrecht: Martinus Nijhoff, 1992); M. Bossuyt, «La Convention des Nations Unies sur les droits de l'enfant», (1990) 2 R.U.D.H. 141; R. Joyal, «La notion d'intérêt supérieur de l'enfant: sa place dans la Convention des Nations Unies sur les droits de l'enfant», (1991) 62 R.I.D.P. 785; A. Lopatka, "Convention relative aux droits de l'enfant", (1991) 62 R.I.D.P. 765; D. McGoldrick, "The United Nations Convention on the Rights of the Child", (1991) 5 I.J.F.L. 132; M. Santos Pais, «La Convention sur les droits de l'enfant», in *Institut canadien d'études juridiques supérieures 1992, Droits de la personne: l'émergence des droits nouveaux: aspects canadiens et européens: Actes des Journées strasbourgeoises*, (Cowansville: Éditions Yvon Blais, 1992) at 665; C. Price Cohen, "The U.N. Convention on the Rights of the Child: Developing an Information Model to Computerize the Monitoring of Treaty Compliance", (1992) 14 H.R.L.J. 216.

47. *R. v. Big M Drug Mart Ltd.*, *supra* note 3 at 344 (S.C.R.).

48. *Re Public Service Employee Relations Act (Alberta)*, *supra* note 32 at 350 (S.C.R.).

49. G.A. Res. 44/128 (1989). Cited in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 6 C.R.R. (2d) 193.

50. *Supra* note 39.

51. *Convention on the Rights of the Child*, *supra* note 46.

II. THE DICKSON DOCTRINE AND SUPREME COURT JURISPRUDENCE

Most of the references to international human rights law in Canadian judgments, both before and after Chief Justice Dickson's pronouncement in the right to strike case, have been rather perfunctory. Judges often make reference to the provisions of an international treaty or a judicial decision of a body such as the European Court of Human Rights in order to bolster an argument, but rarely in order to determine the outcome of a case. For example, in *R. v. Nova Scotia Pharmaceutical Society*, Justice Gonthier cited several cases of the European Court of Human Rights as confirmation of his view of the scope of the term "prescribed by law". "In my opinion", wrote Justice Gonthier, "the case law of the European Court of Human Rights is a very valuable guide on this issue".⁵² Furthermore, Justice Gonthier looked to European case law for indications on what should be the scope of legislative precision. He noted that the European Court of Human Rights had frequently warned against "a quest for certainty" and had preferred an "area of risk" approach.⁵³ In another case dealing with the vagueness argument, *Young v. Young*,⁵⁴ Justice L'Heureux-Dubé held that the "best interests of the child standard" was not unconstitutionally vague because it was specifically recognized in international human rights instruments, notably the *Convention on the Rights of the Child*.⁵⁵ In another case, Justice L'Heureux-Dubé also invoked the *Convention on the Rights of the Child* because it adopted the age of eighteen in its definition of the term "child".⁵⁶ In *R. v. O'Connor*, Justice L'Heureux-Dubé invoked article 17 of the *International Covenant on Civil and Political Rights*, article 12 of the *Universal Declaration of Human Rights*, and article 8 of the *European Convention on Human Rights* to support her argument that section 7 of the Charter protects the right to privacy.⁵⁷ Such references appear to be quite uncontroversial. However, two cases have shown that the Supreme Court of Canada can be far from united on the subject of international human rights law. Sharp differences appear in *R. v. Keegstra*, concerning the hate propaganda provisions of the *Criminal*

52. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 15 C.R. (4th) 1, 74 C.C.C. (3d) 289, 139 N.R. 241, at 637 (S.C.R.).

53. *Ibid.* at 639. Justice Gonthier cited: *Sunday Times v. United Kingdom*, April 26, 1979, Series A, No. 30, 2 E.H.R.R. 245, 58 I.L.R. 491; *Silver v. United Kingdom*, March 25, 1983, Series A, No. 61, 5 E.H.R.R. 347, 72 I.L.R. 334, at 33-34 (Series A); *Malone v. United Kingdom*, August 2, 1984, Series A, No. 82, 7 E.H.R.R. 14, 74 I.L.R. 346, at 32-33 (Series A).

54. [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, 160 N.R. 1, at 75 (S.C.R.).

55. *Convention on the Rights of the Child*, *supra* note 46, art. 3, s. 1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Also, arts. 9 s. 1, 9 s. 3, 18 s. 1, 20 s. 1, 21, 37(c), 40 s. 2(b)(iii).

56. *R. v. L. (D.O.)* [1993] 4 S.C.R. 419.

57. *R. v. O'Connor*, *supra* note 4 at 484 (S.C.R.).

Code, and *Kindler v. Canada (Minister of Justice)*, which deals with extradition in death penalty cases.

High school teacher Jim Keegstra was charged with disseminating hate propaganda, contrary to section 319 of the *Criminal Code*. He challenged the provision as a violation of the right to freedom of expression, enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*. That the text was incompatible with section 2(b) was quickly conceded, and the debate shifted to the Charter's limitations clause, section 1. Chief Justice Brian Dickson invoked international human rights principles "for guidance with respect to assessing the legislative objective". Justice Dickson observed that "[n]o aspect of international human rights has been given attention greater than that focused upon discrimination",⁵⁸ He noted the obligations imposed upon States to take positive measures, including the adoption of criminal law provisions, in order to suppress racist propaganda. These are found specifically in article 4(a) of the *International Convention for the Elimination of All Forms of Racial Discrimination*⁵⁹ and article 20 section 2 of the *International Covenant on Civil and Political Rights*.⁶⁰ Chief Justice Dickson also referred to the fact that a communication directed against Canada before the Human Rights Committee, attacking hate propaganda legislation, had been declared incompatible with the provisions of the *Covenant*.⁶¹ Finally, he referred to the *Convention for the Protection of Human Rights and Fundamental Freedoms* and decisions of the European Commission on Human Rights⁶² upholding the notion that prohibition of racist communication was a valid exception to the protection of freedom of expression.⁶³ The Chief Justice made the same argument in *Canada (H.R.C.) v. Taylor*,⁶⁴ one of the companion judgments to Keegstra, which dealt with the validity of section 13(1) of the *Canadian Human Rights Act*.⁶⁵

In her dissenting judgment in *R. v. Keegstra*, Justice McLachlin considered the analogy between section 1 of the Charter and article 10 section 2 of the European Convention, providing for limits on freedom of expression, to be inappropriate. She agreed that the European Commission on Human Rights had "had little difficulty in holding that prosecutions for dissemination of racist ideas and literature are permitted"

58. *R. v. Keegstra*, *supra* note 33 at 750 (S.C.R.).

59. *Supra* note 16.

60. *Supra* note 13.

61. *J.R.T. and W.G.P. v. Canada* (No. 104/1981), U.N. Doc. CCPR/C/OP/2, p. 25, [1984-85] C.H.R.Y. 357, 5 C.H.R.R. D/2097, 4 H.R.L.J. 193. See also: *Canada (H.R.C.) v. Taylor* [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, at 920 (S.C.R.).

62. *Felderer v. Sweden* (App. No. 11001/84), (1986) 8 E.H.R.R. 91; *X. v. Germany* (App. no. 9235/81), (1982) 29 D.R. 194; *Lowe v. United Kingdom* (App. No. 133214/87) unreported decision of December 9, 1988; *Glimmerveen v. Netherlands* (App. Nos. 8348/78 and 8406/78), (1979) 18 D.R. 187.

63. *R. v. Keegstra*, *supra* note 33 at 750-755, 758 (S.C.R.).

64. *Canada (H.R.C.) v. Taylor*, *supra* note 61 at 919-920 (S.C.R.).

65. *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

under article 10 section 2 of the European Convention.⁶⁶ But she added: "In view of the breadth of the limitations clause, which specifically mentions the protection of 'health or morals' and 'the reputation or rights of others', this is unsurprising. In other contexts, protection for free expression under this article has at times been decidedly lukewarm, as befits an international instrument which is designed to limit as little as possible the sovereignty of the nations that signed it".⁶⁷ She referred critically to the famous *Handyside* judgment of the European Court of Human Rights,⁶⁸ which dismissed the petition of a Northern Irish bookseller who had been prosecuted for selling an educational volume on sexuality destined for adolescents because this was based on "the protection of health or morals".⁶⁹ Justice McLachlin continued, comparing the approach of the international instruments with that of the American courts pursuant to the first amendment to the United States Constitution.

These international instruments embody quite a different conception of freedom of expression than the case law under the U.S. First Amendment. The international decisions reflect the much more explicit priorities of the relevant documents regarding the relationship between freedom of expression and the objective of eradicating speech which advocates racial and cultural hatred. The approach seems to be to read down freedom of expression to the extent necessary to accommodate the legislation prohibiting the speech in question. Both the American and international approach recognize that freedom of expression is not absolute, and must yield in some circumstances to other values. The divergence lies in the way the limits are determined. On the international approach, the objective of suppressing hatred appears to be sufficient to override freedom of expression. In the United States, it is necessary to go much further and show clear and present danger before free speech can be overridden.⁷⁰

In her view, the Canadian Charter "follows the American approach in method... This is in keeping with the strong liberal tradition favouring free speech in this

66. The text of Article 10, s. 2 is as follows:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

67. *R. v. Keegstra*, *supra* note 33 at 820 (S.C.R.).

68. *Handyside v. United Kingdom*, December 7, 1976, Series A, no. 24, 1 E.H.R.R. 737, 59 I.L.R. 150.

69. *R. v. Keegstra*, *supra* note 33 at 820 (S.C.R.).

70. *Ibid.* at 822 (S.C.R.). See also: *Canada (H.R.C.) v. Taylor*, *supra* note 61 at 952 (S.C.R.).

country..."⁷¹ Justice McLachlin's views were rejected by the majority, which opted for an approach to freedom of expression and its limits that is more closely allied to the international models.⁷²

Justice McLachlin's observation that the European Convention's limitations clause is extremely broad because it is an international instrument designed to limit as little as possible the sovereignty of the States parties is of some interest. This point should certainly be borne in mind by Canadian courts when they transpose European case law to the section 1 analysis. Perhaps even more important is an understanding of the European Court's "margin of appreciation" doctrine, which is a form of judicial reserve based on respect for different cultural and judicial traditions in the States parties to the European Convention. Until the beginning of the 1990's, the Convention was confined principally to Western European States, and the "margin of appreciation" was thus applied in a relatively homogeneous context. Recently, the Convention has expanded dramatically, covering all of Eastern Europe and extending deep into Asia, with the January, 1996 admission of the Russian Federation to the Council of Europe. Thus, the "margin of appreciation" is likely to expand, and this militates in favour of increasing caution in the application of the jurisprudence of the Strasbourg organs to the Canadian Charter.

Two years later, in *Zundel*, Justice McLachlin reconsidered the clear legislative purpose of the hate propaganda provisions in the Code, which had been upheld by the Court in *Keegstra*. She noted that "the evil addressed was hate-mongering, particularly in the racial context. No similar purpose could be demonstrated for section 181, the relatively archaic provision dealing with 'false news'". She continued:

*It is noteworthy that no suggestion has been made before this Court that Canada's obligations under the international human rights conventions to which it is a signatory require the enactment of any provision(s) other than that section which was under review in Keegstra: section 319. The retention of section 181 is not therefore necessary to fulfil any international obligation undertaken by Parliament. Can it be said in these circumstances that the Crown has discharged the burden upon it of establishing that the objection of the legislation is pressing and substantial, in short, of sufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not.*⁷³

Justices Cory and Iacobucci, in their dissent in *Zundel*, challenged Justice McLachlin's view, noting that two international instruments to which Canada is a party, the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*, provide that advocacy of national, racial or religious discrimination, hostility or violence shall be prohibited by law.

71. *Ibid.* at 822 (S.C.R.).

72. On the *Keegstra* case, see: W.A. Schabas & D. Turp, "La Charte canadienne des droits et libertés et le droit international: les enseignements de la Cour suprême dans les affaires *Keegstra*, *Andrews et Taylor*", (1989-90) 6 R.Q.D.I. 12.

73. *R. v. Zundel*, *supra* note 33 at 764-765 (S.C.R.).

Addressing the objectives issue, they wrote: "These instruments serve to emphasize the important objective of section 181 in preventing the harm caused by calculated falsehoods which are likely to injure the public interest in racial and social tolerance".⁷⁴ In their view, section 319 was a specific response to the obligations, but that furthermore Parliament had also decided to further the same objectives by retaining section 181.⁷⁵

Because cruel and unusual punishment continues to be practised on a fairly general scale in many States, issues arise regularly before Canadian courts where expulsion or extradition is involved. In *Kindler v. Canada (Minister of Justice)*, which involved extradition to the United States for a capital crime, members of the Supreme Court made frequent use of international law in assessing whether section 12 of the Charter could apply extraterritorially. Justice Cory presented a detailed review of what he entitled "Twentieth Century Developments: the International Protection of Human Dignity". Justice Cory, whose dissenting views were endorsed by the Chief Justice and Justice Sopinka, took the position that extradition to a State where the death penalty would be imposed constituted a breach of section 12 of the Canadian Charter. Justice Cory referred to the preamble of the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights* as evidence of "[t]he commitment of the international community to human dignity and the trend of western nations to abolish the death penalty [which] parallels Canada's own stance".⁷⁶ Interestingly, although he based his conclusions on section 12 of the Charter, Justice Cory cited the right to life provisions of the international instruments, which are more closely analogous to section 7 of the Charter than they are to section 12. Justice Cory went on to refer to recent developments on the death penalty in international law, notably the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* by the United Nations General Assembly in 1989.⁷⁷ Justice Cory noted that Canada had voted in favour of adoption of the Second Protocol, and cited supportive Canadian statements in the Commission on Human Rights during the drafting of the instrument. Canada had declared that "there was merit in the elaboration of a second optional protocol" and that "[t]here was no doubt that the United Nations would be honouring human dignity by enshrining the principle of the abolition of the death penalty in an international instrument".⁷⁸

Justice LaForest, writing for the majority, did not take as enthusiastic a view of the international trend towards abolition of capital punishment as his colleague. He said that the failure of the major international treaties to condemn the death penalty outright contrasted with "the overwhelming universal condemnation that has been directed at

74. *Ibid.* at 811.

75. *Ibid.* at 812.

76. *Kindler v. Canada*, *supra* note 49 at 804-807 (S.C.R.). On the trend towards abolition and the role of international law, see: W.A. Schabas, *The Abolition of the Death Penalty in International Law*, 2d ed., (Cambridge: Cambridge University Press, 1996).

77. Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, A/RES/44/128.

78. *Supra* note 49 at 809 (S.C.R.).

practices such as genocide, slavery and torture".⁷⁹ Noting that despite certain trends, "[t]here is [...] no international norm" providing for abolition of the death penalty, he said that only one international instrument, *Protocol No. 6 to the European Convention*, prohibited the use of the death penalty.⁸⁰ In fact, not only do two other protocols also exist, the *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights*, that are to the same effect as the European instrument, the *American Convention on Human Rights* also provides that States that have already abolished the death penalty may not reintroduce it. A significant number of States in the Organization of American States are bound as a question of international law not to impose the death penalty. When the number of States parties to these four instruments is totalled, it appears that approximately fifty States are abolitionist as a question of international law. Thus, an international norm does most certainly indeed exist, although it is not yet unanimous.

Justice Cory also invoked what he termed the "European position", noting that the European cases decided under the *European Convention on Human Rights* "are useful in their indication of a judicial trend in the consideration of extradition cases where a fugitive may be subjected to cruel and unusual punishment or treatment".⁸¹ The Strasbourg organs have, in fact, taken a different view of the subject than the majority of the Supreme Court of Canada, giving the Convention an extraterritorial effect in cases where there exists the possibility of a breach of article 3, a provision which corresponds to section 12 of the Charter.⁸² The leading case in this respect is *Soering v. United Kingdom*, a unanimous decision of the European Court of Human Rights in which it considered the legality of extradition from the United Kingdom to the United States where the accused would be subject to capital punishment. Although the majority of the European Court refused to find the death penalty *per se* to be a violation of the Convention — because the Convention, which was drafted in 1950, explicitly contemplates capital punishment as an exception to the right to life — the Court concluded that risk of exposure to the "death row phenomenon", by which *Soering* was likely to spend from six to eight years in prison awaiting execution, would constitute inhuman and degrading treatment in conflict with article 3 of the Convention.

Justice Cory was not the only member of the Court to refer to the European Court's *Soering* case in his reasons. In fact, there was somewhat of a debate among the judges concerning the interpretation and the scope to be given to the judgment. Justice McLachlin, writing for the majority, referred to an earlier case decided by the European Commission, *Kirkwood v. United Kingdom*,⁸³ in which an argument based on the death row phenomenon in California was dismissed. She concluded that "the fact that two

79. *Ibid.* at 833.

80. *Ibid.* at 833-834.

81. *Ibid.* at 820.

82. Cory J. cited three European Commission on Human Rights cases: *X. v. Germany* (App. No. 6315/73), (1974) 1 D.R. 73; *Altun v. Germany* (App. No. 10308/82) (1983), 36 D.R. 209, 5 E.H.R.R. 611; *Kirkwood v. United Kingdom* (App. No. 10480/83), (1984) 37 D.R. 158.

83. *Kirkwood v. United Kingdom, ibid.*

tribunals reached different views on not dissimilar cases illustrates the complexity of the issue and supports the view that courts should not lightly interfere with executive decisions on extradition matters".⁸⁴ Post-*Soering* decisions of the European Commission of Human Rights indicate that it now follows the precedent set by the Court, as would be expected from such a subordinate body.⁸⁵ On closer scrutiny, even the earlier *Kirkwood* decision of the Commission had not excluded the application of article 3 in death row extradition cases, but had found on the facts that the case was not sufficiently substantiated. According to the Commission in *Kirkwood*, "notwithstanding the terms of article 2 section 1, it cannot be excluded that the circumstances surrounding the protection of one of the other rights contained in the Convention might give rise to an issue under article 3".⁸⁶

In his reasons in *Kindler*, which were also signed by two other majority judges, Justice La Forest dismissed the significance of *Soering* because the European Court had referred to a number of extenuating circumstances, including *Soering's* young age, his mental instability, his secondary role in the crime, and the fact that he was a German national, and could therefore be tried in his native country, where the death penalty had long been abolished.⁸⁷ Justice Cory replied that "on my reading of the decision neither his youth nor his country of origin were either crucial to or determinative of the result".⁸⁸ But the Supreme Court of Canada was not the only tribunal to attempt to interpret *Soering*. By and large, other courts have taken a different view, which does not insist upon the apparent extenuating circumstances. Since the *Kindler* judgment, Justice LaForest's views have been criticized by courts elsewhere in the world,⁸⁹ and the broad interpretation of the *Soering* case proposed by Justice Cory has been endorsed by no less than the Judicial Committee of the Privy Council.⁹⁰

84. *Kindler v. Canada (Minister of Justice)*, *supra* note 49 at 856.

85. *Aylor-Davis v. France* (App. No. 22742/93), (1994) 76B D.R. 164; *Çinar v. Turkey* (App. No. 17864/91), (1994) 79A D.R. 5; *H. v. Sweden* (App. No. 22408/93), (1994) 79A D.R. 85; *Raidl v. Austria* (App. no. 25342/94), (1995) 82A D.R. 134.

86. *Kirkwood v. United Kingdom*, *supra* note 82 at 184.

87. *Supra* note 49 at 835.

88. *Ibid.* at 823.

89. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, (1993) 1 Z.L.R. 242 (S) 4 S.A. 239 (Z.S.C.) 14 H.R.L.J. 323. See also the discussion of the *Kindler* case in *Makwanyane and Mchunu v. The State*, (1995) 16 H.R.L.J. 154 (Constitutional Court of South Africa), s. 60-62.

90. *Pratt v. Attorney General for Jamaica*, [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1 [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 H.R.L.J. 338, 33 I.L.M. 364 (J.C.P.C.). *Kindler's* petition to the Human Rights Committee was unsuccessful: *Kindler v. Canada* (No. 470/1991), U.N. Doc.A/48/40, Vol. II, 138 14 H.R.L.J. 307. However, Charles Ng, whose application to the Supreme Court of Canada was also dismissed (Reference re: *Ng extradition (Can.)*, [1991] 2 S.C.R. 858, 67 C.C.C. (3d) 61, 84 D.L.R. (4th) 498), won a victory before the Committee, which ruled that his extradition to a State where the death penalty would be imposed in an inhuman manner, namely the gas chamber, breached article 7 of the Covenant: *Ng v. Canada* (No. 469/1991) U.N. Doc. A/49/40, Vol. II, at 189, 15 H.R.L.J. 149.

III. TOWARDS A BODY OF INTERNATIONAL AND COMPARATIVE JURISPRUDENCE: THE CASE OF THE DEATH ROW PHENOMENON

International human rights norms contributed to the drafting process not only of the Canadian Charter but to constitutions around the world. Consequently, the same norms — with minor differences in wording — are now being applied by both domestic and international courts, and often to more or less similar fact situations. The result is the growth of a body of international jurisprudence, to which Canada's Supreme Court is making its own modest contribution. The *Kindler* case provides a remarkable example of this process, for not only did the Court — both majority and minority — draw on international law, it has since been considered in judgments of such august jurisdictions as the Supreme Court of Zimbabwe, the South African Constitutional Court and the Judicial Committee of the Privy Council.

The length of detention on death row is one of its more egregious and contested features.⁹¹ As Albert Camus wrote, man is destroyed by the wait for death long before he really dies. Two deaths are inflicted, of which the first is worse than the second, even though he may only have killed once.⁹² While serving a term in an English jail, the celebrated author Oscar Wilde had a brush with death row. Also being detained at the same time was a trooper of the Royal Horse Guards, condemned for murdering his lover, and sentenced to die within six weeks. Wilde's poem *The Ballad of Reading Gaol* attempts to convey the mental suffering of the condemned man, forced to brood upon "[h]is anguish night and day".⁹³ Death row is, indeed, the stuff of poets, because so much of the suffering that is involved belongs to the spirit rather than to the body. This is not torture that can be easily proven with photographs, X-rays and medical reports, although psychiatrists and psychologists have attempted to study the matter.⁹⁴ The Indian Judge Krishna Iyer put the matter more bluntly in the case of a man who had lived with the agony of hanging for six years: "He must, by now, be more a vegetable than a person and hanging a vegetable is not death penalty".⁹⁵

Virtually all of the courts that have examined the matter concur that there is some inherent suffering in awaiting the hangman, although some judges have taken the view that the struggle to stay alive through the exercise of various appellate remedies is in some

91. See: W.A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts*, (Boston: Northeastern University Press, 1996).

92. A. Camus, "Réflexions sur la guillotine", in A. Camus & A. Koestler, *Réflexions sur la peine capitale* (Paris: Clamann-Lévy, 1957) at 153.

93. O. Wilde, *Plays, Prose Writings and Poems* (New York: Modern Library, 1930) at 524.

94. R. Johnson, "Under Sentence of Death: The Psychology of Death Row Confinement", (1979) 5 *Law and Psychology Rev.* 141.

95. *Rajendra Prasad v. State of Utter Pradesh*, [1979] 3 S.C.R. 78, A.I.R. 1979 S.C. 916, at 130 (S.C.R.) 943 (A.I.R.) (per Krishna Iyer J.).

sense an antidote. One of the first reported cases dealing with the "death row phenomenon" is that of Caryl Chessman, sentenced to die in the California gas chamber in 1948 and eventually executed in 1960.⁹⁶ Early in the 1970s, the Supreme Court of California struck down the death penalty, in part because of the death row phenomenon. According to Chief Justice Wright: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out".⁹⁷ The Appellate Division of the High Court of Rhodesia also considered the death row phenomenon in a case heard during the late 1960's.⁹⁸ During the 1970's and 1980's, the Judicial Committee of the Privy Council, still the highest court of appeal for many Commonwealth countries, examined the death row phenomenon in a series of cases originating in independent Caribbean States.⁹⁹ Internationally, the issue had already been considered by the *European Commission of Human Rights* in *Kirkwood v. United Kingdom*,¹⁰⁰ the *Inter-American Commission on Human Rights*¹⁰¹ and the *Human Rights Committee*,¹⁰² before it came before the European Court of Human Rights in *Soering*.

By chance, the first national court to consider *Soering* was the Supreme Court of Canada, in *Kindler v. Canada*. A few years later, the death row phenomenon was challenged before the Zimbabwe Supreme Court, pursuant to the prohibition of inhuman and degrading treatment or punishment found in section 15(1) of that country's constitution, a provision that was drawn from the *Convention for the Protection of Human Rights and Fundamental Freedoms*. Chief Justice Gubbay relied heavily on the European Court's ruling in *Soering*, and expressly disapproved of the views taken by Mr. Justice LaForest of the Supreme Court of Canada in *Kindler*.¹⁰³ Gubbay C.J. spoke of the

96. *Chessman v. Dickson*, 275 F.2d 604 (9th Cir.1960).

97. *People v. Anderson*, 6 Cal. 3d 628, 649, 100 Cal.Rptr. 152, 493 P. 2d 880, 894 (1972) cert. denied, 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed. 2d 344 (1972) (per Wright C.J.).

98. *Dhlamini v. Carter N.O.*, [1968] 1 R.L.R. 136 (A.) 1968 (2) S.A. 445, at 154-155 (R.L.R.) 454 (S.A.) (per Beadle C.J.).

99. *de Freitas v. Benny*, [1976] A.C. 239, [1975] 3 W.L.R. 388 (J.C.P.C.); *Abbott v. A.-G. of Trinidad and Tobago*, [1979] 1 W.L.R. 1342, 32 W.I.R. 347 (J.C.P.C.); *Riley v. Attorney-General of Jamaica*, [1983] 1 A.C. 719, [1982] 3 All. E.R. 469, 35 W.I.R. 279 (J.C.P.C.).

100. *Kirkwood v. United Kingdom*, *supra* note 82.

101. *Pratt v. Jamaica* (Case No. 9054), Resolution No. 13/84, reported in O.A.S. Doc. OEA/Ser.L/V/II.66 doc. 10 rev. 1, at 111-113.

102. *Pratt and Morgan v. Jamaica* (Nos. 210/1986, 225/1987), U.N. Doc. A/44/40, at 222, 11 H.R.L.J. 150.

103. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, *supra* note 89 at 263-264 (S.A.).

"impressive judicial and academic consensus concerning the death row phenomenon",¹⁰⁴ referring at a number of points in his judgment to the "demeaning" or "harsh" conditions of detention.¹⁰⁵

Then, less than a year later, the Judicial Committee of the Privy Council also considered the issue. According to the Committee, which sat exceptionally as a bench of seven so that it could reverse earlier precedents, "[I]n any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'".¹⁰⁶ In fixing an outer limit of five years, the Committee assessed the time necessary for appeal, petition to the Judicial Committee, and communication to international human rights organs such as the *Human Rights Committee* and the *Inter-American Commission of Human Rights*. In a case subsequent to *Pratt*, the Judicial Committee of the Privy Council has reiterated the importance of proceedings before such international bodies: "Their Lordships consider that it would be wrong in principle to exclude altogether any time taken to pursue such petitions. The acceptance of international conventions on human rights has been an important development since the Second World War and where a right of individual petition has been granted, the time taken to process it cannot possibly be excluded from the overall computation of time between sentence and intended execution".¹⁰⁷ Referring to the European Court's 1989 judgment in *Soering*, the Lords observed that the judgment stands for the unacceptability of prolonged delay on death row. The Lords were clear in their conclusion that delay occasioned by legitimate resort of the accused to appellate procedures, including international remedies, should in no way be imputed to the accused, and they expressly disagreed with the reasons of La Forest J. in *Kindler* that held the contrary.¹⁰⁸ The Supreme Court of Canada's judgment in *Kindler* was also considered by the South African Constitutional Court, in the June, 1995, judgment declaring the death penalty to be contrary to the country's interim constitution. Justice Cory's dissenting judgment is cited approvingly by Justice Kate O'Regan.¹⁰⁹

Thus, the Canadian courts find themselves to be participants in an international process of interpretation and application of human rights norms. Nobody will argue that they are bound by the decisions of other jurisdictions, any more than it will be suggested that the Court of Appeal of one Canadian province is bound by a decision of another Court of Appeal. Yet just as Courts of Appeal find themselves compelled to address the decisions of their counterparts in other provinces, and to justify a departure from points of law that have already been determined by such bodies, so the same approach must

104. *Ibid.* at 239, 270 (S.A.).

105. *Ibid.* at 244, 245, 249, 250, 264, 270 (S.A.).

106. *Pratt v. Attorney General for Jamaica*, *supra* note 90 at 788-789 (All E.R.), 35 (A.C.).

107. *Bradshaw v. Attorney General*, [1995] J.C.J. No. 23, at s. 20 (per Lord Slynn of Hadley).

108. *Supra* note 90 at 784.

109. *Makwanyane and Mchunu v. The State*, *supra* note 89 at s. 330. See also the judgment of Chaskalson P. at ss. 60-62.

inexorably apply to the law of international human rights. The case of the death row phenomenon — as contrasted with the death penalty itself — was only summarily considered by the Supreme Court of Canada in *Kindler*, and the issue is sure to return. Those who seek to defend the Supreme Court of Canada's precedent and to resist any change will be forced to contend with open or implied criticism of Mr. Justice La Forest's views by the decisions of such bodies as the Zimbabwe Supreme Court, the South African Constitutional Court, and the Judicial Committee of the Privy Council

IV. CONCLUSION: INTERNATIONAL LAW AND DYNAMIC INTERPRETATION OF THE CHARTER

Chief Justice Dickson outlined the role of international law in Charter interpretation, in his 1987 judgment in the right to strike case. The promise of his reasons remains largely unfulfilled. As a general rule, the Supreme Court of Canada still rarely goes beyond perfunctory references to the international instruments. On the infrequent occasions where the debate has become more profound, notably with respect to prohibition of hate propaganda and extradition, the judgments reflect serious if only implicit misgivings from members of the Court with respect to Chief Justice Dickson's pronouncement. Moreover, the distinction that he made between instruments that bind Canada and those that do not has never had any impact whatsoever on judicial thinking, at least to the extent that the hundreds of subsequent decisions that refer to international law without any comment on this factor may be any guide. Beyond the Supreme Court of Canada, the Federal Court of Canada, and two specialized tribunals, international human rights law remains as obscure as it was even before the Charter came into force.

Is this because provincial appellate courts and lower courts lack the resources to send clerks and students plodding through dusty libraries in search of international authorities? Is it because the lawyers who argue cases remain indifferent to such sources? The inaccessibility of international materials can no longer be an acceptable excuse. The materials are increasingly available, and sporadic consultation of a specialized publication such as the *Human Rights Law Journal* ought to be sufficient to keep judges and lawyers abreast of developments in the field. Training, too, may be part of the problem. Although Canadian law faculties offer more and more courses in this field, usually the result of demands from keen students sensitive to future careers in the humanitarian field, many young Canadians still complete their legal studies without any exposure to the subject. As for the professional corporations and their own captive training programmes, they tend to marginalize the field of human rights in general. The bar admission school program offered by the Quebec Bar, for example, devotes several weeks to commercial law but only three hours to the study of the Canadian and Quebec Charters. It is sufficient to speculate upon the number of minutes within these three hours that are devoted to international human rights law in order to appreciate the problem.

But perhaps the ultimate responsibility lies with the Supreme Court itself, which more than any other body is in a position to correct the situation. The message it appears to have sent to the Canadian judicial community — perhaps inadvertently but nevertheless quite effectively — is that international human rights law never binds the courts, that its

sources are eclectic, contradictory and confusing, that erudite judges are of course welcome to invoke it, but that at the end of the day its significance is secondary and marginal. The judgments in *Keegstra* ought to have recalled Chief Justice Dickson's principles of interpretation, and noted that if indeed "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", then section 319 of the *Criminal Code* was dictated by the hate propaganda provisions of two international treaties that bind Canada. Those judges who disagreed, ought to have indicated why Chief Justice Dickson's *dictum* did not apply, or why they thought it was wrong. The same point can be made with respect to *Kindler*, where the majority's approach virtually dismissed the significance of international law, which has so much to say on this point.

If the Constitution of Canada is a "living tree", surely the Charter is its most precocious branch. International human rights law provides the most significant source of enrichment and renewal for the Charter. Chief Justice Dickson's vision of the role of international law in Charter interpretation steered adroitly clear of an historical approach, by which the Charter might have been viewed as giving effect to Canadian human rights obligations in force prior to April 17, 1982. Instead, the reasoning he set out for the relevance of international law invites the courts to take account of subsequent evolution in international human rights law, of which there have been many over the past thirteen years. Significant developments in international human rights law since enactment of the Charter include declarations and treaties on the rights of minorities, the repression of violence against women, protection of the child, abolition of the death penalty, prohibition of discrimination based on handicap and sexual orientation, the right of peoples to self-determination including indigenous peoples, and the indivisibility of civil, political, economic, social and cultural rights.

On this last point, Canadian courts have been extremely cautious in giving section 7 of the Charter a scope that goes beyond the core civil and political rights, although they have shown some awareness that international law at least hints at such an approach. According to the Supreme Court of Canada, in *Irwin Toy*:

The intentional exclusion of property from section 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the section 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental

*to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.*¹¹⁰

Contemplating the possibility of giving section 7 a larger scope in a very early decision under the Charter, in *Re Service Employees' International Union local 204 & Broadway Manor Nursing Home*,¹¹¹ Justice O'Leary of the Ontario Divisional Court referred to publications of the Law Reform Commission of Canada, where "security of the person" is defined as "not only protection of one's physical integrity, but the provision of necessities for its support".¹¹²

The dichotomy between "civil and political" rights and "economic, social and cultural" rights which is reflected in the Charter is the outgrowth of an artificial and improper distinction made by the United Nations at the height of the cold war. *The Universal Declaration of Human Rights*, adopted in December, 1948, had made no such distinction between these two categories of rights. The Declaration was in the spirit of Franklin Roosevelt's wartime "four freedoms" speech — freedom of speech and of religion, freedom from want and from fear — which treated these freedom human rights as indivisible. A decade later, when the United States and the United Kingdom were embroiled in ideological conflict with the Soviet bloc, they refused to include economic and social rights in the draft "covenant", which was intended as an international treaty that would give binding legal force to the principles found in the *Universal Declaration*. An eventual compromise was reached whereby two covenants, one concerned with civil and political rights, the other with economic social and cultural rights, were drafted and adopted. It was like separating Siamese twins. The two instruments now carry the scars of this brutal surgery, and are in some respects quite incoherent. For example the fundamental right to property, enshrined in article 17 of the *Universal Declaration of Human Rights*, is absent from both covenants. The drafters were perplexed about where it belonged and eventually solved this problem by simply omitting it.¹¹³ *The Canadian Charter of Rights and Freedoms* bears the traces of this unfortunate development, in that it is apparently concerned only with civil and political rights.

110. *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 58 D.L.R. (4th) 577, 94 N.R. 167, 24 Q.A.C. 2, at 1003-1004 (S.C.R.). Cited in: *R. v. Rehberg*, (1993) 127 N.S.R. (2d) 331, 355 A.P.R. 331 (N.S.S.C.) at 354; *Chippewa of the Thames Indian Band Number 42 v. Ontario Hydro*, [1995] O.J. No. 487 (O.C.J., G.D.); *Haddock v. Ontario (Attorney General)*, (1990) 73 O.R. (2d) 545 (H.C.J.) at 560; *Howard v. Architectural Inst. of B.C.*, (1990) 40 B.C.L.R. (2d) 315 (S.C.) at 319; *Hernandez v. Palmer* (1992) 46 M.V.R. (2d) 26 (O.C.J., G.D.); *Conrad v. Halifax (County)* [1993] N.S.J. No. 342 (S.C.); *Clark v. Peterborough Utilities Commission*, (1995) 24 O.R. (3d) 7 (O.C., G.D.).

111. *Re Service Employees' International Union, Local 204 & Broadway Manor Nursing Home* (1984), 4 D.L.R. (4th) 231, 44 O.R. (2d) 392, 10 C.R.R. 37 (Div. Ct.), at 448-449 (O.R.).

112. Law Reform Commission of Canada, *Medical Treatment and Criminal Law*, Working Paper No. 26, (Ottawa: Supply and Service Canada, 1980) at 6.

113. W.A. Schabas, "The Omission of the Right to Property in the International Covenants", in (1991) 4 Hague Y.B. Int'l L. 135.

In recent years, the international human rights community has come to appreciate the distinction between the two categories of human rights as a serious error. The Vienna Conference on Human Rights, held in June, 1993, called for recognition of the indivisibility of human rights, by which it meant the unity of the two Covenants and of civil, political, economic, social and cultural rights.¹¹⁴ Interestingly, in the international arena, the Canadian government has given a very broad interpretation to the scope of the terms "life, liberty and security of the person", one that includes not only civil and political rights but also economic, social and cultural rights. In its initial report to the Human Rights Committee pursuant to article 40 of the *International Covenant on Civil and Political Rights*, Canada explained its compliance with article 6 of the Covenant ("the right to life") with reference to occupational health and safety legislation,¹¹⁵ family allowances¹¹⁶ and old age pensions.¹¹⁷ In its supplementary report, Canada stated that "[a]rticle 6 of the Covenant requires Canada to take the necessary legislative measures to protect the right to life. These measures, as indicated by Canada in its report, may relate to the protection of the health or social well-being of individuals".¹¹⁸ In its third periodic report, Canada claimed that pursuant to article 6 of the Covenant, it had established a range of social and economic assistance programmes.¹¹⁹ Such a large interpretation of the right to life is consistent with that proposed by the Human Rights Committee in its first general comment on article 6,¹²⁰ and has been supported by some academic writers.¹²¹ Moreover, it stresses the indivisibility of civil, political, economic, social and cultural rights.

Is it not time for Canada's courts to take a new look at section 7 of the Charter, and to read in the protection of certain economic and social rights in what is ostensibly a "civil and political" instrument? Even if the indivisibility of the two categories of rights

114. "Vienna Declaration and Programme of Action", U.N. Doc. A/CONF.157/24 (Part I), chap. III (1993), Part I, (1994) 14 H.R.L.J. 352, s. 5.

115. U.N. Doc. CCPR/C/1/Add.43, at 20-21.

116. *Family Allowances Act*, S.C. 1973, ch. 44.

117. *Old Age Security Act*, R.S.C. 1970, ch. O-6.

118. U.N. Doc. CCPR/C/1/Add.62, at 25.

119. U.N. Doc. CCPR/C/51/Add.1, at 5.

120. General Comment 6(16), U.N. Doc. CCPR/C/21/Add.1, s. 5. Also published as U.N. Doc. A/37/40, Annex V, U.N. Doc. CCPR/3/Add.1, at 382-383.

121. B.G. Ramcharan, "The Right to Life", (1983) 30 *Netherlands I.L.R.* 297; B.G. Ramcharan, "The Concept and Dimensions of the Right to Life", in B.G. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1985) at 1; H. Gros Espiell, "The Right to Life and the Right to Live", in D. Prémont, ed., *Essais sur le concept de «droit de vivre» en mémoire de Yougindra Khushalani* (Brussels: Bruylant, 1988) 43; M.L. Balanda, "Le droit de vivre", in D. Prémont, *ibid.* 31; Y. Khushalani, "Right to Live", in D. Prémont, *ibid.* 283; T. Desch, "The Concept and Dimensions of the Right to Life — As Defined in International Standards and in International and Comparative Jurisprudence", (1985-86) 36 *Osterreichische Zeitschrift für Öffentliches Recht und Volkerrecht* 77.

was less clearly recognized in April, 1982, when the Charter came into force, developments in international human rights law suggest the matter be revisited. International human rights law continues to evolve, and provides the necessary support for lawyers and judges who intend to fulfil the Charter's historic role, one which necessarily involves the periodic and systematic revision of anachronistic and outdated precedents.

