

New Perspectives on International Human Rights Law for Administrative Tribunals

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INTERNATIONAL LAW WAS ORIGINALLY CONCEIVED OF as a law of nations. It had very little to do historically with citizens or citizenship or the common people at all. There was no room at all for citizen participation in international law, and this is still a problem, although things have changed a lot over the years. People occasionally ask international lawyers, “Can I take a case before the International Court of Justice?” We patiently explain that unlike most courts that people are used to in the domestic context, no individual or citizen can ever take a case before the International Court of Justice. It is a court for states, not individuals. Yet to answer that international law is a law of states is a gross oversimplification. Citizens participate in international law in a myriad of ways. The story of their growing involvement in international law is one of the great legal stories of the past half-century.

Probably we could trace this back to the *Charter of the United Nations*,¹ the great treaty of our age, establishing the United Nations and establishing its operations. It begins in its preamble with the words “we the peoples.” These words reflect an enormous popular participation in the international law making that led to the creation of the United Nations in June 1945. Important aspects of the emerging human rights context associated with the United Nations at the time was President Franklin D.

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¹ *Charter of the United Nations*, 1945, Can.T.S. June 26, No 7. See: J.P. Cot & A. Pellet, eds., *La Charte des Nations Unies*, 2nd ed. (Paris: Economica/Bruylant, 1992); A. Petrenko, “The Human Rights Provisions of the United Nations Charter” (1978) 9 *Man. L.J.* 53; F. Jhabvala, “The Drafting of the Human Rights Provisions of the UN Charter” (1997) 44 *Netherlands Int’L L.R.* 1; B. Simma *et al.*, eds., *The Charter of the United Nations, A Commentary* (Oxford: Oxford University Press, 1994).

Roosevelt's famous "four freedoms" speech, in 1941, and the Atlantic Charter, signed by Roosevelt and Churchill on board a ship just off the coast of Newfoundland.²

Citizen participation became still more significant with the *Universal Declaration of Human Rights* in 1948 [hereinafter *Declaration*], to which several non-governmental organizations (NGOs) contributed in a number of significant ways. They submitted a number of the initial drafts that assisted McGill University law professor John P. Humphrey, who acted as secretary during the drafting process, in preparing his initial version of the *Declaration*. NGOs were also active during the drafting process, lobbying delegates of the Commission on Human Rights and the Third Committee of the General Assembly, struggling to ensure that what would be called a "common standard of achievement for all peoples and all nations" truly reflected the aspirations of citizens rather than the selfish concerns of states.³

We speak increasingly of the role of "civil society" in international law. It seems to me that it is not far from being synonymous with the concept of citizenship, at least as it is meant in the title of this conference. Civil society is certainly, in international law, the term that we use more and more to describe how citizens or the general public participate in international law. Recent examples would be the role of NGOs as organs of civil society in the drafting of the *Ottawa Treaty* on anti-personnel mines.⁴ Indeed, they were honoured for their contribution with the Nobel Peace Prize in 1998.

² For a contemporary reference to these sources and the human rights context of the *Charter of the United Nations*, *supra* note 1, see one of the first Canadian judgments in the field of human rights, *Re Drummond Wren*, [1945] 4 D.L.R. 674, [1945] O.R. 778 (H.C.).

³ See: P.G. Lauren, *The Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 1998); J. Morsink, "World War Two and the Universal Declaration" (1993) 15 Hum. Rts Q. 357; W. Korey, *NGOs and the Universal Declaration of Human Rights, A Curious Grapevine* (New York: St. Martin's Press, 1998).

⁴ *United States v. Burns*, [2001] 1 S.C.R. 283.

A few minutes ago my colleague Stephen Toope referred to the *Rome Statute of the International Criminal Court*.⁵ He added, “if it ever comes into force”, which is a little bit too negative. It is a certainty that the *Rome Statute* will come into force, perhaps by the end of this year; and if not by the end of this year, early in the year 2002. It requires sixty ratifications to come into force. Canada was the fourteenth to ratify and we ratified in July 2000. That was fifteen months ago. There are now forty-two ratifications. We have had twenty-eight ratifications in the last fifteen months and we need eighteen more. By all counts that means it is going to happen very soon. The impetus for the adoption and subsequent ratification of the *Rome Statute* is largely due to civil society, to NOGs, to the citizen. This is recognized in all of the literature on the subject, it has been noted by journalists, and it is conceded, sometimes reluctantly, by governments.⁶ Moreover, when the court is set up it will also have room for citizenship involvement because it provides for the possibility of citizens making complaints to the court, helping to initiate prosecutions, and actually contributing to the proceedings to the extent that they are victims of atrocities over which the court will have jurisdiction.⁷

The title of this session is Canadians as Citizens in the International Community, and any number of them could be mentioned. Let me just refer to two of them, although I could mention many. The great John P. Humphrey, one of Stephen Toope’s distinguished predecessors as Dean of the McGill University Law Faculty—not his immediate predecessor, but way back about 1945—was of course the author of the very first draft of the *Universal Declaration of Human Rights* in 1947. Humphrey took various national bills of rights, together with proposals coming from the emerging NGOs community, and made a several-hundred page long compilation of fundamental rights. Out of this,

⁵ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9. See: W.A. Schabas, *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001).

⁶ W.R. Pace & M. Thieroff, “Participation of Non-Governmental Organizations” in R. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 391-398; W. Bourdon, “Rôle de la société civile et des ONG” in *La Cour pénale internationale* (Paris: La Documentation française, 1999) at 89-96.

⁷ See, for example, *Rome Statute*, *supra* note 5, arts. 15(2), 44(4); *Draft Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.1, rules 17(2)(a)(v), 18(e), 104(2).

he prepared a forty-eight article synthesis that was used, subsequently, by Eleanor Roosevelt, René Cassin and other members of the Commission of Human Rights in fine tuning the text.⁸ Philippe Kirsch was formerly legal advisor to the Department of Foreign Affairs, and may not yet be as much of a household name as John Humphrey. Unlike Humphrey, we haven't made a stamp in his honour, not yet at any rate. Ambassador Kirsch was chairman of the 1998 Rome Conference that adopted the *Statute of the International Criminal Court*. Since then, he has presided over the complex deliberations involved in establishing the new institution, which is arguably the most important international organization to be created since the founding of the United Nations in 1945.

Let me turn now specifically to administrative justice and how international law is relevant to administrative justice. Professor Toope described the operative principles and made the very interesting and useful distinction between treaties which bind Canada and other sources of international law. He cited the trilogy of decisions on the right to strike, issued by the Supreme Court of Canada in 1987. In one of the three rulings, Chief Justice Brian Dickson explained the basis for the use of international law in the interpretation of the *Canadian Charter of Rights and Freedoms*.⁹ I think that Stephen was actually Chief Justice Dickson's law clerk when those reasons were drafted. We might even sense his personal influence in the words. I think his fingerprints are on that judgment somehow.

Chief Justice Dickson's dissent—it might be better to describe the relevant portion of the judgment as obiter, and none of the other judges disagreed with his remarks in this area¹⁰—made this distinction between binding international law and non-binding international law. The first category, the really blue ribbon category, consisted of binding international law. More specifically, he meant international human rights

⁸ J.P. Humphrey, "The Draft International Declaration and Covenant of Human Rights" (1948) 26 *Can. Bar Rev.* 548; J.P. Humphrey, "The Draft International Declaration of Human Rights" (1948) 26 *Can. Bar Rev.* 1106.

⁹ *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313.

¹⁰ "Though speaking in dissent, his comments on the use of international law generally reflect what we all do", according to Justice G.V. La Forest, in a speech to the Canadian Council on International Law, 22 October 1988: G.V. La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada" in *Proceedings, XVIIth Annual Conference, Canadian Council on International Law* (1988), 230 at 232.

treaties that had been ratified or acceded to by Canada, such as the *International Covenant on Civil and Political Rights*¹¹ and the *International Covenant on Economic, Social and Cultural Rights*.¹² The second category, which was indeed a secondary category, consisted of international human rights norms that do not impose strict legal obligations on Canada. A good example here would be the *European Convention on Human Rights*,¹³ which can only bind members of the Council of Europe. For obvious reasons, Canada will never be a full member of that regional organization. But non-binding instruments also include a range of declarations, standards, principles and so on that international lawyers often refer to as “soft law.”

According to Chief Justice Dickson, the *Canadian Charter* should necessarily be interpreted in a manner consistent with these international obligations:

“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.*, [1984] 1 S.C.R. 295 at p. 344, 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.”¹⁴

¹¹ *International Covenant on Civil and Political Rights* (1976) 999 U.N.T.S. 171.

¹² *International Covenant on Economic, Social and Cultural Rights* (1976) 993 U.N.T.S. 3.

¹³ *Convention For The Protection of Human Rights and Fundamental Freedoms* (“*European Convention on Human Rights*”), 1955, 213 U.N.T.S. 221.

¹⁴ *Re Public Service Employee Relations Act*, *supra* note 9 at 348.

I agree with Professor Toope in saying that that these remarks by Chief Justice Dickson have, by and large, been neglected in subsequent *Charter* jurisprudence. The words have been cited occasionally,¹⁵ but the interpretative approach, by which ratified treaties are accorded a special status, has little or no echo in Canadian jurisprudence. Certainly, judges have shown no readiness to read rights into the *Charter* simply because they are recognized in an international legal instrument that binds Canada, unless of course there is some very significant and credible “hook” created by an existing provision.

Non-binding legal instruments, said the Chief Justice, may be relevant and persuasive aids to interpretation: “...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.”¹⁶ In effect—and the reference to the United States Bill of Rights tips us off here—Chief Justice Dickson was telling us to apply international law as a particularly compelling variety of comparative law.

In my view, far richer material, from the standpoint of international law, is to be found in this second category, which Chief Justice Dickson had actually given a subordinate role. It is this second limb of the Dickson approach that has found genuine resonance in Canadian law, and not just with respect to the *Canadian Charter*. After

¹⁵ *International Fund for Animal Welfare Inc., Best and Davies v. Canada*, [1989] 1 F.C. 335 at p. 312 (F.C., per MacGuigan J.A.); *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 (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 at p. 750; *Commission des droits de la personne du Québec v. Commission scolaire de Saint-Jean-sur-Richelieu*, [1991] R.J.Q. 3003 at p. 3025 (H.R.T.); *New Brunswick Broadcasting Co. v. Donahoe* (1990) 71 D.L.R. (4th) 23 at 49; *Gould v. Yukon Order of Pioneers* (1991) 14 C.H.R.R. D/176 at D/188 (S.C.Y.T.); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)* (1991) 80 D.L.R. (4th) 11 at 35 (N.S.S.C., A.D.); *R. v. Zundel*, [1992] 2 S.C.R. 731 at 811; *Dufour v. Centre hospitalier St-Joseph-de-la-Malbaie*, [1992] R.J.Q. 825 at 835 (H.R.T.); *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.); *Kelly v. Canada (Minister of Employment and Immigration)*, [1993] I.A.D.D. No 739.

¹⁶ *Re Public Service Employee Relations Act*, supra note 9.

all, there is no particular reason to distinguish between the Charter and other bodies of Canadian law with respect to the relevance of comparative law. The foreign or international comparative source must of course demonstrate some intrinsic relevance for it to be of interest to the judge. The fact that similar institutions to our own, in countries with similar legal institutions, have addressed similar legal problems, should be enough to interest the Canadian judge.

Perhaps the principal reason why Canadian case law has turned to the non-binding law, rather than the binding law, is because there are no hassles about the technical application of public international law. Conventional or treaty law is not directly applicable before the courts in a dualist legal system like that of Canada. The executive cannot usurp the role of the legislature by making international commitments and then requiring that the courts enforce them.¹⁷ But the common law has long recognized an interpretative presumption by which statutes should be construed, in case of ambiguity, in a manner consistent with the country's international obligations.¹⁸

Most of this has remained highly theoretical, and until the coming into force of the *Canadian Charter* there was precious little international law before the courts. Since April 1982, Canadian judges have found international law to be a fertile reference, because it helps them to construe and apply the *Charter*.¹⁹ Concepts like freedom of expression, equality, and limitations in a free and democratic society, resonate throughout the many sources of international human rights law. In the early 1980s, some legal scholars attempted to argue that international human rights law might actually bind the courts, and Chief Justice Dickson's first category was a cautious and compromising nod in that direction.²⁰ But ultimately, whether or not the international legal source is

¹⁷ *Re Arrow River and Tributaries Slide & Boom Co. Limited*, [1932] S.C.R. 495 at 510 (*per* Lamont J.); also: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 173 (*per* Laskin C.J.).

¹⁸ P.St.J. Lanjan, *Maxwell on Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 54; *Ellerman Lines Ltd. v. Murray*, [1931] A.C. 126; *Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 409-410 (*per* Dickson J.).

¹⁹ See: W.A. SCHABAS, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Carswell: Toronto, 1997).

²⁰ See, for example: M. Cohen & A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and International Law" (1983) 61 *Can. Bar Rev.* 265.

actually binding upon Canada has proven to be an issue of little or no significance.

In a way, the two categories in Chief Justice Dickson's "right to strike" opinion reflect the distinction that international lawyers make between "hard law" and "soft law." The "hard law" means that the *Canadian Charter* has to be applied in a manner that is "just as great" (to use Chief Justice Dickson's words) as what is provided for by in similar provisions of the "hard law", that is, the treaties that Canada has ratified. But in my view, the "soft law" is a lot more interesting. It is not only potentially more helpful to judges and litigators in their application of the Charter, it provides much greater potential for growth and evolution. "Soft law" is not binding, in much the same way as the second category identified by Chief Justice Dickson is not binding. But, as the late Chief Justice pointed out, it is not irrelevant either. And we avoid all of the complex technical arguments that seem to excite law professors but also to terrify judges and lawyers.

In the international sphere, tribunals regularly make use of non-binding or soft law in order to apply "hard" provisions. For example, the International Criminal Tribunal for the former Yugoslavia regularly refers to the *Rome Statute of the International Criminal Court*, even though the instrument is not yet in force. It is an authoritative statement of the views of the international community about the scope of international criminal law.²¹ The judges are asking, for example, "what are the defences available to the defendant in an international prosecution for crimes against humanity?" There is an enumeration of them together with detailed definitions in the *Rome Statute*, whereas there is next to nothing on the subject in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

²¹ *Prosecutor v. Tadic* (1998), Case No IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence; *Prosecutor v. Delalic et al.* (1998), Case No IT-96-21-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Kordic & Cerkez* (1999), Case No IT-95-14/2-PT (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3; *Tribunal Prosecutor v. Kordic & Cerkez* (2001), Case No IT-95-14/2-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

The United Nations Human Rights Committee, which applies the *International Covenant on Civil and Political Rights*, often uses a “soft law” instrument, the *Standard Minimum Rules for the Treatment of Prisoners*.²² The elaborate text of the *Standard Minimum Rules*, which are merely a resolution adopted by the United Nations Economic and Social Council, assists the Committee in applying article 10 of the Covenant, which governs conditions of detention.²³

I am not without examples of the use of “soft law” by Canadian courts and tribunals. The *Standard Minimum Rules for the Treatment of Prisoners* have been consulted by Canadian judges in the interpretation of section 12 of the *Charter* in a case dealing with prison conditions.²⁴ Judge Michèle Rivet, who is president of the Quebec Human Rights Tribunal, regularly uses “soft law” instruments such as documents of the European Union, in order to develop concepts relating to discrimination and harassment.²⁵ The Supreme Court of Canada has also looked to European Union documents for guidance in a similar context.²⁶

An excellent recent example of this relationship between hard and soft law, and the relative importance of the two categories in Canadian law, can be seen in this February’s celebrated death penalty case, *Burns and Rafay*.²⁷ The Supreme Court of Canada was in a sense revisiting two judgments of a decade earlier, *Kindler* and *Ng*²⁸, in which it refused to intervene in order to prevent the Minister of Justice from extraditing to the United States without assurances that the death penalty would not be imposed. A big part of the argument was that the *Charter* would be infringed not only by the death penalty itself, but also by the lengthy wait for execution that seems an inevitably feature of capital punishment

²² UN Doc. E/3048 (1957).

²³ *Mukong v. Cameroon* (No. 458/1991), UN Doc. CCPR/C/51/D/458/1991 at para. 9.3; *Potter v. New Zealand* (No. 632/1995), UN Doc. CCPR/C/60/D/632/1995 at para. 6.3.

²⁴ *Collin et al. v. Kaplan*, [1983] 1 F.C. 496 (T.D.); *Stanley v. Royal Canadian Mounted Police* (1987), 8 C.H.R.R. D/3799 (C.H.R.T.).

²⁵ See, for example, *Commission des droits de la personne du Québec v. Habachi*, [1992] R.J.Q. 1439 (H.R.T.).

²⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513.

²⁷ *United States v. Burns*, *supra* note 4.

²⁸ *Kindler v. Canada*, [1991] 2 S.C.R. 779; *Reference re: Ng Extradition (Can.)*, [1991] 2 S.C.R. 856.

practice within the United States. The authority for treating the “death row phenomenon” as being contrary to the prohibition of cruel and unusual punishment was a 1989 judgment of the European Court of Human Rights.²⁹ But in *Kindler* and *Ng* the majority of the Supreme Court of Canada refused to follow the European Court precedent.

Over the ten years that followed, the Court realized that it was out of step with similar institutions, like the South African Constitutional Court³⁰ and the Judicial Committee of the Privy Council.³¹ When a new case presented itself, the Court jumped at the chance to revise its approach. Notably, this time it endorsed the European Court jurisprudence, which is clearly within Chief Justice Dickson’s second category. But what is quite astonishing is that the Supreme Court never even mentioned the case law of the United Nations Human Rights Committee. While its decisions are not binding in Canada, the Human Rights Committee is the authoritative interpreter of an instrument to which Canada is bound, the *International Covenant on Civil and Political Rights*. Loo, the Human Rights Committee has consistently refused to recognize the death row phenomenon. If the Department of Justice had been doing its homework, it might have insisted upon this point in oral argument before the court.

So that faced with a conflict in international authorities, the Supreme Court of Canada opted for the one that was clearly “soft” rather than the one that was “semi-hard”. I think *Burns and Rafay* proves my point that the first category of Chief Justice Dickson has not proven to be significant, and it is in the second category that the interesting things happen. Indeed, over the past twenty years or so, the Supreme Court of Canada has frequently relied upon case law of the European Court and Commission of Human Rights, while generally ignoring that of the body with which Canada is actually related, in a legal sense, namely the Human Rights Committee.

The Supreme Court’s capital punishment cases are really administrative law cases, in that they deal with the use of ministerial discretion in authorizing extradition without assurances that the death penalty will not be imposed. “Soft law” provides administrative decision-

²⁹ *Soering v. United Kingdom*, [1989] 11 E.H.R.R. 439.

³⁰ *S. v. Makwanyane*, [1995] 3 S.A. 391 (Constitutional Court of South Africa).

³¹ *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All E.R. 769 (J.C.P.C.).

makers with a rich reservoir of material that can inspire them in their work. For Chief Justice Dickson, the second category provided “relevant and persuasive” authority. It is almost an oxymoron to talk about relevant and persuasive authority, because if it is only relevant and persuasive, maybe it is not authority. That is part of the ambiguity of what “soft law” is all about. I suppose that administrative law is the mother of all “soft law.”

I have explained why the approach to international law in Canada has turned out the way it has, but I may not have been clear enough about my view that this has probably been a desirable development. The danger with an approach that insists upon binding international legal instruments and technical rules of application is that it may ultimately discourage the resort to non-binding sources, used in a sense as comparative law. Let me give an example from my new home, Ireland, about some of the problems with the “hard law” approach. Like Canada, of course, Ireland is both a common law system and a dualist system. International law is only a part of the law of Ireland if it has been implemented by legislation, subject to all of the caveats that my colleagues this morning made in their presentations. Ireland went just a little bit further in its Constitution because there is a provision that says international law is only part of the law of Ireland if it has been implemented by legislation.³² In a dualist system of law you don’t really need such a provision. We don’t have one in Canada, and yet our courts apply the same rule. Unfortunately, because this is in the Constitution, whenever we go before an Irish judge and say, “Justice, would you look at international law?”, the tendency has been to say “well no, I can’t look at international law. Don’t talk to me about international law. I don’t want to know about international law unless it has been implemented by legislation.”

I fear that new legislation pending in Ireland is about to make matters even worse. Ireland is the only country in the Council of Europe not to have legislation implementing the *European Convention of Human Rights*. There is great pressure to do so, and it is likely that quite soon the *Convention* will become part of Irish *statute* law, in much the same way

³² J. Walsh, “Bunreacht Na hÉireann [Constitution of Ireland]” (2000), Article 29.6: “No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.” Online <http://www.maths.tcd.ie/local/JUNK/Constitution/index.html> (date accessed July 22, 2002). See also: *Re O Laighleis*, [1960] L.R. 93; *Norris v. Attorney General*, [1984] L.R. 36.

as the United Kingdom has introduced the *European Convention* into its domestic law.³³ This is half a loaf, as far as implementing human rights norms are concerned, and we in Canada will well remember the disappointing results of the old *Canadian Bill of Rights*, which has many similarities with the British and Irish legislation. Isn't that why we have a *Charter*? My real fear, though, is that Irish judges will now agree to consider the *European Convention*, precisely because the legislature has told them they should do this, but continue in their indifference to all other sources of international human rights law.

In the past, some Canadian decisions would have shared this hostility to international law. If it is not implemented by legislation, it is just not relevant, they would say. Fortunately, we haven't taken that route in Canada. But we are still troubled by the distinctions that lurked within Chief Justice Dickson's dissent in the "right to strike" trilogy. We still ask: Is this an international obligation that binds Canada? Has it been implemented by legislation? Is it binding law or non-binding law? We get a lot of these questions in the dissent in the *Baker* case.³⁴ It is clear that the Supreme Court of Canada remains troubled by these issues.

We have already been over what the *Baker* case was about in earlier presentations today. It was a case involving the use of administrative discretion in whether or not to expel a Jamaican woman with Canadian-born children. The issue was whether administrative discretion should be guided by an international law obligation that now binds Canada, but that has not yet been implemented in Canadian legislation. Specifically, the obligation is found in article 3(1) of the *Convention on the Rights of the Child*: "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."³⁵ Justices Cory and Iacobucci said that requiring an administrative decision-maker to apply this provision would be to usurp the prerogatives of Parliament. In effect, the Minister of Foreign Affairs, who had ratified the *Convention on the Rights of the Child* at the end of 1991, would be doing indirectly what he or she cannot do directly, and that is to change the law within Canada.

³³ *Human Rights Act 1998* (U.K.), 1998, c. 42.

³⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70-71.

³⁵ *Convention on the Rights of the Child*, [1992] C.T.S. 3.

The Irish judges tell us the same thing whenever we try and argue international law before the Irish courts. Before *Baker*, I would have thought that this argument had been largely laid to rest, but it is obviously still alive and well in spirit and philosophy.

The “soft law” or comparative law approach is one of the ways to get at the obsessions with parliamentary sovereignty that we confront in the dissent in *Baker*, and that may underlie some of the hesitations that judges have with respect to international law sources in general. But there is another angle to this that I would like to develop, and it concerns a body of international law that has been largely neglected, at least by national courts. Besides treaty law, a second major source of international norms is what we call customary law. According to the recognized definition, found in article 38 of the *Statute of the International Court of Justice*, international custom is established by “evidence of a general practice accepted as law.” There are references to customary law in the new *Crimes Against Humanity and War Crimes Act*, which came into force in 2000.³⁶ Courts may prosecute persons charged with these crimes for acts committed prior to its proclamation, to the extent that the acts were criminal under customary international law.

Customary international law is “the law of the land”, subject of course to the right of the legislature to override it.³⁷ This means that it is directly applicable by Canadian courts and tribunals. Unlike treaty law, no legislative intervention or implementation is required. Instead of an unproductive, and ultimately frustrating, debate about the domestic legal effect of ratified treaties in *Baker*, the Justices of the Supreme Court of Canada might instead have asked whether the “best interests of the child” standard is part of customary international law. If the answer is positive, then there is a very strong case that the immigration adjudicator who was examining Mrs Baker’s case ought to have guided his discretion accordingly. This simplifies things enormously, it would seem to me, and

³⁶ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

³⁷ *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 (H.L., per Lord Denning); R. St. J. Macdonald, “The Relationship Between International Law and Domestic Law in Canada” in R. St. J. Macdonald, G.L. Morris & D.J. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 at 111. See also the Attorney General of Canada’s factum in the *Secession Reference* at para. 206-209.

opens the door to a much broader use of international human rights law within our borders, particularly in the sphere of administrative tribunals.

I know that many of you are a bit overwhelmed by the sources of public international law, although to be fair they are increasingly accessible, above all thanks to the Internet resources of the United Nations High Commissioner for Human Rights,³⁸ the Council of Europe³⁹ and various non-governmental organizations like Amnesty International and Human Rights Watch.⁴⁰ But there is no website for “customary international law.” If you go to the Government documents section of your local university library and ask “where is the customary law shelf here?”, don’t expect to find anything.

Yet it is out there, for anyone who cares to look. One of the best places to search for it is in treaties, oddly enough. This is because human rights treaties often codify customary international law. In a recent “general comment”, the Human Rights Committee presented a list of customary norms that overlap with the provisions of the *International Covenant on Civil and Political Rights*. These include the prohibition of slavery, torture, and cruel, inhuman or degrading treatment or punishment, and of arbitrary deprivation of life and of arbitrary arrest and detention, freedom of thought, conscience and religion, the presumption of innocence, the prohibition of advocacy of national, racial or religious hatred, the right of persons of marriageable age to marry, and the right of minorities to enjoy their own culture, profess their own religion, and to use their own language.⁴¹

What about the “best interests of the child” principle found in article 3 of the *Convention on the Rights of the Child*? Here there is a very neat fit between customary international law and the convention, because of the simple fact that the *Convention*, which is barely ten years old, has been ratified by every country in the world, with the significant exception of the United States, and it has signed it. Nobody quarrels with the

³⁸ www.unhchr.ch.

³⁹ www.coe.fr.

⁴⁰ www.amnesty.org; www.hrw.org.

⁴¹ Committee on Human Rights, *General Comment 24 (52), General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev. 1/Add. 6 (1994).

binding force of the *Convention on the Rights of the Child*. It is, in a sense, an instantaneous custom. Some of the provisions in the *Convention* are not acceptable to all countries, and in many cases they made specific reservations to distinct provisions at the time of ratification. Even Canada made some reservations when it ratified the *Convention*. Provisions to which there is a pattern of reservation might not make the grade as customary norms. But no country has made a reservation to article 3, which sets out the “best interests” principle.

Back in 1987, in the “right to strike case,” when Chief Justice Dickson made his comments about the use of international law, it was a lot harder to make the case that the great human rights treaties represented near-universal consensus. That is all a lot clearer now. Aside from the *Convention on the Rights of the Child*, with its 191 ratifications, we have the *Convention on the Elimination of Discrimination of Woman*,⁴² with 168, and the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁴³ with 161. Many human rights treaties have reached the stage of near-universal ratification, giving their provisions a strong claim to customary law status. Consequently, the norms they contain apply even to states that have not ratified them. Moreover—and this is what is interesting for Canadian jurists—they apply before common law courts even where there has been no legislative implementation.

One of the other customary norms that I think would be very intriguing to begin developing in Canadian jurisprudence or Canadian law is the norm set out in article 27 of the *International Covenant on Civil and Political Rights* dealing with the right of minorities to enjoy their own culture, profess their own religion, and to use their own language. The *Canadian Charter* only imperfectly translates minority rights from international human rights law. The main *Charter* provision in this respect is the one dealing with minority language rights, and it only recognizes two minorities, the English inside Quebec, and the French outside of Quebec. It doesn’t talk about minorities in general. Then we have the multiculturalism provision, but it is a little different from the *Covenant* formulation as well. I think it would be awfully interesting if

⁴² *Convention on the Elimination of All Forms of Discrimination Against Women*, 1981, 1249 U.N.T.S. 13.

⁴³ *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, 660 U.N.T.S. 195.

administrative judges and others here in Canada started to say there is a minority rights norm applicable in Canada because it is part of customary law. It is codified in a way in article 27 of the *International Covenant on Civil and Political Rights* and it ought to influence Canadian law. It ought to influence how administrative decisions are taken, how discretion is exercised and how laws and even the *Canadian Charter* are to be construed.

As has already been mentioned, customary international law is part of “the law of the land” and is directly applicable before Canadian courts, whether or not it has some legislative reflection. It has no constitutional value, however, and can be overridden by contradictory enactments of Parliament. But where customary international law seems ideally suited to complement the *Charter*, and to fill its gaps, is before administrative tribunals and similar bodies. Here, as in *Baker*, the decision-maker’s analysis should be informed by international legal norms. These may be found in customary law, and they may be found in “soft law.” Both areas provide administrative law in Canada with rich new avenues to develop.