THE CHARTER AND THE DOMESTIC ENFORCEMENT OF INTERNATIONAL LAW

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This article will raise and analyze arguments whereby the *Canadian Charter of Rights and Freedoms*[1] would provide for the significantly enhanced application and enforcement in Canada of rules of international law. Rules of international law would, through the *Charter*, become invocable in their own terms. The exploration will proceed almost entirely outside of the much-surveyed territory on the interaction of international law, which concerns the use of international law as an aid to the interpretation of particular phrases in the *Charter*.

One line of argument is based on this proposition: the word "law" in sections 11(d) and 15 of the *Charter* encompasses international law, so that Canadians may invoke the *Charter* to benefit from the protections of international law. A second line of argument, closely related to the first, is that the phrase "principles of fundamental justice" in section 7 includes the rule of law, including the rule of international law. The foregoing arguments, if accepted by a court, would permit a litigant to rely upon rules of international law that would ordinarily be unenforceable or overridden; rules, for example, contained in an international convention that Canada has ratified, but which have not been implemented by legislation of Parliament or a province. This article will analyze the legal and policy considerations that weigh both for and against various attempts to invoke international law through the use of the *Charter*.

I. Introduction

In 1946, Philip C. Jessup contended that, "[t]here is more need today than there ever has been before for the co-operation of national courts in contributing to the development of international law."[2] Since that time, the rights of individuals, and not only those of states, have increasingly been made a focus of international law.[3] In particular, internationally accepted notions of human rights have been incorporated into international law. The horrifying results of the totalitarianism that led to the Second World War and the Holocaust raised people's consciousness about human rights. The fashionable moral relativism that preceded the War was to some extent discredited; even if it was impossible to say exactly what was just and good, it certainly seemed possible to condemn some practices as evil. Perhaps it was also recognized that disrespect by a government for its own citizens often correlated with disrespect for, and aggression against, other nations.

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1. Being Part I, *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982* c.11 (U.K.).

2. "Has the Supreme Court Abdicated One of its Functions?" (1946) 40 Am. J.I.L. 168.

3. See especially the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*, 1966, General Assembly Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316.

Despite the growing reach of international law, a challenge was in effect issued in 1986:

> . . . Canadians should not be too sanguine about the present state of the law, and should recognize that while improvement through the political process is necessary and desirable, there are situations where the standards of international law on human rights questions are more favourable than those of the domestic law. The question is how to import such standards into the domestic law and make them available to individuals.[4]

Professor Brudner specifically says, "[t]he challenge is to formulate a theory which will justify the application by domestic tribunals of international human rights law . . ."[5] This article will, it is hoped, be responsive to that challenge.

II. A Survey of the Domestic Effect of International Law in Canada

The role of international law in the Canadian legal system has been extensively canvassed by courts and text writers.[6] We shall attempt a brief outline. The pre-*Charter* principle was that customary international law is "automatically" part of the common law of Canada, and, like other common law rules, may be overriden by statute.[7] As Thomas J. Ungoed has said with reference to England, "[i]nternational law is part of the law of the land, but it yields to statute."[8] Professor Macdonald has defined more precisely the Canadian "adoption" approach as follows:

> . . . customary rules of international law are adopted automatically into our law, amid a few caveats about sovereignty, and then directly applied unless they conflict with statute or some fundamental constitutional principle in which case legislation is required to enforce them.[9]

He has suggested that "this is a favourable situation for it ensures maximum support for international rules."[10] The cases and commentaries are unclear on whether provincial legislation which violates customary international law must be declared *ultra vires*;[11] federal legislation, however, would likely be upheld.[12]

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4. Donald F. Woloshyn, "To What Extent Can Canadian Courts be Expected to Enforce International Law in Civil Litigation?" (1985-86) 50 Sask. L.R. 1 at 11.

5. "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 U.T.L.J. 219 at 223.

6. For a representative discussion of the general interaction between the *Charter* and international law, see S.A. Williams and A.L.C. de Mestral, *An Introduction to International Law*, 2nd ed. (Toronto: Butterworths, 1987) [hereinafter Williams and de Mestral]. The authorities on the relationship between the *Charter* and international law are listed in D. Gibson, *The Law of the Charter: General Principles* (Calgary: Carswell, 1986) at 81, n. 170; see also D. Turp, "Le recours au droit international aux fin de l'interpretation de la Charte" (1984) 18 R.J.T. 353.

7. Williams and de Mestral, *ibid.* at 39.

8. *Cheney* v. *Conn (Inspector of Taxes)* (1968), [1968] 1 W.L.R. 242 at 245, [1968] 1 All. E.R. 779 (Ch.).

9. "The Relationship Between International Law and Domestic Law in Canada" in R. St. J. Macdonald, G.L. Morris and D.M. Johnston, eds., *Canadian Perspective on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 111.

10. *Ibid.*

11. D.C. Vanek, "Is International Law Part of the Law of Canada?" (1950) 8 U.T.L.J. 251 at 266 (argues neither federal nor provincial governments can violate international law); G.V. Laforest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar. Rev. 78 (argues provinces cannot violate international law); compare: Williams and de Mestral, *supra*, note 6 at 40 (both Parliament and provinces may legislate contrary to international law); Macdonald, *supra*, note 9 at 119 (same view); see also Woloshyn, *supra*, note 4 at 9-10 (province can legislate contrary to treaty law, but not customary international law). Two basic arguments found in both the Vanek and Laforest articles may no longer be valid since the Patriation of the Constitution in 1982. One is that the powers of federal and provincial levels of government flow from a British statute, the *B.N.A. Act, 1867*. The delegating legislation is subject to the ordinary principle that a legislature does not intend to violate international law, or empower a subordinate to do so. But the *Constitution Act, 1982* seems to contemplate a constitutional order that is entirely Canadian. The Constitution of Canada now stands on its own as a Canadian institution, not a British one. The second foundation of the Vanek and Laforest positions is that at least the provinces remain subject to the antique doctrine of "extraterritoriality". In Laforest's words: ". . . the law-making authority of a colonial or other subordinate legislature must be construed in accordance with the inherent conditions of the colony or other area over which it exercises jurisdiction." *Supra*, note 11 at 81. Patriation likely overcomes limitations arising out of the colonial past. It remains possible, however, to argue for limitations on provincial authority based on the general structure of federalism in Canada, and the privileged position of Parliament in matters of international relations.

12. *Croft* v. *Dunphy*(1932), [1933] A.C. 156 at 164, [1932] All.E.R. 154 (P.C.).

Conventional international law[13] is generally[14] part of Canadian law only if implemented by legislation.[15] The pre-*Charter* situation was that provincial legislation probably, and federal legislation certainly, would be recognized and enforced by domestic courts even if contrary to a Canadian treaty obligation under international law.[16] While legislation was considered to be supreme over international treaty obligations, the rule of construction was that the statute would be construed, if possible, in a manner consistent with treaties to which Canada was a party.[17]

The *Charter* is now a fundamental part of the Canadian legal system. Its enactment was a watershed. Its scope is wide, its possibilities far-reaching. What effect will the *Charter* have on the role of international law in the Canadian courts? The numerous diagnoses to date have mainly explored the use of international law as an interpretative tool in applying the *Charter*.[18] This use, by now fairly common,[19] is supported by the consideration that the drafters of the *Charter* referred to international human rights documents; it has been observed that the *Charter* is "indissoluably [sic] linked by language and ideology to important international instruments and principles to which Canada subscribes."[20] The aid-to-interpretation function will surely enhance recognition of international law and may result in a broadening of interest in public international law generally.[21] It should be noted, however, that the courts and text writers have tended to ask "what can international law do for the *Charter*?" rather than "what can the *Charter* do for international law?"

Because of the similarity of language and the recourse to international law by the *Charter*'s drafters, Cohen and Bayefsky do go so far as to suggest that parts of the *Charter* may be "implementing legislation" in that its provisions may have been enacted to indirectly fulfill international obligations.[22] They state: "The appropriate question for our courts to ask therefore, is whether a provision of the *Charter* was included in order to give effect to Canada's international obligations."[23] They stop short of suggesting that the *Charter* may more directly prescribe actual adherence to "the letter" of international law. Do provisions of the *Charter* provide that international law cannot be violated?

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13. See A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 20-25.
14. For exceptions, see Macdonald, *supra*, note 9 at 122-7.
15. *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*(1932), [1932] S.C.R. 495, 2 D.L.R. 250 [hereinafter *Arrow* cited to D.L.R.].
16. *Ibid.* and *Francis* v. *R.* (1956), [1956] S.C.R. 618, 3 D.L.R. 641 [hereinafter *Francis* cited to D.L.R.].
17. *Daniels* v. *R.* (1968), [1968] S.C.R. 517, 2 D.L.R. (3d) 1 at 23.
18. See for example Williams and de Mestral, *supra*, note 6 at 323, n. 106.
19. For example, *Re Mitchell and the Queen* (1983), 42 O.R. (2d) 481, 150 D.L.R. (3d) 449 (H.C.); *Kindler* v. *MacDonald*, [1985] 1 F.C. 676, (*sub nom. Kindler* v. *Min. of Employment and Immigration*) 47 C.R. (3d) 225 (T.D.); *R.* v. *Videoflicks et al.* (1984), 48 O.R. (2d) 395, 14 D.L.R. (4th) 10 at 35 (C.A.) *Re Retail, Wholesale and Department Store Union, Locals 544 etc. and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609 at 644-647, [1985] 5 W.W.R. 97 (Sask. C.A.); *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to D.L.R.]; *International Fund for Animal Welfare Inc. et al.* v. *Canada et al.* (1986), [1987] 1 F.C. 244, 5 F.T.R. 193.
20. M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265 at 267.
21. *Ibid.* at 311-2.
22. *Ibid.* at 302.
23. *Ibid.* at 303.

Section 11(g) of the *Charter*, the implications of which will be examined below, contains the only explicit reference to international law. As well, references were made to the *International Covenant on Civil and Political Rights* in the explanatory notes to sections 7 to 14 in the *Charter* of October, 1980.[24] Although the Supreme Court of Canada has shown increasing willingness to consult extrinsic materials[25]—and these explanatory notes may be useful in interpreting *Charter* provisions[26]—the fact remains that the enacted Charter contains no explanatory notes[27] and the earlier notes do not explicitly state that sections 7 to 14 were included in order to implement the UN *Covenant* to the letter.

No court decision has yet construed the *Charter* as providing that international law is enforceable in domestic courts. Belzil J.A. in the Alberta Court of Appeal decision in *R.* v. *Big M Drug Mart*[28] emphatically argued in his dissent that "freedom of conscience and religion" in subsection 2(a) should be defined by international law. In doing so, he states:

> [T]he Canadian Charter was not conceived and born in isolation. It is part of the universal human rights movement . . . The Charter can be divided into two parts, one dealing with fundamental human rights in harmony with the International Covenant, the other dealing with matters peculiar to Canada. It is of course in the first part that s.2 of the Charter must fall.
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> *That these fundamental freedoms were entrenched in the Charter in conformity with Canada's commitment in the International Covenant cannot be doubted.*[29] (emphasis added)

M. Ann Hayward[30] suggests that these words border on an espousal of the "implementation theory" of Cohen and Bayefsky. She states: "This passage comes very close to saying that the *Charter* was adopted in fulfilment of Canada's obligations under the *Covenant* and is therefore an implementation of the *Covenant* in Canada."[31] Even if it does, the implications of the "implementation theory" stop well short of some of those produced by the "invocable-via-the-*Charter*" theory that is raised and discussed in this article. The "implementation theory" is not defined with much precision in the Cohen and Bayefsky article, but however it is understood, it is confined to using specific guarantees in specific international human rights conventions to give a particular meaning to a *Charter* provision. The field of international rules that can be brought into play, therefore, is confined to a limited number of human rights conventions. Furthermore, it will be necessary to persuade a court that the particular international rule somehow had a direct inspirational effect on a particular *Charter* rule.

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24. The notes read that of those rights recognized in sections 7-14 for the first time in Canada, ". . . some now find expression in the International Covenant on Civil and Political Rights (the U.N. Covenant) to which Canada became a party in 1976." Also, re section 8, "this provision derives in part from the U.N. Covenant." See R. Elliot, "Interpreting the Charter: Use of the Earlier Versions as an Aid" (1982) U.B.C.L.R. 11 at 30.

25. See Gibson, *supra*, note 6 at 73-77.

26. See Elliot, *supra*, note 24.

27. To be distinguished from "marginal notes".

28. (1983), 49 A.R. 194, 5 D.L.R. (4th) 121 (C.A.) [hereinafter *Big M Drug Mart* cited to 5 D.L.R.].

29. *Ibid.* at 149. The Supreme Court of Canada, in upholding the majority decision of the Alberta Court of Appeal, made no reference to the line of argument suggested by Belzil; (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to 18 D.L.R.].

30. "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985) 23 U.W.O.L. Rev. 9.

31. *Ibid.* at 11.

By contrast, the "invocable-via-the-Charter" theory raised in this article would use *Charter* provisions to reach out and make domestically applicable a far wider range of international rules. There are arguments (to be considered below) in favour of confining the approach in this article to certain human rights conventions; but, on a broader interpretation, the approach would make invocable virtually every rule of customary and international law to which Canada is a party.

In *Reference re (Alberta) Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*,[32] Kerans J.A. held for the majority that a prohibition on strikes did not violate the workers' "freedom of association" in subsection 2(d) of the *Charter*. In coming to this decision, he states:

> The Freedom of Association Committee of the International Labour Organization, a body established pursuant to other treaties to which Canada is signatory, interprets Convention 87 to say that the right to strike is among the protected activities of the unions. Therefore, it is said, Canada, by ratifying Convention 87, agreed to offer its citizens the right to strike, and the Charter must be so interpreted.
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> . . . [N]othing has been shown to me to persuade me that Canada, in any treaty, has committed itself to constitutionally entrench human rights. It requires a leap which I am not prepared to make to move from a rule that the Constitution should be interpreted to "be consistent with" international obligations to one that we must interpret it to "entrench" international commitments. Specifically, it simply does not follow that, even assuming Canada has agreed in a treaty to protect the right to strike, the Charter must therefore be interpreted to entrench that right.[33]

Kerans J.A., while apparently accepting that the *Charter* should be construed so as to be consistent with Canada's international obligations, refuses to allow the *Charter* to protect rights set out in international law. Given this precedent, and the inherent limitations on the plausibility and scope of the "implementation" theory, it should be worth examining a different approach to the interrelation of international law and the *Charter*.

III. Which Charter Provisions Authorize the Invocation of International Law?

The "invocable-via-the-*Charter*" theory raised and analyzed in this article would enable an individual to claim the defensive and remedial benefits of the *Charter*. Before examining the implications of sections 7, 11(d) and 15, it is worth looking at subsection 11(g) of the *Charter* which uses international law as an aid to state action against individuals.

Subsection 11(g) states:

> Any person charged with an offence has the right . . .

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32. (1984),(*sub nom. Reference re Compulsory Arbitration*) 57 A.R. 268, 16 D.L.R. (4th) 359 (C.A.) [hereinafter *Ref. re Alberta Public Service* cited to D.L.R.].

33. *Ibid.* at 374. As this article was going to press, the Supreme Court of Canada handed down its decision on the appeal from the judgment of Kerans J.A. The only judge who considered the implications of international law was Dickson C.J.C., who stated in his dissenting opinion: "[i]n 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." *Ref. re Alberta Public Service* (9 April 1987), (S.C.C.) [unreported] at 27. It does not appear that the "invocable-via-the-Charter" approach was argued before, or considered by, the Court. The case was thus decided *per inarticlum*.

> (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or *international law* or was criminal according to the *general principles of law recognized by the community of nations.* (emphasis added)

This section provides that no one may be convicted by a retroactive law. There is firm recognition of international law, however, in that the criminality of an act under international law is by itself sufficient to overcome the *post facto* constraint. Manning[34] has raised the concern that subsection 11(g) might be construed as authorizing a prosecution under international law even in the absence of a prohibition by domestic legislation. We agree with Manning that domestic legislation is necessary to authorize a prosecution; subsection 11(g) merely removes a possible objection to such legislation. For the purposes of the "invocable-via-the-*Charter*" argument, it might be suggested that subsection 11(g) takes international law seriously enough to warrant domestic legislation authorizing criminal punishment. It could be contended that the same text—which, after all, is primarily devoted to protecting individuals against the state— should be construed in a manner which gives effect to safeguards for individuals under international law.

There are no other explicit references to international law in the *Charter*. It is nonetheless plausible that other sections of the *Charter* provide that international law cannot be violated.

A. The Section 15 Argument

The section 15 argument is that the "equal protection of the law" prescribes not only equality, but the right to rely on the law, and that relevant "law" includes international law. The most expansive section 7 argument is that the "principles of fundamental justice" include the principle that government must act according to law, including international law. A section 7 argument of more limited scope is that certain rules of international law express or define a "principle of fundamental justice." The subsection 11(d) argument is that the right to be "presumed innocent until proven guilty *according to law*" (emphasis added) implies that criminal and quasi-criminal proceedings must be consistent with international law. Each of these arguments might be bolstered by reference to the preamble of the *Charter* which proclaims that a founding principle of Canada is the "rule of law"—which, it would be argued, should be construed as including international law.

Section 15(1) states in part:

> Every individual is equal before and under *the law* and has the right to the equal protection and equal benefit of *the law* without discrimination . . . (emphasis added)

The words "the law" appear twice. If international law is included in the definition of "law," international law is thereby made the supreme law of the land and cannot be breached; if there is to be "equal protection" there must first be "protection." In other words, every individual would, first, have the right to the protection and benefit of the law and, second, have an

34. M. Manning, *Rights, Freedoms and the Courts* (Toronto: Emond-Montgomery, 1983) at 421. See also P.W. Hogg, *Constitutional Law of Canada* 2d ed., (Toronto: Carswell, 1985) at 775.

equal right to that protection and benefit.[35] Since customary international law and incorporated conventional law are already part of domestic law, the interpretation advanced would to some extent convey conventional international law into domestic law and make it supreme law. Customary and incorporated law would be made paramount to federal legislation. (It should be understood that the "constitutionalization" of international law would not be for general purposes; it would be confined to cases where a person is claiming a violation of his rights under the *Charter*).

The argument might be illustrated with a hypothetical based on the facts of an actual case. An aboriginal person is subject to pay customs duties on household articles brought into Canada from the United States pursuant to the *Customs Act*.[36] The "Jay Treaty" signed by Great Britain and the U.S. in 1794, however, appears to provide that aboriginal people are not liable for such duties. The pre-*Charter* law, as established by *Francis* v. *The Queen*,[37] was that the treaty could not be invoked to exempt natives unless legislation was enacted to make the treaty enforceable domestically.

The *Charter* might warrant a different result. Subsection 15(1) assures in part that "[e]very individual . . . has the right to the equal protection and equal benefit of the law." The aboriginal importer might now claim this section was violated. The "law" in subsection 15(1), he would argue, includes "international law." Accordingly, he would contend, it would include the equal protection and benefit of international law, i.e., the Jay Treaty. Unless the *Customs Act* provision is justified by section 1 of the *Charter*, the provisions of the treaty would prevail by virtue of section 15. Rights under the Jay Treaty would receive the protection of the supreme law of the land.

Similarly, if Customs officials seized the imported goods, the confiscation could be challenged. While the *Charter* does not contain a "property rights" clause, the *Universal Declaration of Human Rights* does. Although the *Declaration* may not be conventional law itself, some have argued that it is declaratory of customary international law.[38] It might also be argued that the norms of the *Declaration* have become conventional obligations of parties to the *Helsinki Accord* by virtue of Part VII—which commits the parties to act "in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights."[39] Under any of these arguments, subsection 15(1) of the *Charter* would relay to a litigant the benefits of an international norm safeguarding an individual's property rights. Should section 1 of the *Charter* not allow for the confiscation, the relevant provisions of the *Customs Act* would be of no force or effect for the purposes of authorizing it. The aggrieved individual might well be able to succeed on a simple basis—that section 8 of

35. The affirmation of the rule of law in the preamble of the *Charter* supports the view that s. 15 guarantees the protection of law, and not just equal treatment. The wording of s. 2(b) of the *Canadian Bill of Rights* is unequivocal in this respect: it recognizes the right of every individual to "equality before the law and the protection of the law."

36. R.S.C., 1970, c. 58, as amended.

37. *Francis*, *supra*, note 16.

38. See Williams and de Mestral, *supra*, note 6 at 309, and the authorities cited at their notes 48 and 49.

39. There is some dispute, however, as to whether this instrument constitutes "international law": Schachter, "The Twilight Existence of Nonbinding International Agreements" (1977) 7 A.J.I.L. 296.

the *Charter* prohibits "unreasonable search and seizure." Indeed, in most *Charter* cases, one would expect a court to first determine by reference to strictly domestic sources of law whether an individual's complaint can be sustained. The broad wording of sections 7 and 15 of the *Charter* may often be given an expansive interpretation to protect rights, such as those concerning property, that are not protected by specific and explicit *Charter* guarantees. The "invocable-via-the-*Charter*" argument is crucial when the individual is seeking to rely on a treaty provision that reflects a particular social or economic policy, rather than a standard human rights complaint, or when the wording of the *Charter* or the cases interpreting it prevent a court from vindicating a standard human rights complaint.

B. Section 7—The Expansive Argument

Section 7 of the *Charter* may, like section 15, permit the invocation of a broad range of international norms. It states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with *the principles of fundamental justice*. (emphasis added)

The phrase "except in accordance with the principles of fundamental justice" is a constraint on any deprivation of life, liberty and the security of the person. [40]

The most expansive use of section 7 would be similar to the section 15 argument suggested above. It would be maintained that one of the "principles of fundamental justice" is that the government should act according to law—including international law. The argument might be bolstered by referring to the preamble of the *Charter* which states that one of the founding principles of Canada is the "rule of law." It might be countered that since the "rule of law" is characterized as a "founding" principle, it is relevant to examine the state of the "rule of law" in 1867. At the time, the constitutional rule was that Parliamentary supremacy prevailed over conflicting international law. The rebuttal to the objection might begin by pointing out that in 1867, international law was a functioning part of the rule of law. Customary international law was automatically part of the common law, and every attempt was made to construe statutes so as to render them consistent with rules contained in treaties to which Canada was a party. It is true that international law yielded to statute; but so did common law, and the latter was surely a part of the system of the rule of law. The rebuttal might continue by observing that the same *Charter* that recognizes the rule of law now prohibits Parliamentary and legislative violation of a broad range of rights. All in all, the rebuttal might conclude the concept of the rule of law as it has evolved in Canada supports the use of specific *Charter* guarantees to uphold the rule of international law.

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40. The necessity of showing that a "life, liberty or security of the person" interest is at stake will sometimes make section 7 inapplicable to a particular case; thus section 15 may be a more generally available conduit for the application of international law.

C. Section 7—The Limited Use

A more restricted, more familiar, but still significant, use of international law through the mediation of section 7 would be to hold that international law defines or expresses some of the "principles of fundamental justice." Lamer J., for the majority of the Supreme Court of Canada in *Reference re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979, c.288,* states:

> . . . ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice." Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice . . .[41]

"Principles" surely include international principles beyond those in sections 8 to 14. Lamer says those sections were merely "illustrative of deprivations" and so other examples could be added. He also states that the principles "are to be found in the basic tenets and principles, *not only of our judicial process, but also of the other components of our legal system.*"[42] (emphasis added)

D. Section 11(d)

Another possible "magnet" in the *Charter* for international law may be section 11(d):

> Any person charged with an offence has the right . . .
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> (d) to be presumed innocent until proven guilty *according to law* in a fair and public hearing by an independent and impartial tribunal.

An accused could argue that in order to conform with the *Charter*, a conviction must conform to international law, and not just to domestic law.

IV. Limits on the Invocation of International Law Via the Charter

Having noted the sections of the *Charter* that could prescribe that domestic law be consistent with international law,[43] some possible limits on the role of international law under the *Charter* should be considered. First, section 33 provides that the federal or provincial governments may override a "provision" of the *Charter*, to be distinguished from entire "sections." A qualified or limited override is possible. Accordingly, a legislature could likely avoid the influence of international law as it might affect a particular statute.[44] The override might contain words to the effect that "[t]his Act shall operate notwithstanding sections 7, 11(d), and 15 of the *Charter* insofar as those sections apply international law." In any event, it is certainly possible for Parliament or a legislature to cut a broader swath that includes international law; it could simply override sections 7, 11(d) and 15 in their entirety.

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41. (1985), [1985] 2 S.C.R. 486 at 503, 24 D.L.R. (4th) 536 [hereinafter *Ref. re s. 94(2)* cited to S.C.R.].
42. *Ibid.* at 512.
43. Also, the phrases "due process of law" and "protection of the law" in the *Canadian Bill of Rights*, R.S.C. 1970, App. III may be considered in this regard. See note 81.
44. See *Alliance des Professeurs de Montreal* v. *A.G. Que.* (1985), [1985] C.A. 376, 21 D.L.R. (4d) 354 at 360-1.

Second, the possibility of a conflict between the *Charter* and international law must be considered. Section 52(1) states:

> The Constitution of Canada is the supreme law of Canada, and *any law* that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. (emphasis added)

With regard to the words, "any law," Dickson C.J.C. said as dictum in *Operation Dismantle Inc.*:

> [N]othing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 . . . is confined to statutes, regulations, and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52 . . .[45]

The general supremacy of the Canadian Constitution over international law seems to be implied by section 52, and is certainly not precluded by the dictum of Chief Justice Dickson. The complication is that under the arguments presented above, international law is implicitly made invocable in Canada by certain sections of the Constitution, namely, sections 7, 11(d) and 15 of the *Charter*. Seidl-Hohenveldern observes in his comparative analysis of the role of international law in domestic legal systems that "[i]n countries where the courts may control the constitutionality of laws, there will always be a temptation to extend that control also to treaties in order to ensure a perfect rule of law in the municipal sphere."[46] One might argue that any provision of international law which is inconsistent with the *Charter*'s provisions is of no force or effect. Indeed, it probably ought to be the case that a person cannot rely on an international norm that is contrary to an express provision of the *Charter*. It would be rare that a rule of international law would be contrary to a specific norm in the *Charter*, however, because international law has its own human rights norms. As well, if the argument is accepted that sections 7, 11(d) or 15 do refer to *international law*, the latter affects the interpretation of the *Charter*, which is part of the supreme law of Canada. International law is attached to, and colours the interpretation of, the *Charter*. Could one part of the Constitution be declared of no force or effect by another part of the Constitution? Seidl-Hohenveldern acknowledges this problem in more general terms:

> All will agree that, within the international sphere, international law should have precedence over municipal law and that, even outside that sphere, international law should also exercise some influence on municipal law. However, any attempt to ensure the unconditional superiority of international law in this latter sphere as well may eventually come into conflict with the claims of the constitution of the State concerned to be the supreme source of the law within that State.[47]

The appropriate approach for the courts, it seems, would be to follow the principle that "*Charter* rights must be read together with the other sections of the *Constitution* and neither should be so construed as to render the other impotent."[48] One would expect a very specific and unambiguous section of

45. (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 494.

46. "Transformation or Adoption of International Law into Municipal Law" (1963) 12 I.C.L.Q. 88 at 112.

47. *Ibid.* at 89.

48. *R. v. Bienert* (1985), 64 A.R. 10 at 18, 39 Alta.L.R. (2d) 198 (Prov. Ct.) [hereinafter *Bienert* cited to A.R.].

the Constitution to prevail over a rule of international law rendered applicable by section 7, 11(d) or 15 of the *Charter*; generally speaking, however, every attempt should be made to develop an interpretation of the relevant domestic and international provisions that does at least some justice to them all.

To summarize the hypothesis in its most expansive form, international law—including both custom and treaties binding on Canada, whether or not the treaties have been implemented by domestic legislation—might be invocable in domestic cases via sections 7, 11(d) and 15 of the *Charter*. The international rules would, under the authority of the *Charter*, act as a shield for an individual against governmental action that would ordinarily be authorized by domestic law. The supremacy of a rule of international law would be subject to all of the limitations on the "*Charter* norm" used to invoke it. Those limitations would include the proviso in section 1 of the *Charter* that all of its guaranteed rights are subject to "such reasonable limits prescribed by law as are demonstrably justified in a free and democratic society" and the provision in section 33 of the *Charter* that Parliament or a legislature may override the effect of section 2 and sections 7 to 15. The supremacy of the Constitution of Canada expressed in section 52 of the *Constitution Act, 1982* must be considered in cases of potential conflict between a rule of international law and a specific provision of the Constitution.

V. The Obstacle Course

The next step is to consider the legal counters, and then the policy objections, to the "invocable-via-the-*Charter*" hypothesis.

A. Extravagance

One general legal counter would be to hurl dismissive epithets at the hypothesis—to call it "extravagant," "weird," "far-fetched," even "ingenious." In *R.* v. *Altseimer*,[49] Zuber J.A. warns that "[e]xtravagant interpretations can only trivialize and diminish respect for the Charter." In response to judicial declarations that the Constitution is "a living tree capable of growth and expansion within its natural limits,"[50] Mahoney J. in *Public Service Alliance of Canada* v. *R.*[51] cautions that while the constitution must be a "living tree" it is "not a weed" and takes time to grow properly. In Manitoba, Scollin J. said in *Balderstone* v. *R.*, "[t]he Charter did not repeal yesterday and did not abolish reality."[52] He quotes from *Potma* v. *R.* which says that it is Canada's "wealth of legal tradition that sustains the real worth of the guarantees themselves and ensures that the Charter will not be translated into a warrant for rule by judicial oligarchy."[53]

49. (1982), 38 O.R. (2d) 783, 142 D.L.R. (3d) 246 at 252 (C.A.).
50. *Re Section 24 of the B.N.A. Act; Edwards* v. *A.G. Can.* (1929), [1930] A.C. 124 at 136, [1930] 1 D.L.R. 98, [1929] 3 W.W.R. 479 (P.C.).
51. (1984), 11 D.L.R. (4th) 387 at 392, 55 N.R. 285 (F.C.A.D.)
52. (1982), [1982] 1 W.W.R. 72 at 81, 19 Man. R. (2d) 321 (Q.B.); aff'd [1983] 6 W.W.R. 438 (C.A.).
53. (1982), 37 O.R. (2d) 189 at 200-201, 136 D.L.R. (3d) 69 (H.C.).

Such statements were acknowledged by Lamer J. of the Supreme Court of Canada in the majority decision in *Ref. re s.94(2)*. Referring to "warnings of the dangers of a judicial 'superlegislature' beyond the reach of Parliament, the provincial legislatures and the electorate," Mr. Justice Lamer reminds us that,

> . . . the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[54]

Furthermore, it is now settled law that a "purposive" interpretation of the *Charter* is called for.[55] On behalf of the Court in *Hunter* v. *Southam Inc.*, Dickson J. prescribes "a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects . . ."[56] This interpretation accords with Lord Wilberforce's statement in *Minister of Home Affairs* v. *Fisher* that constitutional interpretation must be "suitable to give individuals the full measure of the fundamental rights and freedoms referred to."[57]

One of the general purposes that could be attributed to the *Charter* is to affirm that the liberty and dignity of every human being must be respected by the state. Other general purposes that could be attributed to the *Charter* include setting an example to other nations of the recognition of human rights, or "implementing" some of the specific human rights conventions that Canada is already a party to. These purposes would be enhanced by permitting individuals to invoke the guarantees contained in international human rights conventions. A particular purpose that could be attributed to each of sections 7, 11(d) and 15 may be to ensure that the state respects the rule of law in its dealings with individuals; perhaps that purpose is betrayed when Canada violates international law.

There is no lack of profound "purposes" that might be cited in favour of the "invocable-via-the-*Charter*" theory. In the end, the wisdom of applying it to a particular case must be assessed by reference to some practical policy considerations as well as noble aspirations.

B. International Law Isn't International or Law

Voltaire remarked that the Holy Roman Empire of his day was not holy, Roman or an empire.[58] Richard Needham, a Canadian newspaper columnist, once observed that the Lord Privy Seal is not a Lord, a privy or a seal. Similarly, it might be objected that international law is neither international or law. Instead, it is an unenforceable set of pious hopes that every state interprets differently, and for its own purposes. On the interpretive point, we would accept that in some areas, international law has almost

54. *Supra*, note 41 at at 497.

55. *Hunter* v. *Southam* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 at 658 [hereinafter *Hunter* cited to D.L.R.]; *R.* v. *Big M Drug Mart*, *supra*, note 29 at 359-60; *Oakes*, *supra* note 19 at 212.

56. *Hunter*, *ibid.* at 650.

57. (1979), [1980] A.C. 319 at 329, [1979] 3 All.E.R. 21 (P.C.).

58. See his "Essai sur les Moeurs et l'Esprit des Nations", cited in *The Oxford Dictionary of Quotations* (Toronto: Oxford University Press, 1941) at 5669.

no agreed-upon content; and we accept that very often those who apply law have no choice but to resolve uncertainties in international law in light of their own philosophical dispositions or foreign policy interests. We would acknowledge that sometimes the interpretation of a norm of international law is better left to non-judicial branches of government. But we shall stop well short of conceding the complete relativism of international law. The efficacy aspect of the "international law isn't law" objection has been encapsulated as follows:

> International law is a body of vague rules for the attention of the political scientist and the amusement of the law student not much interested in law. It should not be confused with real law, which, as Justice Holmes pointed out, is "the articulate voice of some sovereign or quasi-sovereign that can be identified," and "does not exist without some definite authority behind it." Law is the command of a sovereign backed by force. And however much it is hoped that nations will abide by acknowledged rules, they do not now; nor can they ever be compelled to do so, at least in the absence of world government. Only woolly thinking would confuse positive law enforced by our courts—our Constitution, our civil and criminal laws—with the moral directives that go by the name of international law.[59]

Some have argued that international law is in fact effectively enforced between states, although in a different way than domestic law.[60] In any event, a definition of law should not focus on "effective control" only. Whether one accepts norms as binding may be the paramount element in identifying "law." A religious person who chooses voluntarily to follow the law of a religion may believe that there are no sanctions in the event he does not follow this law. But if he regards the system as prescribing binding rules of conduct, why can we not say that the religion's law is "law"? The perception by members of a community that an international body of norms is binding on them is an important consideration.[61] Finally, it should be noted that no one seems to doubt that Canadian law is "law," and Canadian courts have long recognized and given effect to rules of international law.[62]

C. Is Law is the Law is the Law?

One might argue: Why choose to include international law in a *Charter* definition of law; does that amount to picking that body of law out of the air? Why not just choose American or Zimbabwean law instead? Surely "law" must mean operating within, or at least connected with, the domestic system. This argument can be rebutted. First, customary international law does operate domestically as part of the common law. Second, treaties are signed and ratified by domestic governments. They signify the acceptance of obligations. Because Canada is a member of the community of nations, international law certainly operates upon the Canadian legal system; it is a component of "the rule of law" which the preamble of the *Charter* acknowledges as a foundation of the country. There is a much closer relationship between ratified treaties and Canadian domestic law than, say, Australian law and domestic law.

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59. R.D. Fisher, *Improving Compliance with International Law* (Charlottesville: University Press of Virginia, 1980) at 11-12.

60. Anthony D'Amato, "Is International Law Really Law?" (1984-85) 79 Northwestern U.L. Rev. 1293 at 1308: where rules of international law are broken, a state's "entitlements" (or rights) are taken away by the offended state(s).

61. M. McDougal, H. Lasswell and W.M. Reisman, "The World Constitutive Process of Authoritative Decision" in M. McDougal and W.M. Reisman, eds., *International Law Essays* (Mineola: The Foundation Press, 1981) at 191.

62. John Claydon, "The Application of International Human Rights Law by Canadian Courts" (1981) 30 Buffalo L. Rev. 727; Woloshyn, *supra*, note 4 at 2.

D. Legislative Supremacy

One of the most serious obstacles to successfully arguing for the *Charter* interpretation advanced here is the threat posed to the supremacy of Parliament by enhancing executive treaty-making power. The prevailing view is that unincorporated treaties lack authority; it is founded on the idea that "... the executive not be permitted to escape parliamentary control by doing by treaty what it could not otherwise do alone."[63]

By contrast, even though article 6 of the Constitution of the United States makes all treaties part of "the supreme law of the land," article 2 requires treaties to be approved by a two-thirds vote of the Senate; thus, legislative supremacy is maintained. States' rights are also protected, inasmuch as each state has equal representation in the Senate.

Returning to the Canadian context, the question arises whether it is right to give supremacy to an international treaty negotiated by a small number of officials or representatives (which perhaps receives little Cabinet attention before ratification) when domestic legislation must survive the tangled web of competing interests and policy concerns, public scrutiny and compromise before enactment. For example, the I.L.O. Convention regarding pay equity was relatively 'easy law' as compared with the difficult domestic enactment history of pay equity laws.

One could argue that parliamentary supremacy was diminished with the coming into force of the *Charter* and that court interpretations emanating from that document will simply have to be tolerated as proper delegations of law-making authority to the courts. This rebuttal is far from compelling. The courts may balk at new executive strength in our Westminster-style parliamentary democracy especially in the absence of clear evidence that the framers of the *Charter* intended to disrupt the respective powers of the executive and legislative branches of governments.

E. Section 31 of the Charter

The objection in the previous section was based on construing the *Charter* in light of general constitutional principle. Section 31 of the *Charter* may be a more specific basis for objections. It states:

> Nothing in this *Charter* extends the legislative powers of any body or authority.

It might be maintained that the "legislative" authority of the executive is increased if it can affect the impact of the *Charter* merely by entering into an international treaty. It might be countered that "legislative authority" is the ability to make binding laws, not the ability to do something that affects the interpretation of another law. It might also be countered that "legislative authority" refers to the ability to unilaterally formulate rules, whereas treaty-making is collaborative. A more modest version of this counter

63. R. St. J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307 at 316. Parliamentary supremacy appears to be the judiciary's rationale for restricting the power of treaties: "The treaty in itself is not equivalent to an Imperial Act and, *without the sanction of Parliament*, the Crown cannot alter the existing law by entering into a contract with a foreign power" (emphasis added): *Arrow*, *supra*, n.15 at 260. Also, see Hogg, *supra*, note 35 at 245-6.

would make the test one of degree; to what extent has the federal executive created, as opposed to accepted, the convention? The federal executive does not "legislate," for example, if it merely plugs into a multilateral treaty on which it had little influence. Yet another counter would be largely limited in its application to human rights conventions. It would hold that such conventions protect rights, the rights of individuals and groups against the state, and that section 31 should not be wielded against executive actions that lead to this kind of diminution of legislative authority. The "non-extension" argument is especially strong if the convention is merely declaratory of rights that already exist — as a matter of positive law, or under the theory that principles in human rights treaties "are so transparent to natural reason that they are binding even in the absence of positive enactment."[64] According to this theory, as expounded by Brudner:

> [T]hese [human rights] treaties express *a priori* principles of practical reason rather than the mere particular will of the executive, their domestic applicability constitutes no more an offence to the sovereignty of the general will than does the adoption of rules of international custom.[65]

Section 31 would ground an especially strong objection if a complainant relies on a federally ratified treaty to challenge the actions of a provincial government. As laid down in the *Labour Conventions*[66] decision, treaty obligations can be fulfilled only by the order of government that has jurisdiction under section 91 or 92 of the Constitution relating to the substantive matter of the treaty. Although the *Labour Conventions* case may be subject to reconsideration[67] it is still the law. This decision upholds the power of the federal government to sign and ratify treaties regarding provincial matters. Should these treaties then become the supreme law of Canada, provincial autonomy could suffer. Professor Hogg argues:

> Provincial autonomy would be seriously threatened if every treaty made by the federal government led to an automatic increase in the legislative authority of the federal Parliament . . . The proliferation of multinational treaties concerning health, education, welfare, labour relations, human rights and other matters within provincial jurisdiction . . . is a sufficient reason for caution.[68]

As Hogg notes however, a "federal state clause" in a treaty results in the imposition of an obligation only on the federal government, and a "reservation" may eliminate binding obligations on the provinces. Furthermore, a province could use section 33 to override such use of federal power. These mechanisms may curtail federal intrusion in past and future treaties. Where no such limits exist, a court may resort to refusing to recognize international law where to do so would transgress provincial jurisdiction based on another equally authoritative part of the Constitution—sections 91 and 92. In *Bienert*, Patterson A.C.J. Prov.Ct. adopts this approach:

> The defendant has urged that the *Charter* should prevail over other sections of the *Constitution*. This clearly cannot be so. It is the entire *Constitution*, not just the *Charter*, which s.

64. Brudner, *supra*, note 5 at 253.

65. *Ibid.* We remain somewhat skeptical in this regard. The formulation of international human rights conventions seems to be very much influenced by changing circumstances and attitudes and by shifts in political and military power.

66. *A.G. Can.* v. *A.G. Ont.* (1937), [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.).

67. See Laskin C.J.C. in *MacDonald* v. *Vapour Canada Ltd.* (1976), [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 at 29.

68. *Supra*, note 35 at 254.

52 makes the supreme law of Canada. The very fabric of our nation as a federal state is woven from the careful distribution of powers reflecting a compromise of competing national and regional interests. Surely, the newly enacted *Charter* cannot be used as a vehicle to destroy the difficult political compromises which bond our country together.[69]

F. Expressio Unius Arguments

A technical objection might be developed in connection with subsection 11(g) which, as already mentioned, *explicitly* mentions "international law." It could be argued on the one hand that since those words are not explicitly mentioned elsewhere, the word "law" in sections 1, 7, 11(d) and 15(1) could not have been intended to embrace "international law" or else those words would have been inserted. On the other hand, the words "Canadian law" are used in subsection 11(g). Since the word "Canadian" does not qualify the word "law" in sections 1, 7, 11(d) or 15(1) it could be inferred that "law" in the latter sections means more than just "Canadian law." No effective argument could be made for either interpretation as a consequence. Further, subsection 11(g) was likely included in the *Charter* for a very specific purpose—i.e., war crimes—and to draw very broad conclusions from it may be inappropriate. The "invocable-via-the-*Charter*" argument might also be challenged by contrasting the Constitution of Canada with constitutions that expressly acknowledge the domestic supremacy of international law. For example, article 55 of the 1958 French Constitution states that "[t]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject for each agreement or treaty, to its application by the other party."[70] The German Basic Law of 1949, amended in 1966, clearly provides that "[t]he general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."[71] But the argument by contrast does not seem particularly impressive. We have not uncovered evidence that the framers of the *Charter* considered in any depth its interaction with the law of nations. Nor does it seem fair to attribute to a hypothetical "reasonable drafter" of the *Charter* a comprehensive knowledge of comparative constitutional law; and even our amply informed drafter could reasonably have decided that the issue is contentious and complicated enough to warrant "leaving it to the courts."

The more technical objections just considered do not appear to be compelling. The concerns raised by section 31—about allowing the executive to do an "end-around" Parliament—must, however, be taken seriously. So must the similar concern with respect to the federal level of government and its enhanced ability to put clogs on the exercise of legislative authority by provinces.

VI. Policy Considerations

It is intended here to analyze some further policy implications of the "invocable-via-the-*Charter*" theory.

69. *Supra*, note 48 at 18.

70. John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86) 50 Sask. L.R. 13, n. 2.

71. *Ibid.*; see also: D.R. Deener, "International Law Provisions in Post- World War II Constitutions" (1951) 36 Corn. L.Q. 505; see also B. Graefrath "How Different Countries Implement International Standards on Human Rights" (1984-85) Can. Human Rights Yearbook 3.

A. Canada's Duty to Uphold the Rule of International Law

It may be argued that there is a moral imperative on Canada to observe international law; or at least, that whatever inconveniences are caused to Canada by consistently adhering to international law are outweighed by the contribution such fidelity makes to maintaining the international legal order. In reply, it might be contended that international statesmanship is better left to the superior expertise and flexibility of the executive and legislative branches of government, rather than the judiciary; and that it is wrong for the courts to intervene to uphold the rule of international law when other levels of government choose not to intervene. The internationalist might press the point that it is particularly just and exemplary that Canadian courts ensure that Canada's obligations under international human rights conventions are not flouted; that the *Charter* itself shows that it is appropriate for courts to intervene to protect basic human rights; and that there are unlikely to be subtle international diplomatic reasons which would justify Canada's violating recognized human rights. Claydon argues:

> . . . enforcing the rights of Canadians protected through a multilateral agreement is not going to embarrass our government in its foreign relations with any other state. The real embarrassment lies in permitting the executive to give with one hand by ratifying the treaty and take away with the other by failing to implement it.[72]

It might also be maintained that when domestic courts interpret and enforce international rules, they contribute to the understanding and definition of the world legal order. If Canadian courts interpret and apply international human rights conventions, for example, they will help to nurture the growing body of case law on international human rights.

B. The Impairment of Legislative Supremacy

On the negative side, it could be contended that the "invocable-via-the-*Charter*" argument unduly impairs the freedom of action of legislatures. The ordinary rule of constitutional law is that legislation can be revised and repealed by a subsequent legislature. We generally believe that it can be unwise to prevent a legislature from adapting the law to changed circumstances or perceptions, and that it can be undemocratic to allow the legislators of the past a veto over the legislators of the present. To bind succeeding legislatures in Canada, it is generally necessary to produce an exceptional degree of political consensus; most constitutional changes in Canada require the consent of Parliament and seven provinces. But if the "invocable-via-the-*Charter*" argument is right, an international agreement entered into by Canada may be, in effect, "entrenched." Unless resort is made to the override in section 33, sections 7, 11(d) and 15 of the *Charter* will render invalid an attempt by a later Parliament to legislate contrary to a treaty that is still binding on Canada under international law. Perhaps Canada's treaty partners will be unwilling to discuss and agree on revisions desired by Canada. The "entrenchment" objection will be strongest when neither the treaty nor international law permits Canada to unilaterally exit the treaty at all. The objection is weakest when Canada is free under international law to pick

72. *Supra*, note 62 at 737.

and choose which aspects of a treaty she wishes to disavow. Another legal distinction that might be made is between treaty provisions which Canada has expressly and publicly disavowed, even though international law does not permit her to do so, and provisions that Canada has never challenged. It might be said that the affront to the rule of law is less in the former case; that Canada has at least made it clear that she no longer regards the international commitment as binding upon her, and is not acting hypocritically when she enacts contradictory legislation.

C. Special Interest Treaties

It might be argued that the process of international treaty creation makes it dangerous to make all treaties invocable via the *Charter*. A treaty may, for example, deal with a very specific subject matter that is the concern of only a specialized fragment of a government and its bureaucracy which responds to a very specific set of special interest groups. The courts may therefore wish to make invocable only a limited set of treaties that have received wide attention on the parts of governments, including Canada. It might be countered, however, that it both appears and is improper for the courts to sort through binding international commitments made by the executive branch of government and figure out which have been entered into on a basis that is too frivolous or esoteric to warrant *Charter* invocability. The Governor General in Council, it might be pointed out, has to formally ratify a treaty at some point, and if cabinet members are asleep at the switch, it is not for the courts to divert the train. In any event, supporters of general *Charter* invocability might argue, what appears to be a ill-considered or one-sided feature of a particular treaty might be balanced against norms in other treaties that Canada has signed.

D. Certainty

Critics of the "invocable-via-the-*Charter*" theory might object that making invocable international law only adds to the uncertainty, complexity and expense of domestic litigation. The theory would require a Canadian lawyer to simultaneously deal with befuddling common law, baffling *Charter* law and boggling international law. The materials needed to deal with international law are frequently difficult to obtain. The average law office usually does not contain a file on international diplomatic correspondence; nor, for that matter, does the average law library. The content of customary international law is often difficult to discern even when the materials are available for analysis. Determining the content of customary international law requires identifying what different states consider as "constant and uniform usage, accepted as law."[73] Evidence of custom may be found in such varied sources as:

> . . . diplomatic correspondence, policy statements, press releases, the opinions of legal advisors, official manuals on legal questions . . . comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.[74]

73. *Asylum Case* (*Columbia* v. *Peru*) (1950), [1950] I.C.J.R. 266.

74. I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979) at 5.

Each source has differing weight accorded to it.[75] It can often be particularly difficult to make an assessment of whether the necessary "mental element"—that is, the perception by state officials that their acts are somehow binding— accompanies past practice.

The text of a convention is sometimes easily obtainable and understandable. But sometimes the text of a treaty is hard to obtain. Even more frequently, it may be difficult to obtain the background documents or the international pronouncements and judicial decisions that interpret the treaty. The meaning of the treaty may be elusive; in *R.* v. *Chief Immigrating Officer, Heathrow Airport*,[76] Lord Denning M.R. held that, *inter alia*, article 8(1) of the *European Convention for the Protection of Human Rights* would not permit the entry of certain persons into the United Kingdom because:

> It contains wide general statements of principle. They are apt to lead to much difficulty in application: because they give rise to much uncertainty. They are not the sort of thing which we can easily digest. Article 8 is an example. It is so wide as to be incapable of practical application. So it is much better for us to stick to our own statutes and principles . . .[77]

Without dismissing the difficulty, we do not perceive it as a particularly serious one. Canadian lawyers and judges have managed quite well in a number of areas of law that involve international sources, including maritime law, international tax law and patent and trademark law. Furthermore, the use of international law as an interpretive tool with respect to the *Charter* will stimulate interest and familiarity with some sources of international law. If and when it is established that some international law may be invoked via the *Charter*, it is likely that governments, law publishers and libraries would take measures to assist lawyers with respect to finding and using international legal materials.

E. The Law of Unintended Consequences

Critics of the "invocable-via-the-*Charter*" theory might contend that it is wrong to insist on serious domestic consequences flowing out of international agreements when the Canadian governments entering into them had no idea that the *Charter* would come into existence, or have such subtle implications. One possible response is that Canadian governments should have entered into treaties with the idea that they would solemnly and scrupulously observe them; so they have no legitimate complaint if it turns out later that Canadian courts hold them to their word. Critics might retort that a government can legitimately anticipate that occasionally it will have to bend or break international law; and that the "invocable-via-the-*Charter*" argument involves consequences—such as binding the provinces and giving the courts a say on the interpretation of treaties—that the federal executive may not have considered when they entered into the treaty. An intermediate position is possible here; it might be said that the "invocable-via-the-*Charter*" argument should only be available with respect to international law created on or after April 17, 1982, the day the *Charter* came into force.[78]

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75. *Ibid.* at 5-12.

76. (1976), [1976] 3 All. E.R. 843, [1976] 1 W.L.R. 979 (C.A.) [hereinafter *Chief Immigrating Officer* cited to W.L.R.].

77. *Ibid.* at 985.

78. Or April 17, 1985, if section 15 is being used to invoke international law.

VII. (In)Conclusion

As Robert Nozick has written, "[t]here is room for words on subjects other than last words."[79] The variety and complexity of possible cases has discouraged our normally intrepid selves from prescribing a set of definite solutions to an array of hypothetical problems. We hope to have provided some assistance to lawyers, judges and academics by raising a new approach to the interaction of international law and the *Charter*, and by providing some guidance to future explorers. The analysis in this article suggests that the following distinctions, among others, should be useful in determining whether the invocation of international law via the *Charter* should be permitted in a particular case:

(i) customary versus conventional international law.

The former is already part of domestic law and would merely become paramount in the face of conflicting legislation. Customary law usually represents a wide consensus among states. Its attachment to the *Charter* would not therefore face the criticism possible when attaching conventional law i.e.,—that it is an "end around" Parliament and the division of legislative powers.

(ii) incorporated versus unincorporated conventional international law.

The former has already been accepted at one point by a domestic legislature, thereby softening, to some extent, the criticism that allowing invocation of unincorporated international law undermines the function of democratically elected legislatures. True, a later legislature is hampered in its ability to undo the past, but at least there has been one opportunity for full democratic scrutiny. The situation may be compared with the "one-way ratchet" feature of section 38 of the *Constitution Act, 1982*, whereby a province may "opt-out" of a constitutional amendment, but is permanently "opted-in" if at any time the legislature revokes its dissent.

(iii) denounced versus extant international conventions.

If Canada has the right under international law to exit its treaty obligations, and does so, then invocation of a treaty norm via the *Charter* is generally not possible.[80] But what if Canada disclaims an intention to follow a treaty norm, even if Canada has no right to abandon its obligation under international law? The case for allowing *Charter* invocation is substantially weakened even by a treaty denunciation which is not authorized by international law. The affront to the "rule of law" when domestic rules contradict international rules is less when a state has articulated its dissent from the former. The state that expressly disavows its obligations is also in a better position from the democratic perspective. A government or legislature that simply ignores international law cannot complain too much about a

79. R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at xii.

80. Some exceptions: the treaty may generate customary international law, from which Canada is not free to withdraw; or the treaty may define a "principle of fundamental justice" that a court would rely on in case concerning the *Charter*.

judicial reminder that it must abide by its standing obligation. In a much stronger position is a government or legislature that has plainly signalled its intention to depart from international law, and thereby rendered itself plainly accountable for doing so.

(iv) unambiguous versus ambiguous international law.

In the Canadian legal system, it is usually the case that courts have the last word on the interpretation of a legal norm. But in the international legal system, there is usually no third-party adjudication of disputes. Most interpretation starts and ends in the hands of the executive and legislative branches of government. Domestic courts should not automatically assume that their warrant and expertise at legal interpretation is the same in international law as it is in domestic law. The experience, access to secret information, and strategic capacity of other branches of government often justify leaving with other branches of government the final say in a grey area of international law. The more clear and undeniable the violation of international law, the more affront there is to the rule of law; the less room there is for injecting policy and strategic considerations into the interpretive process; and in light of these considerations, the more warrant there is for judicial intervention.

(v) international law related to federal versus provincial heads of power.

The concern about doing an "end-around" provincial legislatures is only relevant when the "invocable-via-the-*Charter*" theory is applied to a provincial law or decision.

(vi) multilateral versus bilateral international conventions.

There is much less chance of anti-Parliamentary or anti-provincial manipulation by the federal executive when it enters into multilateral, as opposed to bilateral, conventions.

(vii) human rights versus other international conventions.

The invocation of the former can be portrayed as being especially faithful to the spirit of the *Charter*. The former may also escape more clearly the injunction of section 31 of the *Charter*—that nothing in it expands the legislative authority of any body or authority.

(viii) pre-*Charter* versus post-*Charter* international law.

The invocation of the latter gives less cause for concern that a government should have fair notice of the domestic implications of accepting a new international treaty or custom.

We would welcome in particular any efforts on the academic front to consider further the theoretical validity of the "invocable-via-the-*Charter*"

approach, or to examine closely how some true-to-life hypotheticals (or some recent cases involving the interaction of international law and the *Charter*) would be resolved in its light.[81]

81. We would also welcome explorations of the interaction of international law and the *Canadian Bill of Rights*. The relevant sections of the latter might have some advantages over their *Charter* counterparts. The section 2(a) argument is that "due process of law" includes the right to be treated in accordance with any international law binding on Canada. Section 2(a) has some legal advantages over its *Charter* counterpart, section 7, in that the former expressly refers to "law" and that the list of protected interests include "the enjoyment of property" and not just "life, liberty and security of the person." The section 2(b) argument is that the "protection of the law" includes the protection of international law. As mentioned in note 35, section 2(b) is clearer than its *Charter* counterpart, section 15, that an individual can claim the protection of the law even if the government acts with equal lawlessness towards all. An overall advantage of the *Bill* might be that the "starting time" mentioned in part VI, section E, could be 1960, rather than 1982. Courts might actually prefer to decide on the basis of the *Canadian Bill of Rights*, rather than the *Charter*, on account of the fact that the *Bill* only applies to the federal level of government and thus does not raise the federalism concerns discussed in Part V, section C.