# A COMMON LAW OF THE WORLD? THE RECEPTION OF CUSTOMARY INTERNATIONAL LAW IN THE CANADIAN COMMON LAW*

**The Honourable Justice Louis LeBel****

## INTRODUCTION

In an increasingly globalized world, the importance of international law to our domestic legal system continues to grow. This growth is both exponential and multi-dimensional. International law had been traditionally concerned with relations between states and about the status and action of international organizations. But today, not only is international law having a greater impact than ever on the state of domestic law, it also influences more areas of domestic law than ever. These areas include human rights, labour law, commercial law, intellectual property law, immigration and refugee law, and criminal law, to name but a few.

In this paper, I intend to focus on the *means* by which customary international law exerts its influence on the Canadian domestic legal culture. As will be discussed in greater detail below, customary international law is developed by state practice and the recognition of the legally binding nature of this practice, while other parts of international law are grounded in treaties and other multilateral instruments, which reflect the contractual activities of states and organizations. I will address some intricacies of this process. Before I do so, however, I will use again an analogy which, at least for the classical music lovers, may be of some assistance to understand the issues of interaction of international and domestic law.

A number of years ago, I co-wrote an article describing how the reception of international law into the Canadian legal order could be usefully compared to two distinct classical musical styles. First, there is the "fugue" style, from the Baroque period, in which "one or two themes are repeated or imitated by successively entering and interweaving repetitive elements."[1] The second style is "fusion" — "a

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merging of diverse, distinct, or separate elements into a unified whole," or "the combination of different styles . . . to form a new style."[2]

Metaphorically, these two styles refer to two different approaches to the internalization of international law. Under the fugue approach, the domestic and international legal orders operate independently, and are only interwoven when international law is formally incorporated, or "transformed", into the domestic order. This method may also be termed the dualist approach to reception, under which international law must be expressly received to by some executive and/or legislative action in order for it to be effective domestically.

In contrast stands the fusion approach, which is synonymous with the monist approach to reception. Under this approach, international law is directly incorporated into domestic law and is immediately effective without any additional legislative or executive action. Just like the music created by this style, the fusion approach modifies the domestic law and changes it from what it might otherwise have been.

Subject to certain exceptions, upon which I will elaborate, the Canadian approach to the reception of customary international law has moved decidedly towards the "fusion" end of the spectrum. By and large, customary international law is now directly incorporated into the common law of Canada and is effective immediately without the need for further legislative or executive action. I will first discuss what constitutes custom in international law and how it develops. I will then review the development of the law regarding reception of custom into the domestic legal order, in the U.K. and in Canada. Finally, I will turn to some specific problems and issues raised by the Canadian approach to the reception of customary international law.

## CUSTOM IN INTERNATIONAL LAW

A logical starting point is to describe, briefly, what customary international law is and how it gets recognized. Article 38(1) of the *Statute of the International Court of Justice* identifies the various sources of international law, as follows:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

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[1] Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002) 16 SCLR (2d) 23 at 24-25.

[2] *Ibid* at 25.

> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

My comments focus on the second category — international custom, as evidence of a general practice accepted as law. What the inclusion of this category in the *Statute of the International Court of Justice* confirms is that, at its most basic level, customary international law is a source of *law*. In other words, it is a source of legal obligations binding on all states. This rule is subject only to one controversial exception, known as the "persistent objector rule." This rule holds that a state which has persistently objected to a particular rule of customary international law, during its formation and since its inception, will not be bound by that custom.[3] But, this begs the question of what turns a given principle or rule into an international custom and binding law?

## 1. Recognition of Custom

Customary international law is developed by generalized, though not necessarily universal, state practice. Specifically, two requirements must be met in order for a particular rule or principle to be considered an international custom. First, the principle or rule must be generally observed or accepted as a state practice. To determine whether this is so, one enquires as to whether the majority of states are adhering to the rule or principle in their physical acts, claims, declarations, laws, and judgments. The rule must be recognized as a state practice by most, but not *all* nations. As the Supreme Court of Canada held in the *Continental Shelf Reference*, "[i]n order to constitute a custom there must be substantial uniformity or consistency, and general acceptance".[4] Clearly, the use of such adjectives as "substantial" and "general" confirm the recognition of a custom does depend on the generality of a practice, but not on its absolute universality.

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[3] J-Maurice Arbour & Geneviève Parent, *Droit International Public*, 6th ed (Cowansville, Que: Yvon Blais, 2012) at 81-82; James Crawford, ed, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 28.

[4] *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 5 DLR (4th) 385 at 118 [*Continental Shelf Reference*]; Crawford, *supra* note 3 at 24-27; Arbour & Parent, *supra* note 3 at 67-73 [emphasis added].

The second requirement is that states follow the principle or rule out of a sense of legal obligation, not simply out of courtesy or morality. This is known as *opinio juris*, as the International Court of Justice held in the *North Sea Continental Shelf* case in this way, "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to constitute evidence of a belief by the state parties that a practice is rendered obligatory by the existence of a rule of law requiring it."[5]

### 2. Regional Customs

Before turning to the reception of customary international law in Canada, I must add a precision to the definition of custom and, in particular, to the notion that customs are a source of binding legal obligations on *all* states. Certain customs, instead of being general in nature, may be practised only within a particular region. This may lead to the development of a local customary law which is binding only on those states within the region. In fact, as few as two countries may establish a binding local custom as between themselves.[6] Importantly, regional customs are created in the same way as general customs. That is, the alleged custom must be established by state practice in the region to which it appertains and there must be *opinio juris* amongst the states who are alleged to be bound by it.

Against this background, I will now discuss the reception of customary international law into the Canadian common law. Our system of reception is rooted in the British tradition, which will provide a useful starting point for my analysis.

## RECEPTION IN CANADA

### 1. Historical Controversy and the British Approach

As early as 1737, it was seen as settled law in England that customary international law was automatically or directly incorporated as part of that country's common law.[7] This remained so until 1876, when the case of *R v Keyn (The Franconia)*[8] put this assumption in doubt. In this judgment, Chief Justice Cockburn, adopting a firmly dualist approach, held that, for England to be bound by an international rule or a principle of international law, an Act of Parliament was necessary. Of like effect, although somewhat equivocal, was the Privy Council's 1938 decision in *Chung Chi*

[5] *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at 44.

[6] *Right of Passage over Indian Territory (Portugal v India)*, [1960] ICJ Rep 6.

[7] *Buvot v Barbuit* (1737), Cas T Talbot 281, 25 ER 777.

[8] *R v Keyn* (1876), 2 QBD 90, 2 Ex D 63.

*Cheung v The King*.[9] In that case, Lord Atkin emphasized the need for a process of incorporation of rules of international law into the domestic law of the United Kingdom:

> . . . international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated in to the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.[10]

Whether these cases, in fact, constituted a complete rejection of the doctrine of direct incorporation remained uncertain. For example, the *Keyn* decision was followed by a decision approving of the doctrine of direct incorporation of customary international law.[11] Even, the dicta from *Chung* might be viewed as largely consistent with the doctrine. Indeed, the only portion of the above quoted excerpt from *Chung* which appears inconsistent with the incorporation doctrine, as it is understood today, is Lord Atkin's position that the reception of customary international law may be barred by existing conflicting common law. But, as an author observed, at the time *Chung* was decided, the issue of conflict between a norm of customary international law and the existing common law had not been considered by an English court.[12]

In any event, doubts surrounding the acceptance of the incorporation doctrine in England were put to rest, at the time, by Lord Denning's judgment in *Trendtex Trading v Bank of Nigeria*.[13] The complicated facts of this case may be summarized for the purposes of my analysis. The plaintiff, Trendtex, was suing the Bank of Nigeria, a state bank, in the English courts on a letter of credit the Bank had issued in its favour. As a preliminary matter, the Bank sought to stay the proceedings against it on the basis of sovereign immunity — a customary rule of international law which holds that a sovereign state cannot be sued in the court of another country. At issue was the scope of this rule. In particular, the question arose as to whether the rule granted absolute immunity to sovereign states in foreign courts. An argument had been made that the immunity was more restricted in the sense that sovereign states could not be sued in foreign courts in respect to acts of a governmental nature

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[9] *Chung Chi Cheung v The King* (1938), [1939] AC 160, [1938] 4 All ER 786 (PC) [*Chung* cited to AC].

[10] *Ibid* at 167-68.

[11] *West Rand Central Gold Mining Company Limited v The King*, [1905] 2 KB 391 at 406-408.

[12] Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at 188-89.

[13] *Trendtex Trading v Bank of Nigeria*, [1977] 1 QB 529, [1977] 1 All ER 881 (CA).

(*acta jure imperii*), but that court action against them was possible in respect of acts of a commercial nature (*acta jure gestionis*). In deciding that the more restricted latter rule limiting the immunity to acts of government should be followed, Denning J. explicitly endorsed the doctrine of incorporation:

> Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court — as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it.[14]

*Trendtex* was not appealed to the House of Lords. The incorporation doctrine was approved by the House a few years later in the case of *I Congreso del Partido*.[15] More recently, it was given a more cautious and reserved endorsement in *R v Jones*.[16] The defendants in *Jones* had trespassed on to various military bases in the United Kingdom and committed acts designed to hinder the conduct of the Iraq War. The issue before the House was whether their defence, which was premised on s. 3 of the *Criminal Law Act, 1967* and s. 68 of the *Criminal Justice and Public Order Act, 1994*, could succeed. In essence, these Acts respectively provided that a person is entitled to use reasonable force in the prevention of crime and that one does not commit aggravated trespass where the activity disrupted is one that is unlawful. The defendants argued that the military activities of the U.K. government, in relation to the war in Iraq, constituted the international law crime of aggression (that is, waging an aggressive war). Thus, the House was required to consider whether this crime was a crime or offence under domestic law, such that it would provide a defence under either of the Acts.

The main speeches were given by Lord Bingham of Cornhill and Lord Hoffmann. Lord Bingham, for his part, first appeared to accept only with some caution the doctrine of the incorporation of international customary law when he wrote "that customary international law was part of the domestic law of England and Wales, without the need for any domestic statute or judicial decision."

> The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general

[14] *Ibid* at 554.

[15] *I Congreso del Partido* (1981), [1983] 1 AC 244, [1981] 2 All ER 1064 (HL).

[16] *R v Jones* (2006), [2006] UKHL 16, [2007] 1 AC 136.

> truth of this proposition, for which there is indeed old and high authority (citations omitted). I would for my part hesitate, at any rate without much fuller argument to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in JL Brierly's contention (citation omitted), also espoused by the appellants, that international law is not a part, but is one of the sources, of English law. There was, however, no issue between the parties on this matter, and I am content to accept the general truth of the proposition for present purposes . . .[17]

But later in his reasons, Lord Bingham added an important qualification to his cautious endorsement of the *Trendtex* doctrine. He cited *Keyn* for the proposition that a crime recognized in customary international law is not, without more, automatically assimilated into the domestic criminal law of England.[18] This sentiment was shared by Lord Hoffmann and Lord Mance as well.[19] The same proposition was also later endorsed by Baroness Hale of Richmond in *R (on the application of Gentle and another) v Prime Minister and others*,[20] where she held that "Crimes under customary international law are not automatically incorporated into domestic law and it is no longer open to the courts to recognise new common law crimes".[21]

At present, the position in England seems generally favorable of the incorporation doctrine, except in respect to the criminal law. Courts will not be allowed to create crimes unknown to domestic law on the basis of foreign international law. But, the House of Lords' acceptance of the doctrine in *Jones* is far from a ringing endorsement. Its prudent and qualified language may suggest the existence of growing doubts about the express and unqualified acceptance of the doctrine of incorporation stated in *Trendtex*.

## 2. The Development of Canadian Law

The doctrine of incorporation was also considered by the Supreme Court of Canada during the same period. A natural departure point of a discussion of the reception of customary international law is the Supreme Court's decision in *Re Foreign Legations*.[22] In this case, the Court considered the power of Ontario municipal

[17] *Ibid* at para 11.

[18] *Ibid* at para 23.

[19] *Ibid* at para 102.

[20] *R (on the application of Gentle and another) v Prime Minister and others*, [2008] UKHL 20, [2008] AC 1356.

[21] *Ibid* at para 49.

[22] *Re Foreign Legations*, [1943] SCR 208, [1943] 2 DLR 481 [*Foreign Legations* cited to SCR].

corporations to levy taxes for municipal purposes against buildings housing legations owned by several foreign states in the national capital region. Chief Justice Duff wrote the leading judgment in this case. In holding that the legations could not be subjected to municipal taxation, the Chief Justice observed that "[t]here are some general principles [of state immunity] touching the position of the property of a foreign state and the minister of a foreign state that have been accepted and adopted by the law of England (which, except as modified by statute, is the law of Ontario) as part of the law of nations".[23] As G. van Ert notes, this finding "was an application of the doctrine of incorporation".[24]

Although the doctrine of incorporation seemed to have gained a strong foothold in Canadian law on the basis of *Re Foreign Legations*, the jurisprudence which followed from the Supreme Court shortly thereafter began a trend of ebbs and flows in which it expressed a changing appetite for the doctrine and inconsistent views about it. The first case in this line of authority was *Re Armed Forces* that was rendered at almost the same time as its judgment in the *Re Foreign Legations* case.[25] The question referred to the Court in this case was whether American troops stationed in Canada during the Second World War were exempt from criminal proceedings prosecuted in Canadian criminal courts. The alleged rule of customary international law at play was immunity from prosecution in local courts for members of foreign forces stationed in a receiving country with the permission of that country's executive. The dissenting Justices — Justices Kerwin and Taschereau — followed *Re Foreign Legations* and affirmed the incorporation doctrine. However, the majority — Chief Justice Duff, Justice Hudson, and Justice Rand – took the view that the American troops were not immune from prosecution in Canadian criminal courts. Although they recognized that such a rule existed as part of customary international law, they took a weak view of incorporation, as had been done by Lord Atkin in *Chung*. They held that this norm could be overruled by "a rule or principle declared or adopted by the courts or Parliament of this country or accepted as embodied in its constitutional practices".[26] The rule that foreign soldiers were subject to the ordinary criminal courts was already a part of the common law. Accordingly, this common law rule could not be, and was not, displaced by the incorporation of a conflicting custom of international law.

The next case of import in this jurisprudential development is *Saint John v Fraser-Brace Overseas Corp.*[27] The defendant Canadian corporation was taxed on

[23] *Ibid* at 214.

[24] van Ert, *supra* note 12 at 195-96.

[25] *Reference re Exemption of United States Forces from Proceedings in Canadian Criminal Courts*, [1943] SCR 483, [1943] 4 DLR 11[*Re Armed Forces* cited to SCR].

[26] *Ibid* at 524, Rand J.

[27] *Saint John v Fraser-Brace Overseas Corp.*, [1958] SCR 263, 13 DLR (2d) 177 [*Fraser-Brace* cited to SCR].

its real and personal property by the municipality of Saint John even while it was acting as agent for the government of the United States. The Court held that, based on the customary international norm of sovereign immunity, the property in question could not validly be taxed by the municipality. In coming to this conclusion, the opinion of Rand J., with whom Abbott J. agreed, was particularly clear. He expressly adopted the theory of incorporation in holding that:

> It is obvious that the life of every state is, under the swift transformations of these days, becoming deeply implicated with that of the others in a *de facto* society of nations. If in 1767 Lord Mansfield, as in *Heathfield v. Chilton*, could say, "The law of nations will be carried as far as England, as any where", in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say anything less.[28]

In addition, Justice Rand expressly rejected the opposing transformationist model. The spirit of the common law required that it be allowed to move and change as international law evolved itself:

> But to say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law, and a retrograde step in evolving the rules of international intercourse. However slowly and meticulously they are to be fashioned they must be permitted to meet the necessities of increasing international involvements. It is the essence of the principle of precedent that new applications are to be determined according to their total elements including assumptions and attitudes, and in the international sphere the whole field of the behaviour of states, whether exhibited in actual conduct, conventions, arbitrations or adjudications, is pertinent to the determination of each issue.[29]

But, before the judgment of the Supreme Court of Canada in *R v Hape*,[30] *Fraser-Brace* was the high-water mark of the shift of the Supreme Court in favour of the acceptance of the doctrine of incorporation. Although it should have settled the matter in Canadian law, this was not to happen, given further wavering or, at least, silence in some more recent jurisprudence of the Supreme Court.

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[28] *Ibid* at 268-69.

[29] *Ibid* at 269.

[30] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].

In 1984, the Court, in a *per curiam* judgment, decided the *Newfoundland Continental Shelf Reference*.[31] Of some historical interest, this case decided whether Canada or the province of Newfoundland had the right to explore and exploit the resources of the continental shelf off the coast of Newfoundland. The relevance of international law was that, by 1984, the conventional law was clear that States had the rights over their continental shelves by operation of law — that is, without any express proclamation. However, as there had been no conventional law relating to the continental shelf before 1958, the question remained whether a norm of customary international law recognizing a State's right to explore and exploit its continental shelf existed, when, in 1949, Newfoundland joined the Dominion. On this point, the Court said no and found that no general practice had arisen and that it was not commonly accepted by states. It could not be said that the alleged practice was settled law.

> . . . international law had not sufficiently developed by 1949 to confer, *ipso jure*, the right of the coastal State to explore and exploit the continental shelf. We think that in 1949 State practice was neither sufficiently widespread to constitute a general practice nor sufficiently consistent to constitute settled law. Furthermore, several of the early State claims exceeded that which international law subsequently recognized in the 1958 Geneva Convention. International law on the continental shelf developed relatively quickly, but it had not attained concrete form by 1949.[32]

This case is significant in what it did not say or decide in respect of the incorporation of customary international law. The Court may have felt that it was not necessary to address the issue of incorporation, given its conclusion on the existence of the customary rule at issue. Nevertheless, some authors could view this judgment as implicitly applying the incorporation doctrine, although there was not a word about whether customary international law was incorporated in the Canadian common law.[33]

In 1992, the Court again affirmed the incorporation doctrine by applying it, but without expressly making reference to it. *Re Canada Labour Code* dealt with the doctrine of foreign immunity in respect to Canadian civilians employed by the U.S. Department of Defence at its Naval Facility at Argentia, Newfoundland.[34] In short, the Canadian employees sought certification as a union before the Canadian Labour Relations Board and the U.S. government opposed the application on the basis of

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[31] *Continental Shelf Reference*, *supra* note 4.

[32] *Ibid* at 124.

[33] Hugh M Kindred & Phillip M Saunders, *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed (Toronto: Emond Montgomery, 2006) at 192.

[34] *PSAC v United States Defence Department*, [1992] 2 SCR 50, 91 DLR (4th) 449 [*Re CLC* cited to SCR].

lack of jurisdiction, arguing that it was immune from proceedings before the Board. In order to interpret Canada's *State Immunity Act*, which exempted foreign states from immunity from proceedings that related to any commercial activity of the state, Justice LaForest considered the evolution of the common law of foreign immunity. In so doing, he affirmed that the common law of Canada had evolved from applying an absolute theory of foreign state immunity to applying a restrictive theory of immunity, which refused to extend sovereign immunity to proceedings relating to the commercial activities of a state. No "transformative action" was referred to as the cause of this evolution. Accordingly, the only way in which the common law could have evolved in this manner was by way of direct incorporation of customary international law. That this is so is confirmed by Justice LaForest's reliance on the House of Lords' decision in *I Congreso del Partido*, which, as I mentioned, had endorsed the incorporation doctrine.[35]

Another case, which I will mention only in passing, is *Reference re Secession of Quebec*[36] which considered the legality of Quebec's potential unilateral secession from Canada. The opinion of the Court treated customary international law on secession as a consideration in the articulation of its legal reasoning, but not as an explicit part of the common law of Canada.[37] It was not mentioned either in the *Spraytech* and *Suresh* cases where international law issues were discussed.[38] In *Spraytech*, the Court merely held that its interpretation of a bylaw was consistent with the precautionary principle, which it held to be a possible norm of customary international law. The doctrine of incorporation of customary law was not mentioned.

*Suresh*, on the other hand, raised more concerns in respect of the application doctrine of direct incorporation of customary international law, although it was not expressly discussed in the judgment of the Court.

In *Suresh*, the relevant issue before the Court was the extent to which customary international norms, more precisely, peremptory norms now belonging to "*jus cogens*" inform the principles of fundamental justice under s. 7 of the *Charter*. Specifically, the Court had to consider whether the deportation of a Convention refugee to torture violated these principles. The Court had first underlined that international norms informed its analysis, but did not directly govern it, without

[35] *Ibid* at 71.

[36] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Re Secession of Quebec* cited to SCR].

[37] *Ibid* at 275-291.

[38] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

clearly distinguishing between treaty and customary norms, after stating that international treaty norms did not bind Canada unless they had been incorporated into Canadian law by an enactment. "Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself."[39] The applicable international law norm was the prohibition on torture. In the course of its analysis, the Court noted that this norm "cannot be easily derogated from",[40] but did not go so far as to expressly declare it to be a part of Canadian common law. This approach was criticized, an author calling it "astonishingly equivocal" and a missed "opportunity to reaffirm [the Court's] incorporation decisions in *Re Foreign Legation*, *Re Armed Forces*, and *Fraser-Brace*".[41]

It is true that it may be said that the common law's position on the prohibition on torture was not before the Court. Instead, the focus of the argument before Court was on demonstrating the existence of this prohibition at international law and on relying upon it to inform the content and scope of the principles of fundamental justice under s. 7. But, in the perspective of more recent jurisprudence, I believe that this judgment was a failed opportunity to affirm that torture breached a principle of customary international law or even a peremptory norm and that such a principle was now part of the domestic law of Canada.

In any event, a few years later, the decision in *Hape*[42] firmly confirmed that the doctrine of incorporation was part of Canadian law. This case had to do with a money laundering operation being run by a Canadian citizen in the Turks and Caicos. In the course of a joint investigation, the RCMP had carried out a series of searches and seizures in the Turks and Caicos, under the direction of that country's authorities. The question for the Court was whether, and to what extent, the *Charter* applied to this police action in the Turks and Caicos.

One important interpretive aid in determining the jurisdictional scope of s. 32(1) of the *Charter* was customary international law. An examination of the Canadian approach to domestic reception of customary international law was therefore necessary. The key passage from the majority opinion was in paragraph 39, where the recommended approach was summarized as follows:

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[39] *Ibid* at para 60.

[40] *Ibid* at para 65.

[41] van Ert, *supra* note 12 at 205-06.

[42] *Hape*, *supra* note 30.

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[43]

Following this decision, there was some comment and concern to the effect that the last sentence in this passage left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development.[44] In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation. Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter*. Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty "may be adopted into the common law of Canada in the absence of conflicting legislation".[45] The gist of the majority opinion in *Hape* was that accepting incorporation of customary international was the right approach. In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them.

### 3. Distinction Between Prohibitive and Permissive Customs

A further wrinkle in the Canadian approach to the reception of customary international law was noted by LaForest J., in dissent, in *R v Finta*.[46] He drew a distinction between prohibitive and permissive customs to apply in domestic law, on

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[43] *Ibid* at para 39 [emphasis added].

[44] John Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 232.

[45] *Hape*, *supra* note 30 at para 46.

[46] *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513 [*Finta* cited to SCR].

the other hand. Mandatory customs are automatically incorporated, following the approach that was later summarized in *Hape*, but permissive customs are not. *Finta* dealt with the application and constitutionality of the then newly introduced *Criminal Code* provisions dealing with the prosecution of war criminals resident in Canada. These provisions were introduced following the report of the Commission of Inquiry on War Criminals in Canada headed by a retired Chief Justice of the Quebec Superior Court, Jules Deschênes. The report concluded that new legislation was not required to prosecute war criminals in Canada for their acts committed abroad on the assumption that the Canadian courts already had jurisdiction. Commissioner Deschênes viewed the basis of this jurisdiction as twofold: (i) the international customary rule of universal jurisdiction over war crimes and crimes against humanity and (ii) s. 11(g) of the *Charter*, which he viewed as adopting customary international law into Canadian law. LaForest J. disagreed with this opinion. He thought that no such custom had been incorporated into Canadian domestic law and that legislation was necessary for this purpose.

> Despite the Deschênes Commission's assumption that s. 11(*g*) of the *Charter*, coupled with the universality jurisdiction associated with these war crimes and crimes against humanity, could ground a prosecution in Canada, it is not self-evident that these crimes could be prosecuted in Canada in the absence of legislation. On the analogy of other international authority in the area, it is certainly arguable that the international norm regarding universality of jurisdiction is permissive only (see *The S.S. "Lotus" Case* (1927), P.C.I.J., Ser. A, No. 10), and the language of s. 11(*g*) of the *Charter* also appears to be framed in permissive terms. Thus it is by no means clear that prosecution could automatically be pursued for these crimes before the courts of the various states, especially Canada where, barring express exception, crimes must comply with the requirement that they were committed within Canada's territory. . . .[47]

In other words, LaForest J. was of the view that permissive norms are not automatically incorporated into our domestic law. In consequence, the principle of universality of jurisdiction over war crimes and crimes against humanity had not become part of Canadian domestic law and did not necessarily confer jurisdiction on Canadian superior courts over crimes that had been committed abroad in the absence of a law to that effect. For this reason, he found it "not surprising that Parliament saw fit by s. 7(3.71) of the *Code*, to confer jurisdiction on Canadian courts by providing expressly that, notwithstanding any provision in the *Code* or any other Act, a war crime or crime against humanity shall be deemed to have been an act committed in Canada"[48]. The validity of the distinction between mandatory and permissive customs was confirmed in *Hape*, where it was held that "the doctrine of adoption

[47] *Ibid* at 734.

[48] *Ibid* at 734-35.

operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation".[49]

Such a principle is not surprising: the distinction between mandatory and permissive customs is founded on logic and common sense. After all, a custom which is merely *permissive*, by definition, may or may not be followed by a particular country without that country being outside the rules and principles of international law. By contrast, a custom which is *prohibitive* or *mandatory* demands compliance with it in order to avoid violating international law. It follows that only the latter need be directly incorporated as part of our common *law* which, simply put, is a series of judge-made rules which *must* be followed. Only that what is mandatory may be categorized as a *rule* and this holds true for customary international norms.

## 4. The Frailty of Custom

### (A) The Right of Legislatures to Derogate

Next, I need to discuss the frailty of custom and its impact on the notion that the common law might well be a part of — "a common law of the world." It is trite law that legislatures have the right to derogate from, and thus overrule within their jurisdiction, customary international law norms. This principle was acknowledged by Chief Justice Duff in *Re Foreign Legations*, when he stated: "[t]he principles governing the immunities of a foreign sovereign and his diplomatic agents and his property [being principles of customary international law] do not, of course, limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed, or alleged"[50]. More recently, in *Hape*, it was observed that "[t]he automatic incorporation of such [customary] rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly".[51]

The ability of governments to legislate contrary to customary international law impedes, to some extent, the development of a true "common law of the world." There exists an inverse relationship between sovereign derogation from customary international law and the applicability of that law worldwide. In this way, the extent to which customary international law will become a law common to the world very much depends on all or most states sharing common values, which deter them from

[49] *Hape*, *supra* note 30 at para. 39 [emphasis added].

[50] *Foreign Legations*, *supra* note 22 at 231.

[51] *Hape*, *supra* note 30 at para 39.

derogations to international customary law. As we may appreciate, today, worldwide commonality of values is something rare, though perhaps not unachievable in respect of certain matters.[52]

Be that as it may, state sovereignty remains a cornerstone of all international law and its importance may well trump concerns that a true "common law of the world" cannot be created because of the existence of that sovereignty. Nevertheless, it is rare that states expressly derogate from some of the most fundamental and important prohibitive norms of customary international law. Hypocrisy in applying them may reflect a reluctant acknowledgment that these values exist. A good example is the prohibition on torture. As our Court noted in *Suresh*, torture "does not form part of any known domestic administrative practice"[53], although whether it is never practised is another matter. This is also true of many prohibitive customs of international law, given that they originated from generally recognized state practice.

### (B) *Stare Decisis* and Custom

The second potential weakness of custom results from the application of the doctrine of *stare decisis* in the common law. In Canada, it remains unclear whether the rules governing *stare decisis* in the common law will trump a newly developed customary international law norm in the sense that a conflicting existing precedent would bar the application of such a custom. As we have seen, in *Re Armed Forces*, the majority of the Court refused to give precedence to the customary international law rule that a state's domestic courts do not have criminal jurisdiction over foreign forces who have been granted the right of free passage through that state. It relied on the existence of a contrary common law rule. Duff C.J. described this rule as "the fundamental constitutional principle . . . that the soldiers of the army of all ranks are not, by reason of their military character, exempt from the criminal jurisdiction of the civil (that is to say, non-military) courts of this country".[54] Rand J., in his reasons, explicitly considered whether the customary norm at issue conflicted with "a rule or principle declared or adopted by the courts or Parliament of this country or accepted as embodied in its constitutional practices"[55] and noted that, in the event of conflict between such a rule or principle and a norm of customary international law, "the latter must give way".[56]

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[52] M Delmas-Marty, *Les forces imaginantes du droit – Le relatif et l'universel* (Paris: Édition du Seuil, 2004) at 121-125.

[53] *Suresh*, *supra* note 38 at para 65.

[54] *Re Armed Forces*, *supra* note 25 at 490.

[55] *Ibid* at 524, Rand J.

[56] *Ibid* at 525.

The majority's approach in the *Armed Forces Reference* stands in contrast to the approach taken in England by Lord Denning in *Trendtex*. According to *Trendtex*, a newly developed custom will become part of the common law automatically and supersede any contrary common law precedent.

The Supreme Court has not explicitly considered this aspect of the reception of customary international law since the *Armed Forces Reference*. However, when our Court was given the opportunity to consider it, much can be said in favour of the view that it was attracted to the common sense of the English position. This was certainly true of LaForest J. in *Re Canada Labour Code*. He had held that the common law of Canada had evolved from endorsing an absolute theory of state immunity to endorsing a restrictive theory of state immunity whereby a foreign state would not be immune from proceedings relating to commercial activities. Also, we should note that no "transformative action" was referred to by Justice LaForest as the cause of this evolution. Thus, the only way in which the common law could have evolved in this manner is by direct incorporation of the restrictive theory without the old common law of absolute foreign immunity standing in the way. Although Justice LaForest did not expressly overrule *Re Armed Forces* on the correct interplay between *stare decisis* and the doctrine of incorporation, his judgment certainly makes a strong case for customary international law being given precedence.

**5. *Jus Cogens***

Peremptory norms, or *jus cogens* as they are sometimes referred to, are customary norms which prevail over treaties or over other forms of state action. The existence of these norms is codified in the *Vienna Convention on the Law of Treaties*. Article 53 of that Convention defines a peremptory norm as one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Those are strong norms. They affirm the presence of an international legal order. But, at the same time, agreement is often difficult about what they are and mean and when they become binding. As noted in the Court's decision in *Suresh*, these norms develop over time and by general consensus of the international community. In determining what constitutes a peremptory norm, we must be guided by international instruments, international jurisprudence, and the academic literature, as there is inherent uncertainty in what constitutes a "general consensus" and who makes up the international community for the purpose of *jus cogens*.[57]

[57] Crawford, *supra* note 3 at 594-598; Arbour & Parent, *supra* note 3 at 36-40; P Daillier, M Ferteau & A Pellet, *Droit international public*, 8th ed, (Paris: LGDJ, 2009) at 223-229.

Although they hold special status, peremptory norms are, at the same time, customary international law norms. For that reason, they are treated accordingly and, under the doctrine of incorporation, they are directly incorporated into the Canadian common law like other customs of international law. But, given the conflicts of values in the international community, one may wonder how often such rules may arise and be recognized, especially in respect of international humanitarian law. It may well be that rules which are sometimes held by judges to be part of international law, of a common law of the world, may rather represent an expression of the shared values and aspirations of some democratic states within the international community, at least for the time being.

## CONCLUSION

Having reviewed what customary international law is, how it develops, and how it is received into the Canadian common law, I will return briefly to the frailty of custom and this notion of "a common law of the world." As I mentioned earlier, given the divergent sets of values adopted and advanced by the nations of the world, it would appear difficult to expect that states will develop a true "common law of the world", given that states can always overrule customary rules, although this cannot be done for peremptory norms — which, by definition, are norms from which no derogation is permitted. In the result, if a common law of the world exists, peremptory norms are the cornerstones of it. These norms, however, are only identified with great difficulty because of the uncertainties inherent in the definition of what constitutes a peremptory norm and their possible incompatibility with the value systems of some nations.

The different value systems in existence in various parts of the world may lead to the development of a "law of some nations." Local customary law has the ability to permeate a particular region or group of nations, and may be unlikely to be derogated from by the states in the region because of the shared value(s) which form the basis for the customary norm(s). The development of a law "of some nations" may present a more realistic picture of the future than the rise of "a common law of the world." The common law is broad. It is flexible. It is open to the world. But, our world is not unified. Its life reflects some shared values, but not all values that we cherish, despite the hopes one might like to entertain about the future rise of one democratic world.