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The Arar Case
Public and Private International Law Aspects

by J.-G. Castel*

Like the *Dreyfus* affair in France at the turn of the Twentieth Century , the *Arar* case has become a cause célèbre in Canada.

In 2002, on information allegedly provided by the RCMP and the Canadian Security Intelligence Service, Mr. Arar, a naturalized Canadian and a Syrian by birth who was returning to Canada from a vacation in Tunisia, was arrested at Kennedy Airport in New York while changing planes, on suspicion that he was a member of al-Qaeda, a terrorist organization. After a period of detention, the US Immigration and Naturalization authorities deported him to Syria via Jordan. He spent almost a year in a Syrian jail before being released without being charged and returning to Canada. He alleges that during his confinement he was tortured by the Syrian secret police until he falsely confessed that he had been trained in a camp in Afghanistan run by al-Qaeda. He is now trying to clear his name and to obtain compensation for his ordeal.

This case raises some interesting issues of public and private international law specially with respect to the conduct of the US and Syria.

The most important issue is whether the US violated international law when it deported Mr. Arar to Syria. Customary international law recognizes that states have the right to control the movement of aliens across their borders. This flows from the principle of state sovereignty.[1] Therefore, for compelling reasons of national security, the US had the right to arrest, detain and deport Mr. Arar to any country willing to accept him. There is no obligation to deport an alien to his or her state of citizenship. All that is required is that the discretion of the state is not exercised in an arbitrary or discriminatory manner and that the deportation is in pursuance of a decision in accordance with law.[2] When arrested and detained, an alien has the right to communicate with the nearest consular post of the state of his or her citizenship[3] which is what took place in the present case. Thus, the

*(See **The Arar Case Public and Private International Law Aspects** on page 4)*

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[1] Sir R. Jennings & Sir A. Watts, eds., *Oppenheim's International Law*, 9th ed. (London: Longman, 1992) at 940.

[2] See art. 13, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S.1976 No. 47, 6 I.L.M. 368; *Rankin v. Iran* (1987), 17 Iran-U.S. C.T.R. 135.

[3] Art. 36(1)(b) and (c), *Vienna Convention on Consular Relations, Foreign Missions and International Organizations* Act, S.C. 1991, c.41, Schedule III.

President's Message

Message du président

January/janvier 2004

January and the New Year are, rightfully, a time of renewal - a time when we take stock; when we imagine and sometimes resolve on new possibilities; and when we consider how our past experiences can carry us forward to future achievements. So it is also with the Council. I therefore thought it would be timely to share with you, briefly, some of the many ways in which the Council is moving forward and, whether by choice or circumstance, renewing itself so that it may continue to fulfill its important mission.

Le catalyseur de renouveau le plus immédiat pour le Conseil est l'annonce récente du départ de notre directrice exécutive, Sonya Nigam, prenant effet le 2 février 2004. Sonya a joint le Conseil en 1999, à une époque où celui-ci, confronté à une stabilité financière plutôt incertaine, avait besoin de talents organisationnels manifestes, jumelés à une vision d'avenir. La nomination de Sonya à ce poste a été vraiment un très heureux coup de fortune. Elle est vite devenue l'un des atouts principaux du Conseil. Les membres ont remarqué, j'en suis certain, le bel essor des congrès annuels de même que des autres activités et services du Conseil durant le mandat de Sonya. Comme l'indiquait récemment un des membres du conseil d'administration, « le Conseil a été bien servi ». Malgré le grand vide que laissera son départ au Conseil, je tiens, au nom de tous les membres, à exprimer à Sonya notre profonde reconnaissance pour son travail exceptionnel durant les quatre dernières années et demie. Nous lui souhaitons bonne chance dans sa nouvelle carrière à temps plein à l'Université d'Ottawa.

In light of this development, the Executive has already undertaken a search for a new Executive Director. Members are of course encouraged to bring this opportunity to the attention of suitable candidates of whom they may be aware (details relating to the position may be found on the Council's website, www.ccil-ccdi.ca). I hope to be able to report a favourable outcome to this search shortly.

Entre-temps d'autres vagues de changement s'amorcent. Mu par le dynamisme qu'a inspiré le dîner organisé l'automne dernier par notre président honoraire, le professeur et juge Ronald St. J. Macdonald, le comité exécutif a décidé d'explorer certaines avenues pour le renouveau du programme de recherche du Conseil. Encouragé par ses succès récents à stabiliser sa situation financière, à offrir des congrès annuels stimulants et à améliorer son Bulletin trimestriel ainsi que par sa capacité démontrée de mener à bon port ses projets de recherche, le comité exécutif entreprend une consultation afin de recueillir les idées de ses membres quant à la nature et à l'étendue des activités de recherche que le Conseil devrait privilégier dans les années à venir. Don Fleming, membre du conseil d'administration, a très gracieusement accepté de diriger cette consultation, décrite ailleurs dans ce Bulletin. Nous encourageons très fortement les membres à nous faire connaître leurs points de vue sur cet important volet du travail du Conseil.

This year will also mark the formal launch of the Humphrey Scholarships, made possible by a generous bequest to the Council of the late John Peters Humphrey. The Executive has, over the past year, seen to the proper transfer, investment and financial management of that bequest, and it is anticipated that the first round of scholarships will be awarded in 2005 for the 2005-2006 academic year. Watch for announcements of the competition for those scholarships in the late summer or early fall of this year. Obviously, the administration of such an important scholarship programme is a new undertaking for the Council, and promises to raise its profile in new and significant ways while also promoting the study of international law by promising young scholars.

De façon moins tangible, mais non moins importante, le Conseil planifie déjà son prochain congrès annuel. Voulant poursuivre son travail dans la lancée extraordinaire du congrès organisé l'automne dernier sous la présidence de Irit Weiser, membre de l'exécutif, le conseil d'administration a confié l'organisation du congrès 2004 à Don McRae, membre de l'exécutif, et John Hannaford, du ministère des Affaires étrangères et du Commerce international. La date du congrès est déjà fixée; il aura lieu du 14 au 16 octobre 2006 au Fairmont Château Laurier à Ottawa. Le thème retenu pour l'instant est la « La légitimité et l'imputabilité en droit international / Legitimacy and Accountability in

*(See **President's Message/Message du président** on page 14)*

Canada's Treaty Practice in 2003

by Robin Hansen*

Even without the public controversy sparked by the 2002 Kyoto Protocol ratification, 2003 remained an eventful year for Canadian treaty developments. With regard to multilateral treaty activity, one striking move was the long-awaited ratification of the *United Nations Convention on the Law of the Sea* (UNCLOS) and the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*. More than twenty years after its December 10, 1982 signature of UNCLOS, Canada ratified the treaty, as well as its accompanying agreement concerning the deep seabed, on November 7, 2003. With the world's longest coastline, Canada was the 144th nation to ratify UNCLOS, a treaty in force since November 16, 1994.

Another important multilateral ratification was that of the *Protocol on Environmental Protection to the Antarctic Treaty*, on November 13, 2003. In force since January 14, 1998, the protocol outlines environmental measures for the continent, including a prohibition on mineral extraction.

Canada also ratified seven protocols required for NATO's expansion. Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia are expected to join the organization in 2004.

Canada's July 15, 2003 signature of the WHO *Framework Convention on Tobacco Control* (FCTC) has been lauded by many groups and organizations, including the Canadian Cancer Society. Since its adoption by the World Health Assembly on May 23, 2003, the Convention has attracted 85 signatories and 5 ratifications (as of January 3, 2004). Requiring 40 ratifications to come into force, the FCTC is the first treaty initiated by the governing body of the World Health Organization. State obligations include a comprehensive ban on tobacco advertising, promotion and sponsorship within five years of treaty ratification.

Several treaties previously ratified or acceded to by Canada also came into force in 2003. In the area of security, such treaties include the *Inter-American Convention against Terrorism*, effective July 10, 2003. Also now in effect is the *United Nations Convention against Transnational Organized Crime* and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. The *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, will come into force January 28, 2004. Also related to cross-border transport, the *Convention for the Unification of Certain Rules for International Carriage by Air* came into force November 4, 2003.

In the area of human rights, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* came into force for Canada on January 18, 2003. The *Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (with Protocols I, II and III) will come into force May 18, 2004.

Environmental agreements that came into effect in 2003 include the *Protocol on Heavy Metals,* supplementing the 1979 *Convention on Long Range Transboundary Air Pollution* and the *Cartagena Protocol on Biosafety*, supplementing the *Convention on Biological Diversity*. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* will come into force February 24, 2004.

2003 was also a busy year for bilateral treaty developments. As a further step in resolving the Pacific fishing disputes, Canada signed the *Agreement between the Government of Canada and the Government of the United States of America on Pacific Hake/Whiting*. Canada also signed economic agreements with the European Community (EC) on GATT cereal concessions and trade in wine and spirits. Of high profile in the financial world was the conclusion of a double taxation and tax evasion treaty with Ireland. Canada also amended a similar treaty with the UK and Northern Ireland. Canada signed legal cooperation treaties with the following states: Kazakhstan (criminal matters), Cuba (sharing of forfeited assets), Argentina (offender transfer) and the Philippines (offender transfer).

Bilateral treaties on a wide range of subjects came into force in 2003. They included space research treaties with the EC (GalileoSat and European Earth Watch

*(See **Canada's Treaty Practice in 2003** on page 8)*

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informal agreement recently reached between Canada and the US whereby their respective central authorities must be immediately informed of the arrest and detention for security reasons of one of their nationals does not add much to the existing international obligation. However, the right to deport an alien to a particular state may be subject to exceptions by international agreement. The multilateral *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into force on June 26, 1987 which binds Canada, the US and Jordan but not Syria contains a provision to the effect that: «No State Party shall expel ...a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.»[4] It would appear that the deportation of Mr. Arar to Syria constituted a material breach of the Convention provided it is established that in Syria there exists «a consistent pattern of gross, flagrant or mass violations of human rights»[5] notwithstanding the assurances given by Syria that Mr. Arar would not be tortured and its subsequent denial that he had been tortured in order to obtain his confession.

By ignoring norms of *jus cogens*, a state places itself outside the community of nations, forfeits the protection of international law and should be estopped from invoking ordinary rules of international law to escape liability.

The breach of the Convention by the USA does not entitle Canada to terminate or suspend its operation as article 3 relates to the protection of the human person in a treaty of a humanitarian character.[6] However, Canada is entitled to some redress in the form of reparation which may take the form of an apology and the assurance and guaranty of non repetition of the wrongful deportation. Canada may also espouse Mr. Arar's claim by resorting to diplomatic channels or international judicial proceedings on his behalf. It is the bond of citizenship between Canada and Mr. Arar which alone confers upon Canada the right of diplomatic protection. Such citizenship must have existed when the injury occurred and continue until final presentation of the claim.[7] Also, Mr. Arar must have exhausted his remedies in the US without obtaining satisfaction before Canada can act on the diplomatic level.[8] Since he is a dual national, which one of his citizenships must be recognized by the US on the international level? If he is considered to be exclusively a Syrian citizen by virtue of the *jus soli* or the *jus sanguinis*, the US may not have violated the Convention since Syria is not bound by it unless it expresses a norm of *jus cogens* or codifies a general rule of customary international law. Not being considered a Canadian, Canada could not use diplomatic channels on his behalf. However, according to the *Nottebohn* case,[9] a decision of the International Court of Justice, Mr. Arar's Canadian citizenship must prevail because there exists a genuine and effective link between him and Canada where he lives and works. His Canadian citizenship is not one of convenience. Therefore, when he was arrested in the US his Canadian citizenship should have prevailed and Canada has the right to intervene on his behalf. It would seem that the US shared this view since its authorities notified the Canadian consular post of his arrest and detention. Although a passport is only *prima facie* evidence of citizenship, once admitted to the US on his Canadian passport , the US authorities could not argue that he was a Syrian unless they proved that his passport was a forgery.

It would be more difficult for Canada to take up Mr. Arar case against Syria for detention and torture since this state is not a party to the Convention against torture unless it expresses a norm of *jus cogens* or a general rule

*(See **The Arar Case Public and Private International Law Aspects** on page 6)*

[4] Art. 3(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1984), 10 December 1984, 1465 U.N.T.S. 85. See also, art. 7, *International Covenant on Civil and Political Rights*, *supra* note 2.
[5] *Ibid*., art. 3(2).
[6] Art. 60(5), *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331.
[7] Department of Foreign Affairs, *Legal Services Provided by the Department of External Affairs with Respect to International Judicial Co-operation and Other Matters* by J.G. Castel (Ottawa: Department of Foreign Affairs, 1987) at 59.
[8] *Ambatielos Arbitration (Greece v. United Kingdom)* (1956), 12 R.I.A.A. 83, 23 I.L.R. 306.
[9] [1955] I.C.J. Rep. 4.

New and Forthcoming Collections on Feminist Approaches to International Law*

Karen Knop, ed., Gender and Human Rights (Oxford: Oxford University Press, forthcoming March 2004) (Collected Courses of the Academy of European Law)

The field of women's international human rights law depends in every aspect on some combination of ideas about feminism, rights, and international society. Yet these ideas and the relationships between them have been examined and questioned much more outside than inside the field. By bringing a variety of vantage points and methodologies from other disciplines and areas of law to bear on gender and human rights, this collection demonstrates the theoretical and practical importance of revisiting the basic concepts, how they work, and how they interact.

The field of women's international human rights law depends in every aspect on some combination of ideas about feminism, rights, and international society

The collection offers gender perspectives on the fundamentals of women's international human rights from disciplines as diverse as notions of citizenship, queer theory, philosophies of rights, post-colonialism, and migration studies, and from such areas of law as constitutional and humanitarian law.

Contributors: Karen Knop (University of Toronto), Nicola Lacey (London School of Economics), Janet Halley (Harvard Law School), Susanne Baer (Humboldt University, Berlin), Ruth Rubio-Marín (University of Seville, Spain) and Martha Morgan (University of Alabama), Patricia Viseur Sellers (International Criminal Tribunal for the Former Yugoslavia), Nathaniel Berman (Brooklyn Law School), Ruba Salih (University of Bologna).

Special Issue on Feminism and International Law, Guest Editor: Anne Orford, (2002) 71(2) ***Nordic Journal of International Law***

Each of the contributions to this special issue of the Nordic Journal of International Law attempts to think through what it means to read and write feminist legal theory in an age dominated by internationalist narratives, whether of globalization and harmonization, or of high-tech wars on terror or for humanity. The essays that make up this collection attempt to work with and through the limitations of international law, to see whether feminism and international law can remain (or become) allies in this pragmatic, post-humanitarian age.

The introductory article by Anne Orford outlines some of the ways in which feminist legal theory is invited to participate in the project of constituting women and the international community, and suggests that a feminist politics of reading international law must attempt to avoid reproducing the assumptions of imperialism. The article by Hilary Charlesworth and Mary Wood explores the ways in which international feminism comes to East Timor through the international community's new enthusiasm for post-conflict reconstruction. Ruth Buchanan and Sundhya Pahuja explore the complicity of the feminist critic with international law as a cosmopolitan discourse. In her contribution, Saskia Sassen maps a «counter-geography» of globalization, suggesting that the gendered regulation of the global economy is the condition of possibility of the free trade regime. The article by Shelley Wright draws together the themes of violence, trauma, memory and history, in order to think about the ways in which we are all, whether subjects or objects of international law, caught up in History after September 11, 2001. Anne Orford concludes her introductory essay by suggesting: «The ability of international law to respond to the questions these articles pose - of justice, rights, complicity, history, gender and empire - will determine the extent to which it can achieve its promise and become something other than an apology for the pragmatic decisions and ruthless actions of the global elites of the new millennium».

Doris E. Buss & Ambreena Manji (eds.), ***International Law: Modern Feminist Approaches*** **(Oxford: Hart Publishing, forthcoming 2004) ISBN 1-84113-427-9**

At the start of the twenty-first century, the discipline of international law is under pressure. At a time when 'the international' is assuming greater importance, the role of law in a changing international order is very much in the air. What does it mean to refer to 'the international'? And where do we - and should we - locate law in the

* Many thanks to Karen Knop, Doris E. Buss and the Women and International Law Group for compiling this review.

growing cultural, social and political terrain that we increasingly define as 'the international'?

The essays in this collection explore feminist engagements, and feminist futures, in various aspects of international law, including international criminal, environmental, human rights, economic law, and the regional application of law. Each of the chapters brings an interdisciplinary approach to its field of inquiry, resisting a narrow interpretation of the disciplinary account of public international law. Drawing insights from literature, film, ecology, criminology, postcoloniality, and development studies, the chapters map a rich and densely informed terrain of feminist scholarship, exploring the often troubled relationship between feminism, law, and 'the international'.

Contributors: Fiona Beveridge (University of Liverpool, UK), Ruth Buchanan (University of British Columbia, Canada), Doris Buss (Carleton University, Canada), Hilary Charlesworth (Australia National University), Christine Chinkin (London School of Economics, UK),Rebecca Johnson (University of Victoria), Sari Kouvo (University of G(teburg, Sweden), Ambreena Manji (Warwick University, UK), Thérèse Murphy (University of Nottingham, UK), Rachel Murray (Bristol University, UK), Vesna Nikolic-Ristanovic (Institute for Criminological and Sociological Research, Serbia), Dianne Otto (University of Melbourne, Australia), Annie Rochette (University of British Columbia, Canada), Shelley Wright (University of Sydney, Australia). ≺

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of customary international law.[10] Syria could argue that Mr. Arar is still a Syrian citizen. If his Canadian citizenship were recognized by Syria, he would still have to exhaust his remedies in that state unless he could prove that it would be difficult or useless to do so.

Canada has implemented the Convention[11] by making torture an indictable offence.[12] No special civil remedy is provided for the victims of torture whether committed within or outside Canada. Ordinary rules of private international law are applicable. Should Mr. Arar sue the US and Syria in Canada, these states would be immune from the jurisdiction of Canadian courts by virtue of the State Immunity Act.[13] Thus, in *Bouzari v. Iran*,[14] an action brought against the Islamic Republic of Iran claiming damages for torture which took place in that state was dismissed on the ground that it was barred by this Act. The court held that article 14(1) of the Convention against torture[15] does not create an obligation on Canada to provide access to the courts to enable a litigant to pursue a civil action for damages against a foreign state for torture committed outside Canada as an implied exception to the State Immunity Act. This is also the case if the prohibition against torture is a norm of *jus cogens* even though it is a higher form of customary international law overriding other *rules* of customary international law in conflict with it.[16]

Since there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed by a state or its agents outside Canada even for acts contrary to norms of *jus cogens*, Mr. Arar would not be able to succeed against Syria and against the US for deporting him there.[17]

A more satisfactory approach would be for the Canadian Parliament to create an express exception to the State Immunity Act in the case of violations of human rights by foreign states and their agents wherever committed. By ignoring norms of *jus cogens*, a state places itself outside the community of nations, forfeits the protection of international law and should be estopped from invoking ordinary rules of international law to escape liability. ≺

[10] Art. 5, *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; Art. 7, *International Covenant on Civil and Political Rights*, *supra* note 2. *Restatement (Third) of the Foreign Relations Law of the United States* §702(d) (1987).

[11] As required by articles 2 and 4, *supra* note 4.

[12] Section 269.1, *Criminal Code*, S.C. 1987, c. 10 (3rd Supp.), s. 2.

[13] R.C.S. 1985, c. S-18, s. 3.

[14] [2002] O.T.C. 297 (S.C.).

[15] Art. 14(1), *supra* note 4: «Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible...»

[16] Articles 53 and 64, *Vienna Convention on the Law of Treaties, supra* note 6; *Suresh v. Canada (Minister of Citizenship and Immigration*, [2002] 1 S.C.R. 3 at paras. 64-65.

[17] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), [2002] I.C.J. Rep. 1. Also in general, C. Scott, ed., Torture as a Tort (Oxford: Hart Publishing, 2001) and D. Robinson, «The Impact of the Human Rights Accountability Movement on the International Law of Immunities» (2002) 40 Can. Y.B. Int'l L. 151.

IN MEMORIAM
KATIA BOUSTANY

Katia nous a quitté. Le 6 janvier 2004, jour de l'Épiphanie, à Beyrouth, entourée de sa famille, après une longue lutte contre la maladie.

Elle était une voix forte du droit international au Québec et notre communauté académique perd trop tôt une de ses plus brillantes représentantes. Son parcours de juriste et d'universitaire est exemplaire. Rappelons-en quelques étapes.

Katia obtient un bac et une maîtrise en droit (1973) de l'Université Saint-Joseph à Beyrouth. Partie à Paris avant le début de la guerre, elle y fait un DEA de droit international public (1975) et un DEA de droit international de l'énergie (1977), à une époque où, quelques années à peine après le premier choc pétrolier et dans la foulée du « nouvel ordre économique international », la question énergétique est chaude et controversée. Elle entreprend en 1984 une thèse de doctorat d'État qu'elle soutient brillamment en 1988, obtenant les félicitations du jury. Cette thèse, faite sous la direction du professeur Philippe Manin, porte sur la guerre civile libanaise et le maintien de la paix, et une partie en est publiée aux éditions Bruylant en 1994.

Redoutable debater et incapable de supporter l'injustice, pour elle comme pour les autres, elle défendait ses idées avec conviction et énergie.

Ces années d'études sont aussi des années de travail professionnel acharné dans des conditions difficiles, marquées par la guerre dans son pays et donc par l'exil. Elle est auxiliaire d'enseignement du Professeur Antoine Kheir à l'Université Saint-Joseph, entre ses deux DEA parisiens. Elle est ensuite auxiliaire d'enseignement du Professeur Alain Pellet à l'Université de Paris-Nord après son second DEA. Elle entre au cabinet *Saadé & Saadé* de Beyrouth et sera leur représentante en France de 1978 à 1981, puis à Chypre en 1985-1986, puis au Canada après 1992, travaillant sur des dossiers de droit commercial international. Elle est également juriste chez *Total - Compagnie française des pétroles* en 1981-1982, puis travaille en 1982 dans un cabinet d'avocats et une banque d'affaires d'Abu Dhabi dans les Émirats Arabes Unis, avant de passer l'année 1983 à l'*Organisation internationale du travail* à Genève. Elle est encore en 1986-1987 juriste chez *McCarthy Tétreault*, après son arrivée à Montréal, juste avant la soutenance de sa thèse et son embauche comme professeur de droit international à l'UQAM en 1988. Plus récemment, elle passa deux ans (1998-2000) à l'*Agence internationale de l'énergie atomique* à Vienne (Autriche), à travailler sur l'assistance législative aux États membres, y produisant un nombre impressionnant de rapports d'expert.

À l'UQAM, elle contribue grandement à constituer une équipe d'internationalistes au Département des sciences juridiques, où elle est une des cofondatrices du *Centre d'études sur le droit international et la mondialisation* (CEDIM) en 1995. Elle participe à la vie du département devenant Directrice du module (vice-doyenne aux études de premier cycle) entre 1992 et 1995 : au cours de ce mandat, elle mène la « bataille des équivalences » allant plaider jusqu'en Cour d'appel du Québec. Elle anime la vie scientifique en étant, en 1996-1998, directrice du *GRID - Centre de recherche en droit, science et société*. Elle s'implique dans la vie des internationalistes québécois en étant présidente de la *Société québécoise de droit international* entre 1996 et 1998, après en avoir été vice-présidente durant six ans, et en étant membre du CA du *Conseil canadien du droit international*. Elle est une fidèle collaboratrice de la *Revue québécoise de droit international.*

Conférencière appréciée, elle est invitée à enseigner à l'Université de Louvain-la-Neuve (1979), l'Université libre de Bruxelles (1996), à l'Université de Montpellier (1997, 1998, 2000), à l'Université de Paris I (1996, 1999), à l'Université d'Auvergne (1996), à l'Université de Paris XI - Faculté Jean Monnet (2000, 2001), ainsi qu'aux cours de formation du Comité international de la Croix-Rouge, à Lyon (1995, 1998) et Spa (1996).

Elle est un pilier du concours de plaidoirie Jean-Pictet en droit international humanitaire, dont elle co-rédige le cas en 1995. Elle co-rédige aussi le cas du concours de plaidoirie Charles-Rousseau de droit international en 1999 et y encadre plusieurs équipes successives de

l'UQAM, avec grand succès. Elle participe encore activement à la fondation, à l'Université de Montpellier, de la première école de droit nucléaire francophone.

Elle obtient de nombreuses subventions et publie beaucoup. Tout récemment encore, paraissait un ouvrage collectif sur le génocide dont elle co-assura la publication dans des circonstances difficiles.

Ce parcours complexe et diversifié montre l'envergure intellectuelle de Katia. Elle s'intéressait tout autant au droit international humanitaire qu'au droit nucléaire, aux fondements du droit international public qu'au droit international du travail, au droit international des affaires qu'à l'éclatement normatif issu de la mondialisation. Puits de savoir juridique, sa pensée était puissamment articulée autour d'un certain nombre d'idées claires, qu'elle savait exprimer avec finesse et assurance.

Travailleuse infatigable, elle était extrêmement exigeante à son propre endroit et ne supportait pas la médiocrité chez les autres, ce qui ne lui valut pas que des amitiés. Sévère envers ses étudiants, elle sut en conduire de nombreux à se dépasser comme ils n'auraient jamais pensé pouvoir le faire en droit international. Redoutable debater et incapable de supporter l'injustice, pour elle comme pour les autres, elle défendait ses idées avec conviction et énergie.

Elle avait été blessée du refus de la France de lui accorder la nationalité française, alors même qu'elle y avait trouvé refuge contre la guerre. Le Canada lui accorda l'accueil qu'elle espérait, mais ce fut pour elle un deuxième exil, plus éloigné encore des douceurs du climat méditerranéen.

Amie fidèle, généreuse et attentive, elle était sensible aux souffrances tues et aux exils intérieurs de ceux qu'elle appréciait. Animée d'une discrète mais profonde spiritualité, elle savait mettre les choses en perspective, prendre de la distance, et s'intéressait au devenir de la Chrétienté. Femme de goût, elle savait marquer les moments forts, offrant par exemple pain, vin et sel en signe de prospérité à venir lors d'un emménagement. Grande amatrice de musique, qu'elle écoutait à tue tête tout en travaillant, elle avait pu, à Vienne, satisfaire son goût pour l'opéra. Férue de littérature, elle put partager avec certains un goût pour la poésie.

Sa force et sa grâce, comme sa solitude et sa fragilité, nous ont marqué. Nous avons été compagnons de route et nous sommes nombreux à nous sentir diminués de sa disparition. Nous serons tout autant à perpétuer le souvenir de son énergie passionnée, de sa vive intelligence, de son engagement profond et de son amitié. ≺

François Crépeau Montréal, Janvier 2004 (Reproduit avec l'aimable permission du *Centre Études internationales et Mondialisation* de l'Université du Québec à Montréal et de la *Société québécoise de droit international*)

Canada's Treaty Practice in 2003

(continued from page 3- suite de page 3)

programmes) and US (SciSat-1 Atmospheric Chemistry Experiment Mission). As well, social security agreements came into force with Germany, Hungary, Sweden, Australia, the Czech Republic, the Slovak Republic and Israel. Agreements on audiovisual co-production with Iceland, Senegal and Latvia also became effective.

Moreover, treaties and amendments to existing treaties on the administration of justice are now in force with the following countries: Barbados (offender transfer), UK and its overseas territories (sharing of forfeited assets), US (extradition), Trinidad and Tobago (criminal matters) and Belgium (criminal matters). Double taxation and tax evasion treaties with Kuwait, Senegal and Peru became effective in 2003. In commerce, amendments to the *Canada-Israel Free Trade Agreement* came into force, as did a treaty with Mexico on competition law application.

In security, an agreement concerning US air transport pre-clearance came into force, as did the latest interpretation of the *Rush-Bagot Agreement of 1817* concerning the presence of naval forces on the Great Lakes. Japan and Canada also reinforced their arrangement concerning Japan's provision of logistical support, supplies and services to the Canadian armed forces.

Canada's extensive 2003 treaty activity points to the sustained establishment internationally of rules-based state relations. Not all of Canada's treaty developments could be noted here, but those highlighted suggest increased codification in such areas as taxation, law enforcement, the environment and human security. Canada's UNCLOS ratification, although not highly publicized, was a monumental step in Canada's international law participation. ≺

Presentation of the John E. Read Medal to Donald Malcolm McRae, F.R.S.C.
Remarks of Judge R. St. J. Macdonald, C.C.
32nd Annual Dinner of the CCIL, Ottawa, October 17, 2003

From time to time the Canadian Council on International Law awards a commemorative medal in recognition of outstanding contributions to the cause of international law and international organizations. Designed by the well-known Toronto sculptor, Kenneth Jarvis, the medal was struck in honour of John Erskine Read, one-time dean of law at Dalhousie University, long-time legal adviser to the Department of External Affairs, and Judge of the International Court of Justice in The Hague.

From 1929 to 1946, when he became the first Canadian elected a judge of the International Court, John Read participated in the framing of Canadian policy on every major issue of international and constitutional law of direct interest to the Government of Canada.

The first medal was awarded to John E. Read himself, at the first annual dinner of this Council on October 17, 1972. On that occasion, John Read, acting on behalf of the Council, presented the second medal to Percy E. Corbett of Princeton, formerly of McGill University, and in 1973 the third medal was awarded to John P. Humphrey, for many years Director of the Division of Human Rights at the United Nations. Since then the medal has been awarded to such luminaries as N.A.M. MacKenzie of Canada, Charles Rousseau of France, and Myres McDougal of the United States.

In accordance with the unanimous recommendation of its Nominating Committee, chaired by Ambassador Edward Lee, the Council takes great pleasure this evening in presenting its highest award to Donald Malcolm McRae, Fellow of the Royal Society of Canada, Hyman Soloway Professor of Business and Trade Law at the University of Ottawa.

Born in New Zealand in 1944, Professor McRae was educated at the University of Otago, where he became a lecturer in law, later at Cambridge University in England, and then, as the holder of a Charles Evans Hughes Fellowship, at Columbia University in New York.

He served as a leading member of the law faculty at the University of Western Ontario in London, at the University of British Columbia, where he was Associate Dean and President of the UBC Faculty Association, and at the University of Ottawa, where for seven years he was dean of the common law section of the Law Faculty, and, since 1996, Hyman Soloway Professor of Business and Trade Law.

A dynamic member of this Council, whose president he was from 1990 to 1992, Professor McRae is an active member of the Canadian Bar Association, the American Society of International Law, on whose executive he serves, the International Law Association, and the British Institute of International and Comparative Law in London. He has been an invited lecturer at several of the world's most prestigious centers of international law, the famous Hague Academy, the Lauterpacht Center in Cambridge, and Hebei University in China.

Since 1992 he has been editor in chief of the Canadian Yearbook of International Law, with which he has been creatively associated for 19 years, and since 1998 a member of the editorial board of the Journal of International Economic Law. He himself publishes profusely on a variety of pressing legal issues, including the Arctic, Canada's natural resources, trade, and the environment, all in addition to a steady stream of articles and commentaries on maritime delimitation and the law of the sea, on which he is an expert. It is evident to those who read his writings that his published work contributes to the organized development of the discipline as well as the elucidation of the particular problem at hand.

Brilliant as is the formal academic career, which continues at even an accelerated pace, Donald McRae is not a man to be doing just one thing. After serving as Academic in Residence in the Department of External Affairs from 1983 to 1986, he embarked on a series of major undertakings : Senior Legal Adviser to the Agent for Canada in the Gulf of Maine Maritime Boundary Case, Counsel for Canada in the Canada-France arbitration over the St-Pierre and Miquelon Maritime Boundary, chairman and panellist of innumerable hearings under the Canada-U.S. Free Trade Agreement and NAFTA, Counsel to the Province of Newfoundland and Labrador on maritime boundaries, Chief Negotiator for Canada for the Pacific Salmon Treaty, frequent counsel before panels of the World Trade Organization in Geneva, counsel to the Government of New Zealand on matters of international trade law.

It is a record of accomplishment reflecting an astonishing breadth of interests and competences, a record for which it would be difficult to find a parallel in Canada in the last quarter century.

While his career is one of virtuosity and diversity of experience there is also a constant pattern throughout : devotion to scholarship, loyalty to students, service to the community, insistence on the need for justice, fairness and transparency, in the development of the international legal order. It has not been a question of what the law tells him he may do, but what humanity, reason and justice tell him he ought to do.

When Professor McRae first came to Canada, it was said that he was a precionist, a highly trained lawyer in the best traditions of the common law. Soon afterwards it was said that he was a specialist on the law of the sea, for he had practised and written extensively on that formidable subject. Still later it was observed that he was a trade lawyer, an authority on GATT and the work of the WTO. More recently it has been recognized that he is a wise and effective negotiator, one of the most sought-after practitioners of international law in recent Canadian history. This evening the Canadian Council on International Law proclaims that he is all these things and more.

The Council takes pleasure in recognizing him as scholar, teacher, editor, author and practitioner, and outstanding professional whose inexhaustible energy and lucidity of judgment has contributed exceptionally to the development of international law in Canada and abroad.

Acting on behalf of the Council I have pleasure in asking Professor McRae to accept our highest honour.

2003 CCIL ANNUAL CONFERENCE
Report

by Robin Hansen*

The dramatic international events of 2003 framed rich discussions at this year's Annual CCIL Conference, aptly themed «Reconciling Law, Justice and Politics in the International Area.»

Beginning with the Thursday night opening roundtable, presented to a full house at DFAIT's Cadieux Auditorium, conference speakers probed the emerging international law landscape with informed sincerity. Panellists that night responded to the question, «Is the UN still relevant?» and included Lt.-Gen. (Ret.) Romeo Dallaire, former UN peacekeeping force commander in Rwanda. Lt.-Gen. Dallaire spoke of the need to shape UN peacekeeping missions differently for greater success, stressing new global challenges such as the increasingly disturbing phenomenon of children as combatants. Fellow panellists David Malone of the International Peace Academy in New York, and Jocelyn Coulon of Montreal's Pearson Peacekeeping Centre shared their expert perspectives on the geo-political context of recent Security Council decisions and current UN trajectories. Mr. Peter Hutchins, of the firm Hutchins, Soroka and Grant, brought the significance of the UN squarely into the Canadian context, sharing his experiences as council for First Nations in treaty negotiations with the federal government.

The conference recommenced early Friday morning with the Women and International Law Breakfast. Speakers Suki Beavers (Action Canada for Population and Development), Leiliani Farha (Centre for Equality Rights in Accommodation) and Doris Buss (Department of Law, Carleton University) shared detailed information and informed perspectives on the current and future codification of gender-based human rights.

Following this, the day's concurrent sessions left participants with abundant workshop choices, including *The Law of the Sea Convention: The First and Next Decade and Protection of Victims and Witnesses: Armed Conflict and Its Aftermath.* A third workshop on International Financial Institutions included panellists Ross Leckow, Assistant General Counsel at the IMF, Hassane Cisse, Senior Counsel at the World Bank and Henri-Paul Normandin, director of CIDA's Canada Fund for Africa Secretariat. These experts looked beyond the economic factors needed for states' financial stability and stressed the overwhelming importance of transparent judicial institutions and the rule of law.

The afternoon's workshops included the topical *National Security as a basis for justifying trade restrictions* and *L'aménagement de la violence dans l'arène internationale* (The place of violence in the international arena). At the later, presenters Marco Sassoli (Université du Québec à Montréal), Mark Antaki (Université McGill) and Suzanne Lalonde (Université de Montréal) analysed the issue of territorial violence with a solution-oriented approach.

*(See **2003 CCIL Annual Conference Report** on page 18)*

* B.A. (Hons.), Third year LL.B. student at the University of Ottawa and M.A. candidate at the Norman Paterson School of International Affairs, Carleton University. Robin Hansen is also the CCIL student intern at the University of Ottawa for the academic year 2003-2004.

The Future of the CCIL Program of International Legal Research

By Donald J. Fleming*

Background

Several years ago, while planning its 25th Anniversary Conference, the CCIL's Executive Committee established a Committee on the Future of the CCIL. Its members (Pamela Arnott, Donald J. Fleming, Valerie Hughes, and Donald M. McRae) began by consulting with Council members to obtain their views about the organization. This comment initiates a similar consultation about the future of the CCIL research program.

The consultation on the future of the CCIL occurred over a two-year period, taking the form of two Research sessions at concurrent CCIL Annual Meetings (1998 and 1999), and correspondence between the Committee and other interested CCIL members. The Committee issued its findings in a document titled, *Report on the Future of the CCIL* (*Report*). The *Report* identified and addressed the Council's three major concerns: its membership, its funding and its research program.

The Committee presented its *Report* to the Executive Committee and Board on 26 October prior to the 2000 CCIL Annual Meeting and then to the membership at the 2000 Annual General Meeting. The Council had also added copies of the *Report* to its mailing of the (Fall 2000), v. 26, no. 3 edition of the CCIL Bulletin and posted the document on its website in an effort to provide every opportunity for its members to comment on it.

In brief, the *Report* concluded that, above all other concerns, the future of the CCIL depended upon its membership, which expected more from the organization. Having levelled off at approximately 300 members by 1998 (many of them students who retained only a brief affiliation with the Council), the *Report* set out recommendations for retaining and attracting a larger, permanent membership. It identified funding as the second-most important matter for the Council to address after it had improved services to its members.

The CCIL had established an ambitious research policy in its early years: «[T]he purpose of the research program was to broaden the base of Council-sponsored scholarship beyond the activities of the annual conference, and to provide in-depth studies on topical issues, which would remain contributions of enduring value to the Canadian law community.»[3]
While some believe that the *Report* contradicts that CCIL policy, such is not the case and, so far as I am aware, the Council has never altered it.

The *Report* met with acclaim, and the CCIL Executive Committee immediately began to implement a number of recommendations contained in the document, particularly those relating to membership[1]. For example, it broadened the scope of its Annual Meetings to attract more practitioners and students as well as academics and government personnel, improved its tri-annual Bulletin, expanded the content of its website, and produced a membership Directory. In return,

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[1] See, for example, Kim Carter, «President's Year-end Report, October 2000", (Winter 2001), v. 27, no. 1, CCIL Bulletin, p. 2: *What lies ahead in 2000-2001 for the CCIL? After discussion with the Executive on Thursday evening a number of priorities have been established which follow the general course set out in the Report on the Future of the CCIL: The top three priorities are: (1) Increase membership; (2) Establish long term funding programme; and (3) Improve membership benefits*. See, also, Stephen J. Toope, «President's Message», (Spring 2001), v. 27, no.2, CCIL Bulletin, p. 2 at 3: *Over the next few months I will ask the CCIL Executive Committee to focus on the implementation of the excellent Report on the Future of the CCIL, received at our last Annual General Meeting. We will be considering the format of our Annual Conference, the enhancement of communication with members, the role of the CCIL as a promoter of international law in Canada and internationally, the CCIL's relationship to other international law organizations such as the CBA international law section and the ILA Canadian branch, and the possibility of CCIL cooperation in programmes of judicial, political and public education in international law. I invite your thoughts on any of these topics.*

the Council reaped considerable benefit - an increased membership from 1998 of approximately 50% by October 2002[2].

The Executive's attempt to implement the *Report*'s recommendations on funding met with mixed success. On one hand, the CCIL has managed to obtain more finances to support its traditional activities like the Annual Meeting. The majority of funding for those purposes continues to come from Federal government departments, particularly Justice and Foreign Affairs and International Trade, which have generously supported the Council from its inception in 1972.

On the other hand, the organization has not managed to implement fully a recommendation urging it to establish an endowment fund sufficient to provide for the extra administrative support needed to expand and further improve the Council's activities.

Last year, the CCIL received a large - indeed, a most generous - bequest from the estate of Professor John P. Humphrey, and some presumed that it would provide the CCIL with the endowment it requires. That is not the case, however, as the gift provides for an ambitious scholarship program that the Council must administer. While the Humphrey bequest considerably enhances the profile and status of the CCIL, it will add little in the way of funding to support administrative obligations other than the management of the scholarship program.

As a result, the Council must continue to function, as it has for many years, with a part-time Executive Director and a volunteer Executive Committee (largely limited to members residing within easy reach of Ottawa). While performing in an exemplary fashion, both are overworked and cannot assume further obligations.

The CCIL and International Legal Research

The *Report*'s commentary on the third major concern - research - disturbed many. It made three recommendations about research, the first of which advised that «A research program should be a low priority matter for the Council». The drafters of the *Report* made that recommendation because they had observed that the CCIL's limited financial and human resources at the time made research a difficult activity for it to support. They had noted and reported that the Council's Research Director - a position in place for a few years, and created to obtain funding and initiate research projects - had achieved only modest results. During their two year consultation, the drafters of the *Report* grudgingly came to accept that, at the time, the CCIL had insufficient membership and financial resources to mount an effective, active program of international legal research.

The CCIL had established an ambitious research policy in its early years:

> *«[T]he purpose of the research program was to broaden the base of Council-sponsored scholarship beyond the activities of the annual conference, and to provide in-depth studies on topical issues, which would remain contributions of enduring value to the Canadian law community.»*[3]

While some believe that the *Report* contradicts that CCIL policy, such is not the case and, so far as I am aware, the Council has never altered it. Instead, the CCIL heeded both its mandate to promote scholarship and the spirit of the *Report* by retaining the policy but altering the means by which the Council fosters its commitment to research. In short, it moved from an active research program to a passive one. That altered program (presently in place) focuses on enhancing the organization's value to the majority of its members. Instead of commissioning international legal research, the Council supports it in indirect ways. For example, it has improved the substantive content of its Bulletin, has added to the breadth of its Annual Meetings by including multi-disciplinary panel sessions and increasing the number of panels co-sponsored with other international organizations, and it has obtained more funds to pay the expenses of presenters to attend those Meetings. Moreover, the CCIL has welcomed the creation and participation in its Annual Meeting of interest groups like the Women and International Law Group and the International Environmental Law Group. These improvements to its core activities - communications with members and the Annual Meeting - have both promoted Canadian international legal research and have ensured its dissemination through conference meetings and publications.

Reviewing the Council's Research Program

Few recall the second recommendation in the *Report* dealing with research: that, «The Council should maintain a monitoring role on research and be ready to assist scholars in gaining access to funding opportunities.» As

[2] For example, the October 2002 Annual Meeting «attracted a record 450 registrants and participants». - John H. Currie, «President's Message», (Winter/Spring 2003), v. 29, no. 1, CCIL Bulletin, pp. 2-3.

[3] Yves LeBouthillier, Donald M. McRae and Donat Pharand, «Compendium: The First Twenty-five Years - 1972 - 1997», p. 68.

a result, that role has languished somewhat. However, this past October, following the Council's 2003 Annual Meeting, Professor Ronald St.J. Macdonald invited a group of about two dozen CCIL members to meet and, essentially, challenged them to intensify that monitoring role by reviewing the Council's research program.

The group's initial response to Professor Macdonald has prompted the Council's Executive Committee to warrant such a review. Like the earlier one on the future of the CCIL, the review of its research program will begin with a two-part membership consultation. One part is the present call for comments from members via e-mail or letter - and possibly, later, by discussion group on the CCIL website. The second part takes the form of a Research Breakfast session, now scheduled for the Saturday of the upcoming CCIL Annual Meeting in October 2004. That session will implement the third, also much neglected, research-focussed recommendation in the old *Report on the Future of the CCIL*: that, «The Research Breakfast should be a continuing feature of Council meetings to enable scholars to talk about their research and ensure that the Council can maintain its monitoring role.»

Preliminary Views on the CCIL Research Program

Professor Macdonald's initiative generated lively discussion about the future of the CCIL research program. Two views dominated. Some argued in favour of retaining the Council's present method of passive support for research, while others pressed for a renewal of an active program to initiate, commission, and publish international legal research.

Many proponents of the status quo (the passive approach) advocated that the Council expand that program of research. They made the following suggestions:

a. Offer more to members residing outside the Ottawa region. E.g.:

   i. - conduct workshops in, or travelling lectures to, different parts of the country;

   ii. - integrate the CCIL more closely with other Canadian international law organizations like the Société québécoise de droit international.

b. Engage in «community building» E.g.:

   i. - sponsor an annual public radio lecture on topical international legal issues;

   ii. - establish mentorships.

c. Increase student involvement, focussing particularly on the recipients of Humphrey Scholarships.

d. Establish a permanent home for the archives of the CCIL.

Supporters of renewing the active research program advised the Council to foster research into broad areas of public international law that would interest a large part of the CCIL membership. At the same time, they warned against Council-sponsored research into highly specialized subjects, as greater resources to undertake such endeavours are likely available elsewhere and as they would interest limited numbers of the membership. Most proponents of an active program advocated that the Council sponsor research that is topical, original, creative and of a conceptual nature that (from the «Compendium» once again) will be «of enduring value to the Canadian law community.»

Supporters of the active approach suggested the following topics:

i. - a 21st century version of the now classic text, Canadian Perspectives on International Law and Organization edited by R. St.J. Macdonald, G.L. Morris, and D.M. Johnston and published in 1974;

ii. - an examination of the various facets of the legal relationship between Canada and the US;

iii. - a reassessment of the United Nations and the Permanent Members of the Security Council;

iv. - a critique of significant topical developments in international law (e.g. group rights, extraterritoriality, global civil society, or the evolving role of NGOs);

v. - an investigation of the developing legal norms governing the war against terrorism.

Resources for Research

As stated above, while the Council's research policy has not varied, its limited human and financial resources have dictated the programs, or methods, it has adopted to implement that policy. Since the drafters presented their *Report* in October 2000, an increased membership and stable funding have improved the Council's situation sufficiently to prompt this review of its research program. Nevertheless, such a review must consider the following limitations:

1. While the Council's finances are solid, those resources are fully committed to ongoing activities. Little, if anything, exists in the general pool of funds

to allocate to a more ambitious research program.

2. An expanded research program could not draw further on the human resources of either the Council's Executive Director or its Executive Committee members.

However, the review should also consider positive factors like the following:

1. An outstanding CCIL research fund contains a few thousand dollars that the Council can employ as seed money for research.

2. An increased membership provides more likelihood of attracting committed volunteers to administer, and actively engage in, research projects.

3. Government has indicated an increased interest in drawing on the expertise of the Council's membership. For example, prior to the CCIL Annual Meeting last year, Ms. Oonagh Fitzgerald, Special Advisor, International Law, in Department of Justice hosted a meeting of international law professors and Justice officials as part of a departmental effort to strengthen relations with law faculties across Canada. The meeting revealed many issues of common interest that might foster research endeavours suitable for administration through the CCIL.

A Call for Dialogue

This comment attempts to explain the CCIL's program of international legal research and sets out a few preliminary views on expanding and amending that program. As research is crucial to the CCIL and its members, I call on you to begin dialogue on the subject by expressing your views to me. Feel free to address any aspect of the research issue: the CCIL's policy; its program and implementation; its content and subject matter; its funding; the priority it attaches to research; and any other element of its present or, possibly, future research initiatives.

Note that your opinions need not accord with any suggestions that appear in this comment, as I have Reported them merely to promote discussion.

I shall prepare a preliminary report on the consultation for the Research Breakfast session of the 2004 CCIL Annual Meeting.
Please contact me by e-mail at: dfleming@unb.ca
or, if not, then by letter posted to the following address:

Professor Don Fleming
U.N.B. Law Faculty
Ludlow Hall, 41 Dineen Drive
Fredericton, N.B. E3B 1Y3

I thank Stéphane Beaulac, Kim Carter, Maurice Copithorne, John Currie, Anemieke Holthius, Hugh Kindred, Ronald St. J. Macdonald, Sonya Nigam, Donat Pharand, and Colleen Swords for views they have provided in recent communications. Naturally, I assume all responsibility for any errors or omissions this comment might contain.

President's Message

(continued from page 2 - suite de page 2)

International Law ». Nous sommes toujours ouverts aux suggestions de thèmes pour les séances et les travaux. Nous vous prions de bien vouloir faire parvenir vos idées à notre vice-présidente du congrès, Johanne Levasseur à l'adresse conference@ccil-ccdi.ca.

There have also been changes to the composition of the Board and Executive. The Council expresses its gratitude to outgoing Executive members Paul Rutkus and Clare Da Silva, as well as outgoing Board member Denyse MacKenzie, for their contributions over the years; and welcomes incoming Executive members Isabelle D'Aoust and Ritu Banerjee, as well as incoming Board member Stéphane Beaulac. We look forward to their infusion of energy and ideas.

Message du président

Le renouveau assez souvent est terni par quelques pertes. Je termine sur une note un peu plus triste. Nous déplorons le décès de deux amis de longue date du Conseil, Oscar Schachter et Katia Boustany (vous trouverez un article à son sujet ailleurs dans le Bulletin). Je suis certain que tous les membres se joignent à moi pour célébrer leur vie et les remercier de leurs nombreuses contributions au Conseil ainsi qu'à divers projets importants pour le développement d'une société internationale plus juste et plus paisible.

On behalf of the Council, I wish you all renewal and success in this yet New Year. Bonne année à vous tous et à vous toutes !

John H. Currie
President/Président

La loi belge dite de compétence universelle « n'est plus » !

par Pacifique Manirakiza*

En 1993, le Royaume de Belgique s'est doté d'une loi de mise en œuvre, sur le plan pénal, des conventions de Genève de 1949 et de leurs protocoles additionnels de 1977[1]. Cette loi a été amendée en 1999 aux fins d'y intégrer le génocide et les crimes contre l'humanité et de reconnaître une compétence universelle aux tribunaux répressifs belges pour ces crimes odieux[2].

La loi belge de 1993/1999 présentait le triple avantage de permettre le déclenchement de l'action publique par la seule constitution de partie civile entre les mains d'un juge d'instruction, d'autoriser l'action publique même en l'absence des personnes poursuivies et d'exclure l'immunité comme moyen de défense possible contre les accusations du genre.

Cette singularité a permis le dépôt de plusieurs plaintes dont certaines étaient dirigées contre des dirigeants politiques étrangers ou nationaux, anciens ou encore en exercice[3]. Ce qui a fait dire au Prof. Eric David, père spirituel de cette loi, que la Belgique était en passe de devenir un paradis pénal, c'est-à-dire « une sorte de terre d'asile judiciaire du 3ème type où des victimes de toute origine, sans lien de rattachement avec la Belgique pourraient déposer plainte à volonté »[4].

Cette ouverture sans bornes a suscité beaucoup de remous et de préoccupations au niveau de certains citoyens belges et des pays alliés de la Belgique qui ont finalement eu raison de cet instrument extraordinaire de lutte contre l'impunité.

I. Facteurs ayant contribué à l'amendement de la loi de 1993

Facteurs juridiques

a) Effet de l'arrêt *Yerodia* : Dans l'*Affaire du mandat d'arrêt international*, la Cour internationale de justice a confirmé l'existence, en droit international, d'immunités de juridiction à l'égard des ministres des affaires étrangères pour les actes accomplis dans l'exercice de leurs fonctions. Par conséquent, aucune juridiction d'un État étranger ne peut entamer des poursuites pénales à leur encontre sans engager sa responsabilité internationale. Suite à cet arrêt, « il fallait réaffirmer l'attachement de la Belgique à la règle internationale consacrant l'immunité internationale attachée à la qualité officielle d'une personne ». La modification législative intervenue vise donc à assurer une conformité de la loi avec cette jurisprudence en reconnaissant explicitement le régime des immunités de juridiction et d'exécution prévues par le droit international. Ainsi, au nouvel article 1er bis inséré au Code de procédure pénale par l'entremise de l'art. 13 de la nouvelle loi, il est prescrit :

§ 1er. Conformément au droit international, les poursuites sont exclues à l'égard :
- des chefs d'État, chefs de gouvernement et ministres des Affaires étrangères étrangers, pendant la période où ils exercent leur fonction, ainsi que des autres personnes dont l'immunité est reconnue par le droit international;
- des personnes qui disposent d'une immunité, totale ou partielle, fondée sur un traité qui lie la Belgique.

§ 2. Conformément au droit international, nul acte de contrainte relatif à l'exercice de l'action publique ne peut être posé pendant la durée de leur séjour, à l'encontre de toute personne ayant été officiellement invitée à séjourner sur le territoire du Royaume par les autorités belges ou par une organisation internationale établie en Belgique et avec laquelle la Belgique a conclu un accord de siège[5].

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* Ph.D. Professeur à la Faculté de droit de l'Université d'Ottawa, section common law. La version complète de cet article sera disponible sur le site web du CCDI.

[1] *Loi belge du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions*, voir Moniteur belge, 5 août 1993 à la p.17775.

[2] *Loi relative à la répression des violations graves du droit international*. On peut consulter le texte de cette loi en ligne, http://www.diplomatiejudiciaire.com/DJ/Loibelge2.htm.

[3] C'est notamment le cas des anciens présidents Rafsanjani d'Iran, Hissène Habré du Tchad, des dirigeants en exercice comme Paul Kagame, Président du Rwanda, Ariel Sharon, Premier Ministre israélien, Louis Michel, Ministre belge des affaires étrangères, Fidel Castro, Président du Cuba, etc. Pour une liste d'autres personnalités, voir notamment Amnistie internationale, *Bulletin d'information 175/01, Index AI : MDE 15/089/01*, 3 octobre 2001; F. Soudan, «Enfin une justice universelle», dans *Jeune Afrique l'Intelligent,* numéro 2116 du 31 juillet 2001.

[4] E. David, « Une règle à valeur de symbole», dans *Politique (Revue de Débats)* No 23 (sur le thème La Belgique, justicier du monde?) à la p.14.

b) Création de la Cour pénale internationale (CPI) : La CPI, juridiction internationale permanente compétente pour réprimer les crimes internationaux les plus graves existe depuis le 11 mars 2003. Pour certains députés belges, cette juridiction est la mieux indiquée et la mieux politiquement équipée pour poursuivre et juger les affaires qui ne présentent aucun lien de rattachement solide avec les États. En d'autres termes, la compétence universelle serait mieux exercée par une telle juridiction internationale sinon les États feront inévitablement face aux incidents diplomatiques et politiques. Il était donc opportun de bien organiser « la collaboration entre cette cour et les juridictions belges ».

Facteurs politiques

a) Menaces de déménagement du siège de l'OTAN et de sanctions économiques : Suite aux plaintes intentées en Belgique contre certaines autorités politiques et militaires des États-Unis, en l'occurrence l'actuel Vice-Président Dick Cheney, l'ancien Président George Bush, l'actuel Secrétaire d'État, Colin Powell, etc., l'administration américaine a fait des pressions sur le gouvernement belge aux fins de classer ces affaires sans suite et d'amender la loi de 1993.

D'abord, les États-Unis ont menacé de transférer le siège de l'OTAN de Bruxelles à une autre capitale européenne au cas où la Belgique n'accéderait pas à ses requêtes. De passage à Bruxelles en juin 2003, le Secrétaire d'État à la défense, M. Rumsfeld s'est interrogé à haute voix à savoir si la Belgique pouvait « continuer à assumer son rôle d'hôte» avec son arsenal législatif de l'époque. La Pologne était apparemment favorite pour héberger l'OTAN, histoire de tourner le dos à la « vieille » Europe. Ensuite, des menaces de sanctions économiques étaient également envisagées à savoir notamment le non financement de la construction du nouveau siège de l'OTAN dans la banlieue de Bruxelles, le déroutage des navires commerciaux américains du Port d'Anvers vers le Port de Rotterdam au Pays Bas, etc.

Bien que le renvoi des dossiers « américains » ait été opéré vers la justice américaine, la crainte de voir ces menaces mises à exécution a conduit la Belgique à amender la loi de 1993/1999. C'est d'ailleurs ce qu'affirme M. Louis Michel, Ministre belge des Affaires étrangères : « Dès lors que le dévoiement de la loi a conduit les Américains à mettre en cause le siège de l'OTAN à Bruxelles, il devenait impossible de ne pas modifier la loi. Les intérêts de notre pays risquaient d'être gravement préjudiciés »[6].

b) Incidents politiques et diplomatiques : Les plaintes déposées conformément à la loi de 1993/1999 contre des responsables politiques et militaires, anciens ou en encore en activité, ont occasionné un refroidissement au niveau des relations diplomatiques entre la Belgique et certains États comme les États-Unis, l'Israël, la République démocratique du Congo, etc. Rappelons notamment qu'au printemps dernier, Israël a rappelé son ambassadeur accrédité à Bruxelles en guise de protestation de la décision de la Cour de cassation belge du 12 février 2003 qui refusait l'immunité à M. Yaron, un officier coaccusé avec Sharon pour les crimes commis à Sabra et Chatilla, décision qualifiée «de terrorisme judiciaire» ou «d'acte antisémite». D'où la nécessité d'adopter un cadre légal de répression qui s'appuyait sur des critères stricts et qui tenait compte des règles et autres obligations internationales.

Facteurs d'ordre logistique et pragmatique (de politique criminelle)

Depuis la promulgation de la loi 1993 et son premier amendement de 1999 étendant son régime au génocide et aux crimes contre l'humanité, de nombreuses plaintes ont été déposées devant les juridictions belges par des plaignants venant des quatre coins du globe. Ce qui a entraîné « une utilisation politique manifestement abusive de cette loi ». Ce faisant, le fardeau judiciaire des tribunaux belges devenait très important au point de paralyser tout le système de justice pénale. Se jugeant matériellement et financièrement incapable de devenir policière et justicière du monde, la Belgique a décidé, par le biais de la loi amendée, à limiter les conditions de recevabilité des plaintes, réduisant ainsi extrêmement la portée de la compétence universelle grâce à laquelle une porte était ouverte à toutes les victimes du monde, actuelles ou potentielles.

II. Quelques modifications par rapport à l'ancienne législation

Les facteurs exposés ci-dessus justifient l'ampleur des modifications apportées. Celles-ci touchent la loi tant dans son fond que dans sa forme.

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[5] Il convient de signaler que l'ancien art. 5 para.3 de la loi de 1993 tel que modifiée en 1999 prévoyait que « l'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi».

[6] « Compétence universelle : Louis Michel fait amende honorable», Entrevue accordée à *L'investigateur*, 25 juin 2003; voir en ligne : www.investigateur.info/news/articles/article_2003_06_25_michel.html, dernière visite : 12 décembre 2003.

Modifications substantielles

a) Titres de compétence restreints : Les critères de compétence juridictionnelle consacrés par la loi de 1993/ 1999 ont été réduits. La nouvelle loi met de l'emphase sur des critères pouvant justifier une relation claire entre la Belgique et les plaintes introduites : il s'agit des critères traditionnels de la territorialité et de la personnalité active ou passive. S'agissant de ce dernier titre, il est important de remarquer qu'il n'est plus uniquement fondé sur la nationalité belge; il s'étend également aux personnes ayant une résidence principale en Belgique depuis au moins trois ans[7].

b) Restrictions au niveau des personnes habilitées à intenter des poursuites pour crimes international : Aux termes de l'art. 25 de la Loi du 7 août 2003, le procureur fédéral a une prérogative exclusive et discrétionnaire en matière de déclenchement des poursuites. Sa décision de ne pas poursuivre est sans recours bien qu'elle est censée être fondée sur des critères dont l'appréciation peut être subjective. Ainsi, la possibilité pour les victimes ou d'autres personnes intéressées de se constituer parties civiles et de parer à l'inertie du ministère public en déclenchant directement des poursuites n'est plus de mise alors qu'elle constituait la pièce motrice du système instauré par l'ancien régime.

Les nouveaux pouvoirs du procureur fédéral dont les décisions de classement d'une affaire sont sans recours ont été dernièrement décriés par l'avocat des victimes dans l'affaire Jiang Zemin et al. où le procureur a décidé, le 19 septembre 2003, de classer leur plainte sans suite au motif qu'elle ne respectait pas les conditions de recevabilité exigées par la nouvelle loi. Les plaignants ont alors décidé de saisir la Cour européenne des droits de l'homme.

c) Définitions étendues : Enfin, les crimes prévus par la nouvelle loi ont été redéfinis de façon étendue. Le souci du législateur semble être celui d'assurer la conformité de la nouvelle législation au Statut de la Cour pénale internationale dont elle est en plus censée mettre en œuvre. On peut s'en rendre compte en comparant par exemple les versions antérieure et actuelle des dispositions sur la notion de crimes de guerre.

Modifications formelles

L'ancien système belge de répression des crimes internationaux était fondé sur une loi spéciale qui instituait un régime spécial de répression parfois dérogatoire du droit commun. La nouvelle loi opère un transfert de ses dispositions dans différentes législations pénales ou connexes du droit commun. La raison avancée à cet effet est qu'il n'est plus nécessaire de prévoir une législation d'exception pour les infractions internationales «étant donné qu'en matière de compétence extraterritoriale, le droit commun connaît déjà les concepts de principes de personnalité active et passive ». De même, ce « déménagement » législatif se justifie par le fait que le régime de droit commun permet un meilleur accès à la justice.

Ainsi, les dispositions du droit de fond sont désormais enchâssées au code pénal sous un titre 1er bis du Livre II. Les dispositions d'ordre procédural ont leur demeure soit au code de procédure pénale, soit au code d'instruction criminelle, soit au code judiciaire.

III. Bref commentaire

La loi belge sur les violations du droit international humanitaire a été un modèle important d'instrument législatif de répression étatique des crimes internationaux. Plusieurs États s'y sont référé pour rédiger leurs propres législations sur les crimes de droit international. Les victimes y ont trouvé un outil juridique solide pour qu'enfin justice leur soit rendue. Néanmoins, son élan vient de subir un sérieux coup de frein.

Les justifications mises en avant appellent un bref commentaire. D'abord, s'agissant de l'existence désormais réelle de la Cour pénale internationale, peut-on franchement dire qu'elle justifie l'abandon de la compétence universelle par les États au point que ces derniers se rabattent uniquement aux critères de rattachement traditionnels les plus évidents et les moins contestés sur le plan international comme la territorialité et la personnalité? Nous ne croyons pas que cela ait été l'objectif de ceux qui ont conçu la Cour qui, au demeurant, a une compétence subsidiaire aux juridictions nationales dans ce domaine précis de la lutte contre l'impunité du crime international. La cour n'a pas d'ambition de juger tous les crimes, seulement quelques uns des plus graves et dont les principaux responsables politiques et militaires sont reconnus coupables.

Ainsi, la justice pénale internationale comptera encore pour longtemps sur les cours et tribunaux étatiques pour être visible et produire des résultats palpables. D'où l'importance de voir ces juridictions affirmer leur compétence universelle dans les limites permises par le droit international afin de participer à l'œuvre de justice humanitaire.

7 Loi du 7 août 2003, *supra* note 5, art. 14, 15 et 29.

Ensuite, en ce qui a trait au risque d'incidents diplomatiques, on ne devrait pas se leurrer; la plupart des plaintes pour crimes internationaux sont toujours susceptibles d'entacher les relations diplomatiques. En effet, que ce soit au Burundi, au Rwanda, au Kosovo, au Cambodge, etc. on se rend compte que les crimes de droit international sont commis sous la couverture des agents de l'État voire même parfois en poursuite d'une politique étatique. Ainsi, les personnes généralement impliquées dans la perpétration de ces crimes se trouvent être soit des personnes qui occupent des postes de hautes responsabilités politique et/ou militaire, soit celles les ayant occupés et qui gardent des liens forts et solides avec les gens au pouvoir dans un État donné. Si un État tiers touche à ces gens-là dans le dessein de les traduire en justice pour crimes internationaux, cette action constitue un affront contre l'État qui les protége et cela entraîne inévitablement des collisions politico-diplomatiques. C'est d'ailleurs cela qui est en partie à la base du phénomène d'impunité actuelle du crime international car les différents États ne veulent se créer des ennuis en attaquant les protégés d'autres régimes. Au bout du compte, ce serait même créer un mauvais précédent pouvant être opposable contre eux en temps opportun!

Cependant, une telle justification consistant dans le risque d'incidents politiques et diplomatiques est insuffisante si elle aboutit à l'inertie des tribunaux internes devant des cas pour lesquels le droit international conventionnel ou coutumier leur donne compétence. Il est donc important d'affirmer vigoureusement la primauté de la règle de droit dans l'arène internationale en ce sens qu'elle est la seule référence ou le seul dénominateur commun acceptable pour la communauté internationale.

En outre, dans le cas de la Belgique, le fait que le procureur soit amené, en vertu de nouvel art. 10, 1bis du titre préliminaire du Code de procédure pénale, à « porter un jugement sur la question de savoir si une juridiction devant laquelle il renvoie l'affaire présente les qualités d'indépendance, d'impartialité et d'équité requises»[8] risque « de poser des problèmes diplomatiques vis-à-vis de certains États puisque tout refus risque d'être interprété comme un jugement qui dénie à la juridiction concernée les qualités requises ».

Enfin, l'exclusion des parties civiles au procès pénal est un coup dur pour les victimes et le système de justice humanitaire. En effet, même dans des États où les fonctions de procureur général et de ministre de la justice ne se confondent pas, le procureur est toujours hiérarchiquement placé sous les ordres du ministre de la justice, membre du gouvernement. En toute hypothèse, le risque d'inaction est grand surtout quand une affaire paraît déboucher à des incidents politico-diplomatiques. On peut alors se demander ce qui adviendra de la justice pénale internationale si les législations étatiques du monde excluent la constitution de parties civiles. Sans nul doute que l'impunité reprendrait son cours. De même, d'autres conséquences sont à redouter : la Cour pénale internationale serait pratiquement la seule instance de répression efficace des crimes internationaux avec tout le risque d'un fardeau judiciaire très lourd au point de dépasser sa capacité; le Conseil de sécurité se verrait encore dans des situations où il doit recourir aux tribunaux *ad hoc* dont la constitution sélective n'est pas moins controversée.

À notre sens, là où le système juridique peut la permettre, la participation des parties civiles dans le déclenchement et le déroulement des poursuites pour crimes internationaux paraît plus indispensable dans ce domaine où l'intérêt de la justice paraît plus pressant qu'ailleurs. ≺

8 *Projet de loi relative aux violations graves du droit international humanitaire, Amendements*, Amendement No 9 de M. Wathelet, Doc51 0103/002, Chambre, 1ère session de la 51ème législature, 24 juillet 2003 à la p.7.

2003 CCIL ANNUAL CONFERENCE
Report

(continued from page 10 - suite de page 10)

Saturday's sessions included *The Indictment of Charles Taylor by the Special Court for Sierra Leone, Recent Proposals for Protecting and Processing Refugees: Good or Bad?* and *The Politics of Implementing Human Rights Law: Case Studies in Guatemala, Yemen, Bosnia and Sudan.* A fourth workshop on International Environment Law entitled *Liability and Corporate Social Responsibility* brought government and industry representatives together, leading to a engaging exchange on the future of international environmental standards and liability.

More that 300 participants took part in the 2003 CCIL conference, held at the Fairmont Chateau Laurier. The event showcased a wealth of information and ideas at a time when international law is increasingly multi-facetted and complex. ≺

International Law Does Bind Canadian Courts—A Reply to Stéphane Beaulac

by Gib Van Ert*

In the last edition of the Bulletin, Prof. Beaulac considered and rejected the notion that international law binds Canadian courts. Beaulac began by citing authorities for the proposition that international law is not binding. These included the Supreme Court of Canada in *Ordon Estate v. Grail*,[1] an article by Mr Justice LeBel and Gloria Chao,[2] and another article by Karen Knop.[3] He then observed that "strictly speaking, international law does not bind Canada, or any sovereign states", and described international law and domestic law as "distinct and separate" legal systems. He acknowledged that international and domestic law may influence each other. But he insisted that domestic courts only apply international law to the extent that it has in fact become domestic law. "In that sense," he explained, "international law can never 'bind' a sovereign state like Canada, or more accurately, international law can never be 'binding' in or within the domestic legal system because domestic courts have jurisdiction over national law, not international law." Beaulac concluded that the most international law can hope to do is to influence domestic law in a persuasive way, for it cannot bind the courts of sovereign states.

In my view, Beaulac has conflated two separate, though related, questions: the bindingness of international law on the international plane and its domestic reception in the law of Canada.

I do not wish to dwell on the bindingness of international law on the international plane. States themselves treat international law as binding, whatever academic commentators may say.[4] Beaulac seems to regard state sovereignty as a ground for rejecting the bindingness of international law. But state sovereignty is itself a rule of international law; it cannot be grounds for denying international law's bindingness.

The more controversial point concerns the bindingness of international law on Canadian courts. Beaulac was right to point to the passage from *Ordon Estate v. Grail*. The majority observed, "Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments…". To my mind, this dictum is correct but must not be misinterpreted: to say that international law is not binding upon Parliament or the provincial legislatures is not to deny its bindingness on the Canadian state as a whole. Only the Canadian state in the broader sense, and not its various organs, is a subject of international law.[5] So while the court was right to observe that the legislative organs of the Canadian state are not bound by international law, it must not be taken as denying that international law is binding on the Canadian state as a matter of international law, nor that the conduct of these legislative organs is attributable to the Canadian state at international law. Recent judgments of the court have cited *Ordon Estate* as authority for the presumption of conformity rather than for the supposed rule that international law is not binding.[6]

In considering whether international law binds Canadian courts, we must again distinguish two questions. First, does international law purport to bind domestic courts? Second, does Canadian law recognize international law as binding on Canadian courts?

The answer to the first question is somewhat subtle. It is clear that a state may not rely on its domestic law, including its constitutional structure, to excuse itself from performance of international obligations. From the vantage-point of other states to whom treaty or customary obligations are owed, it is a matter of indifference whether Canada's breach derives from its legislative, executive, or judicial branches. Every organ of the state is part of the state for the purpose of determining its responsibility for violations of international law. The authorities for these propositions are numerous and well-known. However, as I observed above in respect of legislatures, international law does not recognize Canadian courts as subjects of international law distinct from the Canadian state. Thus, while Canada will be vicariously liable at international

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[1] [1998] 3 SCR 437 at para. 137.

[2] L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?" (2002) 16 Supreme Ct LR (2nd) 23.

[3] K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYU J Intl Law and Policy 501.

[4] Obviously not all international law is binding. A treaty between Canada and Hungary does not bind Japan, but is nonetheless international law. That states sometimes violate international law is not indicative of their view that it does not bind them, for they routinely defend their unlawful acts by insisting they were legal.

[5] See *R. v. Lyons and others* [2002] 3 WLR 1562 (HL) at paras. 40, 105.

[6] See, eg, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.* 2003 SCC 68 at para. 73 and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4 at para. 31.

law for wrongs committed by Canadian courts, the courts themselves are not bound by international law. Only the Canadian state is.

The second question brings us to the heart of the matter. What does Canadian law say about the bindingess of international law in our law?

Canadian reception law distinguishes custom from treaty.[7] Customary international law is deemed to form part of the common law. Thus, when a court is satisfied that a given proposition amounts to a rule of customary international law, it will apply that rule as common law. This is the doctrine of incorporation.[8] Incorporation means that customary international law does bind Canadian courts: it binds them at least to the same extent as the common law in general binds them. Beaulac's point may be that it is not in fact international law that binds in such instances; rather, it is the common law. Formally, that is true: the doctrine of incorporation makes customary international law the law of the land and courts apply it as such. But I think it overstates matters to conclude from this that custom is not binding on Canadian courts. Having identified a rule of customary international law, Canadian courts are bound to give effect to it in the common law by means of the incorporation doctrine.

Treaties are different. They are made by the executive and it is a rule of the common law that the Crown cannot make laws outside Parliament. Thus treaties are not in themselves law in Canada. To take direct legal effect here they must be implemented by legislation.[9] In this sense, then, it is correct to say that treaties do not, as a matter of Canadian law, bind Canadian courts.

But the question is more complicated than that. Though treaties have no direct legal effect without implementing legislation, they may have a degree of indirect legal effect by means of the interpretive presumption that legislation is intended to conform with international law.[10] Why do courts apply this presumption? Two reasons arise from the case-law. The first is based on historical legislative intent: courts presume legislation not to violate international law because the legislature itself rarely if ever intends to do so. An example is Lord Escher MR in Colquhoun v. Brooks: "the English parliament cannot be supposed merely by reason of its having used general words to be intending to do that which is against the comity of nations".[11] Similarly, Riddell JA observed in the Arrow River case, "The Sovereign will not be considered as enacting anything that will conflict with his plain duty, unless the language employed in the statute is perfectly clear and explicit, admitting of no other interpretation".[12] The second reason is somewhat different. Common law courts sometimes characterize the presumption of conformity as a matter of judicial duty. Lord Denning MR described it as "the duty of these courts to construe our legislation so as to be in conformity with international law".[13] Similarly, Dickson CJ called it "the duty of the Court" in construing the Act before it to give it "a fair and liberal interpretation with a view to fulfilling Canada's international obligations".[14]

On either of these reasons, I think it can fairly be said that the courts are bound to interpret Canadian law in conformity with international law. They may feel bound by the legislature's intent, or bound by international law, or both. Indeed, both propositions are true. The courts must give effect to legislative intent. And the courts, if they are to avoid attracting liability to the Canadian state at international law, must take decisions in conformity with it wherever possible. I say "wherever possible" to allow for the fact that Canadian courts' first commitment is to the constitution. If a provision of the written constitution is irremediably inconsistent with international law, and admits of no internationally lawful interpretation, the courts must give effect to it. And if an Act of Parliament

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[7] I ignore here the reception of general principles of law and subsidiary sources of international law, since no similarly clear reception rules have been elaborated for these sources.

[8] See, eg, *The Ship "North" v. The King* (1906) 37 SCR 385, *Re Foreign Legations* [1943] SCR 209 (notably the reasons of Duff CJ), *Saint John v. Fraser-Brace Overseas* [1958] SCR 263, *Re Regina and Palacios* (1984) 45 OR (2d) 269 (Ont CA), and *Bouzari v. Iran* [2002] OJ No 1624 (HCJ) (QL). See also *Triquet v. Bath* (1764) 3 Burr. 1478, 97 ER 936, *Trendtex Trading v. Bank of Nigeria* [1977] 1 QB 529 (CA), *I Congresso del Partido* [1983] 1 AC 244 (HL), etc.

[9] See, eg, *Attorney General for Canada v. Attorney General for Ontario* [1937] AC 326 (PC) at 347, *Francis v. The Queen* [1956] SCR 618 at 621.

[10] The presumption was first enunciated nearly two hundred years ago in Le Louis (1817) 2 Dods. 210, 165 ER 1465. A more recent affirmation is the application of the presumption to construe Criminal Code s. 43 (the so-called spanking defence) in Canadian Foundation, above note ef64260179 \h 6, at para. 31-3. On how to reconcile this indirect legal effect with the rule that the Crown cannot make law, see my discussion in G. van Ert, Using International Law in Canadian Courts (The Hague: Kluwer Law International, 2002) at 214-9.

[11] (1888) 21 QBD 52 at 57-8.

[12] *Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.* (1930-1) 66 OLR 577 (Supreme Ct of Ont Appellate Div) at 579.

[13] *Corocraft v. Pan American Airways* [1968] 3 WLR 1273 (CA) at 1281.

[14] *R. v. Zingre* [1981] 2 SCR 392 at 409-10.

intentionally, unambiguously and irresistibly violates international law, the courts will apply it pursuant to the unwritten constitutional doctrine of Parliamentary sovereignty. This does not negate the bindingness of international law, but simply recognizes a hierarchy among binding norms.

It is mistaken, therefore, for Canadian courts to treat binding rules of international law as merely persuasive, as Prof. Beaulac advocated. International law is not to be equated with foreign law, or academic commentary, or any other non-binding or non-legal source. Furthermore, it goes too far to characterize international and Canadian law as completely separate legal systems, and to say that Canadian courts lack jurisdiction over international legal matters. International law is part of Canadian law, and the two legal systems overlap in ever-increasing ways. The saying "International law binds Canadian courts" may be a bit of a generalization, but it is generally right. ◅

En Bref

Classement Mondial 2003 de la Liberté de Presse

Reporters sans frontières a rendu public son index mondial de la liberté de la presse pour l'année 2003. Cette seconde étude reflète le degré de liberté accordé aux journalistes et aux médias de chaque pays et les moyens mis en œuvre par les États pour respecter et faire respecter cette liberté. Pour une deuxième année consécutive, le Canada se place parmi les dix meilleurs pays. L'Asie demeure le continent où les atteintes à la liberté de presse sont les plus remarquables comptant huit des pays les plus mal classés dont la Corée du Nord, dernière de la liste. Cuba, qui compte le plus grand nombre de journalistes emprisonnés occupe l'avant-dernière place. Les États-Unis et Israël sont critiqués pour leur politique répressive en dehors de leur territoire. Le classement de RSF est basé sur les réponses obtenues suite à un questionnaire soumis à des journalistes, des chercheurs, des juristes et des militants des droits de l'homme. Le Classement 2003 est disponible à l'adresse internet suivante : <http://www.rsf.org/article.php3?id_article=8240> (par Hong Hanh Vo)

The Dutch Postal Services issue new stamps for use by the International Court of Justice

The President of the International Court of Justice (ICJ), Judge Shi Jiuyong, officially received on 20 January 2004 from Mr. Roy Rempe, Director, Marketing and Communication of the Dutch postal services TPG Post, the first copies of two new stamps exclusively designed for the Court.

The two new stamps cover the most current values for mail within the Netherlands and in the rest of Europe respectively. Both were developed by a Dutch artist, Mr. Roger Willems. The first stamp represents the Peace Palace in The Hague; the other the emblem of the Court. The Court is the only institution in the Netherlands with its own stamps, to which it has exclusive user rights. Indeed, both new stamps are reserved for use on the official mail of the Court. However, they may be obtained by philatelists in a special book of stamps presentation from TPG Post (www.tpgpost.nl).

In Brief

WTO Chairpersons for 2004

The WTO General Council noted on February 11, 2004, the consensus on the following slate of names of chairpersons for WTO bodies :

General Council
Amb. Shotaro OSHIMA (Japan)

Dispute Settlement Body
Amb. Amina MOHAMED (Kenya)

Trade Policy Review Body
Amb. Puangrat ASAVAPISIT (Thailand)

Council for Trade in Goods
Amb. Alfredo CHIARADIA (Argentina)

Council for Trade in Services
Amb. Peter BRNO (Slovak Republic)

Council for TRIPS
Mr. Joshua LAW (Hong Kong, China)

Committee on Trade and Environment
Amb. Naéla GABR (Egypt)

Committee on Trade and Development
Amb. Trevor CLARKE (Barbados)

Committee on Balance-of Payments Restrictions
Mr. Giulio TONINI (Italy)

Committee on Regional Trade Agreements
Amb. Ronald SABORÍO SOTO (Costa Rica)

Committee on Budget, Finance and Administration
Amb. Henrik Rée IVERSEN (Denmark)

Working Group on Trade and Transfer of Technology
Amb. Jaynarain MEETOO (Mauritius)

Working Group on Trade, Debt and Finance
Amb. Péter BALÁS (Hungary)

LIFE AFTER THE SUPREME COURT OF CANADA: The *Howard* and *Mitchell* Petitions

by Peter W. Hutchins* with Aimée Comrie‡

In 1994, Mr. George Howard, a member of the Mississauga Hiawatha First Nation, was told by the Supreme Court of Canada, to his considerable surprise and that of his people, that through the 1923 Williams Treaties his forebears had knowingly and readily surrendered all of their hunting, fishing, trapping and gathering rights to their traditional territory in southern Ontario, a situation that would be unique in the annals of Crown/First Nation Treaty making from the earliest time to the 21st century and which would have been tantamount to a substantive cultural renunciation and disinheritance by the Aboriginal parties to the treaties.

In 2001, Grand Chief Michael Mitchell of the Mohawks of Akwesasne, after having prevailed in the Federal Court Trial Division and the Federal Court of Appeal saw his claim for an Aboriginal right to bring personal and community goods and goods for small scale trade with certain First Nations across the Canada-U.S. border without paying duties substantially re-characterized by the Supreme Court of Canada and, on that basis, denied.

The international border was demarcated in the 18th century across traditional territories of First Nations accompanied by guarantees from the British that it was not intended to interfere with their activities or their rights. The international border runs straight through the Mohawk community of Akwesasne. The territory of the community of Akwesasne lies in part in the Province of Quebec, in part in the Province of Ontario and in part in the State of New York in the United States. The division caused by the presence of the international border affects all residents of Akwesasne on a daily basis and constitutes a profound interference with their ability to live their lives.

In *Mitchell*, the Court in fact confirmed the findings of the lower Courts that trade was «a central, distinguishing feature of the Iroquois in general and the Mohawks in particular.»[1] Nevertheless, the majority decision of the Court found that the evidence led at trial concerning the specific trade activities pleaded by Chief Mitchell did not meet the strict evidentiary test announced by the Court in a judgment released only weeks before the trial in *Mitchell*.[2] At the urging of the Crown, two justices, in separate reasons, also found that Chief Mitchell's claim as re-characterized was incompatible with state sovereignty and therefore not justiciable before the Courts of Canada.

In both these cases the Crown had, successfully in the result, argued against claims based on essential components of Mississauga and Mohawk culture, in other words, against the cultural integrity of these peoples. This might seem surprising, even alarming, given the contemporary international, constitutional and policy context.

In 1976 Canada ratified the International Covenant on Civil and Political Rights which affirms at Article 27:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[3]

On August 1, 1990, Canada deposited its instruments of ratification of the OAS Charter making Canada subject to the *American Declaration of the Rights and Duties of Man (the American Declaration)*. Article XIII of the *American Declaration* states in part:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.[4]

In 1982 Canada as a nation incorporated into its Constitution what is now section 35 of the *Constitution Act,*

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[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[2] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, par. 41.
[3] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[4] *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

1982, recognizing and affirming the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

In the landmark decision of *R. v. Sparrow,* the Supreme Court of Canada quoted with approval words of Prof. Noël Lyon regarding the effect of section 35 on sovereign claims made by the Crown:

> …the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[5]

On January 7, 1998 in response to the Report of the Royal Commission on Aboriginal Peoples, the Government of Canada presented a *Statement of Reconciliation to Aboriginal People* acknowledging Aboriginal nations' fundamental values concerning their relationship to the Creator, the environment and each other and their responsibilities as custodians of the lands, waters and resources of their homelands, acknowledging the cruel impact of cultural superiority resulting in weakening the identity of Aboriginal peoples and formally expressing profound regret for past actions of the federal government in this regard.[6]

The reader would be justified in perceiving a certain incoherence, indeed a dissonance, between Canada's international, constitutional and policy commitments on the one hand and its stance in litigation before the domestic courts as demonstrated in *R. v. Howard and Mitchell v. M.N.R.* Mr. Howard and Chief Mitchell certainly did. They decided to question and challenge this dissonance.

George Howard filed a Petition (the *Howard Petition*) before the United Nations Human Rights Committee in October 1998 claiming violations to Article 27 of the *United Nations International Covenant on Civil and Political Rights*. The Petition alleged that the decision of the Supreme Court of Canada in *Howard* is inconsistent with the provisions of Article 27 of the Covenant and that, in addition, the positions taken by Canada and the Province of Ontario in denying the hunting, fishing, trapping and gathering rights of Mr. George Howard and the other members of the Williams Treaties First Nations are incompatible with those provisions. With respect to Canada's litigation stance, the Petition alleges that Canada failed to respect its obligation to take positive measures of protection by not intervening in support of Mr. George Howard in the *Howard* proceedings to argue for a decision from the courts compatible with Canada's international obligations.

The *Howard Petition* set out for the Committee the consequences of First Nations communities being denied the right to continue conducting traditional harvesting activities individually and in community with each other. The curtailment of these harvesting activities goes well beyond the economic impact on people deprived of access to subsistence resources. There is an impact on the social life of the communities as feasts and ceremonies involving traditional foods become impossible. There is an impact on the health of the community with a very high incidence of diabetes, heart and liver diseases in Hiawatha and in other First Nations as a result of less wild food. And there is an impact on the transmission of culture to other persons and future generations. Harvesting activities are considered part of the education of children. Denying those rights deprives the community of the incidental right to transmit this aspect of its culture. The Supreme Court of Canada has recognized the importance of ensuring the continuity of Aboriginal practices, customs and traditions and the incidental right to teach such practices, customs and traditions to younger generations.[7]

There is also an interesting constitutional division of powers issue raised by the *Howard Petition*. Canada has taken the position that it cannot negotiate hunting, fishing, trapping and gathering rights with Mr. Howard's people without the participation and consent of the Province of Ontario. Mr. Howard responds that Canada is internationally responsible for any violation by the Government of Ontario of the provisions of Article 27. The refusal by Canada and Ontario to include hunting and fishing rights in their negotiations with Hiawatha and the other First Nations parties to the Williams Treaties of 1923 is incompatible with Canada's obligations under the Articles 27 and 2(2) of the Covenant.[8]

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[5] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1106.

[6] Government of Canada, Statement of Reconciliation, *Learning from the Past*, http://www.ainc-inac.gc.ca/gs/rec_e.html.

[7] *R. v. Côté*, [1996] 3 S.C.R. 139, par. 56: «In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.»

[8] Subsection 2(2) of the Covenant provides: «Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such

Invoking section 35 of the *Constitution Act, 1982*, Mr. Howard contends that the suitable remedy would be for the Committee to urge the Government of Canada to take effective steps to recognize and ensure the exercise of constitutionally protected hunting, fishing, trapping and gathering rights through a treaty.

Substantial submissions followed the filing of the initial Petition including three submissions by Canada. On April 1, 2003 the Human Rights Committee rendered its decision on admissibility finding that Mr. Howard's Petition was admissible and should proceed to the merits. It is of not a little interest that the Committee's decision to declare Mr. Howard's Petition admissible is a rare exception in the cases that have been brought to the Committee involving Canada since 1976.[9]

On November 23, 2001, Grand Chief Michael Mitchell submitted a Petition to the Inter-American Commission on Human Rights (the *Mitchell Petition*) alleging that the denial of his rights to bring goods, duty free, across the United States/Canada border dividing the territory of his community, for the purpose of trade with other First Nations is incompatible with the provisions of Article XIII of the *American Declaration of the Rights and Duties of Man*. Subsequently, the Petition has been clarified to focus on the right of the Mohawks to trade, free of duties and taxes, both within Akwesasne Mohawk Territory and from Akwesasne Mohawk Territory with other communities of the Iroquois Confederacy. Central to the *Mitchell Petition* is the issue of the scope of cultural rights under the various international instruments and, in particular, whether economic activities can properly be seen as integral elements of a people's culture.

Chief Mitchell argues that guidance as to the appropriate test for the application of Article XIII may be found by reference to Article 27 of the *International Covenant on Civil and Political Rights* and that it is appropriate for the Commission in a world of overlapping international commitments to apply its powers relative to the *American Declaration* in the manner consonant with Canada's other international human rights obligations. It is important to note that the U.N. Human Rights Committee has taken a broad and flexible interpretation of culture within the scope of Article 27.[10]

Chief Mitchell also refers the Commission to the emerging international norms on indigenous rights recognizing that indigenous peoples can hold specific rights with cross-border dimensions. An example would be Article 35 of the *UN Draft Declaration on the Rights of Indigenous Peoples*.[11]

Similarly, Article XIV(2) of the draft *American Declaration on the Rights of Indigenous Peoples* has recognized that "Indigenous peoples have the right of assembly and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with their members living in the territory of neighboring states."[12]

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legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.» General Comment 23, adopted by the U.N. Human Rights Committee at its fiftieth session in 1994, makes it clear that in the view of the Committee, which is, after all, the expert body established by states to monitor their implementation of the *International Covenant on Civil and Political Rights*, the exercise of cultural rights «manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.» The Committee then gave some examples, noting that: «That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.»

[9] Of those 107 cases, 8 are currently listed as being at the pre-admissible stage, 1 has been declared admissible (presumably Howard), 52 have been declared inadmissible, 27 have been discontinued, and only 19 have proceeded to a determination on the merits. Canada has recently suffered a loss on the merits in the recent case of *Judge v. Canada*. Of these 19 cases which have proceeded to a determination on the merits, Canada has been found in violation in 10. ... For the last three years, Canada has been successful in having all recent cases declared inadmissible on grounds such as the non-exhaustion of domestic remedies, the non-victim status of the complainants, and a failure to substantiate the complaint. Personal communication from Prof. Joanna Harrington, updated to 14 November 2003.

[10] See *supra*, note 8. In *Chief Ominayak and the Lubicon Lake Band v. Canada* the Human Rights Committee affirmed that «the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.» The jurisprudence of the Human Rights Committee under Article 27 has also made it clear that an economic activity, such as fishing, hunting and, reindeer herding, may also fall within the rubric of a protected cultural right, where that economic activity is considered an essential element in the culture of the ethnic community. Human Rights Committee, Communication No. 167/1984 (*Ominayak v. Canada*), views adopted 10 May 1990, UN Doc. CCPR/C/38/D/167/1984, para. 32.2.

[11] Article 35 of the UN *Draft Declaration on the Rights of Indigenous Peoples*, formulated to represent the emerging norms of international law with respect to the rights of indigenous peoples, recognizes that «Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders» and further provides that «States shall take effective measures to ensure the exercise and implementation of this right.»

[12] Recognition of cross-border contact rights, and in some cases, cross-border activity rights, is also found in the following

The very interesting aspect of the *Mitchell Petition* is that it raises the issue of the effect of certain early treaties between colonial powers that stipulated rights or benefits for Indigenous populations. At trial and in the Federal Court of Appeal, Chief Mitchell had invoked the Treaty of Utrecht of 1713, the Jay Treaty of 1794 and the Treaty of Ghent of 1814.[13] The *Mitchell Petition* contends that these colonial era treaties and the obligations they set out continue to exist at international law. Moreover, the Treaty of Utrecht was a treaty of peace and as such is self-executing. Even though there are no Indigenous nations who are parties signatory to these treaties, they contain *stipulations pour autrui* which provide context for his claims and for the colonial powers' recognition of the well-foundedness of these claims.

Canadian Courts have consistently maintained that the Jay Treaty is an international treaty not incorporated into Canadian domestic law.[14] Nevertheless, I would submit that Canadian courts have not adequately taken into account the roles of international law regarding *stipulations pour autrui* nor have they analyzed the legal value of such stipulations in favour of Aboriginal peoples in international treaties that date back to the colonial era. They appear to believe that they are impeded from doing so because they are limited to applying and interpreting Canadian law and consequently, cannot decide what the legal value of the provisions of Article III of the Jay Treaty is under the rules of international law, or whether Canada, as the Successor State to Great Britain, is still bound by these promises under international law. But surely the Supreme Court's endorsement of Prof. Lyon in *Sparrow* referred to earlier suggests a more creative approach to the role of section 35 in liberating the courts.

Finally, as a remedy, Chief Mitchell requests that, pursuant to Article 41 of its Rules of Procedure, the Commission initiate its friendly settlement procedure with a view to implementing the promises made under the Jay Treaty and otherwise ensuring the Mohawks of Akwesasne the exercise of their right, under international law, to bring goods across the international border dividing their territory for the purpose of trade with other First Nations communities, part of the Iroquois Confederacy.

After exchange of Submissions between the parties, the Inter-American Commission on Human Rights has issued its Report on Admissibility finding Grand Chief Mitchell's Petition admissible pursuant to Article 37 of its Rules of procedure.[15] The Commission indicated a particular interest in a further examination of the content of the «right to culture».[16]

Finally, the Commission placed itself at the disposal of the parties with a view toward reaching a friendly settlement of the matter. As in the case of the *Howard Petition*, the decision by the Inter-American Commission on Human Rights to accept Chief Mitchell's Petition as admissible represents a rather unique development in the early stages of Canada's involvement in the human rights system of the OAS. Chief Mitchell's Petition is only the third Petition originating from Canada to be judged admissible by the Commission and is the first Petition relating to Aboriginal peoples originating from Canada to be found admissible.

In my view, the positive decisions of these international bodies indicate that international human rights bodies are prepared to consider seriously complaints by Canadian Aboriginal peoples regarding their treatment by the Crown and to generally scrutinize the relationship

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international instruments which reflect the emerging international standards that must guide state conduct towards indigenous peoples: Article 32 of the *International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples*, adopted 27 June 1989 and in force as of 5 September 1991, not yet ratified by Canada ... Article 2(5) of the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the UN General Assembly on 18 December 1992 by way of Resolution 47/135 ... Article 17(1) of the (European) *Framework Convention for the Protection of National Minorities*, ETS No. 157, adopted 1 February 1995, in force 1 February 1998.

[13] Under the Treaty of Peace and Friendship signed at Utrecht (1713), Great Britain and France guaranteed «the Five Nations or Cantons of *Indians*, subject to the Dominion of Great Britain, and other First Nations who were their allies «the full Liberty of going and coming on account of Trade» without «any Molestation or Hinderance». Article III of the Jay Treaty of 1794, between the United States and Great Britain guarantees the rights of the «Indians dwelling on either side of the said boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective territories of the Two Parties on the Continent of America ... and freely to carry on trade and commerce with each other.» It further provides that «No Duty of Entry shall be levied by either party on Peltries brought by Land or Inland Navigation into the said Territories respectively, nor shall the Indians passing and repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But goods in Bales, or other large Packages unusual among Indians shall not be considered as goods belonging bona fide to Indians.»

[14] *Mitchell v. M.N.R.*, [1999] 1 F.C.375; *R. v. Vincent*, [1993] 2 C.N.L.R. 165; *Francis v. Canada*, [1956] S.C.R. 618.

[15] Inter-American Commission on Human Rights, Report No. 74/03 Admissibility Petition P790/01 Canada, par. 38. The *Mitchell* decision on admissibility can be obtained online at: http://www.cidh.oas.org.

[16] See paragraph 38 of the Report on Admissibility.

between the Crown and Aboriginal peoples. This is as it should be. The British Imperial Crown's relationship with Indigenous peoples had at its origin the Law of Nations. The Crown in Right of Canada inherited that constitutional history. Canada's first Constitution, the British North America Act of 1867, reflected this fact by vesting responsibility and jurisdiction over Indigenous peoples in the central government and Parliament. Throughout its history and continuing to this day, Canada has concluded nation-to-nation and peoples-to-peoples treaties with the Aboriginal peoples of Canada.[17]

As the Supreme Court of Canada has affirmed on a number of occasions, in 1982 a promise was extended to the Aboriginal peoples of Canada through section 35 of the *Constitution Act, 1982* - a promise involving continued unique status, constitutionally entrenched rights, fiduciary duties owed by the Crown and positive duties to protect Aboriginal peoples and their societies, economies and rights. In *Reference Re Secession of Quebec* the Court observed:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The «promise» of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[18]

It is interesting that these words were penned in a matter involving the dramatic convergence of Canadian history and constitutional law on the one hand and international law on the other - the question as to whether a province of Canada may unilaterally secede from the federation. The Court's reference to the contribution of the Aboriginal peoples of Canada to the building of this country is especially poignant given that it was considering arguments related to the country's dismantling. It is also encouraging to hear from individual justices of the Supreme Court, present and past, as to the use made by the Court of key international human rights instruments. Justice Lebel writing in the Supreme Court Law Review had this to say:

> With the enactment of the *Constitution Act, 1982*, the number of cases making use of international public law instruments increased dramatically. Writing on this development in the jurisprudence of the Court, Mr. Justice Gérard La Forest reported that, between 1984-1996, the Court made use of key international human rights instruments in fifty cases in interpreting the *Canadian Charter of Rights and Freedoms*. Since then, that number has doubled. La Forest J. thus explained the necessity of taking into account the applicable international law in *Charter* cases:
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> > The protection of human rights is not a uniquely Canadian concept and just as the drafters of the *Charter* drew on the experience and successes of the international human rights movement, so too would it be necessary for the Canadian courts to look abroad.[19]

It is my contention that over and above the wise words of Justices Lebel and LaForest section 35 itself should be seen as the entry point between Canadian domestic law and the emerging international law on human rights generally and Indigenous peoples in particular. It should be considered as reflecting and projecting outwards the principles applicable to Canada's conduct in international fora, standard setting or adjudicative. It should also be considered the casement through which relevant international standards, values and principles illuminate and burnish the domestic relationship between the Crown and the Aboriginal peoples of Canada.[20]

But that must be for another time and another place. ≺

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[17] See for example Lamer J. in *R. v. Sioui*, [1990] 1 S.C.R. 1025: «I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.» For modern era treaties see for example: *Campbell v. British Columbia* (Attorney General), [2000] 4 C.N.L.R. 1.

[18] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 82.

[19] *The Supreme Court Law Review*, Second Series, Volume 16, 2002 at pp. 45-46. There are less encouraging voices, see Prof. Joanna Harrington, « International Human Rights Law in Canada's Courts: The Ahani Case» (2003) 29:2 *Canadian Council on International Law Bulletin 7-8* and also «Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection» (2003) 48 *McGill Law Journal* 55-87.

[20] See for example L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817 at paragraph 70: «…the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.»

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Au Calendrier — Upcoming Events

Mapping New Boundaries: Shifting Norms in International Law (ASIL's 98th Annual Meeting)

March 31 – April 3, 2004, Washington, D.C. "The meaning, impact and relevance of international law are the focus of public attention as never before. That attention has invited a re-examination of the content and operation of international , and suggests that international law is in the midst of substantial change. States and institutions are rethinking and expanding the systems of norms and standards in which they function, and developing new strategies to resolve global problems." (Theme Statement) The 98th Annual Meeting seeks to identify and evaluate the content of these shifting norms and their implications for international law and international actors. US Supreme Court Justice Antonin Scalia will be the Keynote Speaker on Friday, April 2, 2004. Other Speakers include the Hon. Gareth Evans, president, International Crisis Group and Ambassador Michael Moore, former director general of the WTO. For more information and, for the first time ever, to register online, go to <http://www.asil.org/annual_meeting/index.htm>

Despite State Borders: The Evolving Importance of International Law and Institutions to Indigenous Peoples and their Public and Private Partners

April 2-3, 2004, Montreal. This Conference jointly organized by the National Aboriginal Law and International Law Sections of the Canadian Bar Association will explore the increasing role of International Law and Institutions as a means of advancing Indigenous rights and developing partnerships between Indigenous Peoples and the public and private sectors. The Conference will also examine the incorporation of international standards into Canadian domestic law and policy as well as the contribution of Canadian Aboriginal law to legal developments outside Canada. For further information, contact the co-chairs: Peter Hutchins (phutchins@hsdnativelaw.com) and Mary Cornish (mcornish@cavalluzzo.com).

Inaugural Conference of the European Society of International Law (ESIL)

May 13-15, 2004, Florence. Entitled "International Law in Europe: Between Tradition and Renewal", the conference will bring together leaders in the field as well as younger scholars. Speakers include: Luzius Wildhaber, Mohammed ElBaradei, Alain Pellet, Michael Reisman, Christian Tomuschat, Joseph Weiler, Monique Chemillier-Gendreau and Martti Koskenniemi. More information about the Conference is available at : <http://www.esil-sedi.org>.

71st Conference of the International Law Association

August 16-21, 2004, Berlin. The official website for the ILA 71st Conference next summer in Berlin can be found at <http://www.ila2004.org>. The site contains all the information currently available regarding the Conference, including the outline programme, registration fees, hotels and excursions. Registrations for the conference can be made online or by downloading the forms and returning them to the conference organizers by post or fax. Hotel reservation forms are also available for downloading and should be posted or faxed directly to the appropriate hotel. The pre-conference committee reports will be available on both the Conference website and the main ILA website as of June 1st, 2004.

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