

**Hutcheon Dinner
October 21, 2009**

**“JUDICIAL GLOBALIZATION” – WHAT IMPACT IN
CANADA?**

**Presented by:
Madam Justice Kathryn Neilson**

**I would like to acknowledge the valuable assistance of
Lauren Cook and Aileen Smith, Law Clerks**

“JUDICIAL GLOBALIZATION” – WHAT IMPACT IN CANADA?

Introduction

The genesis of this paper was an article by Adam Liptak in *The New York Times* a year ago that described the ongoing debate in the United States Supreme Court over the use of foreign sources in its decisions, the decline of that Court’s influence on the world stage over the last 20 years, and the rising prominence of other constitutional courts, notably the Supreme Court of Canada, in the international arena.¹

By way of background, the American debate focuses on comparative constitutional law. The opposition to use of foreign sources is rooted in three concepts: originalism, American exceptionalism, and the view that foreigners can have no relevance to the interpretation of the American Constitution.² The issue gained currency from the majority judgments in three decisions in the last seven years that referred to international sources: *Atkins v. Virginia*³, which decided that the execution of mentally retarded offenders was unconstitutional; *Lawrence v. Texas*⁴, in which the majority relied on international sources to overturn a Texas statute that criminalized sodomy; and *Roper v. Simmons*⁵, where the majority drew on international criticism of the death penalty for juveniles to find that it should be prohibited in the United States as cruel and unusual punishment under the Eighth Amendment.

In *Atkins*, the mention of foreign sources was easy to miss. Justice Stephens, writing for the majority, dealt with this in a footnote, simply noting that the world community overwhelmingly disapproved of the death penalty for crimes committed by what were then referred to as mentally retarded offenders.⁶

¹ Adam Liptak, “U.S. Court Is Now Guiding Fewer Nations” *The New York Times* (17 September 2008), online: The New York Times <www.nytimes.com>.

² Mark C. Rahdert, “Comparative Constitutional Advocacy” (2007) 56 Am. U. L. Rev. 553 at 636.

³ *Atkins v. Virginia*, 536 U.S. 304 (2002) [*Atkins*].

⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵ *Roper v. Simmons*, 543 U.S. 551 (2004) [*Roper*].

⁶ *Atkins*, *supra* note 3 at 12.

This nevertheless provoked strong dissents from Chief Justice Rehnquist and Justice Scalia, who provided the following as an opening salvo:

Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members. ...

... The views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. We must never forget that it is the Constitution for the United States of America that we are expounding. ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.⁷

Having warmed up the debate in *Lawrence*, in *Roper* Justice Kennedy, writing for the majority, embarked on a wide-ranging review of the abolition of the juvenile death penalty by nations that “share our Anglo-American heritage”, and by “leading members of the Western European community”, and referred as well to multi-lateral conventions of the United Nations and others. He observed that the United States was the only country in the world that continued to give official sanction to the juvenile death penalty and acknowledged the “overwhelming weight of international opinion” against it. He concluded:

It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.⁸

Justice Scalia’s dissent begins by describing the majority opinion as “a mockery” of the framers’ intentions, and a “legislative judgment” in which the majority has “look[ed] over the heads of the crowd and pick[ed] out its friends”. In his view, the premise that American law should conform to the laws of the rest of the world “ought to be rejected out of hand”. His judgment concludes with these statements:

To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry. ...

... To begin with, I do not believe that approval by “other nations and peoples” should buttress our commitment to American principles any more than (what

⁷ *Ibid.*, at 111-112.

⁸ *Roper*, *supra* note 5 at 24-25.

should logically follow) disapproval by “other nations and peoples” should weaken that commitment. More importantly, however, the Court’s statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our “fidelity” to the Constitution, our “pride in its origins,” and “our own [American] heritage.” To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources “affirm,” rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.⁹

This jurisprudential dispute has taken on a significant political dimension. There have been repeated proposals in both houses of Congress (unsuccessful to date) to enact legislation expressly forbidding courts in the United States from relying on any foreign material, other than “English constitutional and common law” that preceded the adoption of the American Constitution, in interpreting and applying the Constitution.¹⁰ It was a live issue at the confirmation hearings of Chief Justice Roberts and Justice Sotomayor.¹¹ It has also gained some notoriety in the press, with the *Wall Street Journal* observing that it is not the responsibility of the Supreme Court to win an “international beauty pageant”.¹²

By contrast, other constitutional courts demonstrate a much more positive attitude toward foreign sources. Since its inception in 1995, the Constitutional Court of South Africa has borrowed liberally from the jurisprudence beyond its borders.¹³ One

⁹ *Ibid*, dissenting reasons of Scalia J. at 1, 2, 11, 18, 21-23.

¹⁰ U.S. Bill S. 520, *Constitution Restoration Act of 2005*, 109th Cong., 2005.

¹¹ “Transcripts: The Roberts Confirmation Hearings” *The Washington Post* (13 September 2005), online: www.washingtonpost.com; “Transcript: Sotomayor Confirmation Hearings, Day 2” *The New York Times* (10 September 2009), online: www.nytimes.com.

¹² Liptak, *supra* note 1; Jeffrey Tobin, “Swing Shift: How Anthony Kennedy’s passion for foreign law could change the Supreme Court” *The New Yorker* (12 September 2005), online: www.newyorker.com; Collin Levy, “Sotomayor and International Law” *The Wall Street Journal* (14 July 2009), online: <http://online.wsj.com>.

¹³ D.M. Davis, “Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African Experience” (2003) 1:2 *I. J. Int’l L.* 181; The Hon. Richard J. Goldstone, “The First Years of the South African Constitutional Court” (2008) 42:2 *Sup. Ct. L. Rev.* 25.

academic has observed that judgments from that Court often resemble “a jurisprudential ‘Cook’s tour’ of Europe and the United Kingdom and the Common Wealth”.¹⁴

Aharon Barak, President of the Supreme Court of Israel, holds a similar view:

... I have found comparative law to be of great assistance in realizing my role as a supreme court judge. The case law of the supreme courts of the United States, Australia, and Canada, of United Kingdom courts, and of the German Constitutional Court have helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge “expands the horizon and interpretive field of vision. Comparative law enriches the options available to us.”¹⁵

Given these diverse views, my original plan was to look at whether there was a discernible trend in how Canadian judges approached foreign sources, and how Canadian decisions were received elsewhere. My research, however, very quickly led to the broader field of “judicial globalization”, which has been defined as a “diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law”.¹⁶ It is a concept that has generated considerable interest among legal and political academics as well as judges, in both Canada and the United States.

The result is a paper that is neither highly academic nor comprehensive. It is a potpourri of aspects of judging, many of which will be familiar to you, but it examines them in an effort to answer the question of whether and how the phenomenon of globalization is affecting judging in Canada. It offers a little history, some current affairs, some statistics, a very brief primer of international law, and a glimpse at what guidance the Supreme Court of Canada is providing at home and beyond. Finally, it looks at the benefits and pitfalls of using foreign sources, and offers some suggestions as to how Canadian judges might deal with the increasing transnational aspects of our job.

¹⁴ Davis, *ibid.* at 192.

¹⁵ Aharon Barak, “Foreward: A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 Harv. L. Rev. 19 at 110.

¹⁶ Anne-Marie Slaughter, “Judicial Globalization” (1999) 40 Va. J. Int’l L. 1103 at 1104 [Slaughter, “Globalization”].

Defining Terms

I have been using the generic term “foreign sources” to refer to jurisprudence generated beyond national borders. I do not intend this to be a lecture on international law, but it is necessary to parse that term a little more precisely for the purposes of the discussion that follows, and I offer the following brief summary, drawn primarily from three Canadian academics.¹⁷

First, the focus here is public international law, not private international law, or conflicts.

Article 38(1) of the *Statute of the International Court of Justice 1945* is widely accepted as the authoritative declaration of sources of public international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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

Those sources relevant to this presentation are international conventions, or treaties, customary international law, and judicial decisions.

A treaty is defined by article 2.1 of the *Vienna Convention on the Law of Treaties* as an international written agreement concluded between states and governed by international law.¹⁸ Consent to a treaty may be expressed by signature or by ratification. Whether both are required depends on its terms. In a federal system like ours, domestic constitutional law introduces an additional level of validation. Since the executive cannot legislate, state-made treaties must be implemented before a treaty will

¹⁷ Jutta Brunnée & Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) *Can. Y.B. Int’l. L.* 3; Gib van Ert, *Using International Law in Canadian Courts*, 2d ed. (Toronto: Irwin Law, 2008).

¹⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, *Can. T.S.* 1980 No. 37 (entered into force 27 January 1980) [*Vienna Convention*].

become part of domestic law. The traditional view is that implementation must be done by express legislation. However, the Canadian practice also implements treaties in more subtle ways:

... These include the introduction of new legislation that does not refer to the treaty by name; amendments to existing legislation to bring in line with the treaty obligation again without referring to the treaty motivating the changes; and reliance on existing legislation, which of course makes no reference to the new treaty, to give it the required domestic effect. These subtleties mean that courts and counsel must beware of jumping too quickly to the conclusion that a treaty is unimplemented. If the treaty needs domestic implementation, and if Canada has ratified it, it is more likely than not that the treaty is in fact implemented, one way or another. The simple reason for this is that Canada's failure to give domestic legal effect to a binding treaty obligation that requires it is itself a breach of the treaty. The federal government generally avoids such preventable breaches by withholding ratification of treaties that require implementation until implementation is complete.¹⁹

Customary international law has two elements: a settled state practice, and the view that this practice is legally obligatory, rather than simply a matter of courtesy or morality. The second element is referred to as "*opinio juris*". Examples are sovereign immunity, sovereign equality, and universal crimes such as crimes against humanity. Entrenched rules of customary international law from which no derogation is permitted are referred to as "peremptory norms".²⁰ Canadian courts may adopt rules of customary international law as common law rules, in the absence of conflicting legislation.²¹

The presumption of conformity is a "rule of judicial policy" that operates as another means of incorporating treaties and customary international law into Canadian domestic law. It is presumed that legislation is meant to comply with international law, and Canada's international law obligations.²²

Finally, judicial decisions are a subsidiary source, and are not in themselves international law. Use of decisions from courts of other countries is generally referred to as comparative law, as opposed to international law.

¹⁹ van Ert, *supra* note 17 at 234.

²⁰ *Vienna Convention*, *supra* note 18, art. 53.

²¹ *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 36-39 [*Hape*].

²² *Ibid.* at para. 53; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 330.

Judicial Globalization – The Factors at Work

In a recent speech to the American College of Trial Lawyers, Chief Justice McLachlin adopted this definition of globalization:

The late 20th century gave rise to a new phenomenon — beloved by some, loathed by others — that of “globalization.” Definitions of the phenomenon are as varied as the sentiments it provokes. Yet almost all would agree with Drezner’s description: globalization is a process by which “technological, economic, and political innovations ... have drastically reduced the barriers to economic, political, and cultural exchange.”

Key to globalization is the reduction of barriers, accompanied by a correlative increase in the sharing of knowledge and ideas. This is happening everywhere, in all areas of human activity.²³

The Chief Justice went on to acknowledge that legal ideas transcend national boundaries and globalization applies to and affects the law. She and other authors have discussed the factors that are contributing to that process in Canada and the United States.²⁴ I have taken the liberty of adapting their comments to create eight interrelated factors.

1. Breakdown of national barriers

The increased ease of travel, transport, and communication is of course well known and has many implications for globalization. One consequence has been the proliferation of international agreements. In 2007, Canada had signed or was a party to almost 4,000 treaties. Two of the most obvious and familiar to us in our daily work are the 105 extradition treaties now ratified by Canada, and the *Hague Convention on the Civil Aspects of International Child Abduction*.²⁵

As well, there have been amendments to give domestic criminal law extra-territorial effect. Section 7 of the *Criminal Code* sets out offences that follow Canadian citizens,

²³ Chief Justice Beverley McLachlin, P.C., “Canada and the United States: A Comparative View of the Use of Foreign Law” (Remarks delivered to the American College of Trial Lawyers Northwest Regional Conference, Jasper, Alberta, 8 August 2009) at 1.

²⁴ Slaughter, “Globalization” *supra* note 16; Rahdert, *supra* note 2; The Hon. Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights” in Martin H. Belsky, ed., *The Rehnquist Court: A Retrospective* (Oxford: Oxford University Press, 2002); McLachlin, *ibid.*

²⁵ *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T. S. 1983 No. 35 (entered into force 1 December 1983).

victims, ships, and planes around the world, and permits them to be prosecuted in Canada, regardless of where they took place. Under subsections 7(2.3) and (2.31) you may find yourself hearing a trial in which the events took place in outer space.

2. Increase in cross-border issues

Human rights, international crime, trade, finance, terrorism, the environment, health, intellectual property – the list of issues that transcend national boundaries and arrive in domestic courts continues to grow, and results in inevitable judicial exchanges. The ubiquitous nature of these issues creates a growing sense of common judicial enterprise that engages core values and standards.²⁶ Ian Donald's recent Hutcheon paper on *International Law in Environmental Disputes* was an excellent example of this in the environmental field.

The international convergence of constitutional human rights norms has been an area of particular activity since World War II, galvanized by the proliferation of international human rights instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Canada has been an important participant in this process since the proclamation of the *Charter of Rights and Freedoms*.

3. New and complex domestic issues

In the absence of national guidelines for novel issues, the search for guidance may lead to an examination of how the international community or the domestic courts in other countries have dealt with them. Issues such as the treatment of the Guantanamo prisoners have led judges to search beyond national borders for assistance.

4. Creation of transnational courts

The array of treaties and international legal obligations has led to a need for international courts and tribunals to administer them. In 2007, 17 such courts were classified as having a broad and sustaining impact:

²⁶ Slaughter, "Globalization" *supra* note 16 at 1111; McLachlin, *supra* note 23 at 4.

1. International Court of Justice (ICJ)
2. International Tribunal for the Law of the Sea (ITLOS)
3. International Criminal Tribunal for the former Yugoslavia (ICTY)
4. International Criminal Tribunal for Rwanda (ICTR)
5. International Criminal Court (ICC)
6. Special Court for Sierra Leone (SCSL)
7. European Court of Human Rights (ECHR)
8. Inter-American Court of Human Rights (IACHR)
9. World Trade Organization dispute settlement system, and, in particular, the Appellate Body (WTO AB)
10. Court of Justice of the European Communities (along with the Court of First Instance) (ECJ)
11. European Free Trade Area Court of Justice (EFTA Court)
12. Court of Justice of the Andean Community
13. Caribbean Court of Justice (CCJ)
14. Permanent Review Court of the Mercosur
15. Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa
16. Court of Justice of the Economic Community of West African States
17. Court of Justice of the Economic and Monetary Community of Central Africa.²⁷

Since 2007, two more could be added to that list: the Extraordinary Chambers in the Courts of Cambodia, which is prosecuting the Khmer Rouge leaders who are still alive, and the Special Tribunal of Lebanon, which has been established to try those responsible for the death of former Prime Minister Rafiq Hariri, and those who died with him.

These courts fall into four broad categories: state-only courts, such as the International Court of Justice; human rights courts, such as the European Court of Human Rights; courts originating in regional economic and political agreements, such as the Caribbean Court of Justice and the Court of the European Free Trade Agreement; and international criminal courts, such as the ICTY and the ICTR.

²⁷ Daniel Terris, Cesare P.R. Romano, & Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford: Oxford University Press, 2007) at 4-8.

Although Canada is not directly involved in any of these courts, some of them have had an impact on our legal system.

First, given the role that English law has played in our common law, England's membership in the European Union gives the legal system that has developed from that community some relevance for us. The national courts of member nations have a largely cooperative relationship with the European Court of Justice and the European Court of Human Rights and their jurisprudence has become increasingly intertwined. Section 2.1 of the *Human Rights Act 1998 (U.K.)*²⁸ provides that a court or tribunal in the United Kingdom is obliged to consider any relevant decision or advisory opinion of the ECHR when considering a matter that involves rights under the *European Convention*.

Second, Canada enacted the *Crimes Against Humanity and War Crimes Act*²⁹ to comply with article 88 of the *Rome Statute of the International Criminal Court*, which required states parties to ensure they had procedures available to deal with universal crime. The *Act* permits prosecution for genocide, crimes against humanity, and war crimes in Canada, regardless of where they occurred. To date, the only prosecution that has taken place under that statute is *R. v. Munyaneza*.³⁰ Munyaneza was convicted of a number of crimes under the *Act*, arising from his role as a militia leader in the Rwanda genocide. He was prosecuted here as he moved to Quebec in 1997.

Further, the Supreme Court of Canada has acknowledged the precedential value of decisions from a number of these Courts. For example, in *Mugasera v. Canada*³¹ it relied on decisions from the ICTY and the ICTR to redefine the elements of a crime against humanity as established in *R. v. Finta*³², stating:

Since *Finta* was rendered in 1994, a vast body of international jurisprudence has emerged from the International Criminal Tribunal of the Former Yugoslavia ("ICTY") and the ICTR. These tribunals have generated a unique body of

²⁸ 1998, c. 42.

²⁹ S.C. 2000, c. 24.

³⁰ *R. v. Munyaneza*, 2009 QSSC 2201.

³¹ *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 [Mugasera].

³² *R. v. Finta*, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513.

authority which cogently reviews the sources, evolution and application of customary international law. Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law. Therefore, to the extent that *Finta* is in need of clarification and does not accord with the jurisprudence of the ICTY and the ICTR, it warrants reconsideration.³³

While Canada is a member of the Organization of American States, it has declined to ratify the *American Convention on Human Rights* and participate in the Inter-American Court of Human Rights, which was established under that convention. The Canadian government cites inconsistencies with international norms and potential conflicts with Canadian law, for example in the areas of censorship, extradition, right to life, and affirmative action, to justify its non-participation. Nevertheless, in 1990 Venezuela and Uruguay tried unsuccessfully to have Madam Justice Bertha Wilson elected a judge of the Inter-American Court of Human Rights.

That raises the point that, while several Canadians have served as judges on these courts, to my knowledge no federally appointed Canadian judge has done so. Philippe Kirsch, who served six years as the first President of the ICC, was a Canadian diplomat. Professor Ronald St. John Macdonald, a Canadian academic, served as the only non-European judge of the ECHR for 18 years. At least one Provincial Court Judge from Quebec has taken a leave of several months to serve as a judge in Kosovo. The bar that precludes federally appointed judges from pursuing such opportunities is section 55 of the *Judges Act*. In 1996, Parliament had to pass a special amendment to section 56 of the *Act* to permit Madam Justice Louise Arbour, who was then on the Ontario Court of Appeal, to take a leave from her judicial duties to serve as the prosecutor of the ICTY.

5. Constitutional cross-fertilization

This occurs primarily through the use of comparative law by domestic courts. It is not a new phenomenon but, whereas the United States Supreme Court used to be the only

³³ *Mugasera, supra* note 31 at para. 149.

show in town, the practice has expanded due to the proliferation of new democracies and associated constitutional courts created since the Second World War.³⁴ In 2003, Justice Sandra Day O'Connor observed that of the 190 nation states in the world, 120 are now democracies in which the rule of law, independence of the judiciary and a global view of human rights are embedded.³⁵

These new constitutional courts, lacking history and precedent, have been more apt to look abroad for guidance in constitutional first principles.³⁶ The Constitutional Court of South Africa is a good example. Its “transformational” constitution drew on law from Canada, the United States, Germany, the ECHR, and Malaysia. Our *Charter* was a particular source of inspiration.³⁷ Its drafters foresaw that foreign sources would play a pivotal role in the development of its jurisprudence, and included specific provisions in the Constitution dealing with international law:

39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.

233. Application of International Law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.³⁸

A similar pattern can be found in the early stages of Canadian jurisprudence. For example, prior to Confederation, the courts in this country showed a tendency to reject English decisions in favour of those from the United States due to their similar

³⁴ Rahdert, *supra* note 2 at 562.

³⁵ The Hon. Sandra Day O'Connor, (Remarks delivered at the Southern Center for International Studies, Atlanta, Georgia, 28 October 2003).

³⁶ Rahdert, *supra* note 2 at 631.

³⁷ Davis, *supra* note 13; Goldstone, *supra* note 13.

³⁸ *Bill of Rights*, being chapter 2 of the *Constitution of the Republic of South Africa 1996*, No. 108 of 1996.

conditions.³⁹ For example, in 1856 Chief Justice Halliburton made this comment in *Fairbanks v. Union Marine Insurance*:

In a new country like this — changing in its aspect, conditions, requirements, with every returning year; where new interests, new combinations, and new difficulties are perpetually arising, it is impossible to apply stringent rules with the same unvarying fixity that marks their applicability to the circumstances of old and more stable countries. How can the same commercial rules be applied to a sparsely populated country — designated only by its latitude and longitude and a few log huts

In a similar vein, Chief Justice McLachlin reported that use of American authorities by the Supreme Court of Canada doubled in the first ten years after the *Charter*.⁴⁰

There is an evolutionary quality to this process. While the Constitutional Court routinely drew on foreign sources in developing the jurisprudence of the new South Africa, its decisions have also developed its own jurisprudence, and it has come of age and now provides guidance for others. As Judge Guido Calabresi of the United States Court of Appeals, Second Circuit, has observed, such “constitutional offspring” can be very useful. “Wise parents do not hesitate to learn from their children”.⁴¹

A recent exchange between the Constitutional Court of South Africa and the Supreme Court of Canada dealing with capital punishment demonstrates this evolutionary process. *The State v. Makwanyane*⁴² was one of the first judgments of the Constitutional Court, and held that the death penalty in South Africa was unconstitutional. In reaching that conclusion, the Court conducted a wide-ranging review of international and foreign comparative law, including a number of Canadian cases. Later, in *United States of America v. Burns*⁴³, the Supreme Court of Canada turned to international and foreign law to support its conclusion that the abolition of the death penalty reflects a concern increasingly shared by most of the world’s democracies, and that the Minister had to seek assurances that, if extradited and convicted, Burns and Rafay would not be executed. In doing so, the court endorsed the

³⁹ J.M. MacIntyre, “The Use of American Cases in Canadian Courts” (1966) U.B.C. L. Rev. 478 at p. 479-483; *Fairbanks v. Union Marine Insurance* (1856) 3 N.S.R. 67 at 72.

⁴⁰ McLachlin, *supra* note 23 at 6.

⁴¹ *United States of America v. Then*, 56 F.3d 464 (2nd Cir. 1995).

⁴² *State v. Makwanyane*, CCT 3/94 (S. Afr. Const. Ct.).

⁴³ *United States of America v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 [*Burns*].

views expressed in *Makwanyane*. Shortly after this, the Constitutional Court in *Mohamed v. President of South Africa*⁴⁴ relied on *Burns* in declaring that Mohamed's constitutional rights had been infringed when he was handed over to American authorities without an assurance that the death penalty would not be imposed.

6. Judicial Co-operation or Comity

This is directed to harmonizing global litigation through communication with and deference to foreign courts, and encourages dialogue between the adjudicative bodies of the world community. British Columbia has two ongoing examples of this.

The first is the adoption of *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* of the American Law Institute as part of a transnational insolvency project. The importance of coordination and cooperation in cross-border insolvency and reorganization has led to the endorsement of direct judicial communication across borders where appropriate and necessary.⁴⁵

Cross-border judicial communication has also been endorsed in cases involving child abduction. In *Hoole v. Hoole*⁴⁶, Madam Justice Martinson wrote a characteristically lucid judgment recounting the background to its development. The Canadian Judicial Council has formed a Special Committee on International Parental Child Abduction, whose members are part of a national and international network of liaison judges directed to receive and channel requests for international judicial communications in this area.

7. International judicial exchanges and education

Many of you are aware of the numerous opportunities for international judicial exchanges and education. Organizations such as the International Organization for Judicial Training, the International Association of Women Judges, and the International

⁴⁴ *Mohamed v. President of South Africa*, CCT 17/01 (S. Afr. Const. Ct.).

⁴⁵ "Notice to the Profession Re: Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" (November 22, 2004), online: Courts of British Columbia <www.courts.gov.bc.ca/supreme_court/Practice_directions_and_notices>.

⁴⁶ *Hoole v. Hoole*, 2009 BCSC 1248.

Society for the Reform of Criminal Law regularly hold conferences that provide opportunities for judges to meet colleagues from other nations.

The National Judicial Institute has an active international programme. They have recently finished projects in China, the Ukraine, and the Philippines, and are exploring future possibilities in Pakistan, Sudan, and the Ukraine. As many of you know, judges who are interested in doing international work may register on NJI's JEDNET, a roster for Canadian judges who wish to have their names considered for such work. The Canadian Judicial Council has created a set of ethical guidelines to ensure that participation in these projects does not conflict with our judicial duties.

8. Availability of comparative and international sources

When Professor MacIntyre wrote his article in 1966, he observed that one reason that the use of American cases in British Columbia decisions had declined was that there was only one complete set of the American reports in British Columbia.⁴⁷

The advent of the Internet of course has changed that dramatically. The Treaty Section of Foreign Affairs Canada maintains a website at www.treaty-accord.gc.ca that lists all treaties to which Canada is a party. This can be searched by subject, keyword, date, or publication number, and provides a list of parties, the date of ratification, and the date of entry into force.

There are also numerous sites on which domestic cases from other countries are accessible. Lexis Nexis now includes collections of American, United Kingdom, Australian, and New Zealand cases and statutes, as well as German, Chinese, and Japanese databases. Westlaw International has similar resources.

These are other resources with large databases:

- www.worldlii.org has 899 databases from 123 countries.
- CODICES is operated by the European Commission for Democracy through Law that collects and digests decisions of constitutional courts and courts of

⁴⁷ MacIntyre, *supra* note 39 at 489.

equivalent jurisdiction around the world in 24 languages. The entire database can be searched by a key word or phrase.

- www.globalcourts.com is a non-commercial project edited by Chief Judge Stein Schjolberg of the Moss District Court of Norway. It links to the websites of 129 supreme courts around the world.

Judicial Dialogue

I want to offer one example of how these factors have produced transnational judicial dialogue. The plight of the prisoners held at Guantanamo Bay is a good example of a unique situation touching a number of nations, whose domestic courts have looked to each other for assistance in determining their status and their fate. I am grateful to my law clerk, Aileen Smith, for the following summary of these decisions.

In response to the attacks of September 11, 2001, the US Congress granted former President Bush the authority to use “all necessary and appropriate force” against those responsible for the attacks⁴⁸. The ensuing hostilities led to the capture and indefinite detention of many “enemy combatants” at Guantanamo Bay which, in turn, led to a series of legal challenges to their detention, first in US courts and then in various courts around the world, including in Canada.

The first Guantanamo detainee cases heard by the US Supreme Court were *Hamdi v. Rumsfeld*⁴⁹, which involved a US citizen, and *Rasul v. Bush*⁵⁰, which involved non-nationals. The Court held in both cases that the detainees are entitled to challenge their detention in US courts. In response, Congress passed the 2005 *Detainee Treatment Act*, which mandates the transfer of detainees’ petitions to military commissions, with only a limited right of appeal.

⁴⁸ *Authorization for Use of Military Force*, 115 Stat. 224, enacted September 18, 2001.

⁴⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁵⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

This regime was challenged and found to be in violation of both the *Uniform Code of Military Justice* and the *Geneva Convention* in *Hamdan v. Rumsfeld*⁵¹. In response, Congress passed the 2006 *Military Commissions Act*, which further stripped detainees of their legal rights. Last year, this new regime was challenged in *Boumediene v. Bush*⁵². The Court again held that the *habeas corpus* rights of Guantanamo detainees were being unconstitutionally suspended with no adequate substitute.

Some of these decisions of the US Supreme Court do consider the obligations of the US under international conventions, but none make reference to decisions of foreign courts. However, at the same time as these cases were being brought before US courts, detainees who were either citizens or residents of other countries were making claims at home against their own governments, demanding various kinds of diplomatic aid or disclosures. The result of these actions is a growing body of international jurisprudence in relation to Guantanamo.

These cases provide a good example of judicial globalization in several respects: because of their frequent reference to international treaties and decisions of the ECHR or other international bodies, because of their obvious attention to the proceedings taking place before the US Courts, and also because they demonstrate the way in which novel issues can result in dialogue between courts of various nations that are being asked to grapple with similar questions.

In their 2002 decision in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*⁵³, the English Court of Appeal rejected the claim of a British national being held at Guantanamo who requested that the Foreign Office be compelled to take action on his behalf. The Court of Appeal held that the Foreign Office is not under an enforceable duty to provide diplomatic protection, but neither is its discretion completely immune from review by the courts. That judgment has become a leading case in this new body of “Guantanamo jurisprudence”.

⁵¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁵² *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

⁵³ *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 [Abbasi].

Two years later, the Constitutional Court of South Africa, in *Kuanda v. President of South Africa*⁵⁴, had to decide whether the government was under a duty to provide diplomatic aid to South Africans being held in Zimbabwe. The Court relied heavily on the *Abbasi* decision for guidance and, like the English court, rejected the claim.

In 2006, the English Court of Appeal again reviewed a decision of the Foreign Office not to request the release of Guantanamo detainees in *Al Rawi v. Secretary of State for Foreign and Commonwealth Affairs*⁵⁵. Citing both *Abbasi* and *Kuanda*, Lord Justice Laws noted that the two decisions “march together” and called the South African decision “a powerful and important authority”⁵⁶. In the result, he followed both those cases in denying the claim.

In 2007, the Federal Court of Australia in *Hicks v. Ruddock*⁵⁷, relied heavily on the *Abbasi* decision in considering the case of an Australian Guantanamo detainee. It found that *Abbasi* could be distinguished on the facts, and found in favour of Mr. Hicks.

In 2009, Justice O’Reilly of the Federal Court in *Khadr v. Canada*⁵⁸ cited all of the above cases. In the result, he found that the government is obliged to seek Mr. Khadr’s repatriation to Canada, on the basis that his section 7 *Charter* rights had been infringed. Justice O’Reilly cited propositions from the *Al Rawi* and *Abbasi* decisions, explicitly adopted the reasoning of the South African Constitutional Court in *Kuanda*, and included a quotation from the *Hicks* judgment, in which the Australian court acknowledges that this area of law is “far from settled”.

The Federal Court decision was affirmed by the Federal Court of Appeal.⁵⁹ Interestingly, the majority judgment did not make any mention of the line of cases just reviewed, but implicitly distinguished them by focussing solely on the *Charter* infringement by Canadian officials, rather than on foreign policy decisions. Justice Nadon, in dissent, would have granted the government’s appeal and referred to both

⁵⁴ *Kuanda v. President of South Africa*, CCT 23/04 [*Kuanda*].

⁵⁵ *Al Rawi v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA Civ 1279 [*Al Rawi*].

⁵⁶ *Ibid.* at paras. 106-107.

⁵⁷ *Hicks v. Ruddock*, [2007] FCA 299 [*Hicks*].

⁵⁸ *Khadr v. Canada (Prime Minister)*, 2009 FC 405, [2009] F.C.J. No. 462.

⁵⁹ *Khadr v. Canada (Prime Minister)*, 2009 FCA 246, [2009] F.C.J. No. 893.

Abassi and *Al Rawi* in support of his view that the executive should enjoy wide discretion in matters of foreign relations.

The Supreme Court of Canada has granted leave to appeal. Given the approach taken by the Federal Court of Appeal, it is unclear what use will be made of the decisions of foreign courts in this area. What is clear from this case study is that courts around the world, when faced with the claims of Guantanamo detainees, are at least reading each other's decisions and, in some cases, relying on them, in deciding how to respond to this unique situation.

What is happening in Canada?

Canada is well suited historically to move toward judicial globalization. Judicial use of sources from other jurisdictions has always been an aspect of Canadian jurisprudence given our Commonwealth background, federal system of governance, the presence of both civil and common law in the country, and Canada's broad participation in and endorsement of international conventions. The *Charter* has led to heightened interest in comparative human rights in our courts. So how does judicial globalization look on the ground here?

1. What the Supreme Court of Canada says

Comments from Supreme Court judges show some enthusiasm about the participation of Canada's courts in the process of judicial globalization:

Justice La Forest.:

Nevertheless, the result of the developments I have described — and there are others — is that in the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their

role in the international order and national judges adopt an international perspective.⁶⁰

Justice L'Heureux-Dubé:

In recent years, globalization in the process of judging and lawyering and growing international links and influences have affected judicial decisions, particularly at the level of top appellate courts throughout the world. And as courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions, particularly the United States, and then apply them or modify them for their own jurisdiction. Rather cross-pollination and dialogue between jurisdictions is increasingly occurring.⁶¹

Chief Justice McLachlin:

This is the Canadian experience — one that has, from the beginning, accepted foreign law as capable of providing useful insights and perspectives. Foreign law is used selectively, where it is relevant to and useful in resolving disputes.⁶²

Justice LeBel:

The high profile nature of these cases [using principles of international law] has provoked much debate regarding the Supreme Court of Canada's interpretation or application of international law. At the heart of the debate is the tension between the democratic principle underlying the internal legal order and the search for conformity or consistency with a developing and uncertain external legal order. Some feel the Court has given undue weight to principles of international law, others believe the Court should expand on and develop a more principled approach to its use of international law in deciding domestic cases.⁶³

2. What others say about the Supreme Court of Canada

My research revealed universally positive reports about the Supreme Court of Canada and its contribution to comparative jurisprudence.

Several American authors, including Justice Ruth Bader Ginsburg, have observed that the Supreme Court of Canada is cited more widely abroad than the United States Supreme Court. Justice Ginsburg stated this is because “you will not be listened to if

⁶⁰ The Hon. Gérard La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) Can. Y.B. Int'l. L. 89 at 100-101.

⁶¹ L'Heureux-Dubé, *supra* note 24 at 234-235.

⁶² McLachlin, *supra* note 23 at 8.

⁶³ The Hon. Louis LeBel & Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 Sup. Ct. L. Rev. (2d) 23 at 24.

you don't listen to others".⁶⁴ Others have expressed the view that Canada is disproportionately influential as a "donor" of comparative constitutional ideas because its ideas are not American, and it is seen as "reflecting an emerging international consensus rather than existing as an outlier".⁶⁵

A statistical study in 2008 of the use of foreign decisions by Australian State Supreme Courts indicates that in the last 40 years the citation of Canadian cases has increased to the point that the only courts cited more frequently are those of New Zealand, while citations of American cases have decreased significantly.⁶⁶

A more backhanded compliment came from a similar study in New Zealand in 2007. Its authors approached their task with the view that use of overseas authority in *New Zealand Bill of Rights Act* case law is unprincipled "ad hockery", and reported that Canadian courts are cited by New Zealand courts far more than those from any other jurisdiction and twice as many times as American cases, since Canadian judges are "the most judicially activist in the common law world – the most willing to second guess the decisions of the elected legislatures".⁶⁷

President Barak of the Supreme Court of Israel and the Honourable Richard Goldstone, a former judge of the Constitutional Court of South Africa, have both lauded the Supreme Court of Canada for its decisions and its use of comparative law.⁶⁸

3. What is actually happening in Canada?

I think it is fair to say that reference to foreign sources in Canadian courts at all levels is becoming more frequent, and arises in a variety of contexts. To give just a few examples, the courts in this province have recently addressed foreign sources in

⁶⁴ Adam Liptak, "Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa" *The New York Times* (11 April 2009), online: The New York Times <www.nytimes.com>.

⁶⁵ Frederick Schauer, "The Politics and Incentives of Legal Transplantation" in Joseph S. Nye Jr. & John D. Donahue, eds., *Governance in a Globalizing World* (Washington: Brookings International Press, 2000) at 258; Anne-Marie Slaughter, "A Brave New Judicial World" in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 277 at 289.

⁶⁶ Russell Smyth, *Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis* (2008), online: <http://works.bepress.com/russell_smyth/1>.

⁶⁷ James Allan, Grant Huscroft & Nessa Lynch, "The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite" (2007) 11 Otago L. Rev. 433.

⁶⁸ Barak, *supra* note 15; Goldstone, *supra* note 13.

dealing with a section 10(b) *Charter* violation⁶⁹, a prosecution involving sexual offences against children in Cambodia, Columbia, and the Philippines under section 7(4.1) of the *Code*⁷⁰, statutory limits on the right to strike⁷¹, the right to shelter⁷², and an application to stay a class action and proceed instead with arbitration.⁷³

Having said that, a study done in 2004, which reviewed Supreme Court of Canada *Charter* decisions from 1998-2003, does not provide a great deal of support for the view that the Court is relying significantly on foreign jurisprudence or international instruments in reaching its decisions. Only 34 of the 402 cases made reference to these sources. Within those cases there were 87 individual references – 60 to foreign jurisprudence and 27 to international instruments or institutions. Over half of the references were to American jurisprudence, and most of the others were to that of Commonwealth countries. About half of the references were categorized as “supportive”, 16 explicitly distinguished the foreign sources, and only one followed the foreign jurisprudence. The authors viewed this positively, however, as reflecting an open-minded approach, receptive to new approaches but remaining strongly grounded in Canadian domestic law.⁷⁴

The Canadian academic community has not been as positive as the international community about the way in which Canadian judges use foreign sources. What follows is a compilation of commentary from several academics.⁷⁵ Mr. van Ert expresses a generic complaint repeated by several writers that the Supreme Court of Canada has “an inconsistent and even unintelligible approach to international human rights and their

⁶⁹ *R. v. Osmond*, 2007 BCCA 470, 227 C.C.C. (3d) 375.

⁷⁰ *R. v. Klassen*, 2008 BCSC 1762, 240 C.C.C. (3d) 328.

⁷¹ *British Columbia Teachers' Federation v. British Columbia Public School Employers Assn.*, 2009 BCCA 39, 306 D.L.R. (4th) 144.

⁷² *Victoria (City) v. Adams*, 2008 BCSC 1363, 299 D.L.R. (4th) 193.

⁷³ *Seidel v. TELUS Communications Inc.*, 2009 BCCA 104, [2009] B.C.J. No. 469.

⁷⁴ Bijon Roy, “An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation” (2004) 62 U.T. Fac. L. Rev. 99.

⁷⁵ Brunnée & Toope, *supra* note 17; van Ert, *supra* note 17; William A Schabas & Stephane Beaulac, *International Human Rights and Canadian Law*, 3d ed. (Toronto: Thomson Carswell, 2007); Anne Warner La Forest, “Domestic Application of International Law in Charter Cases: Are We There Yet?” (2004) 37:1 U.B.C. L. Rev. 157; Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 535; Kent Roach, “Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience” (2005) 40 Tex. Int'l L.J. 537.

sources” and has failed to develop a theoretical basis to guide courts and counsel in the use of such law.⁷⁶

Professor Anne Bayefsky describes the well-intentioned but inaccurate use of foreign sources by Canadian judges:

While judicial enthusiasm for using international human rights law has grown dramatically since the advent of the *Charter*, judicial comprehension of public international law has not. The references to international law include many examples of basic errors. Canadian courts have spoken of ratification of General Assembly or ECOSOC Resolutions, and ratification of treaties by provinces. They have misstated the jurisprudence of the European Convention on Human Rights, confused the European Court of Human Rights with the European Court of Justice, identified Canada as a signatory to the European Convention on Human Rights.⁷⁷

The American experience and Canadian academic commentary suggest that domestic judges encounter three pitfalls in using foreign sources: they are too liberal; they are too conservative; and they are too ignorant. Clearly, we can't please everyone.

The view that use of foreign sources is too liberal is of course rooted in the American debate, and directed primarily at comparative law. Once the extremes of originalism and American exceptionalism are removed, it raises three points that have relevance for Canadian judges.

The first is the familiar refrain of judicial activism, heightened to “judicial adventurism” in the realm of comparative law by one author.⁷⁸ Its proponents take the view that comparative law is not democratic as foreign judges have no role to play in shaping the domestic law of another nation.

The second sees the use of international law as cherry-picking, epitomized by Justice Scalia's comment in *Roper* that the majority looked over the heads of the crowd and picked out its friends. Critics on this point describe the use of foreign sources as opportunistic and haphazard, and comparative arguments as simplistic, highly selective,

⁷⁶ van Ert, *supra* note 17 at 326.

⁷⁷ Anne F. Bayefsky, “International Human Rights Law in Canadian Courts” in Benedetto Conforti & Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff Publishers, 1997) 295 at 325.

⁷⁸ Christopher McCrudden, “Judicial Comparativism and Human Rights” in Esin Örüçü & David Nelkin, eds., *Comparative Law: A Handbook* (Portland, Oregon: Hart Publishing, 2007) 371.

and result-driven.⁷⁹ They would ask why, in death penalty cases, judges make no reference to the practices in China and Texas.

The third point is that foreign sources are irrelevant because each country is so unique in its historical, cultural, institutional, and political background. Judge Posner, of the Seventh Circuit of the United States Court of Appeals, as reported by Justice Bader Ginsberg, expresses it this way:

“To cite foreign law as authority is to flirt with the discredited ... idea of a universal natural law; or to suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.”⁸⁰

These points, however, are not unique to comparative law. Allegations of activism and cherry-picking are familiar to Canadian judges in the domestic context. Relevance, as always, is a matter of weight. None of these arguments stand in the way of using foreign sources. They simply address the traditional difficulties of judging.

The second criticism, that Canadian judges are too conservative in their use of foreign sources, is more complex. It has been nicely expressed by Jutta Brunnée and Stephen Toope:

... Canadian courts seem to be embracing international law, employing fulsome words of endearment, but the embrace remains decidedly hesitant and the affair is far from consummated.⁸¹

The starting point in understanding this complaint is the oft-quoted passage from the dissenting judgment of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*⁸²:

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that

⁷⁹ Rahdert, *supra* note 2 at 587.

⁸⁰ The Hon. Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind’: The Value of a Comparative Perspective in Constitutional Adjudication” (7 February 2006), online: United States Supreme Court <http://supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html>.

⁸¹ Brunnée & Toope, *supra* note 17 at 4.

⁸² *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161.

these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter’s* protection”. The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the *Charter’s* protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada’s international obligations under human rights conventions.⁸³ [emphasis added]

The “relevant and persuasive” approach suits comparative law well. But Toope, Brunnée, and others complain that Canadian judges have become stuck on that approach and use it too broadly, treating all foreign sources as merely persuasive. They fail to give adequate recognition to the presumption of conformity, which provides that domestic law should be construed as complying with international law and Canada’s international law obligations.⁸⁴ They are inconsistent and timid in recognizing binding norms of customary international law and affirming that these are part of domestic law. They take an overly restrictive view in holding that treaties can only be implemented by express legislation, when treaties are commonly transformed into Canadian law by implication. In short, by treating all sources of international law as merely persuasive, the courts eviscerate its impact and reduce international law to the same status as comparative law. What is needed is a principled and coherent approach, clarifying what effect is given to international law and why in any given case.

A full analysis of these complaints is beyond the scope of this paper. However, three decisions are frequently cited to demonstrate them: *Baker v. Canada (Minister of Citizenship and Immigration)*⁸⁵, *Suresh v. Canada (Minister of Citizenship and*

⁸³ *Ibid.* at 84-85.

⁸⁴ Sullivan, *supra* note 22 at 330; Hape, *supra* note 21 at para. 53.

⁸⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [Baker].

Immigration)⁸⁶, and *Ahani v. Her Majesty the Queen*.⁸⁷ I will set out an admittedly simplistic account of each in an effort to elucidate these criticisms.

Ms. Baker was a Jamaican citizen who overstayed her visitor's visa by 11 years, and had four Canadian-born children. When she was ordered deported, she asked to be allowed to make her application for permanent residence from inside the country on humanitarian and compassionate grounds. That request was refused. On judicial review Justice L'Heureux-Dubé, writing for the majority, relied on international law to find the Minister's decision unreasonable as it was "completely dismissive" of the children's interests. She noted that the importance of the children's interests was evident in the *Convention of the Rights of the Child* and other international instruments ratified by Canada. However, because these had not been implemented by statute, she concluded the provisions of the *Convention* had no direct application to Canadian law. She mentioned the presumption of conformity, and decided that the values expressed in the *Convention* could nevertheless be used as an interpretive aid in deciding what was meant by "humanitarian and compassionate grounds" under the *Immigration Act*. She found the immigration officer was bound to consider those values when exercising his discretion, and his failure to do so was unreasonable.

Justice Iacobucci, in a brief dissenting judgment observed that because the *Convention* had not been implemented it had no force and effect and was irrelevant.

Both judgments have been criticized for minimizing the force of the *Convention* – the minority for ignoring it completely, and the majority for reducing it to an interpretive aid. The critics point out that the majority should have employed the presumption of conformity more clearly and with greater force. Properly applied, it would have permitted the majority to find that the *Immigration Act* must be interpreted to comply with the provisions, as opposed to just the values, of the *Convention*, even though it had not been implemented. As well, *Baker* is seen as a missed opportunity to clarify the status

⁸⁶ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 [*Suresh*].

⁸⁷ *Ahani v. Her Majesty the Queen* (2002), 58 O.R. (3d) 107, 208 D.L.R. (4th) 66 (C.A.) [*Ahani*].

of customary international law in Canada, and to conclude that the best interests of the child has solidified into a norm of customary international law.⁸⁸

Suresh attracts the same criticism with respect to treatment of customary international law. The Canadian government sought to return Suresh, a *Convention* refugee, to Sri Lanka on the basis that he was involved in Tamil terrorist organizations and was therefore a security risk. Suresh claimed that this would breach his section 7 rights, and that it was contrary to international law, as he faced a risk of torture on his return.

The court acknowledged that a section 7 inquiry into the principles of fundamental justice is informed not just by Canadian jurisprudence, but also by international law. It considered whether absolute prohibition against torture is a peremptory norm of international customary law, and found three “compelling indicia” that it is: multi-lateral instruments prohibiting it, the fact that no state has ever legalized torture or admitted to its deliberate practice, and international authority from a number of other nations that indicated this was a peremptory norm and rejected torture as a legitimate tool to combat terrorism. The Court nevertheless stopped short of declaring torture to be a peremptory norm of customary international law, and used the multiple and “compelling” international sources merely as interpretive aids. Critics of the decision wonder what more is needed to establish a peremptory norm.

Ahani was a companion case to *Suresh*. Having exhausted domestic remedies to prevent his deportation to Iran, Ahani applied to the U.N. Human Rights Committee for relief under the *Optional Protocol* to the ICCPR, which Canada has ratified but not expressly implemented. The Committee requested that Canada stay deportation so it could deal with the matter and Canada refused. Ahani’s application for an injunction was denied. The Ontario Court of Appeal upheld that decision, Justice Rosenberg dissenting. Apparently, counsel for both parties and the Court took the view that the ICCPR had not been domestically implemented in Canada because there was no express implementing legislation. The majority’s decision relied heavily on that fact.

⁸⁸ Brunnée & Toope, *supra* note 17; Schabas & Beaulac, *supra* note 75.

Notwithstanding that Ahani conceded the point, Mr. van Ert is particularly critical of the finding that Canadian law does not implement the ICCPR, describing it as an “oversimplification and simply wrong”. He says the decision in *Ahani* “verges on depicting Canada as a pariah among nations”, and maintains that the Court should have recognized that the ICCPR has clearly been implemented implicitly. He points out that it is the leading statement of civil and political international rights of this era. Prior to accession in 1976, Canada obtained an undertaking from all provinces to take measures to implement it. It has also been implicitly implemented by the *Charter*, which used it as both an inspiration and a model. Moreover, in international forums, Canada routinely argues that it has complied with the ICCPR through the enactment of the *Charter*.⁸⁹

Nor does *R. v. Hape*⁹⁰ fare much better in the academic community. One author, continuing with the romantic analogy of Brunnée and Toope, describes *Hape* in these terms:

In 2002, Jutta Brunnée and Stephen Toope described the approach of Canadian courts to international law as a “hesitant embrace,” an affair characterized by “fulsome words of endearment” yet “far from consummated.” In contrast, the majority judgment in *Hape* puts one more in mind of a spontaneous fling — a liaison of doubtfully sustainable intensity, resting on uncertain foundations, engaged in without full consideration of the consequences, and either covered up or only reluctantly justified to others through a series of partial, elusive, and sometimes self-contradictory rationalizations.⁹¹

The difficulties presented by these cases demonstrate the complexities of international law, and provide a segue to the third and central criticism of Canadian judges, which is that we lack “comparative literacy” as well as institutional competence in international law. The vast array of international instruments and conventions, the complexities surrounding their reception into Canadian law, and the historical, constitutional, legislative, and linguistic diversities that underlie decisions of foreign courts all make it difficult for many Canadian judges to be confident that they are understanding and using foreign sources properly.

⁸⁹ van Ert, *supra* note 17 at 248-250.

⁹⁰ *Hape*, *supra* note 21.

⁹¹ John H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007) *Can. Y.B. Int'l. L.* 55 at 94.

The same can be said for most lawyers. It has been my experience that self-represented litigants are more likely than lawyers to refer to international law.

The obvious answer, identified by many critics, is the need to educate the Bar, and count on them in turn to educate us. With that in mind, an examination of the curriculum at both British Columbia law schools revealed an impressive list of courses in international law:

UBC International Law Courses:

- Public International Law
- Indigenous Peoples in Comparative & International Law
- Law of Armed Conflict
- International Law Problems – This seminar focuses on the confluence of law, ethics, and international affairs.
- International Environmental Law
- Conflict of Laws
- International Trade Law
- International Taxation
- International Business Transactions
- Introduction to Asian Legal Systems
- Korean Law
- Trade & Investment in the People’s Republic of China
- Japanese Law
- Human Rights in Asia
- European Union Law
- Topics in Comparative Law – This seminar discusses contemporary legal problems by contextualizing them into three different levels (national, regional and international) and by analyzing them from the perspectives of private actors, courts and national and international regulators.
- Topics in Constitutional Law – A course on Comparative U.S./Canadian/Australian law.

UVIC International Law Courses:

- Law and Society in South East Asia
- Law of the European Union
- International Trade Law
- International Human Rights and Indigenous Peoples
- Advanced Tax: International Taxation

This raises some hope that international literacy for Bar will improve. In the meantime, it does no harm to be aware of these criticisms, and perhaps become more open to an approach that appreciates that international law may sometimes be something more than merely “relevant and persuasive”.

Conclusion

Returning to the concept of judicial globalization, Professor Slaughter describes the product of this process in these terms:

All this activity, from the most passive form of cross-fertilization to the most active cooperation in dispute resolution, requires recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems. It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders. This recognition is the core of judicial globalization, and judges, like the litigants and lawyers before them, are coming to understand that they inhabit a wider world.⁹²

I do not think we are there yet. Nevertheless, it is apparent that there are forces at work that, to return to the Chief Justice's definition of globalization, are reducing international barriers to judicial exchange, and creating a correlative increase in transnational judicial dialogue. We should be aware of this at several levels.

At the personal level, it is an opportunity to indulge intellectual curiosity, receive new ideas on familiar issues, and obtain valuable guidance and reassurance with respect to new problems. It is an opportunity to view what we are doing on a broader plane, beyond the binder or factum of the day.

At an institutional level, it is important to recognize and adapt to transnational issues that affect judging, and accommodate and learn from them through judicial cooperation, education, and exchanges.

At a global level, Canada has a strong international reputation. It has played a leading role in the development of international human rights standards in the political and diplomatic context. The Supreme Court of Canada enjoys an enviable international reputation in developing those standards in the jurisprudential context. Its decisions, of course, are derived from ours. While the international dialogue may be unfamiliar, we should not shy away from our role in this process of supporting and developing

⁹² Slaughter, "Globalization", *supra* note 16 at 1124.

international norms in appropriate cases. As Justice La Forest observed, Canadian courts are becoming international courts in many areas involving the rule of law.

The changes accompanying globalization are not over, and will present ongoing challenges for judges and Canadian jurisprudence. This description by Stephen Toope of where we find ourselves seemed an appropriate way to close:

The old metaphors of “national sovereignty” and “state legal system” are not yet dead. They are the very platform from which the metaphor of “transnationalism” is being launched. So we are living in an “in-between time” where, as T.S. Eliot suggests in his magical poem “Burnt Norton”, we suffer the disaffection of experiencing neither the illucidation of daylight nor the purification of darkness.⁹³

⁹³ Toope, *supra* note 75 at 536.