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Chanakya Sethi

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DOES THE CHARTER FOLLOW THE FLAG? REVISITING CONSTITUTIONAL EXTRATERRITORIALITY AFTER *R v HAPE*

Chanakya Sethi*

INTRODUCTION

Jacques Maritain, the noted philosopher and political thinker and a principal drafter of the Universal Declaration of Human Rights, once contended that “political philosophy must get rid of the word, as well as the concept, of Sovereignty.”¹ He reasoned as much “not because [sovereignty] is an antiquated concept,” or “because the concept of Sovereignty creates insuperable difficulties and theoretical entanglements in the field of international law,” but because “this concept is intrinsically wrong and bound to mislead us if we keep on using it.”² Maritain’s proposal may have been exceedingly bold and his criticisms perhaps too harsh, but they nonetheless resonate over half a century later in light of the Supreme Court of Canada’s recent decision in *R v Hape*.³

The judgment in *Hape*, where the Court concluded on the basis of international law, including principles of sovereign equality and comity, that the *Canadian Charter of Rights and Freedoms*⁴ cannot apply extraterritorially, has been described as “deeply problematic on many levels.”⁵ Criticisms from scholars of both constitutional law⁶ and international law⁷ have been far from reserved. John Currie, for example, has assailed the Court for giving Canadian government officials “a blank cheque ... to violate the *Charter* with impunity as long as they do so abroad.”⁸ Given *Hape*’s purported

* Chanakya Sethi is a graduate of Princeton University and a second-year JD student at Osgoode Hall Law School. He thanks the Journal’s editors and two faculty reviewers, Ron Atkey, and Cynthia Hill for their helpful comments and suggestions.

¹ Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951) at 29.

² *Ibid.*

³ 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁵ John Currie, “*Khadr*’s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the *Canadian Charter*” (2008) 46 Can YB Int’l Law 307 at 316 [Currie, “Tortured Determinations”].

⁶ See e.g., Kent Roach, “*R. v. Hape* Creates *Charter*-Free Zones for Canadian Officials Abroad” (2007) 53 Crim LQ 1.

⁷ See e.g., Amir Attaran, “Have *Charter*, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008) 87 Can Bar Rev 515; Currie, “Tortured Determinations,” *supra* note 5.

⁸ Currie, *ibid.*

grounding in principles of international law, it is not without some irony that the decision has been criticized for its reliance on an “incomplete—frankly, incorrect—view of international law,”⁹ the result of which is that the Court has “sacrifice[d] a basic aspect of Canadian sovereignty itself: namely expectations that Canadian officials respect *Charter* values when they act in their official capacity at home or abroad.”¹⁰

Equally troubling as the substantive outcome of *Hape*, however, is the criticism of the approach adopted by the Court in articulating its reasoning. The majority opinion has been faulted for its largely technical analysis of international law without any meaningful discussion of “the basic values and aspirations of the *Charter* or what the *Charter* means to Canada’s image of itself, especially when it presents itself to the world.”¹¹ Moreover, the Court is criticized for its “radical” approach to reconciling its own precedents, forsaking a scalpel in favour of a sledgehammer. The decision in *Hape* “does not build on or attempt to distinguish prior precedents in this area but rather rejects them, as a critic working outside of the system might do,” Kent Roach has argued, concluding that “[t]his is not the way that judges should develop the law.”¹²

The purpose of this essay is to accept the invitation implicit in these criticisms by revisiting *Hape* and asking anew: Does the *Charter* follow the flag?¹³ The importance of this question is self-evident. The *Charter* is a cherished part of Canada’s Constitution; the two decades of jurisprudence that have sought to shape and give life to its amorphous protections mark the signal achievement of the Supreme Court of Canada in its modern era. More pragmatically though, as Amir Attaran has suggested, “*Hape* is an imperfect judgment that cannot last.”¹⁴ If that is indeed the case, as the Court’s more recent jurisprudence strongly suggests it is, then an analysis of potential alternatives serves to advance discussion of this important question.

In this paper, I conclude that the Court’s reasoning in *Hape* rests on a flawed understanding of international law. Indeed, a more searching analysis reveals that there is ample basis to conclude that extraterritorial application of the *Charter*—far from being anathema to international law—is in harmony with emerging principles of state responsibility. An analysis of foreign jurisprudence provides added support for this conclusion. The question of international law aside, however, fidelity to the principles underlying the *Charter* necessitates an interpretation that contemplates extraterritorial application.

This paper is divided into three parts. In Part I, I review the decision in *Hape* on its own terms, limiting my discussion to those aspects of international law discussed by the Court itself. I attempt to show that the Court’s conclusions on Canada’s extraterritorial

⁹ Attaran, *supra* note 7 at 523.

¹⁰ Roach, *supra* note 6 at 1.

¹¹ *Ibid* at 4.

¹² *Ibid* at 3.

¹³ The diction of this question, and the title for this paper, were inspired by the title of an excellent book on the same topic in the American context: See Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (New York: Oxford University Press, 2009).

¹⁴ Attaran, *supra* note 7 at 1.

jurisdiction and the authority of Parliament are based on a flawed assessment of international law. I also argue that the Court's subsequent decision to recognize an exception to those conclusions exposes fatal contradictions within the *Hape* doctrine. In Part II, I propose a different way to look at the question of the *Charter*'s extraterritorial application through the lens of sovereign responsibility. I review several judgements of foreign high courts that show why this alternative approach is more consonant with emerging principles of international law. Finally, in Part III, I endeavour to demonstrate how the approach offered in Part II can be reconciled with the *Charter* and *Hape*, offering my view of how the Court might proceed in the future by building on the principal minority opinion in *Hape* itself.

I. THE DECISION

The judgement in *Hape* was at once unified and fractured. The case concerned the question of whether the *Charter* applied to searches of the accused's office premises in the Turks and Caicos conducted jointly by the Royal Canadian Mounted Police and local police.¹⁵ The accused brought an application in an Ontario court to exclude evidence collected from the searches on the basis that the searches, allegedly conducted without local warrants, infringed his section 8 rights against unreasonable search and seizure.¹⁶ On final appeal, the nine justices of the Court were unanimous in judgement—there had been no violation of *Charter* rights in this case—but three separate opinions offered three separate sets of reasons as to why. The crux of the debate focussed on the meaning of section 32(1) of the *Charter*, which governs its application:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.¹⁷

Justice LeBel, writing for the five-justice majority,¹⁸ articulated an entirely new approach to constitutional extraterritoriality based largely on conclusions as to

¹⁵ *Hape*, *supra* note 3 at paras 3-6.

¹⁶ *Ibid* at paras 11-14; *Charter*, *supra* note 4, s 8 ("Everyone has the right to be secure against unreasonable search or seizure"). See also *R v Hape*, 2002 CanLII 4900 (Sup Ct), aff'd 201 OAC 126 (available on CanLii) (CA).

¹⁷ *Charter*, *ibid*, s 32(1).

¹⁸ *Hape*, *supra* note 3 at paras 1-122.

international law and in doing so rejected several of the Court's key precedents.¹⁹ Justice Bastarache, writing for himself and two other justices,²⁰ declined to follow Justice LeBel in his emphasis on international law and instead articulated a new approach that, though grounded in the Court's prior precedents, also sought to reform them. Finally, Justice Binnie, writing for himself,²¹ concluded that *Hape* was a straightforward case that could fit within the Court's earlier precedents and declined to use the occasion to engage in wholesale reform of the Court's doctrine.

A. CONCLUSIONS BASED ON JURISDICTION

The majority opinion in *Hape* presents two concepts in international law—one a binding principle, the other non-binding—and suggests that both are instrumental to a proper interpretation of section 32(1). The first concept is sovereign equality, which is described as a “cornerstone of the international legal system.”²² According to Justice LeBel, the concept's “foundational principles—including non-intervention and respect for the territorial sovereignty of foreign states—cannot be regarded as *anything less than firmly established rules* of customary international law.”²³ In other words, a violation of the principle of sovereign equality is a violation of international law.²⁴ The second concept is comity, which includes the “rules observed by states in their mutual relations *out of politeness, convenience and goodwill*, rather than strict legal obligation.”²⁵ In contrast to sovereign equality, “comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations.”²⁶ Comity, in other words, is non-binding.

The distinction between the binding nature of the principle of sovereign equality and the non-binding principle of comity is of much importance to the judgement in *Hape*. As a result of its non-binding nature, the notion of comity “does not offer a rationale for condoning another state's breach of international law” because, as the majority

¹⁹ There is some debate as to whether crucial precedents—including most significantly *R v Cook*, which was previously the leading case on application of the *Charter* extraterritorially—were in fact overruled or not. The official case report suggests *Cook* was “distinguished,” but several observers, including Binnie J in his opinion in *Hape*, have concluded that *Cook* was overturned *sub silentio*. See *ibid* at para 182 (Binnie J, concurring); Currie, “Tortured Determinations,” *supra* note 5 at 313; Roach, *supra* note 6 at 1; H. Scott Fairley, “International Law Comes of Age: *Hape v. The Queen*” (2008) 87 Can Bar Rev 229 at 230, 238.

At least one scholar, however, has noted that the fact that *Cook* was not overruled explicitly is significant, especially to those who would like to abandon *Hape* and return to the core of the doctrine *Cook* espoused. See Attaran, *supra* note 7 at 547. See also *R v Cook*, [1998] 2 SCR 597, 164 DLR (4th) 1 [*Cook*].

²⁰ *Hape*, *ibid* at paras 123-80.

²¹ *Ibid* at paras 181-92.

²² *Ibid* at para 46.

²³ *Ibid* [emphasis added].

²⁴ *Ibid* at para 40ff.

²⁵ *Ibid* at para 47 [emphasis added].

²⁶ *Ibid*.

concludes, “the need to uphold international law may trump the principle of comity.”²⁷ It is worth pausing here to observe a few points which will have special relevance later in this paper. First, note the tentative nature of this conclusion: comity “may” be trumped; crucially, it is not *always* trumped in the face of an international law violation. Second, the question of whether a given state is exempted from adhering to principles of comity toward another state depends on that second state’s adherence to international law. And third, a hierarchy of norms is apparent: In sharp contrast to comity, sovereignty equality, as the “the linchpin of the whole body of international legal standards,” is a principle that is generally inviolable.²⁸

Having laid down these foundational principles, the majority in *Hape* then discusses the concept of jurisdiction. Drawing on well-known treatises, the Court observes that there are three distinct forms. The first, prescriptive jurisdiction, concerns “the power to make rules, issue commands or grant authorizations that are binding upon persons and entities.”²⁹ The second, enforcement jurisdiction, is “the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld.”³⁰ The third and final form, adjudicative jurisdiction, relates to “the power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force.”³¹

To illustrate the application of the above forms of jurisdiction, the majority places much reliance on—but misinterprets a key aspect of—the seminal case of the *SS Lotus*.³² Some background may be helpful: The case involved a collision between French and Turkish steamers on the high seas. The Turkish vessel was very heavily damaged and thus sank, killing eight. The French steamer, though badly damaged, managed to sail to the nearby Turkish port city of Constantinople. Soon after its arrival, however, the ship’s captain was arrested on charges of involuntary manslaughter. He was ultimately tried and convicted of various offenses under Turkish law by a Turkish court in Turkey. These facts afforded the Permanent Court of International Justice (“PCIJ”) an opportunity to offer its understanding of extraterritorial jurisdiction in its prescriptive, enforcement and adjudicative forms.

The PCIJ adopted a narrow view of enforcement jurisdiction, which was cited by the Court in *Hape*:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power [*i.e.*, enforcement jurisdiction] in any form in

²⁷ *Ibid* at para 51.

²⁸ *Ibid* at para 40. Of course, this assertion is limited to the context of the extraterritorial application of a given state’s laws in another state. The UN Security Council, under Chapter VII of the UN Charter, is capable of authorizing military action that would obviously violate the target state’s sovereignty. The UN-backed military action in Libya in early 2011, for example, was conducted under such authority. See UNSC, 2011, 6498th Mtg, UN Doc S/Res/1973 (2011).

²⁹ *Hape*, *supra* note 3 at para 58.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *The Case of the SS “Lotus” (France v Turkey)* (1927), PCIJ (Ser A), No 10 [*Lotus*].

the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.³³

The crucial point here is that the default position as it relates to enforcement jurisdiction is that a state may not exercise such jurisdiction outside its own territory. An exception—a “permissive rule”—would be consent of the state whose territory the other state sought to act.³⁴ The crux of *Lotus*, however, was not enforcement jurisdiction, as recall that the French ship voluntarily entered Turkish territory by docking in Constantinople; Turkey was not seeking to enforce any of its laws on French territory.³⁵

The real issue in *Lotus* thus was whether “Turkey was able to extend the reach of its penal laws, that is, its prescriptive jurisdiction, to events occurring outside Turkish territory, on the high seas.”³⁶ Here, the PCIJ adopted a “quite liberal”³⁷ approach. In the very next paragraph after the one quoted above—but one curiously passed over by the *Hape* majority—the PCIJ concluded:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.³⁸

Put simply, a state must rely on a *permissive* rule to assert enforcement jurisdiction. In sharp contrast, however, a state need only ensure there is no *prohibitive* rule when it seeks to assert prescriptive or adjudicative jurisdiction. In other words, the “starting

³³ *Ibid* at 18 [emphasis added].

³⁴ Attaran, *supra* note 7 at 524.

³⁵ John H Currie, *Public International Law* (Toronto: Irwin Law, 2008) at 339-40 [Currie, *Public International Law*].

³⁶ *Ibid* at 340.

³⁷ *Ibid* at 339.

³⁸ *Lotus*, *supra* note 32 at 18-19 [emphasis added].

premise, when it comes to the extent of the states' prescriptive and adjudicative jurisdiction, is essentially permissive."³⁹

The majority in *Hape* actually shows some appreciation for the territorial nexus distinction between prescriptive and adjudicative jurisdiction on the one hand, and enforcement jurisdiction on the other, though it does so with less sweep. In the majority's view, prescriptive jurisdiction is "primarily territorial," but there are "exceptions."⁴⁰ Nationality jurisdiction, for example, allows a state to "regulate [*i.e.*, prescribe, in the language of *Lotus*] and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders."⁴¹ Crucially, the Court recognizes that such extraterritorial prescriptive and adjudicative jurisdiction, without any extraterritorial enforcement jurisdiction, does not offend either the principle of sovereign equality or comity.⁴² Indeed, the majority cited several crimes in Canada that reflect extraterritorial prescriptive and adjudicative jurisdiction.⁴³

Though one can quibble with the majority's selective adherence to the principles enunciated in *Lotus*,⁴⁴ the real problem in *Hape* comes with the Court's conclusion that "applying the *Charter* to activities that take place abroad implicates the *extraterritorial*

³⁹ Currie, *Public International Law*, *supra* note 35 at 340.

It is worth noting, however, that some states, acting through domestic courts, have voluntarily narrowed the scope of their extraterritorial prescriptive jurisdiction. For example, European governments have in the past have protested American attempts to extend the applicability of the *Sherman Antitrust Act* to cover all anticompetitive agreements made on European soil. See 15 USC § 1 (2006). This has led the US Supreme Court to adopt a "rule of reason" and an "effects doctrine" whereby it will query whether there is a reasonable basis for the US government to exercise its extraterritorial prescriptive jurisdiction even if such jurisdiction is enforced only domestically. See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008) at 309.

As Brownlie has noted, however, the European protests are somewhat ironic given that European laws often mirror American ones in their extraterritorial prescriptive reach. The UK, for example, recently adopted its own equivalent of the American *Foreign Corrupt Practices Act*, criminalizing domestically the bribing of foreign officials on foreign soil. Notably, the UK law goes much further than its US counterpart and has been described as "the FCPA on steroids." *Foreign Corrupt Practices Act*, 15 USC §§ 78dd-1ff (2006); *Bribery Act 2010* (UK), 2010 c 23, s 6; and Dionne Seacrey, "UK Law on Bribes Has Firms in a Sweat" *The Wall Street Journal* (28 December 2010), online: *The Wall Street Journal* <<http://online.wsj.com/article/SB10001424052748704118504576034080908533622.html>>.

All the protests aside, international law is clear that such extraterritorial prescriptive jurisdiction is legal. See generally, Brownlie at 300-8, Currie, *Public International Law* at 339-54, Malcolm N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 649-651.

⁴⁰ *Hape*, *supra* note 3 at para 60.

⁴¹ *Ibid*.

⁴² *Ibid* at para 64.

⁴³ E.g., hijackings of Canadian aircraft while abroad, war crimes and other crimes against humanity. *Ibid* at para 66, citing *R v Terry*, [1996] 2 SCR 207 at para 15, 135 DLR (4th) 214 [*Terry*].

⁴⁴ See note 40, above.

enforcement of Canadian law.”⁴⁵ The majority’s conclusion that extraterritorial application of the *Charter* necessitates, or at least results in, impermissible extraterritorial enforcement jurisdiction is flummoxing.⁴⁶ Professor Currie, for example, has argued that the *Court* has “fatally confused” the concepts of prescriptive and adjudicative jurisdiction, on the one hand, with enforcement jurisdiction.⁴⁷ The key paragraph on this point from the *Court*’s judgement should be read in full:

The powers of prescription and enforcement are both necessary to application of the *Charter*. The *Charter* is prescriptive in that it sets out what the state and its agents may and may not do in exercising the state’s powers. Prescription is not in issue in the case at bar, but even so, the *Charter* cannot be applied if compliance with its legal requirements cannot be enforced. Enforcement of compliance with the *Charter* means that when state agents act, they must do so in accordance with the requirements of the *Charter* so as to give effect to Canadian law as it applies to the exercise of the state power at issue. However, as has already been discussed, Canadian law cannot be enforced in another state’s territory without that state’s consent. Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible.⁴⁸

As Currie has observed, such reasoning makes an unfounded logical leap between the premise that Canada has no enforcement jurisdiction over a given matter and the conclusion that the matter itself therefore falls outside Canada’s prescription jurisdiction. If this is true, the result entails “collapsing the distinction between prescriptive and enforcement jurisdiction entirely.”⁴⁹

The majority’s reasoning seems to presuppose that the *Charter* enforcement in cases where a potential rights infringement occurs abroad requires extraterritorial enforcement. But this view is demonstrably false based on the *Court*’s own jurisprudence. Less than eight months after its decision in *Hape*, a unanimous *Court* in *Canada (Justice) v Khadr* concluded that the Government of Canada’s extraterritorial actions had breached a Canadian citizen’s *Charter* rights and thus crafted a remedy that it was able to enforce

⁴⁵ *Hape*, *supra* note 3 at para 33.

⁴⁶ See e.g., Attaran, *supra* note 7 at 524-29; Currie, “Tortured Determinations,” *supra* note 5 at 31; James Stribopoulos, “The *Charter*’s Unstated Territorial Limits: *R. v. Hape*” *TheCourt.ca* (8 June 2007), online: <http://www.thecourt.ca/2007/06/08/the-charters-unstated-territorial-limits-r-v-hape/>.

Curiously, even a commentator who is generally supportive of the *Court*’s jurisprudence in this area has been unable to explain its focus on enforcement jurisdiction. See Jane M Arbour, “*Canada v. Khadr*: Reflections on the Use of International Law in the Repatriation Litigation” (2010) 51 *SCLR* (2d) 275 at 277.

⁴⁷ Currie, “Tortured Determinations,” *ibid* at 317.

⁴⁸ *Hape*, *supra* note 3 at para 85.

⁴⁹ Currie, “Tortured Determinations,” *supra* note 5 at 318, n 61.

intraterritorially.⁵⁰ There was no discussion in *Khadr* of an inability to enforce the judgement extraterritorially, nor was there any need for such a discussion. Quite simply, there is no exercise of enforcement jurisdiction when a Canadian court applies the *Charter*, in a Canadian court proceeding, to the extraterritorial actions of Canadian officials: “[A] court sitting only in Canada (and thus exercising enforcement jurisdiction only in Canada) and applying a Canadian rule of law to events occurring abroad is defining the *prescriptive* reach of that rule, not *enforcing* it abroad.”⁵¹ Examples of what actually constitutes extraterritorial enforcement confirm this view: Arresting or detaining persons in a foreign jurisdiction, serving a summons, mounting a police investigation, and ordering the production of document—absent the consent of the local sovereign—would all constitute exercises of enforcement jurisdiction.⁵² But a *Charter* remedy, as the decision in *Khadr* clearly illustrates, involves no such impermissible act.

Given the majority opinion’s extensive analysis of the difference between prescriptive and adjudicative jurisdiction on the one hand, and enforcement jurisdiction on the other, it is difficult to comprehend how the Court reached the conclusion that an exercise of any legitimate extraterritorial prescriptive jurisdiction was *per se* impermissible extraterritorial enforcement jurisdiction. One possible explanation may be an unspoken fear that a Canadian court’s domestic enforcement of a *Charter* remedy concerning extraterritorial acts *after the fact* would likely lead in the future to a kind of indirect extraterritorial enforcement jurisdiction *before the fact* when the Canadian government alters its behaviour.⁵³ For example, the judgement in *Khadr* will likely influence the Canadian government’s behaviour abroad in similar situations in the future, which could perhaps be construed as a kind of indirect extraterritorial enforcement by Canadian courts. By this reasoning, one might surmise that the Court was wary of the possibility that requiring Canadian officials to act in conformance with the *Charter* while abroad would potentially lead to Canadian demands of local governments to run their affairs in a particular way, thus running afoul of the principles of sovereign equality and comity. Setting aside for a moment whether Canada is actually in a position to dictate to any government how it should run its affairs, I can find no basis in international law to support a conclusion that domestic enforcement of an extraterritorial act subject to prescriptive jurisdiction can indirectly lead to impermissible extraterritorial enforcement. More importantly, however, the Court offers no principle or precedent that would support such a conclusion.

The minority in *Hape* recognizes that the issue of extraterritorial enforcement jurisdiction does not actually arise. Justice Bastarache notes that the government has a

⁵⁰ *Canada (Justice) v Khadr*, 2008 SCC 28 at para 31, [2008] 2 SCR 125 [*Khadr*]. The same conclusion was reached as recently as last year in *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr II*].

⁵¹ Currie, “Tortured Determinations,” *supra* note 5 at 317 [emphasis in original].

⁵² Brownlie, *supra* note 39 at 309.

⁵³ The majority could be understood as making this point in *Hape* when it said, in passing, that: “Here, to apply the *Charter* to the investigation in Turks and Caicos *would of necessity compel compliance by the foreign authorities*, thus impinging on their sovereign authority.” For the reasons discussed above, however, such a concern is without merit. *Supra* note 3 at para 29 [emphasis added].

choice when faced with *Charter* requirements: It can choose not to act abroad at all or it can negotiate with the local government for *Charter*-compliant standards of conduct (say, insisting that an accused be afforded an attorney). The former option, as the *Hape* majority ostensibly fails to appreciate, relies on the consent of the host nation and thus offends neither sovereign equality nor comity. As the minority opinion concludes: “By putting the onus squarely on Canadian authorities to not exercise control if the investigatory action is not *Charter* compliant, we never have to ask whether the application of the *Charter* results in an interference with sovereign authority of a foreign state.”⁵⁴

Interpreted properly, fidelity to the principles of sovereign equality and comity as recognized in international law does not require that a state compromise its extraterritorial prescriptive or adjudicative jurisdiction, though it does require recognition that extraterritorial enforcement jurisdiction, as a general rule, is impermissible. For these legal concepts to have any meaning, they must be distinct. The logic in *Hape*, however, suggests that extraterritorial enforcement jurisdiction follows inexorably from extraterritorial prescriptive jurisdiction and is thus flawed, for it denies each concept of distinct utility. As *Khadr* clearly illustrates, Canada can apply the *Charter* to governmental acts committed abroad through its right to exercise extraterritorial prescriptive jurisdiction even though it lacks extraterritorial enforcement jurisdiction. Once this logic is recognized, a central basis for the holding in *Hape* “evaporates.”⁵⁵

B. CONCLUSIONS BASED ON THE AUTHORITY OF PARLIAMENT

Building on the foundation established in its discussion of the principles of sovereign equality, the majority opinion in *Hape* also concludes that extraterritorial application of the *Charter* is impossible because such application is outside the authority of Parliament. This conclusion is closely related to the first conclusion based on jurisdiction, but is in fact distinct. Recall that the Court arrived at its first conclusion as to the *Charter*'s applicability by reasoning—incorrectly, as I endeavoured to show above—that extraterritorial application of the *Charter* is impossible because the principles of sovereign equality and comity counsel against extraterritorial enforcement jurisdiction. Such jurisdiction, in the majority's view, is a necessary precondition for extraterritorial application.

The second conclusion is arrived at by extending those principles and anchoring them in the actual text of the *Charter*. Recall that section 32(1) limits application of the *Charter* to “all matters within the authority of Parliament.” But, the majority observes, “[a] criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad.”⁵⁶ This focus on extraterritorial enforcement jurisdiction as the only form of jurisdiction that matters in establishing what is within the

⁵⁴ *Ibid* at para 162.

⁵⁵ Currie, “Tortured Determinations,” *supra* note 5 at 318.

⁵⁶ *Ibid* at para 94.

“authority of Parliament” echoes the Court’s earlier reasoning: Since such jurisdiction, in light of the Court’s conclusions regarding the binding principle of sovereign equality, violates international law, the Court now concludes that any activity necessitating such jurisdiction—all matters outside Canadian territory—is for that reason outside the authority of Parliament.⁵⁷ The *Charter*, hence, cannot not apply.

The Court’s second conclusion cannot be sustained. Putting aside that it is fundamentally counterintuitive,⁵⁸ the lack of extraterritorial enforcement jurisdiction, as I attempted to explain above, in no way forecloses Parliament’s ability to exercise extraterritorial prescriptive and adjudicative jurisdiction. Even accepting for a moment that international law should have some bearing on the interpretation of Canada’s Constitution in this manner, both forms of jurisdiction are plainly legal in international law and hence “within the authority of Parliament.”⁵⁹ Any contrary conclusion would throw the constitutionality of laws like the *Crimes Against Humanity and War Crimes Act*, which the majority accepted as constitutional,⁶⁰ into doubt. By the same reasoning, and as *Khadr* demonstrates, there is no need to exercise extraterritorial enforcement jurisdiction to provide a remedy for a breach of *Charter* rights.⁶¹ The argument that the *Charter*’s extraterritorial application is outside the authority of Parliament thus necessarily fails if the proposition that extraterritorial application in no way requires extraterritorial enforcement jurisdiction is accepted.

More alarming, however, is the majority’s emphasis on narrowing the scope of section 32(1) based on its understanding of international law. In effect, though the Court

⁵⁷ *Hape*, *supra* note 3 at para 94. The minority, however, disagreed: “I would disagree with LeBel J. that if one cannot enforce Canadian law outside Canada the matter falls outside the authority of Parliament and the provincial legislatures under s. 32(1)” at para 160.

⁵⁸ If the activities of Canadian officials are outside the authority of Parliament, whose authority are they under? The minority raises this point as well. See *Hape*, *ibid* at para 161 (“If the investigative activities of Canadian police officers abroad do not fall under ‘matters that are within the authority of Parliament or the provincial legislatures’, then the officers would have no jurisdiction whatsoever to be conducting investigations abroad. Clearly, they do”).

⁵⁹ The Constitution of Canada disabuses one of any remaining ambiguity on this point: “It is hereby declared and enacted that the Parliament of a Dominion [*i.e.*, Canada] has full power to make laws having extra-territorial operation.” *Statute of Westminster* (1931) UK 22 and 23 Geo 5, c 4, s 3. The power to violate international law is thus among the “well-settled axioms of Canadian constitutional law.” Currie, “Tortured Determinations,” *supra* note 5 at 319. The *Hape* majority does not dispute this conclusion. See note 63, below.

⁶⁰ *Hape*, *supra* note 3 at para 66, citing *Terry*, *supra* note 44 at para 15.

⁶¹ See discussion at Part I(A), above.

recognizes that Parliament can legitimately craft statutes that violate international law,⁶² the Court seems to have gone out of its way to interpret the clear language in section 32(1) to ensure that the *Charter* does not. The basis for the Court's conclusion concerning the interpretation of section 32(1) stems from its teaching that "[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."⁶³ By this logic, in light of its determination that the language of section 32(1) is ambiguous, international law—specifically the principle of sovereign equality—can therefore fill that gap. Though the Court has for some time recognized that "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation,"⁶⁴ it is an entirely novel proposition to suggest that Canada's own Constitution should conform to international law.⁶⁵ There are three compelling reasons—one specific to section 32(1) and two more generally applicable to the Constitution—for rejecting this rule of interpretation.

First, the interpretation given by the Court to the phrase "within the authority of Parliament" fails to take account of its own prior understanding of the purpose of that language. References to "authority of Parliament" and "the legislature of each province" in section 32(1) "are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*," as the Court itself concluded in the early days of the *Charter*.⁶⁶ In other words, the language was intended to avoid the possibility that one level of government might seek to justify its encroachment on the legislative sphere of another level of government on the basis that it needed to act to uphold the *Charter*.⁶⁷ To now read additional meaning into that language, as the majority in *Hape* does, thus creates and exploits a textual ambiguity that did not previously exist.

⁶² *Hape*, *supra* note 3 at para 39 ("Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly"); para 53 ("[T]he legislature is presumed to comply with the values and principles of customary and conventional international law. ... The presumption is rebuttable, however"); and para 68 ("By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations").

See also *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 141, [2004] 2 SCR 427; *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86 at 103, 5 DLR (4th) 385; and *Reference re Offshore Mineral Rights of British Columbia*, [1967] SCR 792 at 816, 65 DLR (2d) 353.

The Judicial Committee of the Privy Council has also held that Parliament is fully competent to pass legislation with extraterritorial effect. *Croft v Dunphy*, [1933] AC 156.

⁶³ *Hape*, *ibid* at para 56.

⁶⁴ *Ibid* at para 37, citing *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 at para 65, 243 DLR (4th) 406 (CA).

⁶⁵ Currie, "Tortured Determinations," *supra* note 5 at 315. I would add using international law as an aid to interpret the meaning of the *Charter* is a distinct animal from what the majority does in *Hape*, which is concluding that the *Charter* must conform to international law.

⁶⁶ *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 463-64, 18 DLR (4th) 481 [*Operation Dismantle*].

⁶⁷ Stribopoulos, *supra* note 46.

Second, there is a firm basis to adopt different approaches to the interpretation of ordinary statutes and the Constitution. The *Charter*, self-evidently, is no ordinary law, neither from a hierarchical perspective or a linguistic perspective. In contrast to most ordinary statutes, which speak in relative detail and with precision, the *Charter*'s prose is purposely broad and even vague. Any ambiguity in section 32(1) is therefore to be interpreted, as one scholar has termed it, as "a meaningful silence."⁶⁸ International law can, of course, be an aid to interpreting the scope of the *Charter*, just as it has been an aid in interpreting the scope of its specific guarantees.⁶⁹ But the Court should also look to its traditional methodological approach to *Charter* interpretation: The Court has long recognized it as "obvious" that the *Charter* is "a purposive document."⁷⁰ Justice Dickson (as he then was), writing for a unanimous Court in *Hunter v Southam*, concluded that "[i]ts purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."⁷¹ By way of example, in *Operation Dismantle v The Queen*,⁷² the Court was urged to reject the notion that government action taken pursuant to the royal prerogative was outside the "authority of Parliament" and thus not subject to *Charter* scrutiny. The Court correctly rejected this argument. Justice Wilson could find "no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also."⁷³ The majority's opinion in *Hape*, however, makes no allowance for such a purposive interpretation.

Third and finally, the interpretative approach adopted by the Court may undemocratically limit Canada's own sovereignty. As part of the Constitution, the *Charter* is a part of "the fundamental law of the nation, effectively removed from legislative whim or any practicable ability to repeal or amend."⁷⁴ Yet, the decision in *Hape* implicitly suggests the meaning given to ambiguities and silences in the *Charter* will automatically evolve independent of any democratic decision by the Canadian people as a result of developments in international law in which Canada may have no

⁶⁸ *Ibid.*

⁶⁹ See e.g., *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70, [2007] 2 SCR 391 ("the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified"). Both cases cite *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 359, 38 DLR (4th) 161 (Dickson CJ, dissenting) ("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").

⁷⁰ *Canada (Combines Investigation Branch, Director of Investigation and Research) v Southam*, [1984] 2 SCR 145 at para 19 (WL) (sub nom *Hunter v Southam*), 11 DLR (4th) 641 [*Hunter*].

⁷¹ *Ibid.*

⁷² *Operation Dismantle*, *supra* note 66 at para 463-64.

⁷³ *Ibid* at para 50. Though Wilson J wrote separately, the remaining members of the Court were in agreement on the point of the *Charter*'s applicability. Dickson J (as he then was) concluded for them: "I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*" at para 28.

⁷⁴ Fairley, *supra* note 19 at 235.

hand.⁷⁵ If this is indeed the case, the Court has opened the door to an alarming abdication of Canadian sovereignty.

C. THE PARADOX OF THE HUMAN RIGHTS EXCEPTION

Even if one takes the majority's view of the law of jurisdiction as correct, the judgement in *Hape* now suffers from a confounding logical flaw stemming from what has been called the fundamental human rights exception. The possibility of such an exception was first hinted at in *Hape* but only articulated fully in *Khadr*.⁷⁶ In the latter case, the Court—in a *per curiam* opinion—pointed to *Hape* as recognizing an “important exception” to the general rule of the *Charter*'s inapplicability abroad.⁷⁷ According to the Court, *Hape* held that “if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.”⁷⁸ This assertion is baffling and leaves *Hape* in a state of self-contradiction. Indeed, Justice Binnie's admonition in *Hape* that “[t]he law of the Constitution can only ‘grow and evolve’ if the Court leaves it the flexibility to do so” appears remarkably prescient in light of *Khadr*.

The Court in *Khadr* describes the human rights exception “an important exception to the principle of comity.”⁷⁹ It is worth recalling, however, that the majority's decision in *Hape* did not rest on comity alone, but on two separate bases: first, the binding principle of sovereign equality⁸⁰ (or, more specifically, that Canada cannot assert extraterritorial enforcement jurisdiction without violating international law) and second, the related determination that extraterritorial application of the *Charter* was outside the authority of Parliament.⁸¹ The non-binding principle of comity merely provided a supplementary basis for confirming the conclusions reached on other grounds.⁸² Though it is evident why another state's breach of international law might negate fidelity to comity to that state, the Court—neither in *Hape* nor in *Khadr*—offers any explanation for how such a breach justifies an exception to the binding principle of sovereign equality. Indeed, the Court does not even claim that there is an exception to these binding principles:

⁷⁵ One might respond to this argument by pointing out that it is open to Parliament to pass a law extending the application of the *Charter* extraterritorially. This is a legally possible outcome; see notes 60 and 63, above. Whether it is politically probable, however, is a separate question.

⁷⁶ See *Hape*, *supra* note 3 at para 101 (“I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada”); *Khadr*, *supra* note 50 at paras 18-19.

⁷⁷ *Khadr*, *ibid* at para 18.

⁷⁸ *Ibid* at para 19.

⁷⁹ *Ibid* at para 18.

⁸⁰ See discussion in Part I(A), above.

⁸¹ See discussion in Part I(B), above.

⁸² *Hape*, *supra* note 3 at para 47 (“comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations”).

[The] conclusion [in *Hape* that the *Charter* does not apply] was based [first] on international law principles against extraterritorial enforcement of domestic laws and [second] the principle of comity which implies acceptance of foreign laws and procedures when Canadian officials are operating abroad.

In *Hape*, however, the Court stated an important exception to the principle of comity ...⁸³

The inability to offer an exception is not surprising given the Court's own admission that it was split on the application of sovereign equality in *Hape*.⁸⁴ Nevertheless, judging from the silence in *Khadr*, the dictate of sovereignty equality—that there cannot be any extraterritorial enforcement of the *Charter*—ostensibly remains sound. The problem, of course, is that the majority decision in *Hape* posits—albeit incorrectly—that extraterritorial enforcement is a prerequisite for *Charter* applicability; without such enforcement, the application of the *Charter* is “impossible.”⁸⁵ And yet, notwithstanding this impossibility, the *Charter* applies in *Khadr*. Crucially, the Court in *Khadr*, though perhaps silently recognizing the flaw in *Hape*, makes no attempt to explain the sorely contorted state in which it has left that decision.

Separately, nowhere in *Khadr* are we told how Canada's participation in a process that violates international law somehow legalizes extraterritorial enforcement jurisdiction and consequently makes the assertion of such jurisdiction a matter within the authority of Parliament.⁸⁶ Of course, though it is open for Parliament to throw its binding obligations of international law to the wind, the Court has voluntarily bound itself in *Hape* to interpreting the *Charter* in a manner that conforms to international law.⁸⁷ Accordingly, even though comity may be moot, the problems associated with the application of sovereign equality and authority of Parliament are very much still alive. Again, notwithstanding all of this, the Court crafted a remedy in *Khadr*. Where does this leave us?

First, the teachings of *Hape* are now in contradiction with one another. Setting aside that the majority was wrong in its assessment that application of the *Charter* amounted to

⁸³ *Khadr*, *supra* note 50 at paras 17-18.

⁸⁴ *Khadr*, *ibid* at para 18 (“While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations”).

⁸⁵ *Hape*, *supra* note 3 at para 85 (“Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible”).

⁸⁶ There are other problems as well. For example, what happens if Canada is the sole participant in the violative process, assuming that the state on whose territory Canadian officials are operating are wholly unaware of what Canada is doing? Surely this would not deny an obligation of Canadian comity toward that state. Arguably, though, the need for a *Charter* remedy would be stronger.

⁸⁷ See discussion in Part I(B), above.

prohibited extraterritorial enforcement jurisdiction, any conflicting principles in *Hape* could be reconciled prior to *Khadr*. Even if a violation of international law negated any obligation of comity, *Hape* makes clear that binding principles of international law would still prohibit extraterritorial enforcement of the *Charter*. As such, no matter what the circumstance, the application of the *Charter* abroad was, as the majority concluded, “impossible.”⁸⁸ *Khadr*, however, in purporting to apply an exception created in *Hape*, has turned a piece of *dicta* into the whole substance of *Hape*.⁸⁹ The Court’s opinion completely sidesteps the question of how its decision to apply the *Charter* in *Khadr* can surmount the concrete hurdles the Court itself created in *Hape*. We know now, however, that extraterritorial application of the *Charter* is at once “impossible” and possible.⁹⁰

It bears noting that in *Amnesty International v Canada (Canadian Forces)*,⁹¹ the only case to consider the doctrine established in *Hape* prior to the Supreme Court’s subsequent decision in *Khadr*, Justice MacTavish of the Federal Court dismissed an argument for the recognition of a “fundamental human rights” exception for the very reasons highlighted above:

310 Surely Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does not. It cannot be that the *Charter* will not apply where the breach of a detainee’s purported *Charter* rights is of a minor or technical nature, but will apply where the breach puts the detainee’s fundamental human rights at risk.

311 That is, it cannot be that it is the nature or quality of the *Charter* breach that creates extra-territorial jurisdiction, where it does not otherwise exist. That would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction.

312 I agree with the [government] that to find that the *Charter* applies, where *Charter* jurisdiction does not otherwise exist, as a result of the gravity of the impugned actions or their effects, conflates the question of the existence of *Charter* jurisdiction with the question of whether a fundamental right has been infringed.⁹²

Speculation is, of course, a risky enterprise, but it is perhaps telling that the Federal Court of Appeal, which had the occasion to affirm the Federal Court’s decision in *Amnesty* after the Supreme Court’s holding in *Khadr*, declined the opportunity to

⁸⁸ *Hape*, *supra* note 3 at para 85.

⁸⁹ As Attaran has noted, “that the precedential weight of the formerly obiter dicta exception has now overtaken the rest of *Hape*.” *Supra* note 7 at 520.

⁹⁰ *Hape*, *supra* note 3 at para 85.

⁹¹ *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FC 336, [2008] 4 FCR 546 [Amnesty (FC)].

⁹² *Ibid* at paras 310-12.

comment on the problems created by a fundamental human rights exception as noted by Justice MacTavish.⁹³

Moreover, the approach in *Khadr* places the question of whether a breach of international human rights law occurred ahead of the threshold question of whether the *Charter* applies in the first instance. Allowing the question of a rights breach to usurp the threshold question of *Charter* applicability has “an odd cart-before-the-horse feel to it.”⁹⁴ Indeed, if this criticism is valid, the opinion of Justice MacTavish in *Amnesty* is prescient in concluding that the recognition of a fundamental human rights exception results in a “sort of ‘cause and effect’ approach ... that conflate[s] the question of jurisdiction with the question of whether an individual’s rights had been violated.”⁹⁵

II. A PATH FORWARD

The decision in *Hape* is premised on conclusions regarding the international law of jurisdiction. Putting aside for a moment the problem, as I attempted to show above, that these conclusions are flawed as matter of law, the Court’s focus on jurisdiction as a starting point for determining whether the *Charter* can be applied abroad is misplaced. The concept of jurisdiction is better suited to the question of how a state can assert itself (for example, by criminalizing particular conduct) as opposed to whether others can assert rights against the state (for example, by making a claim for a rights violation). A better lens through which to tackle the question of extraterritoriality of the *Charter* is thus the doctrine of state responsibility, a long-standing concept in international law. Indeed, as a review of emerging jurisprudence in Europe and the United States shows, foreign high courts are reaching sharply different conclusions on the question of constitutional extraterritoriality than the Supreme Court of Canada, largely untroubled by concerns about jurisdiction.

D. CONSTITUTIONS ARE DIFFERENT

Any discussion of extraterritoriality is amiss without mention of the classic scenario of smoking in Paris. In this example, which is discussed by the majority in *Hape*,⁹⁶ Parliament might pass legislation making it a criminal offence for Canadian nationals, or perhaps even all persons, to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality. The prohibition, especially if it includes all persons walking the streets, quite obviously raises questions of sovereign equality and comity, but it is nevertheless *prima facie* legal.⁹⁷ Of course, should Canadian police officers march into Paris and began arresting all smokers—a

⁹³ *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 401, [2009] 4 FCR 149 [Amnesty (FCA)].

⁹⁴ Attaran, *supra* note 7 at 520.

⁹⁵ *Amnesty* (FC), *supra* note 91 at para 313.

⁹⁶ *Hape*, *supra* note 3 at para 63.

⁹⁷ See discussion in Part I(A), above.

clear act of extraterritorial enforcement jurisdiction—that would be illegal under international law.

The smoking in Paris analogy, however, breaks down in the context of the extraterritorial application of the constitutional rights. Professor Attaran has attempted to explain it this way: “Can it honestly be imagined that if the RCMP were frisking Canadians for tobacco on the Champs-Élysées without French consent, but Canada sought to restore comity by stripping those Canadians of their *Charter* rights [to bring an action against their government in a Canadian court], suddenly the French would breathe a sigh of relief and stop being irritated?”⁹⁸ In other words, the important point here is that extraterritorial application of the *Charter* is a *rights-conferring* act, while extraterritorial application of other laws is a *rights-negating* act: Criminalizing smoking in Paris takes away Parisians’ rights, whereas extending the *Charter* to cover the actions of Canadian officials in Paris confers on them rights, albeit rights enforceable only in a Canadian court.⁹⁹

An obvious question then is how one should conceptualize a rights-conferring act. Jurisdiction is still a factor, since the very act of conferring rights on persons abroad is an act of extraterritorial prescriptive jurisdiction. The doctrine of state responsibility, however, is more directly relevant, as I will show in the next section.

E. LOOKING TO STATE RESPONSIBILITY

The doctrine of state responsibility is intended to provide accountability for instances when states break their international legal obligations. It may be useful to think of the concept “as akin to the legal principles of liability for wrongful acts found in most domestic legal systems.”¹⁰⁰ Crucially, as Ian Brownlie has observed, “[r]esponsibility is the necessary corollary of a right.”¹⁰¹ Accordingly, when an international right is breached by a state, the state is obligated, under the doctrine of state responsibility, to make amends. It is also worth observing that state responsibility is a concept of general application, “meaning that it is of potential relevance in virtually all substantive international legal contexts.”¹⁰²

In 2001, the UN General Assembly adopted a resolution concerning “internationally wrongful acts.”¹⁰³ The resolution included the text of the draft articles of state responsibility, which constituted the work of over half a century of the International Law Commission (“ILC”), a body set up by the General Assembly in 1948 as a step toward

⁹⁸ Attaran, *supra* note 7 at 527.

⁹⁹ Bastarache J essentially makes the same point for the *Hape* minority: “[T]here [is] no interference or ‘conflict’ with sovereign authority when Canadian officials are subject to the *Charter* because the *Charter* does not mandate specific conduct, but rather imposes certain limits on the conduct of government officials.” *Supra* note 3 at para 162.

¹⁰⁰ Currie, *Public International Law*, *supra* note 35 at 533.

¹⁰¹ Brownlie, *supra* note 39 at 435.

¹⁰² Currie, *Public International Law*, *supra* note 35 at 533.

¹⁰³ *Responsibility of States for internationally wrongful acts*, GA Res 56/83, UNGAOR, 56th Sess, UN Doc A/Res/56/83 (2002) [GA Res 56/83].

its aspiration of “encouraging the progressive development of international law and its codification.”¹⁰⁴ In its resolution, the General Assembly only noted the draft articles, meaning they lack legal force and are accordingly non-binding. Nevertheless, the body did state that it “commends [the articles] to the attention of Governments.”¹⁰⁵ Article 4, for example, states:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

Article 6 attributes responsibility for the actions of any “organ” that contravenes international law to a state “if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.” Similarly, Article 8 attributes responsibility for the actions of any person to a state “if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” Professor Attaran has observed that these doctrines are “almost identical” to the teachings of the Supreme Court concerning *Charter* applicability in *RWDSU v Dolphin Delivery* and its progeny.¹⁰⁶ The lesson here is that the UN system has endorsed principles which suggest that states should be held responsible for their illegal actions, whether undertaken by the state itself or through agents authorized by it. Such a principle is hardly foreign to the underlying values of the *Charter*.

The remaining question then concerns how states can be held accountable for such acts. Here there is an emerging notion that a state’s own judicial system can take responsibility for violations of international law committed by that state’s own actors. The International Criminal Court (“ICC”)—an institution whose creation Canada ardently backed—is precisely such a forum. Genocide, crimes against humanity and other international crimes within the ICC’s jurisdiction are investigated and prosecuted only after national courts have acted inappropriately or have altogether failed to act; the ICC, in other words, is a court of last resort. Article 17 of the *Rome Statute*, the ICC’s constating document, makes plain that a case shall be “inadmissible” if the matter “is being investigated or prosecuted by a State which has jurisdiction over it” or if it “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.”¹⁰⁷

¹⁰⁴ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, Art 13(a); *Establishment of an International Law Commission*, GA Res 174 (II), UNGAOR, 2d Sess, UN Doc A/519 (1947).

¹⁰⁵ GA Res 56/83, *supra* note 103.

¹⁰⁶ Attaran, *supra* note 7 at 532. See also *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573, 33 DLR (4th) 174; *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545; and *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94.

¹⁰⁷ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, art 17(1) (entered into force 1 July 2002) [*Rome Statute*].

The *Rome Statute* thus reflects the codification of the principle of “complementarity,” whereby individual states have a primary obligation under international law—and potentially a sovereign right—to prosecute international crimes. Complementarity attempts to strike a balance by ensuring a forum for the prosecution of international crimes without eroding or violating state sovereignty. Indeed, upon assuming office in 2003, the ICC’s chief prosecutor stated that, “[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”¹⁰⁸ Some scholars have gone so far as to suggest that “the ICC could participate more directly in efforts to encourage national governments to prosecute international crimes themselves.”¹⁰⁹

In discussing the ICC, my point here is merely to illustrate that international law recognizes the valuable role that national courts play in ensuring state accountability by undertaking the adjudication of violations of international human rights law. Notably, the adjudication in such cases is conducted under domestic laws, which though similar in what they criminalize,¹¹⁰ are technically distinct from international law. I note this because it suggests that a Canadian court could, by the same logic, adjudicate an infringement of *Charter* rights, which are quite similar to international human rights obligations,¹¹¹ as a mechanism of ensuring accountability of the actions of Canada and its agents.¹¹² Indeed, this is precisely what European and American courts have done in their own contexts.

F. LESSONS FROM ABROAD

Article 1 of the European Convention on Human Rights (“ECHR”) places an obligation on its member states to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”¹¹³ The language is quite similar to that of section 32(1), though diction concerning “authority of Parliament” is arguably

¹⁰⁸ Luis Moreno-Ocampo, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003), cited in William W Burke-White, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice” (2008) 49 *Harv J Int’l L* 53 at 55.

¹⁰⁹ Burke-White, *ibid* at 54. Others, however, have cautioned that too much deference to national courts could lead to prosecutions that do not meet the high standards for due process at the ICC. See e.g., Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process” (2006) 17 *Crim Law F* 255.

¹¹⁰ Mark S Ellis, “The International Criminal Court and its Implications for Domestic Law and National Capacity Building” (2002) 15 *Fla J Int’l L* 215 at 219-22.

¹¹¹ See note 70, above.

¹¹² It should be noted that the Supreme Court of Canada has not as yet offered its own in-depth assessment of the doctrine of state responsibility. I can find only one instance of the term—a passing reference—in the Court’s jurisprudence. See *United States v Burns*, 2001 SCC 7 at para 56, [2001] 1 SCR 283.

¹¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, art 1.

broader. Accordingly, the European Court of Human Rights' interpretation of Article 1 can be instructive for our purposes.

Like the Supreme Court of Canada in *Hape*, the European Court has recognized that "the jurisdictional competence of a state is primarily territorial."¹¹⁴ That said, the European Court has also recognized that "the principles underlying the convention cannot be interpreted and applied in a vacuum" and that there are thus "other bases of jurisdiction" which are "exceptional and requiring special justification in the particular circumstances of each case."¹¹⁵ What emerges, keeping with Article 4 of the ILC's draft articles, is a concern by the European Court that the applicability of the ECHR depends on the *de facto* issue of which state is responsible for particular conduct, the answer to which may be altogether different from which states exercises *de jure* sovereignty over the area where the impugned conduct occurred.¹¹⁶

The European Court has thus recognized two separate heads of extraterritorial jurisdiction.¹¹⁷ The first stems from *state agent authority* (SAA),¹¹⁸ where "persons who are in the territory of another State but who are found to be under [the first] State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State."¹¹⁹ Jurisdiction here is justified on the basis that the ECHR "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."¹²⁰ European

¹¹⁴ *Banković v Belgium*, (2001) 11 BHRC 435 at para 59 (QL) [*Banković*]. See also *Hape*, *supra* note 3 at paras 45-46.

¹¹⁵ *Banković*, *ibid* at paras 57, 61.

¹¹⁶ Attaran, *supra* note 7 at 538.

¹¹⁷ There has been some question as to whether the European Court has actually recognized two separate heads. The House of Lords, for example, has questioned whether SAA jurisdiction, described in *Issa v Turkey*, which was a Chamber decision, conflicts with ECA jurisdiction, described in the earlier case of *Banković*, which was a Grand Chamber decision. See *R (on the application of Al-Skeini and others) v Secretary of State for Defence*, [2007] UKHL 26 at paras 72-84; *Issa v Turkey*, [2004] ECHR 31821/96 (QL) [*Issa*].

It appears that the law lords have misunderstood both *Banković* and *Issa*. Though it is certainly true that the jurisprudence could be clearer, there is no trouble reconciling it. The language of *Issa*, which incidentally was decided by an unanimous bench that shared three judges with the *Banković* panel, makes clear that it is supplementing, not replacing or contradicting, *Banković*. For a lucid assessment, see e.g., *R (on the application of Al-Skeini and others) v Secretary of State for Defence*, [2005] EWCA Civ 1609 at paras 48ff (QL) [*Al Skeini* (CA)].

Also, as Attaran has observed, "[t]he majority of international law scholarship criticizes any suggestion that *Banković* put an end to the SAA rule." See e.g., Alexandra R  th & Mirja Trilsch, "*Banković v. Belgium* (Admissibility)" (2003) 97 Am J Int'l L 168; Colin Warbrick, "The European Response to Terrorism in an Age of Human Rights" 15 EJIL 989 (2004); Kerem Altıparmak, "*Banković*: An Obstacle to the Application of the European Convention on Human Rights in Iraq?" (2004) 9 J Confl & Sec L 213; and Erik Roxstrum *et al*, "NATO Bombing Case (*Banković et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection" (2005) 23 B U Int'l L J 55, cited in Attaran, *supra* note 7 at 542, n 68.

¹¹⁸ The short-hand labels, and their accompanying initials, appear to have been described as such for the first time in by the English Court of Appeal. See *Al Skeini* (CA), *ibid* at para 49.

¹¹⁹ *Issa*, *supra* note 117 at para 71.

¹²⁰ *Ibid*.

courts have applied SAA principles on at least two occasions. In the first case, a British court found the ECHR was applicable to the case of an Iraqi citizen who was arrested and subsequently died while being held in a British military prison in Iraq.¹²¹ In the second case, the ECHR would have been applied to the case of six Iraqi civilians tortured and killed by Turkish troops had the facts alleged been proven.¹²² Notably, both examples bear some broad similarities to the facts of *Amnesty*, discussed earlier.

The second head of extraterritorial jurisdiction stems from the *effective control of an area* (ECA), where a state through “the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.”¹²³ The rationale here is obvious and accords perfectly with the principles of state responsibility articulated in the ILC articles. It is for the same reason broader than the SAA rule: “Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.”¹²⁴ Deploying ECA principles, the European Court determined that the torture of several individuals arrested by local officials in a secessionist enclave in Moldova could be attributed to Russia as a result of Russia’s military presence in that area. The court reasoned that Russia had effective control of the region, and thus responsibility for *all* state actors within it, even though Moldova retained *de jure* sovereignty.¹²⁵

The US Supreme Court has used reasoning similar to that of the European Court of Human Rights in justifying its application of the writ of *habeas corpus* to individuals detained by the US government at Guantanamo Bay. Though the court did not doubt the US government’s assertion that “Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay,” that fact “does not end the analysis.”¹²⁶ In language strikingly similar to that of the European Court, the US Supreme Court in *Boumediene v Bush* noted that the detainees are “held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”¹²⁷ That fact, combined with a determination that extension of the writ posed no insurmountable practical obstacles, led the Court to conclude that the relevant portion of the US Constitution “has full effect at Guantanamo Bay.”¹²⁸ American appellate courts, however, have been reluctant to adopt the more expansive

¹²¹ *Al Skeini* (CA), *supra* note 117 at para 108.

¹²² *Issa*, *supra* note 117 at paras 72-82.

¹²³ *Banković*, *supra* note 114 at para 71.

¹²⁴ *Ilascu v Moldova and Russia*, [2004] ECHR 48787/99 at para 316 (QL) [*Ilascu*].

¹²⁵ *Ibid.* See also the more recent case of *Medvedyev v France*, [2010] ECHR 3394/03 at paras 62-67.

¹²⁶ *Boumediene v Bush*, 553 US 723 at 754 (2008).

¹²⁷ *Ibid* at 771.

¹²⁸ *Ibid.*

implications of the European SAA doctrine,¹²⁹ though no case involving this question has yet reached the US Supreme Court.

An analysis of European and American jurisprudence thus shows that foreign high courts, charged with giving meaning to human rights guarantees much like the *Charter*, have come to fundamentally different conclusions as to international jurisdiction. Most notably, concerns about extraterritorial enforcement jurisdiction are completely non-existent. Mindful nevertheless of the need to balance extraterritorial prescriptive jurisdiction that recognizes state responsibility on the one hand, with sovereign equality and comity on the other, these courts instead have devised control-based tests to determine whether domestic human rights protections apply extraterritorially to entire areas where the state exercises control. The European Court of Human Rights has gone further by extending extraterritorial applicability to actions taken by authorized state agents regardless of whether the state itself exercised effective control over the area. These approaches can be instructive for Canada.¹³⁰

III. RECONCILIATION

The discussion thus far as it relates to the jurisprudence on the extraterritorial applicability of the *Charter* in *Hape* has been unfortunately negative. I have argued, first, that the majority opinion in *Hape* is based on flawed conclusions about the nature of international law—conclusions, notably, that foreign high courts have not reached. Second, the fundamental human rights exception as articulated in *Khadr* undermines the very legs that *Hape* stands on by suggesting extraterritorial application is no longer impossible by virtue of Canada's participation in a process that breaches international law. Quite simply, the conclusion in *Khadr* cannot be reconciled with the reasoning in *Hape*.

It should perhaps not be surprising, however, that the conclusion in *Khadr* is more easily reconcilable with the minority opinion in *Hape*. Recall that though the judgement in *Hape* was split five to four, the opinion in *Khadr* was unanimous and unsigned. One can reasonably infer that a *per curiam* opinion was at least in part symbolic: The Court was speaking with one voice on a highly contentious issue that had dominated public discourse for years. One is left to wonder whether the price of unanimity was an opinion that, while undermining the logic of the majority opinion in *Hape*, accords more

¹²⁹ The US Court of Appeals for the DC Circuit, for example, has held that the Constitution does not apply to the conduct of US officials at Bagram Air Force Base in Afghanistan on the basis that the US had no ECA-type authority. The court concluded that “[w]hile it is certainly realistic to assert that the United States has de facto sovereignty over Guantanamo, the same simply is not true with respect to Bagram.” It did not entertain any arguments that would lead to application based on SAA-type arguments. *Maqaleh v Gates*, 605 F 3d 84 at 97 (DC Cir 2010).

¹³⁰ Notably, however, control-based tests are not entirely foreign to Canadian jurisprudence in this field. See *Cook*, *supra* note 19.

harmoniously—in substance, if not form—with the approach adopted by the minority, which itself accorded with the Court’s past precedents in cases such as *R v Cook*.¹³¹

The minority opinion in *Hape*, in contrast to the majority, expressly declined to use international law as a “vehicle” for interpreting section 32(1).¹³² Rather, the minority saw it as patently obvious that the *Charter* applied to all actions of the Canadian government, at home or abroad.¹³³ At the same time, the minority recognized that “differences resulting from different legal regimes and different approaches adopted in other democratic societies will usually be justified given the international context, the need to fight transnational crime and the need to respect the sovereign authority of other states, coupled with the fact that it is impossible for Canadian officials to follow their own procedures in those circumstances.”¹³⁴

Accordingly, the minority proposes an approach whereby the onus will be on the claimant to “demonstrate that the difference between fundamental human rights protection given by the local law and that afforded under the *Charter* is inconsistent with basic Canadian values; the onus will then shift to the government to justify its involvement in the activity.”¹³⁵ In deference to comity and the principle of sovereign equality, courts could “apply a rebuttable presumption of *Charter* compliance where the Canadian officials were acting pursuant to valid foreign laws and procedures.”¹³⁶ Only acts that are “substantially inconsistent with the fundamental principles emanating from the *Charter*” would then breach the *Charter*, requiring justification under section 1.¹³⁷

The approach advocated by the minority opinion in *Hape* is salutary for two reasons. First, the result in *Khadr* and its progeny, which together make up the most recent case law on the *Charter*’s application abroad, accords with the approach adopted by the minority. Though the Court did not proceed through the several steps that would form part of the minority’s suggested approach, the substantive outcome—that there was a violation of international rights that also offended the fundamental principles of the *Charter*—is the same. More broadly, though, the minority approach offers a clearer and more principled approach to the exception recognized in *Khadr* by starting with the premise that the government and its agents must act within justifiable bounds of the *Charter*, which bounds will be informed not only by their domestic application but also by an analysis of the international context.

Second, the minority opinion is also consonant with the principle of state responsibility. Indeed, the minority’s approach, which goes beyond the more restricted ECA and SAA doctrines espoused by the European Court of Human Rights, would arguably make Canada a leader among states that provide a meaningful avenue for justice to those who have suffered a deprivation of rights at the hands of national governments. It would be a significant step in transforming state commitments to international human rights from

¹³¹ *Cook*, *ibid.*

¹³² *Hape*, *supra* note 3 at para 125.

¹³³ *Ibid* at para 160.

¹³⁴ *Ibid* at para 169.

¹³⁵ *Ibid* at para 174.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

“utopian ideals that have little bearing on the way states actually behave” to an enforceable promise.¹³⁸ It is thus regrettable that the Supreme Court in 2009 did not grant leave to appeal in *Amnesty*,¹³⁹ which would have been a fine opportunity to revisit *Hape* in light of the lessons of *Khadr*. Under the minority approach, it seems reasonable that the Court could have found the *Charter* to apply to the Canadian Forces’ actions with respect to the Afghan detainees, but left for any subsequent action the question of whether the Canadian government was violating international standards for the treatment of detainees, which would presumably run afoul of section 7 of the *Charter*.¹⁴⁰

It bears noting that the minority’s approach to extraterritorial application of the *Charter* breaks new ground and will no doubt raise some challenging questions in the future. But there is little reason to doubt that the Court will be able to evolve its approach over time as needed, much as it has with the rest of its *Charter* jurisprudence. As Professor Roach has observed, “If courts can tailor *Charter* requirements to the regulatory context, it is difficult to understand why they cannot make adjustments for the foreign context.”¹⁴¹

IV. CONCLUSION

Lord MacMillan, the Scottish jurist, once remarked that “[w]here ... so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning.”¹⁴² As I have endeavoured to demonstrate here, in its decision in *Hape*, the Supreme Court of Canada took the wrong turning: Interpreting the scope of the *Charter*’s applicability solely through the lens of jurisdiction focuses on merely a limited subset of the jurisprudence properly brought to bear for this important task. Instead, the Court should have had regard for the emerging principles of state responsibility and it should have placed greater weight on the values underlying the *Charter*.

It is crucial to remember what is at stake here. The majority in *Hape* places much emphasis on the importance of Canada’s ability to contribute to the fight against transnational crime. No doubt one should be mindful of the potential that the extraterritorial applicability of the *Charter* may have the effect of restricting Canadian officials’ participation in certain foreign activities. Under some circumstances, such restrictions might even “fall short not only of Canada’s commitment to other states and the international community to provide assistance in combating transnational crime, but also of Canada’s obligation to Canadians to ensure that crimes having a connection with Canada are investigated and prosecuted.”¹⁴³ I share the view that facilitating an

¹³⁸ Hugh M Kindred & Phillip M Saunders, eds, *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed (Toronto: Emond Montgomery, 2006) at 905.

¹³⁹ *Amnesty International Canada v Canada (Canadian Forces)*, [2009] SCCA No 63 (available on QL).

¹⁴⁰ For an analogous conclusion, see e.g., *Suresh v Canada (Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

¹⁴¹ Roach, *supra* note 6 at 3.

¹⁴² *M’Alister (or Donoghue) v Stevenson*, [1932] AC 562 at 611.

¹⁴³ *Hape*, *supra* note 3 at para 98.

appropriate role for Canada in combating global crime—or terrorism—is a laudable goal. But as Justice Bastarache observed for the minority in *Hape*, “I fail to see how the *Charter* prevents us from taking into account this important societal need while holding Canadian officers to their obligation to respect fundamental Canadian values.”¹⁴⁴

There is another important lesson in *Hape*. As I have stressed, *Khadr* underscores fundamental problems with the internal logic of the case and suggests that *Hape* is a judgment that will not endure the test of time. The lesson then is one of judicial minimalism: The Court should have declined the opportunity to reshape its section 32 jurisprudence on the back of a relatively uncomplicated case, when much more complex—and controversial—cases were not far off on the horizon. One lone justice made this point in *Hape*.¹⁴⁵ Prudence counsels that the Court must not make “far-reaching pronouncements” before it is required to do so, lest it forget, “There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy.”¹⁴⁶

¹⁴⁴ *Ibid* at para 163. The more recent comments of another justice, albeit speaking in a different context, are also apropos: “Rights ... will be harder to administer than no rights.” Or, more fully, the mere presence of difficulties in administering *Charter* rights abroad is hardly a sufficient basis to disavow those rights. *R v Sinclair*, 2010 SCC 35 at para 107, [2010] 2 SCR 310 (Binnie J, dissenting).

¹⁴⁵ *Hape*, *supra* note 3 at para 184 (Binnie J, concurring).

¹⁴⁶ *Ibid*, citing William Shakespeare, *Hamlet*, Act I, Scene V, 166-67.