next president authority to create a regulatory regime in the absence of a new statute. And that, in turn, could produce international repercussions.

In any event, the issues outlined above will keep international lawyers and legal scholars busy. They have long been occupied with navigating through foreign systems of climate change regulation; *Massachusetts v. EPA* heralds this field's impending importation into American law.

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Customary international law—state jurisdiction—extraterritorial enforcement—international investigations—presumption of conformity with international law—Canadian Charter of Rights and Freedoms—reception of custom in domestic law

R. V. HAPE. 2007 SCC 26. *Available at* <http://scc.lexum.umontreal.ca>.
Supreme Court of Canada, June 7, 2007.

In *R. v. Hape*,[1] the Supreme Court of Canada held that section 8 of the Canadian Charter of Rights and Freedoms,[2] a part of the Constitution of Canada that guarantees a right against "unreasonable search or seizure," does not apply extraterritorially to investigations conducted abroad by Canadian officials. In reaching this conclusion, the Court determined that the Charter's scope of application must be interpreted in light of customary international law. After reviewing the customary rules governing the permissible scope of a state's jurisdiction, the Court concluded that applying section 8 to an investigation outside Canada would be an impermissible exercise of extraterritorial enforcement jurisdiction.

The case arose out of a Royal Canadian Mounted Police (RCMP) investigation, on suspicion of money laundering, of Lawrence Richard Hape, a Canadian who operated an offshore investment company in the Turks and Caicos Islands (Islands). The officers sought and obtained permission from Turks and Caicos authorities to pursue their investigation on the Islands. The permission was granted on the condition that the RCMP officers would work, as the Court stated, "under the authority" of the Turks and Caicos police force.

A sting operation was commenced, in which undercover RCMP officers provided Can$252,000 to Hape, to be laundered through his company. Several undercover activities ensued, including covert entries of the investment company's premises during which RCMP officers downloaded computer files and scanned numerous documents. Later, RCMP and Turks and Caicos officers entered the company's offices and seized several boxes of records. RCMP officers subsequently testified that the senior local police officer with whom they were working had represented to them that the warrants had been properly obtained, and had shown them warrants for the seizure and at least one of the covert entries; however, no warrants were introduced into evidence for the covert entries and seizure. Although Turks and Caicos authorities did not authorize physical removal of the records from the Islands, thousands of documents were electronically transmitted to Canada.

[1] 2007 SCC 26 (Sup. Ct. June 7, 2007). The decisions of the Supreme Court of Canada are available at <http://scc.lexum.umontreal.ca>.

[2] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (UK).

Some of these documents were introduced as evidence in Hape's Canadian trial. Hape challenged their admissibility on the basis of section 8 of the Charter, which provides that "[e]veryone has the right to be secure against unreasonable search or seizure." The trial court rejected Hape's motion to exclude the documents and convicted him of money laundering. The Court of Appeal for Ontario affirmed the trial court's decision, and Hape appealed to the Supreme Court.

Justice LeBel, writing for a majority of the Court, stated that the sole issue in the appeal was "whether s. 8 of the *Charter* applies to searches and seizures conducted by RCMP officers outside Canada" (para. 24). To answer this question, the Court turned to section 32 of the Charter, which provides that the Charter applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament." The majority determined that, although section 32 does not expressly establish territorial limits to the Charter's application, the section must be interpreted in light of customary international law norms governing jurisdiction.

The majority offered three reasons for this conclusion. First, following the English tradition, Canada follows the adoption doctrine regarding custom, with the consequence that "[p]rohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action" (para. 36). The implication, the majority said, is that the customary principles of territorial sovereignty and nonintervention are part of Canadian common law and must be applied to determine the territorial scope of the Charter's application (para. 46).

Second, the principle of comity must guide the interpretation of Canadian laws—including the Constitution—that could have an impact on the sovereignty of other states. While comity is a matter of courtesy rather than of positive law, requests for assistance in criminal matters should be approached with respect for the other state's sovereignty and for "the way in which [it] chooses to provide the assistance within its borders" (para. 52).

Finally, citing its case law drawing on international human rights treaties to interpret the Charter, the majority determined that the well-established presumption that statutes conform to international law applies to constitutional interpretation. Not only, the majority said, will Canadian courts construe the Constitution and statutes so as to avoid violations of international law, but they will further presume legislative compliance with "the values and principles of customary and conventional international law" (para. 53).

Turning to the substantive customary principles relevant to the territorial reach of the Charter, the Court noted that state jurisdiction takes several forms, and it pointed to the distinctions among prescriptive, enforcement, and adjudicative jurisdiction. Although territoriality is the primary basis of all three types of jurisdiction (para. 59), states may also rely on the nationality principle to exercise prescriptive and adjudicative jurisdiction over their nationals abroad (para. 61).[3] When states have concurrent valid claims to jurisdiction, "comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event" (para. 62).

Enforcement jurisdiction, by contrast, is strictly territorial: "[I]t is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law" (para. 65). Thus, Canadian law cannot be enforced in another state's territory without that state's consent.

[3] The Court also discussed other bases of jurisdiction in international law, including universal jurisdiction (para. 61).

Applying these principles to the Charter, the majority determined that under section 32 a criminal investigation "cannot be a matter within the authority of Parliament . . . because [it has] no jurisdiction to authorize enforcement abroad" (para. 94). To reach this conclusion, the majority reasoned that applying the Charter to an investigation conducted outside Canada would always interfere with the territorial state's sovereignty and violate the principle of non-intervention:

> 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. . . . Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible. (Para. 85)

The majority thus departed from the Court's 1998 holding in *R. v. Cook* that Charter rights apply to investigations abroad as long as their application would not "generate an objectionable extraterritorial effect."[4]

Cook was "problematic," the Court explained (para. 158), because the majority in that case failed to distinguish prescriptive from enforcement jurisdiction and failed to give due consideration to the wording of section 32. In theory, a foreign state could consent to the extraterritorial application of Canadian law to an investigation conducted in its territory. The majority found, however, that no such consent was given in this case, as the RCMP agents were clearly acting under the authority of Turks and Caicos officials (para. 106).

Additionally, the *Cook* approach failed to address the practical and theoretical difficulties of applying the Charter to investigations abroad—an argument raised by the attorney general of Ontario as intervenor. The Court noted that it would be unrealistic to expect Canadian officials acting abroad to obtain warrants pursuant to the Charter, and it could compromise cooperative investigations to require that they operate simultaneously under two different sets of rules (paras. 86, 89). Likewise, prohibiting Canadian officials from participating in investigations conducted abroad under rules inconsistent with the Charter would unduly restrict Canada's participation in the fight against international crime (paras. 97–100).

Having ruled that the Charter does not apply to the conduct of investigations abroad, the majority took care to emphasize that certain Charter protections could affect the admissibility of evidence in a Canadian trial. For example, certain investigation practices might compromise the accused's right to a fair trial under section 11(d) or offend the principles of fundamental justice protected by section 7 (para. 100).[5] The majority also evoked the possibility that investigatory conduct abroad that violates Canada's international human rights obligations might justify a Charter remedy (para. 101).[6] None of these considerations, however, were of any benefit to Hape: the majority determined that admission of the Turks and Caicos evidence did not violate his right to a fair trial, and dismissed his appeal.

[4] R. v. Cook, [1998] 2 S.C.R. 597; *see also* R. v. Harrer, [1995] 3 S.C.R. 562; R. v. Terry, [1996] 2 S.C.R. 207; R. v. Canada (Attorney General), [1998] 1 S.C.R. 841 (precedents analyzing extraterritorial application of the Charter to evidence-gathering abroad).

[5] Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[6] In particular, section 24(2) of the Charter contemplates the exclusion of evidence obtained in violation of Charter rights.

In a concurring opinion joined by two other members of the Court, Justice Bastarache maintained that the Charter did apply to the search and seizures by RCMP officers in the Islands. In his view, Canadian law could apply to Canadian government officials in a foreign country without "automatically" interfering with the latter's sovereign authority (paras. 160, 162 (Bastarache, J., concurring)). Further, the Charter's criminal procedure provisions do not mandate specific actions by Canadian officials but instead set a benchmark for subsequent review of their conduct. In the context of an investigation conducted abroad, courts should consider the need to fight transnational crime effectively while respecting the sovereignty of other states. There would be no Charter violation when Canadian officials complied with local law, as long as the differences between fundamental human rights protection given by the local law and that afforded under the Charter were not "inconsistent with basic Canadian values" (para. 174; Bastarache, J., concurring). Bastarache concluded that the differences between Turks and Caicos law and the Charter did not raise serious concerns, and agreed with the majority that Hape had failed to establish a breach of section 8.

In a separate concurring opinion, Justice Binnie favored resolving the issue on the basis of *Cook* and its predecessors, and argued that application of section 8 in this case would be unworkable and produce an objectionable extraterritorial effect. He criticized the majority for effectively overruling *Cook* by holding, "in essence, that *any* extraterritorial effect is objectionable." The straightforward issues of a money-laundering investigation presented in this case did not "afford a proper springboard for . . . sweeping conclusions" regarding section 32, Binnie wrote, opining that the Court should "avoid premature pronouncements that restrict the application of the *Charter* to Canadian officials operating abroad in relation to Canadian citizens" (paras. 181–83; Binnie, J., concurring). Evoking the U.S. debate concerning "special renditions," the involvement of Canadian troops in Afghanistan and in multiple peace operations, and the controversy surrounding the Maher Arar affair—in which serious issues were raised concerning Canadian police conduct in relation to the apprehension of a Canadian citizen in the United States that led to his incarceration and torture in Syria—Binnie reasoned that the Court "should not in this case substitute rigidity for flexibility and, prematurely (and unnecessarily), foreclose *Charter* options that are now open to it" (paras. 184, 191; Binnie, J., concurring).

* * * *

The majority opinion in *R. v. Hape* will be widely cited in Canada for its abundant dicta reaffirming and clarifying fundamental aspects of the relationship between international law and the Canadian legal order. In particular, the Court's unambiguous espousal of the adoption doctrine should quell many lingering doubts about the status of international custom in Canadian courts.[7] Likewise, the majority's discussion of the presumption that laws must be read consistently with Canada's international obligations reaffirms the doctrine with exceptional force and clarity (para. 53).

The majority's discussion of customary principles of jurisdiction, a topic largely neglected by courts, will be of interest to international lawyers. In particular, *Hape*'s extensive dicta on

[7] *See* GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 137–70 (2002); Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 2002 CAN. Y.B. INT'L L. 3.

prescriptive jurisdiction, to the effect that "a state ought to assume jurisdiction only if it has a real and substantial link to the event" (para. 62), may suggest high court support for the "reasonableness" approach advocated by the *Third Restatement*.[8] Nevertheless, the majority's operative discussion of enforcement jurisdiction is problematic. The majority correctly observed that, while states may exercise prescriptive and adjudicative jurisdiction on any of several possible bases, enforcement jurisdiction is strictly territorial (para. 65). Yet the majority's assertion that any application of the Charter to Canadian officials participating in investigations abroad would constitute impermissible extraterritorial enforcement is unlikely to attract consensus.

The majority defined enforcement jurisdiction as "the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld" (para. 58). It is unclear, however, why a Canadian agent's mere compliance with the Charter fits this definition.[9] Had RCMP officers conducted their investigation without the consent of local authorities, Turks and Caicos sovereignty would have been infringed. It is also plain that even after consent was obtained, the agents were subject to the laws of the territorial sovereign. They retained, however, their status as Canadian agents, and Canada retained the authority to direct and limit their actions.[10] The majority's insistence that the investigation was exclusively a Turks and Caicos operation seems at odds with its initiation by RCMP agents in Canada and with its pursuit in the Islands for the sole purpose of obtaining evidence for a Canadian trial. The case might better have been treated as one of concurrent prescriptive jurisdiction, subjecting the Canadian agents to both Turks and Caicos law and Canadian law—including the Charter.[11]

Having decided that application of Charter protections abroad would violate international custom, the majority applied this customary norm in interpreting the Charter. The majority correctly recognized that the presumption of conformity with international law is generally rebuttable (para. 53). Thus, Parliament may, by clear language or implication, adopt laws that exceed Canada's prescriptive or adjudicative jurisdiction under customary international law, and the courts will be bound to apply them (para. 68). Nevertheless, the majority appears to hold that Parliament cannot validly adopt laws that exceed Canada's international enforcement jurisdiction (paras. 68–69). Why should the rules governing *enforcement* jurisdiction, which do not differ in nature from other prohibitive customary rules, be singled out? The implications of this dictum are unclear, especially given the majority's expansive conception of "enforcement."

Beyond the difficult issues raised by international jurisdiction, the case will likely generate broader concerns about the use of international law to interpret the Charter. The majority does not adequately explain why the presumption that statutes conform to Canada's international obligations applies to the Charter. The Court had previously referred to Canada's international obligations as supporting expansive interpretations of Charter rights, providing protection at least as great as that afforded by similar provisions in international human rights documents

[8] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §403 (1987).

[9] Leading doctrinal sources cited by the majority do not directly support this holding. *See* Michael Akehurst, *Jurisdiction in International Law*, 1972–73 BRIT. Y.B. INT'L L. 145; F. A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 9 (1984-III).

[10] It would be otherwise if Canadian law expressly mandated acts prohibited by local law, which was not the case here. *See* Mann, *supra* note 9, at 45–46.

[11] The question then would have become whether, under Canadian constitutional law, Hape could reasonably expect to enjoy the full benefits of section 8 after deliberately organizing his company and conducting its activities abroad.

ratified by Canada.[12] This approach followed the Court's "generous and purposive" approach to Charter interpretation.[13] In *Hape*, however, the majority cites these cases to support its invocation of international law to limit the availability of Charter protections in a Canadian trial. This approach is particularly troubling where the international law principles invoked—here, the customary rules on jurisdiction—are notoriously rarefied and imprecise.

The contrast with parallel cases in the United States concerning the extraterritorial application of the U.S. Bill of Rights is striking.[14] Unlike the leading U.S. cases, which are virtually silent on international law, *Hape* painstakingly analyzes international custom to inform its interpretation of the Charter, with a surprising outcome. The case far exceeds *Verdugo-Urquidez*[15] in limiting the extraterritorial application of search and seizure protections. It appears likely that in a similar situation—an investigation of an American citizen conducted by U.S. officials abroad for a trial in the United States—U.S. courts would apply the Fourth Amendment.[16] Ironically, the Canadian Supreme Court's openness to international law leads to lesser constitutional protection abroad than the narrower use of international law by the U.S. Supreme Court in interpreting the Bill of Rights—a result few international lawyers would have predicted. Even more significantly, the Court resolved *Hape* by interpreting section 32, a general provision governing the scope of application of the entire Charter. Its far-reaching ruling creates a presumption against extraterritorial application of virtually all Charter rights, and stands out against the more cautious and fact-sensitive approach adopted by the U.S. Supreme Court. Justice Binnie's warning that *Hape* may prejudge more consequential cases relating to the Canadian government's involvement in the war on terror appears well-founded.

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Japan-China Joint Communiqué of 1972—San Francisco Peace Treaty Article 14(b)—individual victims of Japanese wartime forced labor and sexual slavery—World War II restorative justice—denial of right to compensation in domestic litigation

NISHIMATSU CONSTRUCTION CO. V. SONG JIXIAO ET AL. 61 MINSHŪ 1188, 1969 HANREI JIHŌ 31. *Available at* <http://www.courts.go.jp/hanrei/pdf/20070427134258.pdf> (in Japanese), <http://www.courts.go.jp/english/judgments/text/2007.04.27-2004.-Ju-.No..1658.html> (English translation).
Supreme Court of Japan (2d Petty Bench), April 27, 2007.

KŌ HANAKO ET AL. V. JAPAN. 1969 HANREI JIHŌ 38. *Available at* <http://www.courts.go.jp/hanrei/pdf/20070427165434.pdf> (in Japanese).
Supreme Court of Japan (1st Petty Bench), April 27, 2007.

The panoply of claims against Japan and Japanese parties arising from wartime acts in the mid-twentieth century remains a pressing matter of diplomacy, international affairs, economic

[12] *See* Slaight Commc'ns, Inc. v. Davidson, [1989] 1 S.C.R. 1038, 1056 (Dickson, C.J.) (citing Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 349 (Dickson, C.J., dissenting)).

[13] *See, e.g.*, Hunter v. Southam, Inc., [1984] 2 S.C.R. 145, 156.

[14] *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957).

[15] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[16] Unlike the U.S. Supreme Court, the Canadian Supreme Court seems to have attached very little significance to the accused's citizenship and other links with Canada.