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***R.* v. *Hape*: International Law before the SCC**

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R. v. Hape: International Law before the SCC

By Noemi Gal-Or*

The Supreme Court of Canada recently had occasion to tackle the extraterritorial application of the *Charter* and the domestic[1] judicial interpretation and application of international law. Shortly thereafter, *Hape*[2] came to figure prominently in the application for judicial review concerning the Canadian Armed forces treatment of Afghani detainees. [3] In an age of exponential growth in international law, a State's judiciary cannot afford the luxury of oblivion to its domestic implications. Whether we like it or not - more than ever before, international law has become part of the domestic regulation and governance - and if only by distinction. *Hape* glaringly illustrates this *prise de conscience*. It also demonstrates that in matters security, incorporating international legal considerations within our domestic law is a complex fiat. Although the full Court reached the same final decision and rejected the appeal, it was divided into three groups reasoning along three different lines; moreover - the two concurring judgments strongly challenged the reasons of the majority.[4]

Hape arose as a result of a search for suspected money laundering activities, which was conducted by the RCMP in the offshore investment company's office of a Canadian businessman in the Turks and Caicos Islands (T&C). The search was performed with the permission and under the control of the local authorities. The SCC was asked to decide the appellant's submission that "the *Charter* applied to the actions of the RCMP officers in the course of their searches and seizures at his office, notwithstanding that those

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[1] Often referred to as municipal or national law.

[2] *R.* v. *Hape*, 2007 SCC 26 [hereinafter: *Hape*].

[3] *Amnesty International Canada and British Columbia Civil Liberties Association* v. *Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2007 FC 1147 [hereinafter: *Amnesty International Canada*].

[4] Maintaining that it overruled the judgment (and test) in *R. v. Cook*, [1998] 2 S.C.R. 597, a case where an American, for which a Canadian extradition requested was outstanding, and who was arrested in the U.S., was interrogated there by Canadian police officers.

actions took place outside Canada".[5] In dismissing the appeal, the Court stated that "[t]he *Charter* does not generally apply to searches and seizures in other countries".[6] The Court also expressed itself on the application of international law to the Canadian legal system:

> While Parliament has clear constitutional authority to pass legislation governing conduct by Canadians or non-Canadians outside Canada, its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. 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. Since it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law, in interpreting the scope of application of the *Charter*, a court should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction. [53] [56] [68][7]

It is this paragraph which opens up the Pandora Box of legal interpretation. It highlights the challenges that are still facing the Canadian judiciary in matters where domestic law meets international law. In the following sections, I will outline and discuss the general and most salient issues[8] arising from the majority and the two concurring but, in fact, differing opinions in *Hape*.

Perspectives

The general legal perspective applied sets the tone, colouring the argumentation that follows. Currently, two perspectives are competing for prominence in international law: The constructivist and the positivist. Different, not at all contradictory, they are occasionally even mutually complementary, depending on the extent to which any argument "stretches" either perspective. The constructivist approach is "the new kid on the bloc" representing the increasing "popularity" of soft law.[9] It plays an increasingly important role in the shaping of international (also national) law, gaining notoriety at

[5] *Hape*, at 2-3. The appellant sought to have documentary evidence excluded pursuant to ss. 24(2) and 8 of the *Charter*.
[6] *Ibid.* at 3.
[7] *Ibid.* at 3-4.
[8] E.g., lleaving issues relevant to the applicable "test" for another time.
[9] Soft law is still a controversial term considered an oxymoron by its opponents.

least by challenging the positivist perspective. Constructivism is the perspective guiding the majority's decision in *Hape*. It is best reflected in the following paragraph written by Justice LeBel:

> We cannot always know what new issues might arise before the courts in the future, but we can trust that the law will grow and evolve as necessary and when necessary in response. But until those new issues are presented in live cases we ought not to abdicate our duty to rethink and refine today the law when confronted by jurisprudence that has demonstrated practical and theoretical weaknesses.[10]

The "orthodox" positivist perspective sees international law as a primarily and generally collaborative inter-governmental law for states. It prefers adherence to hard (conventional treaty), and traditional formal (customary), law.[11] It is the main stream perspective, and guides the two separate concurring opinions in *Hape*. Justice Binnie asserts it when raising the concerns brought before Canadian courts related to, for instance, individuals detained by the Canadian Forces operating in Afghanistan and the *Maher Arar Inquiry*. He argues:

> I mention these matters simply to illustrate the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the *Charter*. Traditionally, common law courts have declined to make far-reaching pronouncements before being required by the facts before them to do so, heeding the cautionary words of the poet:
>
> There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy.
>
> (*Hamlet*, Act I, Scene v, 11. 166-67)[12]

Furthermore, Justice Binnie expresses doubts as to the majority's "proposal [...] that international human rights obligations should become the applicable 'extraterritorial' standard in substitution for *Charter* guarantees even as between the Canadian

[10] *Hape* ¶ 95 at 64-65.
[11] This is a very simplistic description of the sources of international law, which nevertheless suffices for the purpose of this paper.
[12] *Hape* ¶ 184 at 110-111.

government and Canadian citizens".[13] These comments assist in distinguishing the two perspectives from each other: The interpretation based on the positivist perspective, which traditionally defers to state sovereignty and hard law, recognises Canadian law's extra-territorial effect (as long as it is not "objectionable"),[14] whereas the constructivist approach (at least in *Hape*) defers to international law - so much so as to deny Canadian law almost "*any* extraterritorial effect."[15]

When and how is international law relevant to domestic law?

Besides being a constitutional case, *Hape* is undoubtedly a judgment - albeit inconclusive - about the relationship between domestic and international law. This is reflected in the three different lines of argumentation pursued in the three opinions. *Hape* raises issues of concurrence of law, supremacy, conformity, and compatibility of domestic and international law, the difference between conflict of law (private international law) and public international law as well as a host of international legal issues, general and specific (including some left non discussed, e.g. concerning the relationship between Canada and the T&C Islands). The judgment is consequently a source of confusion, particularly the majority's opinion. Here are some examples.

The majority opinion spans many pages of international legal analysis although the purpose for this remains unclear particularly as the final reasoning is not based on international law. Moreover, the majority analysis juggles conflict of law with public international law arguments, often obscuring which teleology is determinant of the case.[16] And because the Court interprets international, by recourse to domestic, law and its

[13] *Ibid* ¶ 186 at 112. This foreboding is reinforced in *Amnesty International Canada*, especially in ¶ 87 and ¶ 94, when addressing the ("other side of the coin" of Justice Binnie's doubts) question whether constitutional right guarantees "follow the flag" and govern Canadian security authorities when outside the country.
[14] *Ibid* ¶ 186 at 112.
[15] *Ibid*. [original emphasis], according to Justice Binnie.
[16] Justice Bastarache "prefer[s] to continue to rely on the *Charter*, as this Court attempted to do in *Cook*, though [I] recognize[s] [there are] problems with the position of the majority in that case that must be dealt with." *Ibid.* ¶ 125 at 79.

typical departmentalisation[17] (but not at all, to international law), the analysis is further blurred. For instance, when identifying the *Charter* s. 32(1) as the first leg of the test, Justice LeBel argues that

> [t]he activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each province. 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. Criminal investigations, like political structures or judicial systems, are intrinsically linked to the organs of the state, and to its territorial integrity and internal affairs. Such matters are clearly within the authority of Parliament and the provincial legislatures when they are in Canadian territory; it is just as clear that they lie outside the authority of those bodies when they are outside Canadian territory.[18]

This broad brush statement ignores several relevant matters. For once, it overlooks the existence in international law of conventions on international cooperation in criminal matters, which were designed precisely to regulate such circumstance.[19] After all, the *raison d'être* of treaties is, among other things, to enable states to mutually assist in their domestic law enforcement. While the majority prefers to formulate its argument mainly in terms of public international customary law,[20] it nevertheless makes indirect reference to conventional law as well. Moreover, it seems peculiar to devote an entire sub-title to "(3) The Globalization of Criminal Activities and the Need for International Cooperation" [21] yet at the same time disregard the growing volume of relevant conventional law.

At the substantive level of analysis, the majority becomes entangled in its own expansive discussion of a typology arising from state (not international) jurisdiction - prescriptive,

[17] Justice Bastarache notes that this tautological fallacy is vitiating the majority's interpretation of domestic law: "The *Charter* is not meant to be applied as if it were merely a code of criminal procedure". *Ibid.* ¶ 125 at 79.
[18] *Ibid*. ¶ 94 at 64.
[19] I do not know whether Canada and the T&C Islands are mutually bound by any such instruments.
[20] The majority elaborates on the domestic reception of international customary law and the two relevant doctrines. However, relying on a history of relevant Canadian *stare decisis*, it fails to distinguish between customary and conventional law, moving back and forth between them, for instance, when relying on a quote referring to the United Nations as a source of law. *Ibid.* ¶ 73 at 31.
[21] *Ibid*. at 65, original emphasis.

enforcement, and adjudicative - and their application to the analysis of international law principles of jurisdiction. Extraterritorial jurisdiction is based on two underlying principles: Nationality and Universal.[22] This would have sufficed to ascertain Canada's extraterritorial jurisdiction over the RCMP operations in the T&C Islands without venturing into any further study of the three facets of domestic jurisdiction. In fact, from an international law point of view, little does it matter what particular section of the *Charter* (or any Canadian statute for that matter), applies. Once conditions for extraterritorial jurisdiction (nationality or universal) are established, all that remains is to shift gear to an analysis (test) of the particular and relevant domestic provisions. Consequently, it is both redundant and confusing to engage in any broader or deeper analysis of conventional or customary international law. Therefore, by dwelling on the different aspects of domestic jurisdiction and linking them to the international principles of jurisdiction, the majority lost focus and contradicted itself.[23]

Incongruous argumentation regarding one point tends to propel further uncertainties. The majority argues that "Canadian consular officials operating abroad have some immunity from local laws on the basis of nationality jurisdiction, but that does not mean they have the power to abide by Canadian laws and only Canadian laws when in the host state".[24] Certainly, this doesn't mean either that Canadian consular officers are stripped of their Canadian *Charter* obligations when on mission abroad. Consequently, what this paragraph reveals is yet another set of confusion which runs throughout this judgment, this time concerning the distinction between the two functions of the *Charter*: Rights of the citizen and duties of the government. In fact, *Hape* looks like a pendulum pulling the majority to swing from the rights to the duties aspects in an effort to accommodate its interpretation of Canada's international obligations. How else can the following statement be reconciled with the majority's reliance on the nationality principle of extraterritorial jurisdiction?: "There is no magic in the words 'co-operative investigation', because the issue *relates not to who participated* in the investigation but to the fact that it occurred on foreign soil and that consent was not given for the exercise of extraterritorial

[22] For the discussion see *ibid.* § E. (1) at 42-47.
[23] E.g., *ibid.* ¶ 60 at 87 versus ¶ 104 at 69.
[24] *Ibid.* ¶ 104 at 70.

jurisdiction by Canada".[25] Indeed, it is here that the concurring opinion by JJ. Bastarache, Abella, and Rothstein sets the matter straight - as belonging to *Charter*, not international law, interpretation. "Section 32(1) defines who acts, not where they act. […] The *Charter* thus applies extraterritorially, but the obligations it creates in the circumstances will depend on the nature of the right at risk, the nature of the action of the police, the involvement of foreign authorities and the application of foreign laws."[26]

In fact, both concurrent opinions prefer to treat *Hape* as a *Charter* rather than international law case. While Justice Bastarache's opinion focuses on substantive issues, it shares with Justice Binnie a concern for efficiency and effectiveness of both domestic and international law. For Justice Bastarache, "practically speaking, […] it is preferable to frame the fundamental rights obligations of Canadian officials working abroad in a context that officers are already expected to be familiar with — their obligations under the *Charter*".[27] And for Justice Binnie, "[i]t is precisely because of the uncertainty about future developments, some of which are now in the litigation pipeline, that I believe the Court should not in this case substitute rigidity for flexibility and, prematurely (and unnecessarily), foreclose *Charter* options that are now open to it under the flexible principles enunciated in *Cook*".[28]

Finally, at the backdrop of the SCC recent conspicuous silence regarding international law - where the risk was of a national security type[29] - the Court's enthusiasm in *Hape* to follow the route of international law, is surprising. In *Charkaoui*, addressing Canada's relevant international legal commitments would have been appropriate from both the

[25] *Ibid.* ¶ 117 at 77, emphasis added.
[26] *Ibid.* at 7.
[27] *Ibid.* ¶ 173 at 103.
[28] *Ibid.* ¶ 191 at 114.
[29] *Adil Charkaoui* v. *Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness*, Supreme Court of Canada, 2007 SCC 9, Docket: 30762, 30929, 31178, 23 February, 2007 [hereinafter: *Charkaoui*]. In this immigration case the constitutionality of the anti-terrorism law's security certificate was challenged. (See also, Gal-Or, Noemi. "Zooming in and out: The Tree and the Forest in the Justice Approach to Terrorism", submitted for publication 2007, available with author.) This has now been responded to by the "special advocate" amendment bill to Canada's national security immigration law tabled October 2007.

positivist and constructionist perspectives. Similar to ***Charkaoui***, *Hape* (even if not a future precedent), serves us as one more step in furthering our judiciary's adaptation to globalisation.