

THE DOMESTIC ENFORCEMENT OF  
INTERNATIONAL COVENANTS ON HUMAN  
RIGHTS: A THEORETICAL FRAMEWORK*Introduction*

The post-war recognition of individuals as proper subjects of international legal norms has attracted much scholarly comment.<sup>1</sup> Whereas traditionally the state has been the exclusive bearer of legal personality in the international arena, the last three decades have witnessed a proliferation of treaties purporting to guarantee rights to individuals, not as nationals but as human beings, and indeed to protect these rights even against their own governments. Pre-eminent among these treaties are the European Convention on Human Rights (E.C.H.R.),<sup>2</sup> the International Covenant on Civil and Political Rights (I.C.C.P.R.),<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights (I.C.E.S.C.R.).<sup>4</sup>

Each of these conventions contains provisions for enforcement or implementation at the supranational level. Thus, the I.C.C.P.R. creates a Human Rights Committee with power to consider reports from state parties concerning their compliance with the treaty and to receive a complaint by one contracting state of alleged violations by another.<sup>5</sup> Furthermore, under the optional protocol to the covenant, the committee may hear complaints from individual petitioners provided all domestic remedies have been exhausted and the state whose activities are complained of is a signatory of the protocol.<sup>6</sup> It would be to take an unduly cynical view of international legal arrangements to regard these provisions as being entirely inefficacious. Undoubtedly the supranational bodies charged with implementing human rights conventions can achieve worthwhile results by focusing public attention on alleged violations, particularly when the complaint concerns a state by and large committed

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1 See Eide and Schone (eds.) *International Protection of Human Rights* (1968); Lauterpacht *International Law and Human Rights* (1950); Lillich and Newman *International Human Rights* (1979); Luard (ed.) *The International Protection of Human Rights* (1967); Sohn and Buergenthal *International Protection of Human Rights* (1973); McDougal, Lasswell, and Chen *Human Rights and World Public Order* (1980).

2 E.T.S No. 5; U.K.T.S. 70 (1950); Cmd. 8969

3 G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966)

4 G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)

5 Articles 40(1), 41(1)

6 Article 5

to the protection of human rights.<sup>7</sup> Nevertheless, the weaknesses of supranational enforcement are apparent. Under the I.C.C.P.R., for example, the Human Rights Committee may consider a complaint by a member state only if that state and the one complained against have separately recognized the competence of the committee with regard to themselves.<sup>8</sup> Second, the remedial powers of the committee are limited to those of conciliation between the parties. If a solution is not reached, the committee may, with the consent of the parties, appoint a conciliation commission, whose final report is, however, not binding.<sup>9</sup> The remedial jurisdiction of the committee is even more restricted under the optional protocol. For though it may entertain a petition from an individual against a state party, the committee is not a court and so has no authority to make a judicial determination of the dispute. It may only communicate 'its views' on the matter to both the state party and the individual.<sup>10</sup>

Given the weakness of the machinery for the supranational enforcement of human rights, the question arises whether treaties like the I.C.C.P.R. can acquire additional effectiveness through their enforcement by domestic tribunals. Of course, where domestic laws provide a standard of protection equal to or greater than the international standard, the issue is of little practical importance. Nor is it of much significance at the opposite extreme – where a government has little practical commitment to the domestic protection of its citizens against its own abuses. However, the question becomes extremely important where international standards of protection are higher than the domestic standards of a constitutional democracy.<sup>11</sup> For in this situation the issue concerns not only the extent to

7 See Novak, The effectiveness of the international covenant on civil and political rights—Stocktaking after the first eleven sessions of the Human Rights Committee (1980) 1 *Human Rights L.J.* 88; Humphrey, The implementation of international human rights law (1978) 24 *N.Y.L.S.L. Rev.* 31.

8 Article 41(1)

9 Article 42

10 Article 5(4). The enforcement machinery of the E.C.H.R., while stronger than that of the I.C.C.P.R., also betrays weaknesses. Unlike the I.C.C.P.R., the European convention establishes a European Court of Human Rights with jurisdiction to hear complaints referred to it by the contracting parties or by the Commission on Human Rights (articles 38–54). However, the court's jurisdiction in each case is dependent on the prior or *ad hoc* recognition thereof by the parties concerned (article 48). And while the decision of the court is said to be binding (article 53), no provision authorizes sanctions against a recalcitrant state.

11 See *Sandra Lovelace v. Canada*, U.N. Doc. CCPR/C/DR (XIII) (1981) (Communication No. R. 6/24), in which the Human Rights Committee expressed the view that the section of the Indian Act upheld by the Supreme Court of Canada in *Attorney-General of Canada v. Lavell* (1973), 38 D.L.R. (3d) 481 violates article 27 of the I.C.C.P.R. See also *Re Mitchell and The Queen* [1983] 42 O.R. (2d) 481 (H.C.) (right to lesser penalty broader under I.C.C.P.R. than under Charter); *Malone v. Commissioner of Police of the Metropolis* [1979] 2 All E.R. 620 (right of privacy guaranteed by E.C.H.R. but not by common law); *Gleaves v.*

which international treaties can acquire additional effectiveness through enforcement by domestic tribunals, but also, and correlatively, the extent to which domestic tribunals can use international covenants to develop their internal law.

One matter requires immediate clarification. In considering the domestic enforceability of international treaty obligations, one must distinguish between the duty of enforcement under international and under municipal law. It is a well-established principle of customary international law that a state is obliged to make whatever domestic legal changes are necessary to comply with its international obligations.<sup>12</sup> It may not, in other words, rely either on domestic statutes or on constitutional law as a defence to an allegation of non-compliance. Since, however, this rule is one of international law, it is binding only on an international tribunal. It cannot bind a domestic court except as a rule of statutory construction. If international treaty obligations are enforceable by a domestic tribunal, they are so either by virtue of their having become part of municipal law or by virtue of some theory which distinguishes treaty obligations whose domestic enforcement would compromise legislative supremacy from those whose enforcement would be consistent with this principle. This essay deals exclusively with the issue of enforcement by domestic tribunals.

There are at present two prevalent techniques for incorporating international treaties into domestic law.<sup>13</sup> One is the method of 'general transformation,' whereby a constitutional provision automatically incorporates ratified treaties into the law of the land. This method, which presupposes ratification by a legislative body, is used in the United States, France, the Netherlands, and the Federal Republic of Germany. In these states, a ratified treaty, provided it is 'self-executing,' becomes a rule of municipal law binding on domestic tribunals.<sup>14</sup> The other technique is the one used in the United Kingdom and Canada. Known as the method of 'special transformation,' it consists in the domestic implementation of treaties by appropriate and separate legislation. Absent such legislation, a treaty will be powerless to affect domestic rights unless it can be shown to

*Deakin* [1980] A.C. 447 (criminal libel protections stronger in E.C.H.R. than at common law); McCouch, Implementing the European Convention on Human Rights in the United Kingdom (1982) 18 *Stan. J. Int. L.* 147.

12 Permanent Court of International Justice, Series B, No. 17, p. 32; PCIJ, Series A/B, No. 44, p. 24; see also the Draft Declaration on Rights and Duties of States 1949, Article 13, Y.B.I.L.C., 1949, 288.

13 Sorensen, Obligations of a state party to a treaty, in Robertson (ed.) *Human Rights in National and International Law* (1968) 13-17

14 See *Sei Fujii v. California* 242 P.2d 617 (1952).

have become part of customary international law.<sup>15</sup> The requirement of a transformation (whether by constitution or statute) of an international convention is to be contrasted with the automatic 'adoption' by a domestic jurisdiction of a rule of international custom.<sup>16</sup> The ground of the distinction is the principle of legislative supremacy. As an expression of the will of the executive, a convention cannot consistently with the sovereignty of the general will create domestic rights until it has been enacted by the legislature, and (in Canada) by the legislature entrusted with the subject-matter of the treaty.<sup>17</sup> A rule of customary law, however, is viewed as the expression not of executive will but of a common human reason, the same reason that is historically embedded in the common law.<sup>18</sup> Hence the automatic incorporation of such a rule is considered to be no more antithetical to the sovereignty of the general will than is the enforceability of judge-made law. We shall see that this principle can be used to ground a general theory of the domestic enforceability of international covenants on human rights.

Where human rights treaties are automatically incorporated into domestic law by a constitutional provision, no problem of the legitimacy of enforcement arises. One need only determine whether the treaty is self-executing and whether, given the place of treaties in the domestic hierarchy of legal norms, it takes precedence over conflicting laws. Still, a constitutional provision for general transformation is far from guaranteeing the domestic enforcement of human rights covenants. Such a

15 See *The Parlement Belge* (1878-9), 4 P.D. 129 (C.A.); *A.-G. Canada v. A.-G. Ontario* [1937] A.C. 326 (P.C.). Human rights treaties have hitherto been held to be subject to the same rule; see *Re Mitchell and The Queen*, supra note 11.

16 *Buvot v. Barbut* (1736) 3 Burr. 1491; *Triquet v. Bath* (1764) 3 Burr. 1478; *The Paquete Habana* 175 U.S. 677 (1900). There is some controversy as to whether later English cases like *Chung Chi-cheung v. The King* [1939] A.C. 160 (P.C.) have changed this rule of adoption of international custom into one of transformation; see McDonald, The relationship between international law and domestic law in Canada, in MacDonald, Morris, and Johnson (eds.) *Canadian Perspectives on International Law and Organization* (1974) ch. 5; Cohen and Bayefsky, The Canadian Charter of Rights and Freedoms and public international law (1983) 61 *Can. Bar Rev.* 265, at 276-80. However, the adoption theory has recently been clearly reaffirmed in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 All E.R. 881. The Canadian position, moreover, is firmly adoptionist; see, for example, *Reference Re Exemption of U.S. Forces from Canadian Criminal Law* [1943] 4 D.L.R. 11 (S.C.C.).

17 *A.-G. Canada v. A.G. Ontario*, supra note 15

18 4 Blackstone *Commentaries on the Laws of England* c. 5, 67-8: 'The law of nations is a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world ... [This law] is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of Parliament which have from time to time been made to enforce this universal law ... are not to be considered as introductory of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world.'

provision will obviously avail little if, as is true of the United States, the state is not a party to any major human rights treaty.<sup>19</sup> Furthermore, the requirement that the treaty be self-executing is unlikely to be fulfilled by covenants guaranteeing the protection of human rights by means of broadly worded statements of principle.<sup>20</sup> For a country like the United States, therefore, the domestic enforceability of international human rights instruments must (barring a finding of custom) rest on a theory which makes their enforceability independent of the existence of a treaty obligation.

A different problem arises in countries requiring a specific act of legislative transformation. Since the question of the domestic enforceability of international human rights law assumes practical importance only when a disparity exists between international and municipal standards, the requirement of a specific transformation seems to render international guarantees powerless precisely when they are needed most. There is, to be sure, an alternative route to enforcement, namely, through a finding that an international convention has, through general acceptance and compliance, passed into customary law. Except, however, for two recent American decisions,<sup>21</sup> this avenue has not been particularly fruitful, nor is it likely to become so, given the indeterminate criteria for a finding of custom and judicial reluctance to legislate what are perceived to be external rules.<sup>22</sup> This, then, is the problem I shall primarily address. The challenge is to formulate a theory which will justify the application by domestic tribunals of international human rights law even in the absence of legislative transformation, of a treaty obligation activating a constitutional provision for automatic transformation, or of a near-universal acceptance of a convention as a binding rule of custom. Such a theory must satisfy a number of desiderata. While justifying a departure from existing rules governing the domestic enforceability of international law, it must show how this exception is consistent with the principle underlying the rules, which are thus preserved within a more comprehensive and differentiated framework. Moreover, this framework must not impose itself on juridical phenomena from without, but must render intelligible and coherent the salient features of the law as it exists independently of

19 The United States is a party to the United Nations Charter, but not to the I.C.C.P.R., the American Convention on Human Rights, or the International Convention on the Elimination of All Forms of Racial Discrimination.

20 American courts have held that the human rights provisions of the United Nations Charter are not self-executing and hence not enforceable domestically without implementing legislation. The leading case is *Sei Fujii v. California*, *supra* note 14.

21 See *Filartiga v. Pena-Irala* 630 F.2d 876 (1980); *Fernandez v. Wilkinson* 505 F. Supp. 787 (1980). These cases are dealt with below.

22 See Bilder, Integrating international human rights law into domestic law - U.S. experience (1981) 4 *Houston J. of Int. Law* 1.

theorizing. Finally, our theory must, while remaining internally unified, provide a specific rationale for each of the three possible uses of human rights treaties by municipal courts. It must, first of all, justify the use of such treaties in interpreting domestic constitutional standards. Second, it must justify their use as evidence of a public policy favouring the recognition of novel causes of action. And third, it must specify the conditions under which such treaties might justifiably be used as generating principles of law directly applicable to domestic activity.

*Rules and principles*

The question of the domestic enforceability of international human rights norms raises the eternal problems of jurisprudence. Specifically, it raises the issue of what counts as law in any legal system. The position one takes on the propriety of a court's applying international legal norms to domestic disputes will probably reflect one's views on the meaning of 'law' and legal 'validity.' It seems clear, for example, that a positivist stance on these matters would reject the suggestion that a domestic court could apply international conventions without their having been internalized by a domestic act of legislation. This conclusion would follow from the positivist thesis that determinate acts of will issuing either directly or mediately from the sovereign are the exclusive source of legal norms in any civil society. Although positivists may differ as to the ultimate criterion for identifying the sovereign, they agree that a norm is a law if, and only if, it is an act of will, and that the validity of acts of will depends on their pedigree, that is, on their being traceable to a will authorized (whether by habitual obedience, a 'rule of recognition,' or an intellectual presupposition) to issue binding norms.<sup>23</sup> On this view, an untransformed international convention could not legitimately be applied by a domestic court, since such a convention is by definition not posited by the sovereign.

On the other hand, the prospects for the domestic enforceability of international human rights norms brighten from a natural law perspective. It has become customary to regard natural law as a substantive criterion of legal validity transcending the merely formal requisites of positive constitutional law. On this view, the distinctive claim of natural law theory is that the brute fact of pedigree is at most a *prima facie* and defeasible ground of legal obligation, yielding to the further requirement that law promote a substantive common good discoverable by practical

<sup>23</sup> See Austin *The Province of Jurisprudence Determined* (1932); Hart *The Concept of Law* (1961); Kelsen *The Pure Theory of Law* (trans. Knight 1967).

reason.<sup>24</sup> No doubt this is the import of Aquinas' saying that 'every human law has just so much of the nature of law as it is derived from the law of nature, [and] if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.'<sup>25</sup> We shall presently see, however, that there exists a theory of natural law for which constitutional pedigree assumes significance neither simply as a conclusive, formal basis of validity nor as a *prima facie* condition of validity subject to a further test for content, but as itself a substantive test of positive law. Moreover, once we have understood the principle that renders pedigree a test of content, we shall be in a position to identify norms that satisfy the principle *a priori* or independently of pedigree. Of course, having done so, we shall not yet have demonstrated the duty to enforce these norms. It is one thing to say that only those commands which are ordered to the common good are laws in the fullest sense; it is quite another to say that some commands so ordered are laws irrespective of whether they are issued by the sovereign. The first statement views natural law as an exclusionary test of valid law; the second sees it, ostensibly in disregard of any need for publicity, as a self-sufficient source of law. Yet natural law theorists typically do make both claims, and it is essential for our purposes to try to explain the connection between them.

When Aquinas says that a command, in order to have the nature of law, must accord with the law of nature, he is making a statement about the order of ends and, in particular, about the finality of ends common to self-conscious beings relative to the particularistic ends of appetite. If law is understood as a mere instrumental good directed towards the secure satisfaction of self-interest, then its authority must always repose on such variable conditions of insecurity as infinite acquisitiveness (hence scarcity) and the equality of human vulnerability. The notion of law, however, seems to import a norm that obliges with necessity and so independently of the vagaries of self-interest. Accordingly, if we are to take seriously the notion of law, we are bound to say that only those commands which affirm the primacy of a common, non-vital end are laws in the most stringent sense, for only such commands owe nothing for their obligatory force to the contingent requirements of self-preservation. Inasmuch, however, as this exclusionary statement assumes the finality of ends proper to rational beings, it entails the further proposition that commands inwardly necessitated by this order are also laws whether or not they are enacted.<sup>26</sup>

24 Aquinas *The Summa Theologica* I-II, Q. 90, A. 1-2; Finnis *Natural Law and Natural Rights* (1980) 245-52

25 Aquinas I-II, Q. 90, A. 1

26 *Ibid.*, Q. 94, A. 2, 4

On this view, then, positivity becomes essential to law, not as a *sine qua non*, but as a positing of a connection between a rule and the human good that does not exist necessarily and that therefore cannot otherwise be known. For Aquinas, the publicity of law and the intelligibility of law are one and the same condition of legality, satisfied without enactment in the case of laws whose connection with the common good is inward.<sup>27</sup>

The distinction between commands whose positedness is essential to their authority as law and those whose authority is independent of enactment corresponds to the distinction in natural law theory between rules and principles. The former are positive commands derived from the external application of the common good to concrete and variable circumstances, and whose validity is itself, therefore, contingent and local. Principles, on the other hand, are more abstract norms that are universally valid because their connection with the common good is grounded (in the Kantian view) *a priori* in reason or (in the Thomist view) in certain ontological necessities of human nature.<sup>28</sup> In either case, the connection with the human good is rational and necessary rather than merely empirical.

Rules and principles differ, moreover, not only in their degree of generality and in the manner of their genesis, but also in the way in which they are binding. Ronald Dworkin has expressed this distinction by saying that whereas rules apply in all-or-nothing fashion, principles have the dimension of weight.<sup>29</sup> That is to say, principles are binding not as compelling any particular result, but as embodying considerations that must be weighed in determining the scope of, or in elaborating, more concrete rules. Some of Dworkin's critics have argued that he has exaggerated the difference between rules and principles, pointing to the fact that rules sometimes conflict and so cannot, any more than principles, be said to compel a particular result.<sup>30</sup> This argument misses the point. Of course rules may conflict empirically, just as principles do in particular situations. However, while we are logically compelled to resolve the contradiction between rules – say, by qualifying the more general or by imputing a repeal of the earlier – we are under no such compulsion in the case of a conflict between principles or between principles and rules. The principle that one ought to pay one's debts is in no way undermined as a valid principle by the fact that it does not hold in a situation where the deposit is a weapon and the bailor a madman. We are not required to reconcile this inconsistency by a refinement of the initial proposition,

<sup>27</sup> *Ibid.*, Q. 90, A. 4

<sup>28</sup> *Ibid.*, Q. 91, A. 1; Q. 94, A. 2, 4; Q. 95, A. 2, 4

<sup>29</sup> Dworkin *Taking Rights Seriously* (1977) 24–8

<sup>30</sup> See Raz, *Legal principles and the limits of law* (1972) 81 *Yale L.J.* 823.



because the conflict does not amount here to a contradiction, or does not negate the first statement as a true statement of principle.

The reason, it seems, that conflicting rules are self-contradictory, while conflicting principles are not, has to do with the difference in the way that principles and rules originate. Principles originate independently of action and, concomitantly, independently of any particular experience. They do not arise, as rules do, through the subsumption of particular facts under a general purpose; rather, they derive either analytically from a first principle or (in the Thomist view) from a mantic or interpretive listening to the universal inclinations of one's nature. Principles, then, are just those universals which, abstracted from everything determinate, are not yet actual, not yet objective in any ordering of life. Because, however, principles are prior to action, and because action deals with contingencies not contained in principles, it follows that the latter can have none but a *prima facie* validity. Accordingly, the negation of its universality in the transition to existence can never contradict a principle, which, so to speak, avows its provisional, merely theoretical character from the start. A rule, by contrast, originates through an act, through the application to circumstances of a general purpose with a view to realizing the purpose in a finite context. A rule, therefore, is not an abstract universal but a concrete ordering of particulars towards an end. Its validity thus depends on, indeed *is*, its actualization in the circumstances stipulated by it, so that if it fails of actualization in those circumstances, it fails as a statement of a rule. Finally, because principles are (while rules are not) subject without contradiction to qualification in practice, it follows that, whereas rules operate by compelling conclusions, principles function only as guides prescribing limits to the operation of putative rules or providing premises for rule development. Thus, the refusal of American courts to apply the principles of the United Nations Charter on the ground that they are not 'self-executing' (that is, not rules) is a fundamental mistake. This refusal is based on a misunderstanding of the nature of principles and of the specific way in which they function in legal reasoning.

### *Three forms of will*

From a natural law perspective, therefore, it would be sufficient to demonstrate the rational connection between human rights principles and the common good to establish their domestic enforceability in the manner appropriate to principles. However, even assuming one could do this, one would have succeeded in justifying the domestic enforcement only of norms that are, for the most part, already enshrined in the constitutions of western democracies; one would not have justified the

domestic application of international human rights rules, nor of the interpretations made of principles by international agencies. Furthermore, this reasoning would support the domestic enforceability of international human rights principles only by dogmatically asserting the natural law thesis in the face of the positivist one. If the argument of the natural lawyer is to persuade the positivist, we must either resolve the age-old controversy in his favour, or else show that, from the standpoint of the positive legal order itself, the natural law criterion is relevant. It is the second of these strategies that I shall pursue. If it can be demonstrated that the positive order itself incorporates the natural law criterion of law, then the domestic application of untransformed international human rights norms cannot, provided it is consistent with immanent natural law standards, be objected to on positivist grounds.

One way to accomplish this objective would be to show that a positive order that directly adopts international custom implies a conception of sovereign will inconsistent with that of legal positivism. Although positivists generally count their neutrality on moral controversies as one of the virtues of their position, the concept of the will that is presupposed in their view is anything but uncontroversial. Hobbes, who is the father of modern legal positivism, also remains the only thinker to have self-consciously elucidated the theory of the will on which it rests:

In deliberation, the last appetite or aversion immediately adhering to the action or to the omission thereof is that we call the will – the act, not the faculty, of willing. And beasts that have deliberation must necessarily also have will. The definition of the will given commonly by the Schools, that it is a rational appetite, is not good. For if it were, then could there be no voluntary act against reason. For a voluntary act is that which proceeds from the will, and no other. But if instead of a rational appetite we shall say an appetite resulting from a precedent deliberation, then the definition is the same that I have given here. Will, therefore, is the last appetite in deliberating.<sup>31</sup>

Hobbes thus sees the will as an empty capacity for choice, the content of which is externally given by appetites and aversions. To any particular content the will is indifferent, because as a mere capacity to choose, it contains no inner criterion for distinguishing between appropriate or inappropriate contents, nor is such a criterion to be found in the appetites themselves. The so-called separation of law and morality (or of the form and content of law) in positivist thought is nothing but the claim that this egoistic or natural will exhausts the human potentiality for freedom, defining the horizon of rational choice. Laws are distinguished from the

31 Hobbes *Leviathan* (Liberal Arts Press 1958) 59

arbitrary pleasure of private individuals merely by the fact that they are commanded by a will to which all other wills have submitted.

To the Hobbesian theory of the will must be contrasted the Kantian. In the introduction to his *Sittenlehre*, Kant draws a distinction within the faculty of desire between two forms of will, to which correspond two types of freedom.<sup>32</sup> The will understood by Hobbes is capable only of negative freedom, or the freedom from external constraints. This, however, does not exhaust the human potentiality for freedom, because the individual is capable of being moved to action not only by the 'last appetite in deliberating' but also by the form of law or by the fitness of a principle for universal self-legislation. For Kant, only principles that all rational beings could will for themselves qualify as laws properly so called, since no principle embodying particular interests can oblige in the unconditional or non-prudential sense demanded by the concept of law. The possibility of such principles as something more than a mere chance agreement of interests is given by the existence of an end of action that has intrinsic and objective worth, and that would therefore necessarily be willed by all human beings if they willed only what all could will for themselves. This end is human personality, understood as the capacity to propose any end whatever, and whose unconditional worth at once authorizes and constitutes the limit of all freedom of action.<sup>33</sup> In acting for the sake of this end, the will is positively free, because its content is given not externally by appetite but autonomously by practical reason in the form of laws under which the liberty of each may co-exist with the equal liberty of all. Moreover, this capacity for self-determination reveals the existence in the individual of a pure Will, one abstracted from all subjective interests, and which thus expresses itself not in determinate actions but in the intellectual grasp both of the form of law and of principles which, because entailed by the dignity of the person, possess this form a priori – that is, whether or not they are actually consented to. Accordingly, Kant actually bids us distinguish between three forms of will: the will considered as a faculty of choosing among appetites and aversions, which the tradition of moral philosophy calls the natural or arbitrary will; second, the Will considered as practical reason or as the intellectual intuition of the form of law as that which is capable of being rationally willed by all; third, the will considered as a capacity for acting determinately in accordance with the form of law, which Kant, following Rousseau, calls the general will.

Now, I do not wish to claim that Kant's views on the nature of the will are in any way definitive. Indeed, it could be argued that by conceiving the essence of freedom by abstraction from the natural will, he shares the

32 Kant *The Metaphysical Elements of Justice* (trans. Ladd, Liberal Arts Press 1965) 12–13

33 Kant *Foundations of the Metaphysics of Morals* (trans. Beck, Liberal Arts Press 1959) 46–9

positivist's prejudice concerning the latter's irreducible reality. My aim, however, is to show that the distinction between a natural will directed towards particular interests and a lawgiving will devoted to universal ends illuminates doctrines of the legal order that remain obscure from a positivist viewpoint, and that it may thus serve as a premise for doctrinal elaboration. Moreover, I shall suggest that the concept of a will that is intellectually and practically oriented towards universally valid principles of law may ground a theory of deference to exogenous legislative bodies so constituted as to ensure the dominance of such a will.

The juridical doctrines I shall focus on are those which require a domestic transformation of international conventions but which 'adopt' or directly incorporate rules of international custom. It is not difficult to show that the positive legal order of which these doctrines form a part acknowledges the general will as the standard of law in both the exclusive and inclusive sense. Let us note, to begin with, that the distinction uncovered by Kant between the will as active and the Will as practical reason is the source of the difference between the exclusive and inclusive modes of natural law, or between natural law as a test and natural law as a source of law. Since the pure Will is abstracted from every contingent interest of individuals, it necessarily also repels from itself all considerations of the general welfare in so far as this standard presupposes the immediately given wants of individuals. It therefore cannot itself generate but can only set constraints upon the content of positive laws which have welfare or happiness for their aim. Positive law must originate from acts of will pursuant to contingent interests, acts whose conformity with the pure Will is institutionally guaranteed by committing them to a democratic assembly so structured as to be representative of the will of all. This means that, from a Kantian perspective, the test of constitutional pedigree will be relevant to the validity as law of determinate acts of will, whereas it will be irrelevant to legal contents having their origin a priori in practical reason (because necessarily an object of every rational will) or capable of being appropriated by practical reason by virtue of the de facto consent of mankind. Now, this is precisely the basis of the distinction between the 'adoption' of rules of international custom and the requirement of a 'transformation' of international conventions. A convention requires legislative transformation, because it is seen as an act of executive will serving contingent interests, one which, to be valid, requires confirmation by the general will expressed through the legislative assembly. Indeed, the very term 'transformation' signifies what is involved here, namely, a supplanting of the will in its natural form by the will in its rational form. By contrast, the widespread practice and *opinio juris* that constitutes a rule of customary law attests to its being already a

rule of practical reason directly assimilable into municipal law. Thus, the positive order itself recognizes, first, that an act of transformation is needed only for contingent acts of will; and second, that this transformation is needed not for formalist or positivist reasons (otherwise the adoption theory would be incoherent) but in order to guarantee institutionally that such acts of will are in content acts of a general will.

It remains to show that the identification of international conventions with contingent acts of will is an oversimplification. For this purpose, Kant's distinctions will again prove helpful. Specifically, the distinction between the natural will and the will conformable to practical reason reveals as inadequate any view of international conventions which sees them as forming an undifferentiated category of international law. It suggests, rather, a distinction between conventions that are products of arbitrary will and so require transformation to become domestically effective, and those that, because they embody principles of practical reason, are already expressions of the general will. A convention is a product of arbitrary will if, like any contract between private individuals, it represents a fortuitous harmony of self-regarding interests. Here the common good is, because derived from contingent needs, something essentially created by the parties and wholly dependent on their wills. A convention is an expression of reason, on the other hand, if it embodies an insight concerning what is a priori entailed by the human being's right to as much liberty as is consistent with the equal liberty of others. Such a convention, while in origin a treaty between independent states, is in content the legislation of a universal community of rational beings united under a conception of their equal worth as persons. This ground of distinction is not foreign to international law. As we shall see, it forms the basis of the difference within customary law between the *jus dispositivum* and the *jus cogens*.<sup>34</sup> Now, since international conventions on human rights belong to the category of conventions articulating principles rationally connected to the common good of the international community, they stand conceptually in no more need of transformation than do rules of international custom connected to the common good empirically. As the latter are automatically part of municipal law by virtue of a de facto universal assent in their obligatoriness, so the former must be authoritative guides for domestic judges by virtue of their status as

34 See Verdross, *Jus dispositivum and jus cogens in international law* (1966) 60 *Am. J. of Int. Law* 55. The European Commission on Human Rights has itself recognized this distinction between treaties. It has declared that 'the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realize the aims and ideals of the Council of Europe ... and to establish a common public order of the free democracies of Europe.' See Decision of 12 January 1961, *Yearbook* IV 138.

necessary objects of a general or lawgiving will. Indeed, the view that these norms lack domestic force absent transformation by the legislature is unsupportable on any ground save that of a dogmatic positivism which asserts that the arbitrary will of the sovereign is the sole source of valid norms. Yet, if the positive order incorporates rules of international custom on the basis of their pre-established harmony with the general will, there is surely no logical reason for its failure to incorporate human rights principles on the same basis.

Accordingly, the thesis proposed here is that a distinction must be drawn between international conventions that represent a fusion of national interests and so require transformation to become domestically effective and those that, because ordered to a transcendent human good, embody principles of practical reason already incorporated in the general will; that conformity with practical reason (as the adoption theory demonstrates) constitutes a self-sufficient ground of legal validity, independent of constitutional pedigree; and that principles of practical reason are thus valid domestically not as rules of decision but as guides to the interpretation of positive norms. We have now to elaborate this thesis within the context of the several means by which international covenants on human rights might become domestically effective.

*The interpretation of domestic standards*

It is well settled that, as a matter of municipal law, a state may legislate in violation of its international obligations.<sup>35</sup> In Canada this power probably belongs to the provinces as well as to the federal government, since each is sovereign with respect to the area of its legislative competence.<sup>36</sup> It is no doubt true that, in construing a domestic statute, a court will assume that the legislature did not intend to violate its international commitments, and will thus attempt to save the latter if possible.<sup>37</sup> This rule of construction reflects the domestic adoption of the customary international norm requiring state parties to conform their domestic laws to their external obligations. It is clear, however, that this use of international conventions to interpret domestic laws will be possible only

35 *Chung Chi-cheung v. The King* [1939] A.C. 160 (P.C.); *Mortensen v. Peters* (1906) 14 Scots L.T.R. 227; *Cheney v. Conn* [1968] 1 W.L.R. 242; *I.R.C. v. Collico Dealings Ltd.* [1962] A.C. 1; *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116 (C.A.). See also MacDonal, *supra* note 16.

36 *Re Arrow River and Tributaries Slide and Boom Co.* [1932] 2 D.L.R. 250

37 *Reference ... on Foreign Legations and High Commissioners' Residences* [1943] S.C.R. 208; *Re Arrow River*, *supra* note 36; *Capital Cities Communications Inc. v. C.R.T.C.* (1977) 81 D.L.R. (3d) 609 (S.C.C.)

where the statute is ambiguous.<sup>38</sup> Faced with a conflict between an unimplemented international treaty and a clear municipal law, a domestic tribunal will consider itself bound to apply the law. The question arises, therefore, whether unincorporated international human rights norms might be indirectly applied against conflicting legislation through their use in interpreting open-textured constitutional standards under which such legislation is challenged.<sup>39</sup>

A number of decisions in the United States illustrate this approach. In *Oyama v. California*,<sup>40</sup> the United States Supreme Court struck down portions of the California Alien Land Law as being inconsistent with the equal protection clause of the Fourteenth Amendment. In concurring judgments, four members of the court invoked the obligations of the United States under the United Nations Charter as further support for this result. In particular, Black J. said: 'How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens are permitted to be enforced?'<sup>41</sup> For Black J., therefore, it was the existence of an international treaty obligation that permitted reference to the charter to support an interpretation of the Constitution.

However, in several more recent cases, a different and (I shall argue) more coherent theory underlies the use of international standards in constitutional interpretation. In *Rodriguez-Fernandez v. Wilkinson*,<sup>42</sup> the Tenth Circuit Court of Appeals referred to the Universal Declaration on Human Rights and the American Convention on Human Rights in interpreting the due process clause of the Fifth Amendment. The case involved a Cuban refugee who was being indefinitely detained in a maximum security penitentiary pending deportation because of criminal activities in Cuba. The Kansas Federal District Court held that Rodriguez was an excludable alien and hence not entitled to constitutional protection. Nevertheless, it ordered his release on the ground that arbitrary imprisonment violated a rule of customary international law evidenced by a variety of agreements and resolutions including the Universal Declaration and the American Convention. While affirming the order of release, the Court of Appeal declined to comment on the District Court's reason-

38 *I.R.C. v. Colloco Dealings Ltd.*, supra note 35; *Salomon v. Commissioners of Custom and Excise*, supra note 35; *Capital City Communications Inc. v. C.R.T.C.*, supra note 37.

39 See Claydon, International human rights law and the interpretation of the Canadian Charter of Rights and Freedoms (1982) 4 *Supreme Ct L.R.* 287; Cohen and Bayefsky, supra note 16.

40 332 U.S. 633 (1948)

41 *Ibid.*, at 649

42 654 F.2d 1382 (1981)

ing, preferring to rest its decision on constitutional law as interpreted by the aforementioned international instruments. In giving judgment for the court, Logan J. said:

Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness. ... It seems proper then to consider international law principles for notions of fairness as to the propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.<sup>43</sup>

It is to be noted that the Universal Declaration creates no binding international obligations and that the United States Senate has not ratified the American Convention. Nor was there any suggestion by the Court of Appeal that the principles enunciated in those documents had attained to the status of customary international law. Accordingly, the invocation of the two instruments in aid of constitutional interpretation could not be justified on the traditional ground that an international obligation existed. The court seems to have believed that it was entitled to look to these documents simply because they represented authoritative guides to 'current notions of fairness.'

Further examples of this approach are provided by two cases involving the treatment of prisoners. In *Lareau v. Manson*,<sup>44</sup> a Connecticut Federal District Court had to deal with a complaint of overcrowding in a state correctional institution. In determining whether prison conditions violated due process and the Eighth Amendment injunction against 'cruel and unusual punishment,' the court looked for guidance in interpreting these standards to the United Nations Standard Minimum Rules for the Treatment of Prisoners. While acknowledging that the adoption of these rules by administrative organs of the United Nations did not in itself render them binding on the court, Cabanes J. nonetheless referred to them as 'an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind.'<sup>45</sup> The standard minimum rules were also applied in *Sterling v. Cupp*,<sup>46</sup> where the Oregon Supreme Court referred to them as 'contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners' as was reflected in the Oregon constitutional guarantee against cruel and unusual punishment.

At first sight, the theory adopted in the *Oyama* case for the use of

43 *Ibid.*, at 1388

44 507 F. Supp. 1177 (1980)

45 *Ibid.*, 15 1188, note 9

46 625 P.2d 131 (1981)



international norms in constitutional cases seems more solidly based than that favoured in *Fernandez*, *Lareau*, and *Sterling*. The existence of a treaty obligation and that alone, it could be argued, permits the court to interpret an open-ended constitutional provision in accordance with the convention, since it is the obligation that triggers the rule of statutory construction derived from international customary law.<sup>47</sup> A moment's reflection, however, will reveal the serious conceptual problems posed by this approach. If the court construes a constitutional provision in accordance with an unimplemented treaty, and in doing so invalidates an explicit statute, is it not accomplishing indirectly what it is forbidden to do directly? If the presumption in favour of a state's international obligations is defeated by clear conflicting legislation, it is difficult to see why that presumption should be revived merely by the interposition of an ambiguous constitutional provision.<sup>48</sup> Presumably the statute must, if it resists adverse treaties, also resist adverse constitutional interpretations derived from treaties. On the other hand, to reject the interpretation suggested by the international standard for one that saves the legislation merely because the statute is explicit is to accord the statute a presumption of validity, the appropriateness of which in judicial review is certainly questionable.<sup>49</sup> This dilemma suggests that the use of international norms in constitutional interpretation must be placed on a theoretical footing entirely different from that which grounds the use of such norms to construe domestic statutes. As we have seen, the theory behind the latter employment of international conventions makes reference to the adoption of the rule of customary law prohibiting a state from pleading its domestic laws as an excuse for breaching its treaty obligations. If we ignore the fact of an international obligation, upon what basis can we justify the use of international human rights norms in constitutional interpretation?

To begin with, a distinction must be drawn between human rights

47 This approach is suggested by Cohen and Bayefsky, *supra* note 16, at 281, and by Claydon, *The application of international human rights law by Canadian courts go Buff. L.R.* 727 (1981). It was approved in *Re Mitchell and The Queen*, *supra* note 15.

48 This argument would, of course, not apply if the constitutional provision could be demonstrated to be a self-conscious implementation of the treaty. However, there is no express declaration in the Canadian Charter that the latter was enacted in order to implement Canada's international obligations. This degree of explicitness was required by the Supreme Court of Canada in *MacDonald v. Vapour Canada Ltd.* (1976) 66 D.L.R. (3d) 1, albeit to justify (assuming a reconsideration of the *Labour Conventions Case*) federal incursions into provincial fields. Less stringent tests are imposed in the United Kingdom; see *Salomon v. Commissioners of Custom and Excise*, *supra* note 35. For a thorough discussion of this problem, see Cohen and Bayefsky, *supra* note 16, at 286-9, 294-5, and Rigaldies and Woehrling, *Le juge interne Canadien et le droit international* (1980) 21 *Cahiers de Droit* 293, at 313-28.

49 See Dworkin, *supra* note 29, 137-49.

principles and human rights rules. Human rights principles embody imperatives of respect for persons directly deducible from the right, understood as a capacity to bind others to respect one's person, to equal liberty under law. Inasmuch as these principles express a common good transcendent of particular national interests, they are dictates of practical reason rather than contingent products of will. As such, they are (it is submitted) binding on a domestic tribunal even in the absence of legislative transformation. Since there is contained in these principles no element of arbitrary will, there is nothing that would need confirmation by the general will to become legitimately binding on a court. On the other hand, because of their high level of generality, these principles are unlikely to be of much assistance in interpreting similarly worded phrases in a domestic constitution.<sup>50</sup> Of far greater utility are norms such as the United Nations Standard Minimum Rules for the Treatment of Prisoners, which give concrete meaning to the prohibition against cruel and unusual punishment. Yet human rights rules (for example, that there be one cell for every prisoner) differ from human rights principles in that, not being rationally deducible from the right to equal liberty, they contain an element of discretion or arbitrary choice. Because, in other words, these rules are positive norms derived from the application of fundamental principles to particular and variable circumstances, they embody a mixture of reason and will, of the necessary and the contingent. And because they contain an element of arbitrariness, they cannot be said to be binding on a domestic tribunal absent confirmation by the general will expressed through the legislative assembly. As we saw earlier, however, the rule of adoption of international custom suggests that a democratic transformation of acts of will is necessary not for positivist reasons, but in order to guarantee by institutional means that these acts are acts of a general will, or are such as could rationally be legislated by everyone to himself. The lawgiver most adequate to the notion of the general will is a democratic assembly.<sup>51</sup> However, rule-making bodies falling short of this ideal should nonetheless attract deference as creators of valid law if the institutional guarantees of their public virtue approximate those of a democratic assembly, if their rules concretize principles of universal validity rather than particular national interests, and if the domestic application of these rules is consistent with the requirement of publicity. Executive organs of the United Nations as well as the agencies charged

50 As Professor Claydon notes, however, the guarantees in the I.C.C.P.R. and in the E.C.H.R. are often more articulated than their counterparts in the Canadian Charter of Rights; see Claydon, *supra* note 39, at 293.

51 Kant, *supra* note 32, at 112-14

with interpreting and implementing the I.C.C.P.R. and the E.C.H.R. would seem, on the whole, to qualify as such bodies. Their supranational character, their expertise, and the duty imposed on them of applying conscientiously the human rights provisions of the covenants constitute some guarantee that the products of their will are indeed rules of practical reason applicable by a court even without transformation.<sup>52</sup> In applying such rules in constitutional interpretation, no offence is given to the requirement of notice, since no sanction is imposed for a violation of the rules save that of invalidity. Now, it is not suggested that norms such as the standard minimum rules are, by virtue of their approval by an international body, universally valid dictates of reason. The point, rather, is that such norms form a system of positive law whose congruence with the form of law is sufficiently ensured by its origin in a body removed from the influence of national self-interest and directed exclusively to interests intrinsic to abstract personality. They accordingly embody, as Cabanes J. noted, 'an authoritative international statement ... of certain practices which are repugnant to the conscience of mankind.'

This reasoning might usefully be applied in a case like that of *Alberta Union of Public Employees v. The Crown in Right of Alberta*.<sup>53</sup> There, the union applied to the Alberta Court of Queen's Bench for answers to questions concerning the international legality of a statutory ban on public service strikes and the authority of a province to legislate in violation of international law. The union argued that the blanket prohibition against public sector strikes in The Public Service Employee Relations Act violated Canada's treaty obligations under convention 87 of the International Labour Organization and article 8 of the I.C.E.S.C.R. Article 3 of the convention affirms the right of trade unions 'to formulate their programmes and organize their activities,' while article 10 imposes an obligation on all member countries to ensure that employees and employers are free to join organizations of their own choosing. Convention 87 thus affirms the right to freedom of association but says nothing explicit about the right of unions to strike. However, in interpreting the convention, the I.L.O. Committee on Freedom of Association has maintained that union rights under article 3 include the right to strike, inasmuch as the withdrawal of labour is a 'legitimate and indeed essential means by which workers may defend their occupational interests.'<sup>54</sup> It has, to be sure, recognized that this right may be restricted in the public

52 Of course, the de facto politicization of an international agency would, on this theory, vitiate its title to deference from a national tribunal.

53 81 C.L.L.C. 99

54 I.L.O., LXII, O.B. 10 (Series B, No. 2 1979)

service, but only to the extent that 'a work stoppage may cause serious harm to the national community.'<sup>55</sup> Accordingly, the committee has recommended to the province of Alberta that legislative amendments be made to restrict the ban on public sector strikes to services whose interruption would 'endanger the existence or well-being of the whole or part of the population.'<sup>56</sup>

In contrast to convention 87, article 8 of the I.C.E.S.C.R. contains an explicit affirmation of the right of trade unions to strike. As Sinclair c.j. noted, however, it permits legal restrictions on this right in the case of the armed forces, police, and administration of the state. Yet article 8 also states that nothing contained in the covenant can be interpreted as authorizing parties to convention 87 to take action that would prejudice the guarantees under that convention. An important issue in the interpretation of article 8, therefore, is the status to be accorded the reports of the I.L.O. Committee on Freedom of Association.

The court addressed this question solely from the point of view of whether the reports of the committee in response to union complaints created binding obligations in international law. Sinclair c.j. concluded (quite rightly, it would seem)<sup>57</sup> that the reports neither established a customary rule permitting strikes in non-essential public services nor were effective as part of a conventional obligation in the absence of confirmation by the provincial legislature. His Lordship therefore dismissed the reports with the statement that 'the Government of Alberta is in no way bound by the I.L.O. recommendations, which do not and have never formed part of the law of Alberta.'<sup>58</sup> Having decided that the committee reports were irrelevant to his decision, Sinclair c.j. looked exclusively to the general provisions of convention 87 and article 8 of the covenant. Finding in the former no mention of a right to strike and in the latter a restriction on this right as regards the administration of the state, His Lordship held that the Alberta statute did not violate Canada's international obligations. He therefore found it unnecessary to determine whether a provincial legislature could validly legislate in violation of international law.

The court failed to consider another possible basis for the domestic applicability of the committee's reports. Since the I.L.O. constitution confers exclusive authority for interpreting convention 87 on the International Court of Justice, the reports of the committee are, it seems

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> For a contrary view, see Bendel, *The international protection of trade union rights: A Canadian case study* (1981) 13 *Ont. L. R.* 169, 188-91.

<sup>58</sup> *Supra* note 53, at 117

clear, not binding as part of any treaty obligations.<sup>59</sup> Yet the domestic applicability of such reports need not depend exclusively on their obligatory force as part of either customary or conventional international law. Let us assume a right in every human being to as much liberty as is consistent with the equal freedom of others. This right sets limits on the liberty of one person to impose his ends on other human beings. In most cases, the content of permissible liberty will be undefinable a priori, since the kinds of liberty that are able to co-exist will depend on many contingent factors. All that will matter is that the laws restricting freedom apply to everyone equally. However, in the case of certain liberties, it will be possible to announce a right a priori, because their nature is such as to preclude by definition the unilateral imposition of one person's ends on another. The freedom of individuals to associate in order to pursue more effectively their common goals cannot, considered apart from any other activity, impinge on (let alone subvert) the liberty of others. Inasmuch as the right to this freedom is thus logically deducible from the right to equal liberty, it is one which a domestic court is obliged to consider in applying domestic rules of decision.<sup>60</sup> The committee's interpretation of the incidents of that right, while not binding on a municipal tribunal, nonetheless deserves deference because of the committee's institutional disinterestedness, or because of the fitness of its supranational status to the task of elaborating a right of pure reason. The court might no doubt have concluded that, however worthy of respect the committee's opinion might be, it is nevertheless overborne by clear domestic legislation. However, it would then have been compelled to reach its decision by addressing the question it declined to answer (whether a province may validly legislate in violation of international law) instead of by denying the domestic relevance of the committee's reports. The point is by no means an academic one. For if the same legislation were now to be challenged under the freedom of association guarantee of the Canadian Charter of Rights and Freedoms, the argument from explicit legislation would be powerless against the use of the committee's reports as an aid in constitutional interpretation. Whether or not a province can, by means of a clear statute, validly legislate in violation of international law, it certainly cannot do so in violation of the Charter.<sup>61</sup>

59 See Bendel, *supra* note 57, at 185.

60 I shall argue in a moment that such abstract human rights norms are domestically binding as part of the *jus cogens*.

61 Indeed, we have not had to wait long for a reprise of this skirmish under the Charter. In *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al.* [1984] 44 O.R. (2d) 392, the Ontario Divisional Court struck down as inconsistent with the Charter's guarantee of freedom of association a provision of the Inflation Restraint Act, 1982 (Ont.), c. 55 which, by extending the collective agreements of public service employees, effectively denied them the right to strike for the period of the

*International conventions and public policy*

## THE ELABORATION OF DOMESTIC COMMON LAW

Another method of domestically enforcing international covenants on human rights takes advantage of the public policy aspect of such covenants. It might, in other words, be possible to view international human rights treaties as authoritative expressions of public policy upon which judges may rely in voiding discriminatory contracts, in elaborating novel causes of action, or in refusing to enforce foreign rules of decision.<sup>62</sup> This use of international treaties is fraught with logical difficulties and, in fact, has given rise in Canada to a long-standing judicial controversy. The two leading cases in which the issue is discussed are *Re Drummond Wren*<sup>63</sup> and *Re Noble and Wolf*.<sup>64</sup> In *Wren*, the Ontario High Court struck down a covenant precluding the sale of land 'to Jews or persons of objectionable nationality' on the ground, inter alia, that it was contrary to public policy as expressed in the United Nations and Atlantic charters as well as in various federal and provincial statutes. In addition to relying on instruments to which Canada was a signatory, Mackay J. also referred to statements by world leaders, to resolutions of international bodies of which Canada was not a member, and even to the internal constitutional law of the Soviet Union. These matters were relevant, according to Mackay J., as evidence of 'wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.'<sup>65</sup>

Three years later, the Ontario High Court reversed itself. In *Re Noble and Wolf*, Schroeder J. upheld a similarly restrictive covenant, finding in the instruments relied upon by Mackay J. no basis for interfering with 'the paramount public policy that one is not lightly to interfere with the freedom of contract.'<sup>66</sup> His Lordship advanced two principal arguments

extension. En route to this result, both Leary and Smith J.J. bowed to the interpretations of I.L.O. convention 87 by the Freedom of Association Committee and by the Committee of Experts. 'Since,' said Leary J. (at 439), 'much of the wording employed in the *Charter of Rights* bears a strong similarity to that found in several international conventions, ... the court should consider the rulings of the international tribunals established to interpret and apply these conventions. It is to be noted that nothing in this rationale limits the courts' sources to the jurisprudence of conventions ratified by the Canadian government. The basis of deference is rather the directedness of tribunals to principles of universal validity.'

62 See Rigaldies and Woehrling, *supra* note 48, at 308-9; Duffy, *English law and the European Convention on Human Rights* (1980) 29 *Int. Comp. L.Q.* 585, at 601.

63 [1945] 4 D.L.R. 674

64 [1948] 4 D.L.R. 123, *aff'd* [1949] 4 D.L.R. 375 (Ont. C.A.)

65 *Supra* note 63, at 679

66 *Supra* note 64, at 139

for declining to follow the court's previous decision. The first was a clear restatement of the transformationist doctrine. The treaties to which Mackay J. referred and to which Canada was a signatory, said Schroeder J., had not been implemented by any domestic legislation; hence, they could not be given judicial effect in the face of a conflicting internal law upholding contracts voluntarily made. The second argument was in the nature of a critique of the judicial use of public policy as a relevant ground of decision. Referring to a dictum of Parke B. in *Egerton v. Brownlow*,<sup>67</sup> Schroeder J. identified public policy with 'political expedience,' and stated that the elaboration of this standard was a matter for legislatures rather than for the subjective opinions and preferences of judges. His Lordship seemed to acknowledge that public policy might become a relevant decisional principle if embodied in a domestic statute, but neither unimplemented treaties nor the public policies of other countries could properly be referred to in order to ascertain the public policy of Canada or the provinces.

There is undoubtedly considerable force in these arguments. One can easily sympathize with Schroeder J.'s view that reference to international covenants as a source of public policy applicable to domestic disputes runs afoul of the transformationist doctrine. For it is the gravamen of this doctrine that unimplemented treaties are not public policy. There is no discernible difference, one could argue, between using a treaty as an authoritative expression of public policy and applying it directly as a rule of domestic decision. If the transformationist doctrine precludes the latter, it must also preclude the former. Furthermore, if an unimplemented treaty is no evidence of authoritative public policy, then judicial reliance thereon would seem to amount to the arbitrary imposition of the personal value preferences of the judge.

Nevertheless, the decision in *Re Drummond Wren* can, I believe, be rationally defended without doing violence either to the transformationist doctrine or to the principle of legislative supremacy. Schroeder J.'s argument depends on an identification of public policy with political expediency or with whatever promotes the general welfare understood as aggregative utility. It is undeniable that decisions as to what will maximize public utility are matters for the legislative process, and that judicial reliance on unimplemented treaties as evidence of public policy in this sense amounts to judicial legislation. Yet it seems rather odd to characterize a norm prohibiting racial or religious discrimination as serving political expediency or as the outcome of a process of welfare maximization. There is, in fact, another sense of the term 'public policy,' one more

sued to norms of this type. Public policy may also refer to a set of background rights or principles that are indefeasible by interests external to those of the right-bearer, and that are the preserve of neither the common law nor statute because they are the common substrate of both.<sup>68</sup> It is surely this notion of public policy that human rights norms instantiate. Moreover, the distinction between political expediency and principle corresponds to a distinction between two justifications for the use of public law sources in the adjudication of civil disputes. Most lawyers are familiar with the contrast between a civil right of action for breach of a statute and one that arises at common law by reference to a public policy embodied in a statute. The purpose of granting civil remedies for statutory violations is, it has been argued, to advance the legislative policy behind the statute.<sup>69</sup> This rationale is inescapable if the statute embodies public policy in the sense of expediency, because the only legitimate reason for a court's advancing such a policy is that it is the policy of the legislature. Here, in other words, the constitutional source of the policy is crucial to its civil enforceability. On the other hand, courts look to some penal statutes in civil disputes not from a desire to advance the legislature's policy, but because the legislature, being institutionally more representative than the courts of the universal moral consciousness of a nation, is an authoritative source for the self-conscious grasp of principles already implicit in the common law.<sup>70</sup> Thus, whereas in the first context the legislature's will is the source of the policy's validity, in the latter context, the principle is valid independently of will, but the legislature's capacity rationally to intuit the principle attracts respect.<sup>71</sup>

The next step in the argument is perhaps easily anticipated. For it is at

68 See Dworkin, *supra* note 29, 81–130.

69 See Pound, *Common law and legislation* (1908) 21 *Harv. L.R.* 383; Landis, *Statutes and the sources of law* (1965) 2 *Harvard J. on Legislation* 7. For an alternative view, see Prichard and Brudner, *Tort liability for breach of statute: A natural rights perspective* (1983) 2 *Law & Philosophy* 89.

70 See, e.g., *O'Rourke v. Schacht* [1976] 1 S.C.R. 53.

71 In *Board of Governors of Seneca College v. Bhadauria* [1981] 124 D.L.R. (3d) 193 (S.C.C.), Laskin C.J. declared (at 199) that 'there is a narrow line between founding a civil cause of action directly upon breach of a statute ... and finding a civil cause of action at common law by reference to policies reflected in the statute ...' Discerning no real difference between these two uses of statutes, His Lordship denied the plaintiff a common-law right of action upon grounds traditionally relevant only to whether a statute creates a civil right of action directly. The *Bhadauria* case is significant for the issue of the domestic enforceability of human rights covenants, because the distinction blurred by Laskin C.J. is crucial to the formation of a sound theoretical basis for judicial reliance on such instruments. If the judicial use of statutes is in all cases nothing but the implementation of legislative policy, then there is no justification for using international covenants to expand domestic rights without legislative transformation. If, however, there is a use of statutes that defers to the legislature's reason rather than to its will, then the same justification will permit reference to international covenants.



once evident that international covenants on human rights may lay claim to the same deference that is accorded statutes as authoritative sources for the elaboration of common-law principles. Indeed, if statutes deserve this respect because the legislature reflects most authentically the moral consciousness of a nation, how much more worthy of regard are international human rights norms, which, denuded even of national particularity, express the purest moral insight of an epoch? Furthermore, if the use of such norms is justified on this basis, then no offence is given the doctrine of transformation. For the same distinction we have drawn between statutes that embody political expediency and those that affirm universal rights must also be made with respect to international conventions. The doctrine of transformation can be meaningfully applied only to conventions representing a fusion of self-regarding national interests, for only these conventions are truly external to municipal law until confirmed as public policy by the legislature. It cannot logically be applied to prevent the judicial use of conventions affirming human rights, for strictly speaking this use of conventions incorporates nothing *ab extra*, nor does it in any sense involve an implementation of the particular will of the executive. Rather, the court looks to the human rights convention merely as a reliable guide in elaborating the content of principles already present within its own private law tradition. In *Drummond Wren*, it is true, Mackay J. often speaks as though the policy against racial discrimination served a political interest in national unity, one which limits freedom of contract from above. However, his judgment as a whole is, I think, better understood as an attempt to shine a public law self-consciousness on the premises, and hence on the inherent, private law limits of contract power. The right to contractual freedom is, after all, coherent as a right only in so far as it is exercised in a manner consistent with the equal right of all those with full legal capacity. To the extent that an agreement abridges this equality of contractual rights, it condemns itself to nullity, for by denying the right to some on morally irrelevant grounds, it denies the right in general and so also its own.<sup>72</sup> Accordingly, the policy against discrimination is ultimately relevant in *Drummond Wren*, not as an external, public interest limit on freedom of contract, but as a conceptual boundary beyond which such freedom contradicts its claim to legal recognition. This is why Mackay J. thought he could adopt as a source of domestic 'policy' not only covenants Canada had signed but also resolutions of international bodies of which Canada was not a member, and even the

72 This reasoning would have no application to devises made conditional on the donee's espousing a particular religion, or even on his not espousing one; see *Blathwayt v. Baron Cawley* [1975] 3 All E.R. 625, in which the House of Lords declined to use the E.C.H.R. as evidence of a public policy invalidating such a gift.

concurring declarations of foreign statesmen. Without the distinction between expediency and principle, and between conventions that embody contingent national interests and those which affirm universal rights, Mackay J.'s procedure is incomprehensible. Moreover, because he failed to draw these distinctions, Schroeder J. quite naturally thought that Mackay J. had illegitimately incorporated foreign rules of decision.

#### OVERRIDING FOREIGN RULES IN CONFLICTS CASES

The distinctions developed above may also help clarify the use of international law by domestic courts to refuse recognition to foreign laws selected by the forum's choice of law rule. Two separate considerations have shaped the practice of common-law and Continental courts in this area. One is the interest in comity between nations, an interest that has dictated a strong presumption in favour of recognizing the foreign rule, even if it is one with which the policy of the forum disagrees.<sup>73</sup> The other is judicial deference to the executive in the conduct of foreign policy, a consideration that, in some countries, has elevated this presumption into a full-blown doctrine known as act of state, according to which the courts of one country may not pass judgment on the formally valid acts of another committed within its own territory.<sup>74</sup> However, even where the act of state doctrine is acknowledged, it is usually limited by a discretion in the court to refuse recognition to a foreign law that conflicts with a fundamental public policy of the forum. Moreover, in several cases decided in the post-war era, municipal courts have shown a willingness to measure foreign expropriation decrees by the standard of international law and to refuse enforcement to those which fail to provide fair compensation. Thus, in *Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary)*,<sup>75</sup> the Supreme Court of Aden withheld recognition from Persian laws which had nationalized without compensation the plaintiff company, on the ground that such legislation violated principles of international law adopted into the law of Aden.

The *Rose Mary* case is, however, still exceptional in Anglo-American jurisprudence. The domestic application of international law to override foreign rules has yet to gain complete respectability, most courts preferring to invoke the standard of fundamental public policy.<sup>76</sup> Given the interest in comity, this preference is understandable. If a municipal

73 See *Luther v. Sagor* [1921] 3 K.B. 532 (C.A.); *Princess Olga Paley v. Weisz* [1929] 1 K.B. 718 (C.A.); Kindred, Acts of state and the application of international law in English courts (1981) 19 *Can. Y. of Int. Law* 271.

74 See especially *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964).

75 [1953] 1 W.L.R. 246

76 See *Re Helbert Wagg & Co. Ltd.* [1956] Ch. 323; *Oppenheimer v. Cattermole* [1975] 1 All E.R. 539 (H.L.).

court recognizes as an incident to sovereignty the right of its own forum to legislate in violation of international law, it can hardly refuse to recognize a similar right in a foreign state without impugning that state's sovereignty. Furthermore, while a court's insistence on the primacy of the forum's policy is perfectly compatible with respect for the independence of other states, its application of international law against a foreign rule is an arrogation of authority vis-à-vis the foreign state incompatible with the equality of nations. Finally, the interests of comity are hardly advanced, nor are the boundaries of judicial authority respected, if a court measures foreign rules by a standard that fails to differentiate between matters over which national policies may legitimately differ and those where divergence from the international norm deprives a rule of the very form of law.<sup>77</sup> As the *Rose Mary* case illustrates, the effect of such an indiscriminate application of international law is, on the one hand, to pervert the latter into a tool of parochial economic interests and, on the other, to involve the court in an area of political and ideological controversy better left to diplomacy.

In sum, then, the problem is to reconcile the interest in comity as well as the strictly adjudicative role of the courts with their use of international law to override foreign rules. Here again the distinction between acts of will serving contingent national interests and principles that all rational beings would necessarily legislate is an appropriate starting point. To refuse recognition to a foreign rule that conflicts with public policy in the first sense is inconsistent both with comity and with the judicial function, inasmuch as this refusal ascribes moral superiority to the forum policy in an area where diversity is both necessary and legitimate. Thus, a refusal to enforce foreign laws that are confiscatory but not discriminatory must be considered a political rather than an adjudicative act, because the form of law is indeterminate with respect to the best property régime, although it demands equal respect for individual property once the institution of private property is presupposed.<sup>78</sup> On the other hand, the refusal to recognize foreign laws that deny the equal worth of persons is compatible both with comity and with the judicial function, since it asserts the priority of the forum's policy in an area where divergence from that policy objectively divests the foreign rule of the character of law. English courts, unlike their American counterparts, have instinctively understood this distinction. For while they have consistently recognized the confiscatory

77 See Christenson, The uses of human rights norms to inform constitutional interpretation (1981) 4 *Houston J. of Int. Law* 39, at 42-5; Falk *The Role of Domestic Courts in the International Legal Order* (1964) 72-5; Lillich, The proper role of domestic courts in the international legal order (1970) 11 *Va. J. Int. L.* 9.

78 See Hegel *Philosophy of Right* (trans. Knox, 1967), par. 135.

laws of socialist régimes, the House of Lords has recently stated that a Nazi decree stripping Jewish emigrés of their citizenship and confiscating their property 'constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all.'<sup>79</sup>

What role is played here by international law? We have seen that, because of the bluntness of this standard and because of the courts' reluctance to arrogate to themselves a supranational jurisdiction, foreign rules are seldom refused enforcement merely because they are said to violate international law. Recently, however, Continental courts have achieved some precision in the use of this criterion through the development of the concept of *ordre public international*.<sup>80</sup> By this standard is meant a segment of international law which, mirrored in domestic public policy, constitutes the aggregate of nation-states into a world community ordered to the actualization of the equal dignity of persons. In the Federal Republic of Germany, foreign rules that contravene this standard derive no benefit from the act of state doctrine.<sup>81</sup> It is no doubt true that in the F.R.G., principles of *ordre public international* are part of municipal law by virtue of the domestic transformation of the E.C.H.R. However, as Continental practice itself illustrates, the use of these principles to override foreign rules need not depend on any act of transformation, or, indeed, on the existence of any treaty obligation.<sup>82</sup> Domestic courts may refer to international human rights instruments as guides to the content of the fundamental principles of forum policy and as confirmation of the universal validity and hence peremptoriness of these principles.<sup>83</sup> Accordingly, since the court ultimately applies nothing but public policy, no offence is given the principle of the equality of nations; and since use of the international standard can be justified as deference to the moral insight of supranational bodies, the question of its domestic adoption or transformation is irrelevant.

79 *Oppenheimer v. Cattermole*, supra note 76, at 567

80 See van der Meersch, Does the convention have the force of 'ordre public' in municipal law? in Robertson (ed.) *Human Rights in National and International Law*, supra note 13, 97-150.

81 See Bleckmann, Voidness of a private contract because of breach of the international *ordre public* (1974) 34 *Zeitschrift für ausländisches Recht und Völkerrecht* 132.

82 In a 1972 case, the German federal court refused to enforce a contract for insurance on Nigerian works of art exported in violation of that country's laws. The court held the contract to be contrary to *ordre public international*, since it contravened the principles formulated by Unesco for the protection of the cultural heritage. See Lauterpacht and Collier (eds.) *Individual Rights and the State in Foreign Affairs* (1977) 257.

83 For example, Belgian courts have twice refused recognition to Polish legislation denying the right to renounce Polish nationality on the ground that this law violated Belgian public policy, whose peremptoriness was attested to by article 15(2) of the Universal Declaration on Human Rights. See *In re Pietras*, 16 Nov. 1951, U.N. Yearbook on Human Rights 14 (1951); *In re Jacqueline-Marie Burkowicz*, 10 Oct. 1952, U.N. Yearbook 21 (1953).

*The direct enforcement of human rights covenants*

Thus far we have considered two indirect means by which international human rights norms might be enforced by domestic tribunals: as guides to constitutional interpretation and as sources for the identification and development of common-law principles. We have now to deal with a third possibility, namely, the direct creation by international covenants of domestic rights and obligations.

It would appear that international conventions can affect municipal rights directly only if the convention is evidence of a custom automatically assimilable into domestic law.<sup>84</sup> Even then, the rule of customary law will not prevail against an inconsistent domestic statute or common-law rule.<sup>85</sup> Accordingly, where legislation contrary to international human rights norms exists, the enforceability of these norms will depend on their applicability in constitutional interpretation rather than on their status as customary law. Furthermore, even where no legislation stands opposed to international human rights conventions, their enforceability as customary law will be no simple matter.<sup>86</sup> In the *North Sea Continental Shelf* case,<sup>87</sup> the International Court of Justice imposed an onerous evidentiary burden on anyone seeking to prove a rule of customary law from the existence of a

84 *North Sea Continental Shelf Cases* [1969] I.C.J. Rep., p. 3

85 *Mortensen v. Peters*, supra note 35; *Chung Chi-cheung v. The King*, supra note 35. A controversy exists as to whether Canadian legislatures can validly legislate in violation of customary international law. In 1950, Professor Vanek argued that, since ambiguous statutes must be interpreted in conformity with international law, and since the *British North America Act* was silent about the capacity of Canadian legislatures to violate this law, it must be construed as not having granted the legislatures this power; see *Is international law part of the law of Canada?* (1949-50) 8 *U.T.L.J.* 251. Judge La Forest denies the capacity of the provinces to violate international law, invoking the doctrine of extraterritoriality under which colonial legislatures were enjoined from legislating beyond their boundaries in order to avoid conflict with the foreign policy of the Imperial Parliament; see *May the provinces legislate in violation of international law?* (1961) 39 *Can. Bar Rev.* 78.

These arguments save Canada's international obligations at the expense of Canadian sovereignty on the one hand and provincial autonomy on the other. Vanek's argument is that the British Parliament could not have intended to grant powers that could be used to violate its international obligations. This reasoning assumes that the legislative competence of Canadian legislatures is limited by the external policy of Great Britain, an assumption directly contrary to the Statute of Westminster. La Forest views the provinces as standing in the same relation to the federal government as the colonial legislatures stood to the Imperial Parliament — an assumption contradicted by Privy Council and Supreme Court decisions recognizing the co-ordinate sovereignties of the federal and provincial legislatures; see *Liquidators of the Maritime Bank of Canada and the Receiver General of New Brunswick* (1892) A.C. 437; *A.-G. Canada v. A.-G. Ontario*, supra note 15; *Murphy v. C.P.R.* (1958) 15 D.L.R. (2d) 145.

86 See Oliver, Problems of cognition and interpretation in applying norms of customary international law of human rights in United States courts (1981) 4 *Houston J. of Int. Law* 59.

87 Supra note 84

convention. There must, first of all, be 'a widespread and representative participation in the convention' by states whose interests are 'especially affected.' Non-ratification, even if due to factors other than active disapproval, will count against the existence of a custom. Second, state practice must have been 'both extensive and virtually uniform in the sense of the provision invoked' and must 'have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'<sup>88</sup> The obstacles posed by this standard of proof are apparent. Not only must state practice be widespread, but it must be motivated specifically by a conviction that the rule is binding as custom and not simply as convention.

Despite these difficulties, some courts in the United States have recently shown a willingness to apply international human rights norms as customary law. In *Filartiga v. Pena-Irala*,<sup>89</sup> the United States Court of Appeals for the Second Circuit inferred from various human rights treaties as well as from the Universal Declaration on Human Rights a norm of customary international law prohibiting the torture of prisoners. We have already seen, moreover, that in *Fernandez v. Wilkinson*<sup>90</sup> the District Court of Kansas held that the universal declaration established a rule of customary international law prohibiting arbitrary imprisonment. Both decisions have been hailed by American human rights advocates as breakthroughs in the judicial use of international human rights norms to affect domestic rights directly.<sup>91</sup> They should, however, be treated with caution. In *Filartiga* the court was expressly directed by a domestic statute to have regard to the law of nations in determining whether to exercise jurisdiction over tort claims by aliens. Specifically, the Alien Tort Claims Act granted district courts jurisdiction where the alleged tort was committed in violation of international law or of a treaty of the United States.<sup>92</sup> While the case is interesting for the court's derivation of a rule of customary law from human rights conventions, it is not a precedent for enforcing such conventions directly as customary law. It is true, of course, that the logic of the adoption theory leads inexorably to this result. Yet municipal courts might, in their reluctance to apply unratified or unimplemented treaties to domestic disputes, manipulate the result by forbearing to find a rule of customary law. It is for this reason that *Wilkinson* is generally regarded as much the stronger support for the direct enforcement as custom of international human rights norms.<sup>93</sup> However, it will be recalled that the Tenth Circuit Court of Appeals, while

88 *Ibid.*, at 42-3

89 *Supra* note 21

90 *Ibid.*

91 See International Human Rights Law Group (1981) 1 *The Law Group Docket* 7.

92 28 U.S.C. s. 1350 (1976)

93 See Hassan, Panacea or mirage? Domestic enforcement of international human rights law: Recent cases (1981), 4 *Houston J. of Int. Law* 13.

affirming the result of the district court, declined to rest its decision on a finding of custom.

As long as the direct applicability of human rights law depends on empirical factors indicative of a custom, this mode of enforcement is unlikely, in my view, to be a particularly prominent one. Non-ratification of treaties, state practice in violation of conventional obligations, and the unwillingness of states to give teeth to supranational enforcement are always available to a court hesitant to use an international convention as a domestic rule of decision. Nor is judicial restraint in this area necessarily to be lamented. The indeterminateness of the empirical criteria for a finding of custom often renders such a finding so assertory as to amount to judicial legislation of a particularly blatant sort. Nevertheless, I want to argue that there is a theoretical basis for directly enforcing some international human rights norms, one that neither depends on empirical factors nor threatens domestic legislative supremacy.

International jurists recognize a distinction within customary international law between the *jus cogens* and the *jus dispositivum*.<sup>94</sup> Although dormant throughout the nineteenth century, this categorization has roots in the classical writers on international law<sup>95</sup> and has been revived recently by the Vienna Convention on the Law of Treaties.<sup>96</sup> Article 53 of the convention provides: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' Accordingly, the *jus cogens* consists of peremptory or imperative norms binding on states independently of their will and from which it is thus not possible to derogate in treaties. The *jus dispositivum*, by contrast, consists of customary norms whose obligatoriness derives entirely from the assent of nations and which states may thus alter through agreements inter se. The criterion of the distinction between the two types of customary law has been well stated by Verdross. The *jus cogens*, he points out, is a set of norms ordered to the interest of the international community taken as a whole, while the *jus dispositivum* consists of norms that 'satisfy the needs of individual states.'<sup>97</sup> In our terms, the *jus cogens* is customary law that is ordered to a transcendent common good of the international community,

94 See Brownlie *Principles of Public International Law* (1979) 512-15; Kelsen *Principles of International Law* (1952) 89, 323, 344; 1 Schwarzenberger *International Law* 352-3, 425-7.

95 Wolff *Jus Gentium* (1764) par. 5; Vattel *Le Droit des gens* (1758) par. 9

96 Misc. 19 (1971), Cmnd. 4818

97 Verdross, supra note 34, at 58

while the *jus dispositivum* is customary law that embodies a fusion of self-regarding national interests. This distinction was also recognized by the International Court of Justice in its Advisory Opinion concerning Reservations to the Genocide Convention.<sup>98</sup> The court said: 'The Convention was manifestly adopted for a purely humanitarian and civilizing purpose ... In such a Convention the contracting states do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages of states.'

While the fundamental nature of the *jus cogens* is thus fairly well settled, its content is more uncertain. Neither the Vienna Convention nor the draft convention of the International Law Commission from which the former is taken provide concrete examples of norms from which no derogation is possible. It is clear, however, that human rights norms easily satisfy the definition of the *jus cogens* given by Verdross and by the International Court of Justice. Indeed, in the *Barcelona Traction* case,<sup>99</sup> the international court, after distinguishing between state obligations vis-à-vis another state and obligations 'toward the international community as a whole,' gave as examples of the latter 'the outlawing of acts of aggression and of genocide ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'<sup>100</sup>

Now, given the distinction between the *jus cogens* and the *jus dispositivum*, it cannot be the case that custom serves the same function with respect to both. We have to distinguish, in other words, between custom as an evidentiary principle and custom as a formal basis of validity. This distinction is recognized in article 38 of the *Statute of the International Court of Justice*, which stipulates as a source of international law 'custom as evidence of general practice recognized as law.' Moreover, Brownlie distinguishes between custom as a 'formal source' of international law and custom as a set of 'evidences of the existence of consensus among states concerning particular rules or practices.'<sup>101</sup> With respect to the *jus dispositivum*, custom is both an evidentiary and a formal principle. That is, the empirically observable consensus among nations is itself the ground of the obligatory force of the rule agreed upon. Indeed, this must be the case, for since the *jus dispositivum* is grounded in interest, it can oblige in no other way but through consent. However, the basis of the validity of the

98 [1951] I.C.J. Rep. 23

99 [1970] I.C.J. Rep. 3

100 *Ibid.*, at 32 (my emphasis). See also the dissenting opinion of Tanaka J. in the *South West Africa Cases* (Second Phase) [1966] I.C.J. Rep. 298.

101 *Supra* note 94, at 2-3



*jus cogens* is not consent but reason. This is shown by the fact that rules of *jus cogens* cannot be derogated from by treaty, nor is their validity as law affected (as is other customary law) by protest or by acquiescence in practices contrary to it.<sup>102</sup> Accordingly, the sole function of custom with respect to the *jus cogens* is an evidentiary one. More specifically, its purpose is to provide evidence that a rule not rationally deducible from the common good of the international community is nevertheless a genuine embodiment of this good. It follows, however, that proof of custom is superfluous in the case of principles self-evidently contained in the notion of the common good – principles such as those outlawing genocide and those affirming the equal dignity of persons. With regard to such principles, proof of custom is needed neither for evidentiary purposes nor for purposes of grounding their obligatory force. They are part of the law of nations solely by virtue of their being necessary, a priori principles of the practical reason. But since it is (according to Blackstone)<sup>103</sup> their derivation from natural reason that justifies the incorporation of rules of international custom directly into municipal law, such principles as are self-evidently part of the *jus cogens* should automatically be part of municipal law even though they might fail to satisfy the strict empirical tests applicable to rules originating wholly or partly in human will. And since such norms will necessarily be of a high order of generality, they will be relevant in domestic law, not as rules of decision, but as principles guiding and constraining the operation of such rules.

This line of reasoning might help resolve a dispute within the English Court of Appeal regarding the status in domestic law of the European Convention on Human Rights.<sup>104</sup> The cases involved all concern the interaction between immigration regulations and section 8 of the convention, which affirms 'the right to respect for ... private and family life' subject to such limitations as are 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' In *R. v. Secretary of State for Home Affairs, Ex p. Bhajan Singh*,<sup>105</sup> Lord Denning M.R. declared that immigration officials, in exercising their authority under the immigration rules, 'ought to bear in mind the principles stated in the Convention,' inasmuch as these principles 'are only a statement of the principles of fair dealing.'<sup>106</sup> This position was reaffirmed by Scarman L.J. in *R. v. Home Secretary, Ex p. Phansopkar*,<sup>107</sup>

102 Brownlie, *supra* note 94, at 514

103 *Supra* note 18

104 See Duffy, *supra* note 62.

105 [1976] Q.B. 198

106 *Ibid.*, at 207

107 [1976] Q.B. 606

where His Lordship stated that the convention was something 'to which it is now the duty of our public authorities in administering the law ... and of our courts in interpreting and applying the law to have regard.'<sup>108</sup> Accordingly, both Lord Denning in *Bhajan Singh* and Scarman L.J. in *Phansopkar* thought that the principles of the convention were part of municipal law even without transformation, and so could be directly applied in the interpretation of domestic rules both by administrative officials and by courts. This is quite different from the more traditional view that treaties are to be considered in construing domestic statutes only where a prior ambiguity is found in the statute. The latter principle presupposes an international obligation to conform to an external norm, whereas *Bhajan Singh* assumes that the convention norm is part of internal law, and is thus applicable in statutory interpretation even without a prior ambiguity. On the other hand, in *R. v. Chief Immigration Officer, Ex p. Bibi*,<sup>109</sup> Lord Denning retracted his statement in *Bhajan Singh*, while two other judges disagreed with Scarman L.J.'s dictum in *Phansopkar*. In recanting from his original position, Lord Denning advanced three principal arguments: that in the absence of legislation by Parliament, the European convention is not part of English law; that immigration officers 'cannot be expected to know or to apply the Convention';<sup>110</sup> and that the convention contains principles so broadly stated as to be incapable of practical application. Moreover, both Roskill and Geoffrey Lane L.JJ. denied that the European convention could become part of English law without appropriate domestic legislation.

On the theory presented here, Scarman L.J.'s view is the correct one. To deny the domestic applicability of section 8 of the convention in the absence of legislative transformation is to ignore the relevance of the concept of the *jus cogens*. The latter is valid as customary law and is thus adopted into municipal law even without confirmation by Parliament. None of the three judges who dissented from Scarman L.J.'s view considered the question of whether section 8 of the convention was or had become part of customary international law. Had they done so, two possible approaches would have lain open to them. On the one hand, they might have required strict proof of widespread state practice coupled with *opinio juris*, taking into account the regional character of the convention, abstentions from similar conventions, and the divergence of practice from principle. On the other hand, they might have concluded that the heavily qualified right to privacy affirmed in section 8 is so

108 *Ibid.*, at 626; see also *Pan American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257.

109 [1976] 1 W.L.R. 979

110 *Ibid.*, at 985

self-evidently contained in the right to the maximum reciprocal liberty, is indeed merely a restatement of that principle, that it may be admitted as part of the *jus cogens* notwithstanding abstentions and contrary practice. Against this position the arguments put forward by Lord Denning in *Exp. Bibi* have little force. It cannot be said of necessary principles of the *jus cogens* that government officials cannot be expected to know them. The distinctive property of such principles is precisely that they are so transparent to natural reason that they are binding even in the absence of positive enactment. Second, it is no reproach against these principles that they are too broad and indeterminate. Since the function of principles is not to act as rules of decision but to guide and constrain the operation of such rules, their generality, far from being a defect, constitutes their specific excellence. Accordingly, it seems quite justifiable to require that administrative officials and courts have regard to the qualified right to privacy in the enforcement of regulations and statutes, and that, failing such regard, their decisions be impeachable for error of law.

#### *Conclusion*

The effectiveness of international covenants on human rights will depend in large measure on the extent to which municipal courts are willing to apply them to domestic disputes. In turn, the domestic enforcement of such covenants will depend on the effect given to the transformationist doctrine and, in particular, on whether courts will be open to arguments about the rational limits of its applicability. I have tried to argue that the transformationist doctrine, in that it is designed to ensure the subordination of the executive to the general will, is applicable only to covenants that are products of executive discretion, or that purport to further public policy in the sense of national expediency. Until the middle of the twentieth century, most international agreements were of this nature. The last few decades, however, have witnessed the conclusion of a number of treaties whose object is to advance not particular national interests but a transcendent common good of the human community. The transformationist doctrine, while applicable to the first type of treaty, has no logical relevance to the second. Inasmuch as these treaties express a priori principles of practical reason rather than the mere particular will of the executive, their domestic applicability constitutes no more an offence to the sovereignty of the general will than does the adoption of rules of international custom. On the other hand, a distinction must be drawn between international human rights rules and international human rights principles. Inasmuch as concrete rules contain an element of discretion, they cannot be binding on a municipal court without

confirmation by the legislature. Nevertheless, such rules may be properly considered in interpreting constitutional guarantees of human rights, since the international bodies that formulate them are, by virtue of their mandate and supranational status, deserving of deference. Human rights principles, by contrast, are properly authoritative for a municipal court both as guides to the elaboration of the common law and as constraints to the operation of rules of decision. The authoritativeness of such standards rests on their reliability as insights of the purest moral consciousness of an epoch, as well as on the theory that, as principles of the *jus cogens*, they are part of the law of nations directly enforceable by municipal courts.