International Comity and the Construction of the *Charter*'s Limits: *Hape* Revisited

Kerry Sun[*]

In this article, the author examines the Supreme Court of Canada's approach to international comity and Charter *rights cases with foreign elements through the lens of* R v Hape. *Contrasting the seemingly contradictory outcomes in* Hape *and in the* Khadr *cases, the author contends that comity has a significant role in the Court's reasoning about the* Charter*'s extraterritorial applicability. The author relates this reasoning to the traditional outlook of Commonwealth foreign relations law, which excluded the conduct of foreign affairs from legal control.*

The author proceeds in five parts. First, the author explains how previous scholarship has tended to focus on Hape*'s treatment of jurisdiction under international law, rather than on international comity. Second, the author posits that comity has a "permissive" face that justifies extraterritorial action in the interests of international co-operation and a "preclusive" face that restrains the reach of Canadian standards of justice. Third, the author argues that comity's role in* Hape *mirrors its role in the Court's private international law jurisprudence. In that jurisprudence, comity's two faces operate as an extra-legal mechanism to mediate conflicting exercises of state sovereignty, based on a classical, positivist vision of the international order. Fourth, it is shown that the majority's reasoning in* Hape *reflects a positivist conception of sovereignty, international law, and comity. It presupposes a division between an external realm of sovereign power and an internal realm of peace, order, and legality. Fifth, the article evaluates Bastarache J's concurring opinion—which attempts to normalize the treatment of rights cases with foreign elements—as an alternative framework for the extraterritorial application of the* Charter.

The author concludes by noting the trend in other jurisdictions to move away from and question the exclusionary outlook in foreign relations law. Whether the Canadian jurisprudence will follow that course remains to be seen.

* JD (University of Toronto). The author gratefully acknowledges David Dyzenhaus and Karen Knop for their guidance. An earlier version of this paper was written during the author's studies at the University of Toronto and was awarded the Patricia Julia Myhal Scholarship in legal writing. All views, errors, and omissions are those of the author only.

Introduction

More than a decade ago, the Supreme Court of Canada redefined the extraterritorial scope of the *Canadian Charter of Rights and Freedoms*.[1] In *R v Hape*, the accused, a Canadian businessman investigated for money laundering, had argued that his section 8 rights were infringed when Royal Canadian Mounted Police officers conducted searches of his office in the Turks and Caicos Islands under the authority of that territory's police.[2] The Court held that *Charter* rights could not apply to the activities of Canadian state agents operating abroad, due to the "principles of international law and comity".[3] At the time, the judgment surprised observers not only because of its unexpected departure from earlier jurisprudence, but also because of its restrictive application of the international law principles of jurisdiction. Adding to the doctrinal confusion, in the *Khadr* cases the Supreme Court of Canada subsequently articulated an exception to this seemingly categorical limitation on the basis of Canada's international human rights obligations.[4] To this day,

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

2. 2007 SCC 26.

3. *Ibid* at para 96.

4. See *Canada (Justice) v Khadr*, 2008 SCC 28 at para 27 [*Khadr* 2008]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 14 [*Khadr* 2010].

the precise contours of the extraterritorial reach of the *Charter* and its attendant human rights exception remain unclear.

The present re-examination of the *Hape* judgment is prompted by a recent resurgence of interest in the field of foreign relations law. Foreign relations law, "the domestic law of each nation that governs how that nation interacts with the rest of the world", is historically identified with the United States.[5] However, scholars around the world are now devoting greater attention to elaborating this field in their own jurisdictions.[6] As Campbell McLachlan observes in his seminal treatise, there exists a "shared frame of reference" that makes it possible to study "a largely shared approach of foreign relations law in Anglo-Commonwealth states" despite internal differences.[7] In part, the relative paucity of treatments of Commonwealth foreign relations law is attributable to the traditional outlook of English law, which embraced "a set of doctrines that served to exclude the field from municipal legal control".[8]

To the extent that a corpus of Canadian foreign relations law exists, *Hape* is situated at its core. As a judgment about the territorial scope of constitutional rights, it implicates the fundamental question of the field: "Can the law control the conduct to foreign affairs?"[9] In *Hape*, the majority of the Court appeared to deliver a negative response with respect to extraterritorial state action, relying on classic foreign affairs considerations such as respect for other states and the need for transnational co-operation. Yet, the presence of these "internationalist" concerns in the judgment, notably its numerous invocations of international comity, has not been well studied. In fact, the concept of comity is more prominently associated with Canadian private international law, rather than public law.

Analyzed from a foreign relations law perspective, three interrelated features of the *Hape* judgment become salient. First, there is the underappreciated role of "international comity" in the majority judgment, which defined the term as "informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and goodwill".[10] Frequently invoked in

5. Curtis A Bradley, "What is Foreign Relations Law?" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 3 at 3 [Bradley, "Foreign Relations Law"].

6. See e.g. Campbell McLachlan, *Foreign Relations Law* (Cambridge, UK: Cambridge University Press, 2014) [McLachlan, *Foreign Relations Law*]; Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: Oxford University Press, 2016); Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) [Bradley, *Handbook*].

7. McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 1.24–1.25.

8. *Ibid* at para 1.32. See also *ibid* at paras 1.33–1.39.

9. FA Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986) at 15.

10. *R v Hape*, *supra* note 2 at para 47.

conflict of laws cases, comity is a protean concept that, in the broadest sense, is meant to encompass an attitude of respect by a domestic legal system toward the actions and interests of foreign sovereigns. The role of comity exposes a second feature of the judgment, which is the vision of the international legal order that it shares with the Court's private international law jurisprudence. In both contexts, comity serves to discipline the legal system's treatment of "foreign elements" cases. Third, the Court's conception of the external, international realm informs its delimitation of the territorial boundaries of the *Charter* and, in essence, the extent to which foreign affairs can be mediated by law. Re-examining *Hape* with a focus on comity provides a novel lens on the Court's approach to rights cases with foreign elements.

This paper undertakes the reappraisal in five sections, which aim to relate the Court's reasoning to the traditional, exclusionary outlook of Commonwealth foreign relations law. Section I presents the prevailing criticisms of *Hape*, which focus on its misapplication of the international law principles of jurisdiction. I contend that these criticisms tend to minimize the majority's reliance on the notion of international comity. Section II discusses the significance of comity and its role in the majority judgment. Two functions of comity are identified: a preclusive and a permissive role that call for deference to foreign actors and recognition of the demands of international relations, respectively. Section III argues that the applications of comity in *Hape* mirror its role in the Court's private international law jurisprudence. Others have observed that this jurisprudence developed a particular juristic vision of the international legal order.[11] I argue that this vision involves a classical, positivistic conception of state sovereignty, international law, and the role of comity. Under this conception, comity is conscripted as an extra-legal mechanism to mediate the structural problem of conflicting exercises of state sovereignty.

Section IV argues that the majority's reasoning in *Hape* emanates from this vision. I reach the conclusion that it was international comity, rather than the doctrinal rules of extraterritorial jurisdiction, that governed the Court's delimitation of the *Charter*. In turn, the positivist vision of the international order sustains a sovereigntist model of the Canadian Constitution that categorically divides an external realm of pre-legality from an internal realm of peace, order, and legality. The prominence of comity in *Hape* reflects its implicit reliance on the sovereigntist model, which resists subjecting foreign affairs to law. Finally, in Section V, I consider the merits of Bastarache J's concurring opinion in *Hape* as an alternative framework for the extraterritorial application of the *Charter*.

11. See e.g. Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 39 Can YB Intl Law 117; Nathan Hume, "Four Flaws: Reflections on the Canadian Approach to Private International Law" (2006) 44 Can YB Intl Law 161.

I. The Prevailing Criticisms of *Hape*

What is now acknowledged as a landmark decision on the territorial scope of the *Charter* was greeted with considerable surprise, for neither the parties' counsel nor observers had anticipated that *Hape* would turn on a consideration of customary international law.[12] Justice LeBel, writing for the majority, prefaced his analysis of the *Charter*'s reach by considering "the relationship between Canadian domestic law and international law".[13] Because section 32(1) of the *Charter* did not expressly impose any territorial limits, he held that it was appropriate to refer to "international law and the principle of the comity of nations" to interpret and define "the jurisdictional reach and limits of the *Charter*".[14] Based on his analysis, LeBel J concluded that because "extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible".[15] In other words, the *Charter* could not extend beyond Canadian borders "because its application would necessarily entail an exercise of the enforcement jurisdiction that lies at the heart of territoriality".[16] The only exceptions to this rule arise where the foreign state consents to the enforcement of Canadian law and where the extraterritorial activities "would place Canada in violation of its international obligations in respect of human rights".[17] On the facts of the case, the *Charter* did not apply to searches and seizures taking place in the Turks and Caicos Islands under the authority of that territory's police.[18]

The commentaries that followed, naturally, tended to focus on the significance of international law to the judgment.[19] While the Court clarified

12. See Hugh M Kindred et al, eds, *International Law: Chiefly as Interpreted and Applied in Canada*, 8th ed (Toronto: Emond Montgomery Publications, 2014) at 305. See also H Scott Fairley, "International Law Comes of Age: *Hape v The Queen*", Case Comment, (2008) 87:1 Can Bar Rev 229 (stating the decision "came as no small surprise to all concerned" at 230); Pierre-Hugues Verdier, Case Comment on *R v Hape*, 2007 SCC 26, (2008) 102:1 AJIL 143 (stating the decision had a "surprising outcome" at 148).

13. *R v Hape*, *supra* note 2 at para 34. See also *ibid* at para 24.

14. *Ibid* at para 33.

15. *Ibid* at para 85.

16. *Ibid* at para 87.

17. *Ibid* at para 101. See *ibid* at para 85.

18. See *ibid* at paras 116–18.

19. See e.g. John H Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can YB Intl Law 55 [Currie, "Weaving a Tangled Web"]; John H Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*", Case Comment, (2008) 46 Can YB Intl Law 307 [Currie, "*Khadr*'s Twist

the Canadian approach to the domestic reception of international law, it was its analysis of the extraterritorial application of the *Charter*, the topic of the present paper, that attracted greater controversy.[20] In relation to this aspect of the decision, the *Hape* majority's treatment of the relevant international legal principles has been criticized. McLachlan aptly expresses a representative view, contending that the majority misapplied the rules of jurisdiction:

> It betrays a confusion of thought between a state's *exercise* of jurisdiction – its '[p]ower or authority in general' – and the limits imposed by international law on that exercise, not for the state's own benefit, but for the benefit of other states and individuals . . . The doctrine provides no assistance in a case where the state is *already* exercising its executive power outside the state.[21]

In his view, the decision allowed the Canadian government to avoid responsibility for its official acts by imposing jurisdictional limits on the scope of a rights instrument.[22] And McLachlan is not alone in focusing his critique on the principles of jurisdiction. As some have argued, *Hape* conflated prescriptive and enforcement jurisdiction, adopting an "overly simplistic characterization of international [law]" by effectively reducing all forms of jurisdiction to enforcement jurisdiction.[23] In a similar vein, others contend that the majority based its restrictive view of the *Charter*'s scope on a misinterpretation of the *Lotus* case, a key precedent of the Permanent Court of International Justice.[24]

Given their common focus, it is fair to describe the prevailing criticisms of *Hape* as being concerned with the application of international law, particularly the rules of jurisdiction. It is not suggested here that those

---

on *Hape*"]; Amir Attaran, "Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism", Case Comment on *R v Hape*, 2007 SCC 26, (2008) 87:2 Can Bar Rev 515; Chanakya Sethi, "Does the Charter Follow the Flag? Revisiting Constitutional Extraterritoriality After *R v Hape*" (2011) 20:1 Dal J Leg Stud 102.

20. See Kindred, *supra* note 12 at 305; Kent Roach, "*R v Hape* Creates Charter-Free Zones for Canadian Officials Abroad", Editorial Comment, (2007) 53:1 Crim LQ 1.

21. McLachlan, *Foreign Relations Law*, *supra* note 6 at para 8.55 [emphasis in original]. See also *ibid* at para 3.57.

22. See *ibid* at para 8.66.

23. Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 317. See e.g. Chimene I Keitner, "Rights Beyond Borders" (2011) 36:1 Yale J Intl L 55 at 86; Verdier, *supra* note 12 at 147.

24. See *The Case of the SS "Lotus" (France v Turkey)* (1927), PCIJ (Ser A) No 10. See e.g. Attaran, *supra* note 19 at 525; Sethi, *supra* note 19 at 106–08.

criticisms are incorrect. Still, despite their cogency, they do not satisfactorily account for an important aspect of the reasoning. Under the prevailing view, the majority's views on enforcement jurisdiction would have been sufficient to dispose of the case.[25] If the majority had relied solely on its interpretation of the relevant principles of jurisdiction, then there would have been no need to invoke the concept of international comity at all. Having determined that the *Charter* cannot be "enforced" abroad without the consent of the foreign state, LeBel J could have concluded his analysis. At least one member of the Court did appear to see things this way. Justice Binnie's concurrence cautioned against using an "analysis of certain aspects of international law" to restrict the *Charter*'s applicability, without mentioning comity at any point.[26] For this reason, one might consider that the majority's references to a "non-binding principle of comity" were merely "supplementary" to the primary, jurisdictional analysis.[27] That is, the invocation of comity is superfluous, at least insofar as the extraterritorial reach of *Charter* rights is concerned.

To the contrary, however, the judgment repeatedly referred to the "principles of international law *and comity*" in justifying the non-application of the *Charter*.[28] Asserting that "[t]he nature and limitations of comity need to be clearly understood", LeBel J explained that the principle of comity, while not a "positive" rule of international law, upholds "peaceable interstate relations and the international order".[29] As a feature of the international order, LeBel J clearly considered comity to be relevant to the interpretation of the *Charter* and its geographical contours.[30] The majority judgment further implied that any exceptions to the rule against extraterritoriality were informed by "the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights".[31] These statements point to a substantive role for international comity within the majority's reasoning; as LeBel J indicated, it was both "[t]he principles of international law and comity that . . . demonstrate why Charter standards cannot be applied."[32]

25. See e.g. Currie, "Weaving a Tangled Web", *supra* note 19 at 91–94.
26. *R v Hape*, *supra* note 2 at paras 186, 191.
27. Sethi, *supra* note 19 at 115. See also Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 326.
28. *R v Hape*, *supra* note 2 at para 96 [emphasis added].
29. *Ibid* at para 50.
30. See *ibid* at para 56.
31. *Ibid* at para 90.
32. *Ibid* at para 96. See also *ibid* at paras 33, 49, 56, 68, 72, 87, 96, 99, 101.

Subsequently, in the *Khadr* decisions, the Supreme Court of Canada again invoked international comity, this time to justify the exceptional application of the *Charter* to events occurring outside of Canada. In *Canada (Justice) v Khadr* (*Khadr 2008*), it stated that "the *Hape* comity concerns that *would ordinarily justify deference* to foreign law have no application here", a formulation that seemed to attribute a decisive role to "comity concerns" in the normal course.[33] Here, the Court implied, the distinction between *Hape* and *Khadr 2008* could be explained through the notion of comity, rather than differences in the application of jurisdictional principles. Likewise, in *Canada (Prime Minister) v Khadr* (*Khadr 2010*), the Court reaffirmed the proposition that "[i]nternational customary law *and* the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada."[34] The reasoning expressed in both cases appears to confirm that comity has a substantive role, independent of the principles of international law.

From these suggestive references, there arises the puzzling problem of how comity, articulated in *Hape* as a non-binding "interpretive" principle, could in *Khadr 2008* override the binding principle of sovereign equality that governs the limits of state jurisdiction. Some claim that this apparent contradiction is a "logical flaw" in *Hape*'s analytical structure.[35] It has been posited that the human rights exception elaborated in the *Khadr* cases was, in fact, "an innovation" rather than an application of *Hape* itself.[36] In *Hape*, it was "the binding principles of *international law*" rather than "the non-binding principle of *comity*" that had prohibited the extraterritorial application of the *Charter*.[37] Even if comity became inoperative on the grave facts of the *Khadr* cases, those jurisdictional strictures would presumably continue to operate, so that constitutional rights could not extend to the events in Guantánamo Bay. A similar outcome to *Hape* should have followed, yet it did not. Thus, these critics allege that the outcome in *Khadr 2008* resulted from a covert ouster of the binding jurisdictional rules of international law, and not from an ouster of comity concerns.[38]

If the reasoning in *Hape* is difficult to reconcile with the outcomes of the *Khadr* cases, it may be helpful to examine the shared appeal to comity in both cases. The Court's approach to the concept of comity outside of the *Charter* context is a logical starting point. In what follows, I show that the application of comity in *Hape* parallels its use in private international law, an

33. *Supra* note 4 at para 26 [emphasis added].

34. *Supra* note 4 at para 14 [emphasis added].

35. Sethi, *supra* note 19 at 115. See also Attaran, *supra* note 19 (referring to the human rights exception as a "logical paradox" at 520).

36. Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 323.

37. *Ibid* [emphasis in original].

38. See *ibid*.

area with which comity is most closely associated. In those cases, the Court developed a "common vision of the international realm" which I argue entails a classical, positivist conception of the international legal order.[39] The inquiry yields the surprising insight that this vision, and its corresponding conception of international law and comity, underlies the *Hape* majority's analysis of jurisdiction and the extraterritorial reach of the *Charter*.

II. Comity and Its Functions in *Hape*

A. The Significance of Comity

As this discussion indicates, the references to international comity in *Hape* and its successors have been underappreciated. These references merit examination for several reasons. First, as scholars have long observed, "[c]omity is one of the most ambiguous and multifaceted conceptions in the law in general".[40] In a characteristic affirmation of this quality, the Court observed not long ago that "comity itself is a very flexible concept".[41] It is this very imprecision that is sometimes criticized for engendering judicial confusion and unprincipled decision making.[42] Despite this, comity is frequently invoked in cases where interstate relations are implicated. Alex Mills claims, for instance, that the ambiguous status of comity derives from its function in acknowledging "the international dimension" of disputes adjudicated within municipal legal systems.[43] There is some link, however nebulous, between the notion of comity and the legal system's confrontation with foreign elements, whether in private or public law disputes. Accordingly, studying its application is likely to illuminate the domain of foreign relations law, which is concerned with domestic law's interconnections with the external, international realm.[44]

---

39. Wai, *supra* note 11 at 123.

40. Mann, *supra* note 9 at 134. See e.g. Curtis A Bradley & Jack L Goldsmith, *Foreign Relations Law: Cases and Materials*, 5th ed (New York: Wolters Kluwer Law & Business, 2014) at 114.

41. *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 74 [*Van Breda*].

42. See e.g. Mann, *supra* note 9 at 136; Michael D Ramsey, "Escaping 'International Comity'" (1998) 83:5 Iowa L Rev 893 at 902–06.

43. Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge, UK: Cambridge University Press, 2009) at 1–2, 47 [Mills, *Confluence*].

44. See Bradley, "Foreign Relations Law", *supra* note 5 at 5; Campbell McLachlan, "Five Conceptions of the Function of Foreign Relations Law" in Bradley, *Handbook*, *supra* note 6, 21 at 21 [McLachlan, "Five Conceptions"].

Second, comity is frequently described as "informal" and an "attitude" or "desire", rather than a strict legal obligation or rule.[45] The classic formulation originates from *Hilton v Guyot*, a decision of the Supreme Court of the United States:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[46]

Some conceptions of comity associate it with "subjective elements" like utility, habit, or morality, so that it may not be a rule of law at all, but rather a discretion directed to political considerations.[47] Prior to *Hape*, LeBel J even acknowledged that "comity has proven a difficult concept to define in *legal* terms".[48] Given its extra-legal nature, it seems aberrant that comity is considered alongside international law in defining the *Charter*'s scope.[49] Indeed, the constitutional principle of the rule of law would seem to demand otherwise.[50] Yet, insofar as comity implies recourse to extra-legal considerations, its application is relevant to ongoing debates about the nature of law's engagement with foreign affairs.[51]

---

45. *R v Hape*, *supra* note 2 at paras 47, 50; *Van Breda*, *supra* note 41 at para 74. See *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1096, 76 DLR (4th) 256 [*Morguard*].

46. 159 US 113 at 163–64 (1895).

47. Jörn Axel Kämmerer, "Comity" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law: CA to DE*, vol 2 (Oxford: Oxford University Press, 2012) 375 at para 2. See also Mann, *supra* note 9 at 134; Joel R Paul, "Comity in International Law" (1991) 32:1 Harv Intl LJ 1 at 3–4 [Paul, "Comity in International Law"].

48. *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 16 [*Spar Aerospace*] [emphasis added].

49. See Fairley, *supra* note 12 at 239.

50. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 71, 161 DLR (4th) 385.

51. See e.g. McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 2.61–2.64; Alex Mills, "Rethinking Jurisdiction in International Law" (2014) 84:1 Brit YB Intl L 187 at 192–94 [Mills, "Rethinking"]; Thomas Poole, "The Constitution and Foreign Affairs" (2016) 69:1 Current Leg Probs 143 at 153–55 [Poole, "Constitution and Foreign Affairs"]. See also Lord Sumption, "Foreign Affairs in the English Courts Since 9/11" (Lecture delivered at the Department of Government, London School of Economics, 14 May 2012), online (pdf): *The Supreme Court* <www.supremecourt.uk/docs/speech_120514.pdf>.

Third, comity is far more prominent in Canadian private international law than in constitutional law. It is declared to be "the informing principle" and one of the "backbones of private international law".[52] While international comity has also been recognized as a basis for transnational criminal co-operation, it had historically formed part of the definitional balancing of *Charter* rights as applied to the domestic extradition process.[53] But the Court's explicit reliance on this concept to categorically delimit the territorial scope of constitutional rights, as an interpretive precept, was somewhat novel. In *Canada v Schmidt*, one of the first cases to address the *Charter*'s extraterritorial reach, La Forest J alluded to the needs of international criminal co-operation without invoking the concept by name.[54] He elaborated further in a companion case, *Argentina v Mellino*, adding that it would be "in fundamental conflict with the principle of comity on which extradition is based" for a Canadian court to supervise "the conduct of the diplomatic and prosecutorial officials of a foreign state".[55] Four years later, in *Kindler v Canada (Minister of Justice)*, McLachlin J affirmed that "considerations such as comity" may affect whether an extradition action is found to offend section 7 rights, but did not directly relate the concept to the scope of the *Charter* under section 32(1).[56]

The interests of transnational co-operation were again referred to in *R v Harrer*, which held that the *Charter* had no application to custodial interrogations in the United States conducted by American authorities.[57] Only in *R v Terry* was comity implied to have a discrete role in governing the extraterritorial application of *Charter* rights; McLachlin J referred simply to "the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity".[58] In *R v Cook*, the leading case until *Hape*, the majority of the Court relied on the "[j]urisdictional competence under international law to apply the *Charter*" extraterritorially, mentioning comity only in passing references to earlier precedents.[59] A trend of judicial

52. *Morguard*, *supra* note 45 at 1095; *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 69 [*Yaiguaje*].

53. See Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 2nd ed (Toronto: Irwin Law, 2013) at 478–81, 534–35.

54. [1987] 1 SCR 500, 7 DLR (4th) 18. See also *United States v Allard*, [1987] 1 SCR 564, 40 DLR (4th) 102.

55. [1987] 1 SCR 536 at 551, 40 DLR (4th) 74. See also *United States of America v Cotroni; United States of America v El Zein*, [1989] 1 SCR 1469, 96 NSR 321 [*Cotroni* cited to SCR] ("the comity of nations fostered by extradition is not adversely affected by the result I have reached" at 1516, Wilson J, dissenting).

56. [1991] 2 SCR 779 at 850, 84 DLR (4th) 438.

57. [1995] 3 SCR 562 at para 12, 128 DLR (4th) 98.

58. [1996] 2 SCR 207 at para 16, 135 DLR (4th) 214.

59. [1998] 2 SCR 597 at para 41, 164 DLR (4th) 1.

deference toward the interests of international comity is discernible in the earlier extradition and foreign investigation cases.[60] Nonetheless, this principle had not yet fully emerged as a stand-alone proposition bearing on the interpretation of the *Charter*'s territorial limitations.[61]

In contrast, as noted, comity occupies a prominent place in the reasoning in *Hape* and the *Khadr* cases. The presence of "comity concerns" in the later *Charter* jurisprudence is highly suggestive of an underlying connection between the analysis of the extraterritorial scope of constitutional rights and of private international law. Such a connection is not as unintuitive as it may seem. Constitutional and private international law share the aim of "the coordination of legislative and adjudicatory jurisdiction" by legal authorities, namely states or sub-state entities.[62] Both conflict of laws disputes and what Jacco Bomhoff calls "fundamental-rights cases with foreign elements" involve a foreign element of some kind (a foreign actor, interest, or law), and both engage the terminology and methodology of "'jurisdiction'", "'scope'", and "'application'".[63] Each type of case is concerned with the reach of legal norms, whether derived from constitutional or private law. The Court itself does not appear to discern a rigid distinction between these two fields, for it has cited cases from either context interchangeably in reference to comity.[64] To the extent that it imported the comity concept from private international law, then, it reflects certain fundamental similarities between foreign relations law and conflict of laws.[65]

---

60. See e.g. Robert J Currie, "*Charter* Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms" (2004) 27:1 Dal LJ 235 at 260–66 [Currie, "*Charter* Without Borders"] (discussing the role of international comity in definitional balancing under section 7's "'shocks the conscience'" standard in extradition cases, where extraterritorial application is not engaged at 262–64); Ed Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49:4 UTLJ 447. See also Thomas Rose, "A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada" (2002) 27:1 Yale J Intl L 193 at 202–05.

61. See Fairley, *supra* note 12 at 234–35.

62. John P McEvoy, "Federalism, Territorialism and Justice La Forest" in Rebecca Johnson & John P McEvoy with Thomas Kuttner & Wade MacLauchlan, eds, *Gérald V La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 345 at 346.

63. Jacco Bomhoff, "The Reach of Rights: 'The Foreign' and 'The Private' in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements" (2008) 71:3 Law & Contemp Probs 39 at 41, 55 [Bomhoff, "Reach of Rights"].

64. See e.g. *R v Terry*, *supra* note 58 at para 16; *Van Breda*, *supra* note 41 at para 74; *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 59; *Yaiguaje*, *supra* note 52 at para 51.

65. See Bomhoff, "Reach of Rights", *supra* note 63 at 55–61.

B. The Two Faces of Comity in Hape*: Preclusion and Permission*

Given its ambiguous nature, it will be useful to distinguish the various "faces" of comity.[66] Describing its functions in American foreign relations law, William Dodge has developed a taxonomy of comity-based doctrines. He proposes that such doctrines can be categorized along an axis of recognition and restraint: (1) a "'principle of recognition'" that operates to recognize foreign law, foreign courts, and foreign sovereigns as litigants, and (2) a "'principle of restraint'" that operates to limit the reach of American law and the jurisdiction of American courts, and to immunize foreign sovereign litigants.[67] In more general terms, the former accommodates the interests of foreign sovereigns, while the latter restrains the reach of domestic law and exercises of jurisdiction. These represent two ways that a domestic court responds to the foreign element before it. Both principles, Dodge notes, express in the domestic legal system forms of "deference to foreign government actors that [are] *not* required by international law".[68]

This distinction usefully explains the functions of comity in the reasoning in *Hape*. In my view, however, it would be more accurate to refer to its functions as roles of "permission" and "preclusion", rather than recognition and restraint. Following the formulation in *Hilton*, later imported into Canadian law in *Morguard*, LeBel J defined comity as "'the deference and respect due by other states to the actions of a state legitimately taken within its territory'".[69] At times, the majority's appeal to international comity is used to justify or *permit* Canadian state action abroad. Comity is "based on a desire for states to act courteously towards one another", that is, to act internationally with the goals of facilitating "interstate relations and global co-operation".[70] At other times, it serves to deny or *preclude* the possibility of extending Canadian norms abroad, such as when Canada must defer to the laws of a foreign state.[71] Nonetheless, at all times, comity is said to permit or preclude various extensions of the Canadian state abroad in light of the interests of foreign sovereigns, interstate relations, or the international order.

The structure of the *Hape* majority judgment exhibits the double-faced nature of comity. First, it held that the principles of international jurisdiction

66. See William S Dodge, "International Comity in American Law" (2015) 115:8 Colum L Rev 2071 at 2099.

67. *Ibid*.

68. *Ibid* at 2080 [emphasis in original].

69. *R v Hape*, *supra* note 2 at para 47, citing *Morguard*, *supra* note 45 at 1095, La Forest J.

70. *R v Hape*, *supra* note 2 at para 50.

71. See *ibid* at para 52.

"arise from sovereign equality and the corollary duty of non-intervention".[72] Jurisdiction being only an "aspect" of sovereign equality,[73] it is answerable to this superordinate latter principle: "International law – and in particular the *overarching* customary principle of sovereign equality – *sets the limits of state jurisdiction*."[74] Through this overarching principle, the preclusive role of comity comes into view, given that "[t]he principle of comity reinforces sovereign equality."[75] It does so by mediating claims to extraterritorial jurisdiction. Where such a claim may be legally valid but incompatible with sovereign equality, "comity dictates" that jurisdiction be exercised only under conditions where it is "proper and desirable" from a standpoint that could be characterized as "internationalist".[76]

Accordingly, the preclusive face of comity calls for territorial limits on the application of Canadian standards of justice. In this role, comity "restrain[s]" the reach of domestic norms and interests in accordance with the interests of foreign states, the international legal order, and "respect for differences in other jurisdictions".[77] Comity is invoked here, I submit, to support a principle of "limited responsibility for justice".[78] Because foreign states are sovereign and exercise plenary legal authority within their own territories, it must be acknowledged that Canada bears only a limited responsibility for the laws of foreign states.[79] In cases of transnational legal assistance, it means that a state "must respect the way in which the other state chooses to provide the assistance within its borders".[80] Thus, according to the majority, *Charter* standards cannot "be applied in other countries", presumably because such an approach would infringe the requirements of "courtesy among states".[81] As I will argue, it seems to be this line of reasoning that spurs the Court to its affirmation, in *Khadr 2008*, that "comity concerns . . . would ordinarily justify deference to foreign law".[82]

In its second role, comity generates a "permissive rule that allows Canadian officers to participate" in investigations abroad.[83] As the majority explained,

72. *Ibid* at para 57.

73. *Ibid* at para 41.

74. *Ibid* at para 59 [emphasis added].

75. *Ibid* at para 50.

76. *Ibid* at para 62. See also Wai, *supra* note 11 at 169–70.

77. *R v Hape*, *supra* note 2 at paras 48, 96.

78. Timothy Endicott, "Comity Among Authorities" (2015) 68:1 Current Leg Probs 1 at 16.

79. See *R v Hape*, *supra* note 2 at para 59.

80. *Ibid* at para 52.

81. *Ibid* at paras 50, 99. See also *ibid* at paras 87, 96.

82. *Supra* note 4 at para 26.

83. *R v Hape*, *supra* note 2 at para 101.

"disputes and events commonly have implications for more than one state," and exercises of jurisdiction are consequently "subject to *strict limits* under international law that are based on sovereign equality, non-intervention and the territoriality principle".[84] But if Canadian law "cannot be enforced in another state's territory without the other state's consent", it might be thought that Canadian officers are completely disabled from acting abroad.[85] After all, the extraterritorial acts of these state agents are, in a sense, emanations of the Canadian state and its legal apparatus: "Since the *Charter* does not authorize state action, but simply operates as a limit on such action, could it not be said that the *Charter* 'applies' to extraterritorial investigations by prohibiting Canadian officers from participating in investigations abroad that do not conform to Canadian law?"[86] However, notwithstanding the conclusion that *Charter* rights cannot extend abroad, LeBel J asserted that the inability to enforce those domestic legal standards does not absolve Canada of its "commitment to other states and the international community to provide assistance in combatting transnational crime".[87]

Such a commitment arguably lies among the "informal acts performed . . . by states in their mutual relations out of politeness, convenience and goodwill".[88] According to LeBel J, it is the "spirit of comity" that impels Canada to act co-operatively to confront "a growing problem in the modern world" of transnational activity.[89] It is significant that this concern is addressed to Canada in its capacity as a member of the international order, rather than as guarantor of its citizens' legal rights. At this point, the considerations of comity represent a permissive rule precisely because they offer a basis for state action abroad. Like its preclusive face it does so by invoking the need to account for foreign and internationalist interests within the Canadian legal system. Those considerations treat the external realm, the realm of transnational activity, as an arena governed exclusively by the logic of interstate relations: what is salient are the interests of "other *states* and the *international community*".[90] The spirit of comity permits, and even seems to require, Canada to participate in transnational activities, such as co-operation in criminal investigations.

84. *Ibid* at paras 60, 65 [emphasis added].
85. *Ibid* at para 69.
86. *Ibid* at para 97.
87. *Ibid* at para 98. See also *ibid* at paras 52, 97–98.
88. *Ibid* at para 47.
89. *Ibid* at para 98. See also *ibid* at paras 52, 98–99.
90. *Ibid* at para 98 [emphasis added].

C. The Distinction Between the Internal and External Realms

The outcome of this conjunction of comity's preclusive and permissive faces is striking. It is held that the Canadian legal system may countenance extraterritorial activities in aid of transnational co-operation. Nevertheless, enforcement activities "can be authorized only by the territorial state", and the "guests" must abide by the rules of the host state.[91] As a result, "[a]s a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state."[92] Therefore, comity serves a dual function in *Hape*. It justifies Canadian participation in transnational co-operation in the international realm, and it simultaneously disaffirms the applicability of domestic Canadian standards in that realm.

Both faces of comity derive their influence from the putative basis "that they facilitate interstate relations and global co-operation; however, comity ceases to be appropriate where it would undermine peaceable interstate relations and the international order".[93] However, separating these two faces exposes an underlying distinction between an internal and external domain of state action in the *Hape* judgment. As noted, the preclusive role of comity aims to uphold the principle of sovereign equality and to avoid transgressions of territorial sovereignty. It does so by suppressing the reach of Canadian standards of justice. Yet, what is being precluded is the extension of constitutional constraints otherwise applicable in the internal, domestic realm to the external realm. In contrast, the permissive role responds to the problems of coordination and "jurisdictional cracks" that are posed by transnational activity.[94] That is, the permission to act abroad responds to comity's appeal to the needs of the international order, the external realm. In either role, comity attends to the legitimacy of the state's actions relative to other states, rather than to individuals.[95]

While the majority's conclusions on the *Charter*'s scope initially appeared to stem from a flawed application of jurisdictional principles, the issue is not merely doctrinal. In my view, the curious role of comity in *Hape* reflects the Court's theoretical presuppositions about the nature of the international legal order, the logic of interstate relations, and the domestic legal system's relation to that order. This conception of the international order, I will contend, originates in the Court's private international law jurisprudence. This feature of the *Hape* judgment has been somewhat obscured by the focus on jurisdiction under

91. *Ibid* at para 87. See also *ibid* at paras 99, 101.

92. *Ibid* at para 101.

93. *Ibid* at para 50.

94. *Ibid* at para 99.

95. See Roxana Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013) 31:1 Windsor YB Access Just 197 at 199.

international law and has thus far eluded critical examination. As discussed below, the Court has constructed a vision of the external realm that it considers to be separate and apart from the internal realm and its prevailing norms and standards of justice.

III. Comity in Private International Law

A. The Structural Problem of Decentralized Legal Authority

Examining the roles of comity reveals a particular, juristic vision of the international order underlying the Court's decisions in both the *Charter* and the private international law context. In a tetralogy of cases in the 1990s, the Court adopted international comity as a key principle of private international law, beginning with *Morguard*.[96] Not only did LeBel J affirm *Morguard*'s definition of comity in *Hape*, but also the same preclusive and permissive roles of comity can be discerned in these early cases. As Roxana Banu observes, a common theme underlying these private international law cases is the concern "with a universal *a priori* division of legislative authority between states".[97]

In *Morguard*, La Forest J explained that Canadian law was required to adapt to a modern "world where legal authority is divided among sovereign states".[98] Injustice would result if each state applied its "'parochial'" interests and denied the recognition of foreign states' laws and interests.[99] Drawing from Joseph Story's conception of comity in *Hilton*, La Forest J explained that comity was a necessary idea to make transnational activity flow "in a fair and orderly manner".[100] It was a voluntary matter based on the "'common interest'" of sovereign states to apply foreign laws, rather than "'a matter of absolute obligation'".[101] But despite the non-binding nature of comity, the Court held that "the *rules* of comity or private international *law*" called for a more liberal approach to foreign judgments.[102]

In *Hunt v T&N plc*, the Court elaborated upon this view, stating that comity is "grounded in notions of order and fairness to participants" of the

96. See Wai, *supra* note 11 at 169.

97. Banu, *supra* note 95 at 203.

98. *Supra* note 45 at 1096.

99. *Ibid* at 1097.

100. *Ibid* at 1096.

101. *Ibid*.

102. *Ibid* at 1101 [emphasis added].

international legal order.[103] Here, order and fairness are imbued with a special meaning. These two goals are defined in light of the Court's vision of the international realm and the underlying purpose of private international law: "[I]n our era where numerous transactions and interactions spill over the borders defining legal communities *in our decentralized world order, there must also be a workable method of coordinating this diversity*."[104] Indeed, the judgment described this decentralized legal order as an "anarchic system".[105] For this reason, though fairness is initially defined as a principle of private international law alongside order and comity,[106] it becomes subordinated to order, for "[o]rder is a precondition to justice."[107] Later, the Court affirmed in *Tolofson* that "the relevant underlying reality is the territorial limits of law" that forms the basis for state sovereignty.[108]

In developing its conflict of laws approach, the Court conceived the foundation of the international legal order to be its decentralized and territorially bound character. The underlying territorial basis of state sovereignty is a first-order principle in its vision of the international realm. This first-order principle is a recognition of the *fact* that the world is divided into zones of exclusive territorial sovereignty, such that legal authority is decentralized, but it does not necessarily impose a course of permitted and prohibited *actions* in light of that fact. This model is articulated most clearly in *Tolofson*, where La Forest J described the issue of conflicts of laws as "a structural problem".[109] That is, the challenges of private international law arise from the structural features of the international legal order itself: "If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected."[110] The response to the prospect of "chaotic situations" is itself structural: it imposes the requirements of a uniform, general, and predictable set of rules to allocate sovereign authority.[111] Hence, concerns of comity "are partly a concern with rationalizing unseemly and dangerous

103. [1993] 4 SCR 289 at 325, 109 DLR (4th) 16.

104. *Ibid* at 295 [emphasis added].

105. *Ibid*.

106. See *Morguard*, *supra* note 45 at 1097.

107. *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at 1058, 120 DLR (4th) 289 [*Tolofson v Jensen*].

108. *Ibid* at 1047.

109. *Ibid*.

110. *Ibid* at 1051.

111. *Ibid* at 1050–51. See also Banu, *supra* note 95 at 208–09.

battles between different state courts".[112] As such, the content of the concept of comity is to be adjusted "in light of the changing world order", consistent with the goals of order and fairness.[113]

Within the decentralized, potentially anarchic international order, the function of comity is to "discipline state action" to prevent clashes of sovereign authority in the external realm.[114] Because the vision presupposes that sovereignty is territorially founded, a state's actions can have no binding effect outside its borders. On this view, as discussed below, comity becomes an extra-legal notion that is invoked to promote the common interests of sovereigns.[115] As LeBel J explained in *Spar Aerospace*, comity achieves this co-operation via states' self-imposed "attenuat[ions of] the principle of territoriality".[116] Where it would be undesirable for a state to intervene in the international arena, the weight of comity is said to counsel against an exercise of extraterritorial jurisdiction.

One practical consequence of this outlook is demonstrated in *Tolofson*, where the Court adopted *lex loci delicti* as the general choice of law rule in tort. Because a state's jurisdiction is both territorial and exclusive, it explained, "other states must *under principles of comity* respect the exercise of its jurisdiction within its own territory".[117] International comity compels respect for "the law of the place where the activity occurred", which must be applied as the substantive law governing tort disputes with foreign elements.[118] As La Forest J explained, one sovereign's "defining the nature and consequences of an act done in another country" would "fly against the territoriality principle".[119] Following the needs of order and fairness, the rule must be predictable, so as to escape "the spectre that a multiplicity of jurisdictions may become *capable* of exercising jurisdiction over the same activity".[120] The terminology of "capability" is germane, suggesting that the Court was concerned not merely with the actual exercise of jurisdiction, but also with defining the structural limits of state jurisdiction.

To further that goal, the Court's analysis conscripted international comity "as the guarantor of an international economic order that depends generally

112. Wai, *supra* note 11 at 170.

113. *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897 at 930, 102 DLR (4th) 96 [*Amchem*]. See also *Morguard*, *supra* note 45 at 1097.

114. Hume, *supra* note 11 at 220.

115. See *Morguard*, *supra* note 45 at 1095–97.

116. *Supra* note 48 at para 15. See also *R v Finta*, [1994] 1 SCR 701 at 770, 112 DLR (4th) 513.

117. *Tolofson v Jensen*, *supra* note 107 at 1049–50 [emphasis added].

118. *Ibid* at 1050.

119. *Ibid* at 1052.

120. *Ibid* at 1055 [emphasis added]. See also Banu, *supra* note 95 at 204–05, 208–09.

on *territorially confined* regulation".[121] International comity, it held, ensures "harmony" in the face of potential conflicts of laws.[122] The concept emerges from the Court's vision of the external realm, layered upon the first-order principle of territoriality. Informed by order and fairness, it provides guidance on how states should *behave* on the international level given the underlying realities of the anarchic international system. In this manner, comity supplements, as a second-order consideration, the first-order principle recognizing the decentralized, territorial distribution of sovereignty under the international order.

B. Preclusion and Permission in Private International Law

As in *Hape*, the invocation of comity in private international law serves preclusive and permissive roles. On the one hand, comity encourages states to "ordinarily respect . . . what another state chooses to do within [the] limits" of territorial sovereignty.[123] This rationale justifies adopting a foreign state's laws in tort cases, while precluding consideration or disapproval of the content of those laws.[124] This logic flows from the structural features of the international order and the need to harmonize competing exercises of sovereignty, which informs the function or "content" of comity. For this reason, the demand for predictability excludes even a domestic exception to the *lex loci delicti* rule.[125] In the choice of forum context, this preclusive face also requires Canadian courts to reject a "parochial attitude" and "to become more tolerant of the systems of other countries".[126] Again, these references to comity call for greater restraint in the application of Canadian standards of justice.

On the other hand, the permissive face of comity favours accounting for the interests associated with foreign elements in private disputes. In *Morguard*, for example, comity justified the adoption of "more generous rules for the recognition and enforcement of foreign judgments".[127] Following *Amchem*, comity is implicated whenever a foreign court might regard an anti-suit injunction "as an interference with its jurisdiction".[128] Operating on an internationalist logic, the principle of comity permitted domestic courts to recognize the Fourteenth Amendment to the Constitution of the

121. Hume, *supra* note 11 at 215 [emphasis added].

122. *Tolofson v Jensen*, *supra* note 107 at 1048.

123. *Ibid* at 1047.

124. See Banu, *supra* note 95 at 202–03.

125. See *Tolofson v Jensen*, *supra* note 107 at 1058, 1060–62.

126. *Amchem*, *supra* note 113 at 912.

127. *Supra* note 45 at 1097–98.

128. *Supra* note 113 at 940.

United States as an analogue for the *forum non conveniens* doctrine, so that an anti-suit injunction was unwarranted.[129] Through its preclusive and permissive roles, the principle of comity represents "a *rough* form of reciprocity and cooperation among states" that mitigates the structural problems of the distribution of legal authority in the "anarchic" international system.[130]

As Nathan Hume observes, the Court continued to reinforce the essential link between the territorial principle and international comity.[131] In *SOCAN*, the Court advanced an analysis that would presage the reasoning later adopted in *Hape*, interpreting the *Copyright Act* as applying only to internet transmissions with a "'real and substantial connection'" to Canada.[132] Writing for the majority, Binnie J advanced two strands of reasoning to justify this restrictive interpretation. Following the Court's vision of the decentralized international order, the first strand held that this test reflected the "underlying reality" of the first-order territorial principle.[133] Relying on an appeal to state sovereignty, this strand posited the division of legal authority into exclusive territorial zones. Second, the adoption of the test was supported by "respect for the legitimate actions of other states inherent in the principle of international comity".[134] Similar to its role in *Tolofson*, comity "discipline[s] state action" beyond these territorial zones in terms of the state's capability to exercise jurisdiction abroad.[135] Once more, international comity supplemented the territorial principle within the Court's vision of the international order.[136]

This approach accords with the *Hape* majority's affirmation that "comity reinforces sovereign equality" and is directed toward the preservation of "peaceable interstate relations and the international order".[137] The goals of private international law—avoiding uncertainty and "'chaotic situations'", as well as promoting order through adherence to the territorial principle[138]—are the same goals that govern the delimitation of constitutional rights. As this analytical perspective reveals, the *Tolofson* and *Hape* decisions parallel each other. Comity motivates the same choice of law rule, namely that the *lex loci delicti* or "the law of the state in which the activities occur" will generally govern, whether

129. See *ibid* at 937–38.

130. Wai, *supra* note 11 at 179, 183–84.

131. See Hume, *supra* note 11 at 217.

132. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 60 [*SOCAN*].

133. *Ibid*, citing *Tolofson v Jensen*, *supra* note 107 at 1047.

134. *SOCAN*, *supra* note 132 at 1047. *Cf R v Hape*, *supra* note 2 at paras 47–49.

135. Hume, *supra* note 11 at 220.

136. See *ibid* at 219.

137. *Supra* note 2 at para 50.

138. Hume, *supra* note 11 at 221.

the claim is in private or constitutional law.[139] The Court's conflict of laws methodology adopted comity as a key element of its vision of the external realm. That vision, and its conception of comity, was later imported into *Hape*.

IV. *Hape* and the Classical, Positivist Vision of the International Realm

A. International Legal Positivism in Foreign Elements Cases

The vision of the external realm in *Hape* and the private international law cases, I argue, entails a conception of the international legal order belonging to the tradition of positivist international law theory. According to this theory, states are "the key actors in international law, and are formally independent, free, equal, and perhaps most importantly 'sovereign'".[140] While state sovereignty is a contested concept, as Mills explains, in international legal positivism it refers to the essential feature of unrestricted, exclusive freedom within territorial boundaries that is "an *a priori* consequence of . . . statehood" and that exists "'prior' to law".[141] Because international legal positivism treats sovereignty as a question of fact, it considers the rules that developed to govern relations between states to be "a distinct but 'primitive' form of law . . . *voluntarily* adopted by and between sovereign states".[142] In other words, all international legal norms are mere emanations of the will of sovereigns.[143]

On this classical view of sovereignty, the international legal order is theorized as a form of private law between sovereigns, so that international law exists "purely 'between' states and not 'above' them".[144] This conception of international law, however, creates difficulties in explaining the jurisdictional limitations that derive from the principle of territoriality, which are ostensibly binding legal rules. One state's adherence to another state's territorial sovereignty must be characterized as a *self-imposed* limitation, because sovereignty is theoretically

139. *R v Hape*, *supra* note 2 at para 90 (application in constitutional law matters). See *Tolofson v Jensen*, *supra* note 107 at 1049–50 (application in private law matters).

140. Mills, "Rethinking", *supra* note 51 at 192. See also Bruno Simma & Andreas L Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" (1999) 93:2 AJIL 302 at 303–05.

141. Mills, "Rethinking", *supra* note 51 at 192–93.

142. *Ibid* at 191 [emphasis added].

143. See Simma & Paulus, *supra* note 140 at 303.

144. Mills, *Confluence*, *supra* note 43 at 44.

unconstrained.[145] If sovereignty exists prior to law, the phenomenon of self-limitation cannot be described as a matter of legal obligation. Consequently, recourse to the terminology of "deference" to other states is required. In turn, this generates the more elaborated notion of an exercise of international comity.[146]

There is good reason to think that this conception of the international legal order, and the function of comity it involves, is embedded in the Court's approach to cases with foreign elements. As previously mentioned, the Court originally imported its definition of international comity from *Hilton*.[147] Fittingly, *Hilton* understood comity to arise from the sovereign equality of states and that its role was to mediate between exercises of that sovereignty.[148] In fact, it accepted the premise that laws can have no force "beyond the limits of the sovereignty from which its authority is derived".[149] That view incorporated the positivist methodology of Joseph Story and Ulrich Huber, who argued that territorial sovereignty was the foundation of international law.[150] Comity thereafter became the core justification for permitting the domestic recognition of foreign judgments—that is, the application of foreign law in a sovereign's territory.[151] Drawing on the theories of Huber and Story, American courts then invoked comity "to address problems created by a strictly territorial view of sovereignty", namely, how to contend with multiple, competing claims of extraterritorial jurisdiction.[152] Tellingly, the Supreme Court of Canada has approvingly cited the Huberian and Storyian approach to international comity.[153]

Developed on these premises, the Court's private international law jurisprudence is committed to a view of international law as "not really concerned with private interests, but with questions of state sovereignty".[154] Its approach is oriented to the values of fairness, "certainty, ease of application

145. See e.g. *R v Finta*, *supra* note 116 at 770.

146. See Mills, *Confluence*, *supra* note 43 at 68. See also *Spar Aerospace*, *supra* note 48 at paras 15–16.

147. See *Morguard*, *supra* note 45 at 1096.

148. See Joel R Paul, "The Transformation of International Comity" (2008) 71:3 Law & Contemp Probs 19 at 27 [Paul, "Transformation"].

149. *Hilton v Guyot*, *supra* note 46 at 163. See also Dodge, *supra* note 66 at 2089.

150. See Mills, *Confluence*, *supra* note 43 at 48–49.

151. See Paul, "Transformation", *supra* note 148 at 23.

152. Dodge, *supra* note 66 at 2092.

153. See *Tolofson v Jensen*, *supra* note 107 at 1069–70; *Spar Aerospace*, *supra* note 48 at paras 15, 19.

154. Banu, *supra* note 95 at 206.

and predictability", rather than the interests of individuals.[155] International comity, as what LeBel J has called "a principle of enlightened self-interest", simply encapsulates the discretionary exercise of self-restraint of a sovereign's otherwise unconstrained will.[156] As discussed, it is the second-order principle that supplements the first-order empirical reality of territorial zones of exclusive sovereignty. The ambiguous definition of comity in *Hilton* as "neither a matter of absolute obligation . . . nor of mere courtesy" reflects the mode of interaction within this pre- or extra-legal zone of sovereign relations.[157] In truth, the concept of comity is often associated with political considerations precisely because of its role in mediating the discretionary acts of state sovereigns in the international realm.[158]

In both the public and private law context, then, the picture of the international order is one constituted by "a particular form of cooperation characterized by action *within* each state's legitimate sphere of domestic activity and deference *beyond* it".[159] This division is the concomitant of the positivist view that considers the international legal order to merely represent "the will of individual states".[160] Its classical, territorial foundations formed the basis for English law's traditional, Diceyan dismissal of international law as "a zone of non-law", since its rules "'are not commands proceeding from any sovereign'".[161] It follows that directing the discretionary acts of states in this arena is not a matter of law, but of politics. Accordingly, the regulation of transnational activity, which by definition lies across rather than within the boundaries of sovereignty, is "something that, in *juridical* terms, simply cannot be done".[162] In consequence, this vision leads to a domestic legal methodology that treats the foreign elements of legal disputes as exceptional and relies on extra-legal considerations, such as comity, to resolve these cases.[163]

155. *Ibid* at 204, citing *Tolofson v Jensen*, *supra* note 107 at 1050. See also Banu, *supra* note 95 at 210; Hume, *supra* note 11 at 221.

156. *Beals v Saldanha*, 2003 SCC 72 at para 174, LeBel J, dissenting. See also Poole, "Constitution and Foreign Affairs", *supra* note 51 at 149; *R v Finta*, *supra* note 116 at 770.

157. *Morguard*, *supra* note 45 at 1096, citing *Hilton v Guyot*, *supra* note 46 at 163–64.

158. See Paul, "Comity in International Law", *supra* note 47 at 54.

159. Hume, *supra* note 11 at 219 [emphasis added].

160. Mills, *Confluence*, *supra* note 43 at 68.

161. McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 2.61, 2.66. See also Mills, *Confluence*, *supra* note 43 at 69.

162. Jacco Bomhoff, "The Constitution of the Conflict of Laws" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 262 at 264 [italicized emphasis in original; underlined emphasis added].

163. See *ibid* at 273. See also Bomhoff, "Reach of Rights", *supra* note 63 at 50.

B. Comity and the Two Faces of the Constitution

What emerges from the classical, positivist view of international law is the division between the realm of domestic activity and the realm of international activity observed in *Hape*. It perceives the latter regime as characterized by a Hobbesian state of nature or pre-legality that is impermeable to the norms constituting the internal realm.[164] On this view, international law is purely an "instrument of legally unconstrained (though politically constrained) state power".[165] In his comprehensive study, McLachlan traces the development of this traditional outlook of Anglo-Commonwealth foreign relations law to Locke's conception of the federative power.[166] The approach in *Hape* and the private international law cases is reminiscent of that conception, perceiving, as Locke and others did, that the international order is a community without coherence, unregulated by law.[167] Supported by international legal positivist theory, the traditional outlook excluded the prerogative power over foreign affairs from legal constraint.

While these postulates are not explicit in the judgment, I posit that the majority's reasoning in *Hape* is strongly influenced by the Court's vision of an "anarchic system" and the potential for "chaotic situations" in the external realm. In its private international law decisions, the Court had taken a structural approach that defined the field as a response to the distribution of legal authority among states.[168] Just as it emphasized certainty and uniformity in conflict of laws, so too did LeBel J analyze the extraterritorial application of the *Charter* as a structural problem requiring a consistent, uniform answer. It was necessary, he stated, to "avoid the uncertainties that now plague the question" of when the *Charter* applies.[169]

The judgment demonstrates this structural methodology in its rejection of a "'divided and tailored'" approach to the *Charter* that would have allowed some rights, but not others, to apply extraterritorially.[170] According to LeBel J, the alleged obstacle was that certain *Charter* rights require more demanding forms of compliance than others:

164. See Poole, "Constitution and Foreign Affairs", *supra* note 51 at 149.

165. David Dyzenhaus, "Hobbes on the International Rule of Law" (2014) 28:1 Ethics & Intl Affairs 53 at 55.

166. See McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 2.06–2.10.

167. See *ibid* at paras 2.17, 2.26.

168. See Banu, *supra* note 95 at 205.

169. *R v Hape*, *supra* note 2 at para 102.

170. McLachlan, *Foreign Relations Law*, *supra* note 6 at para 8.79. See *Al-Skeini v United Kingdom* [GC], No 55721/07, [2011] IV ECHR 99 at paras 109, 137, (2011) 53 EHRR 18.

> Consequently, while imposing an obligation on Canadian officers conducting an interrogation abroad to inform the accused of a right would not significantly interfere with the territorial sovereignty of the foreign state, interference would occur if the accused were to claim that right. At that point, Canadian officers would no longer be able to comply with their *Charter* obligations independently.[171]

Put differently, the goals of order, certainty, and predictability would be undermined by inconsistent application of the *Charter*. The inability to enforce *Charter* standards abroad *in toto* is treated as a reason not to extend any such protections. The majority's reasoning implies that once again, order is treated as "a precondition to justice", at least in the external realm. Though LeBel J acknowledged that "[i]ndividual rights cannot be completely disregarded", the interests of individual fairness are subordinated to the foreign element, the interests of interstate relations.[172]

Here, the preclusive and permissive functions of comity have a significant role. Comity serves to justify the transition between the "two faces" of the Constitution, its outward- and inward-facing aspects.[173] Characterized as "[a]cts of comity" permitted in the interests of "transborder co-operation", the foreign investigative activities of Canadian officers are transmuted from *governmental* action to matters of *sovereign* choice.[174] Casting the state action in question as an act of comity implicates the outward-facing aspect of the Constitution, as opposed to its inward-facing aspect that would subject the act to norms of legality. The *Hape* judgment, in effect, uses comity to invoke the juridical category of "reason of state": the state action is moved "from one register, based on law and right, to another, based on interest and might".[175]

In contrast to purely domestic rights cases, where the relevant relationship is the one between the individual and the state or its agents, the presence of the foreign element redefines the relevant relationship as the one of sovereigns *inter*

171. *R v Hape*, *supra* note 2 at para 92.

172. *Ibid* at para 100.

173. Poole, "Constitution and Foreign Affairs", *supra* note 51 at 148. See *ibid* at 148–50. For a collection of essays on the idea of a constitution as an interface between "internal" and "external" legal orders, see Jacco Bomhoff, David Dyzenhaus & Thomas Poole, eds, *The Double-Facing Constitution* (Cambridge, UK: Cambridge University Press, 2020) [forthcoming in 2020].

174. *R v Hape*, *supra* note 2 at paras 50, 100.

175. Thomas Poole, "Constitutional Reason of State" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 179 at 179 [Poole, "Constitutional Reason of State"].

se.[176] Recall that according to international legal positivism, states are conceived to possess an unconstrained freedom existing prior to law. This freedom effectively amounts to a discretion to act in the international arena, and this discretion is disciplined by the "spirit of comity" toward mutually beneficial, peaceable interstate relations.[177] Within the "anarchic" international order, the standard of legitimacy appropriate to such discretionary choices is determined by the territorial principle and the "basic goal of stability and unity".[178] In its sedulous appeal to comity, *Hape* appears to adopt the attitude, discerned by one commentator in some of the Court's past extradition cases, that "individual rights were for the sovereign to grant or withhold".[179] Hence, as the judgment held, such rights are considered only in the stage of trial fairness, situated in the domestic domain of peace and order.[180] It is only the inward-facing aspect of the constitution that implicates "the fundamental values of the Canadian trial process".[181]

Furthermore, the international legal positivist conception of sovereignty as an a priori value explains the reductive treatment of jurisdiction in *Hape* that critics have attacked. In truth, this reductive view, which premises extraterritorial jurisdiction upon the presence of a "permissive" rule, rests upon a misreading of the *Lotus* judgment. Properly understood, customary international law did not require Canada to refrain from applying *Charter* rights extraterritorially.[182] Scholars have also promoted the international doctrine of state responsibility as a more principled basis on which to analyze the extraterritorial reach of constitutional rights.[183] In spite of its apparent attractions, the principles of state responsibility were never considered in *Hape*. While the omission might be attributed to the fact that both parties regarded it as "an essentially pure *Charter* case" and did not plead international law,[184] this had not otherwise prevented the Court from embarking on its extended discussion of international law.[185]

176. See McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 2.17, 2.20.

177. *R v Hape*, *supra* note 2 at para 99. See *ibid* at para 50.

178. *Morguard*, *supra* note 45 at 1099. See also *ibid* at 1095–99; *Van Breda*, *supra* note 41 at para 73.

179. Rose, *supra* note 60 at 207.

180. See *R v Hape*, *supra* note 2 at para 107.

181. *Ibid* at para 111.

182. See Attaran, *supra* note 19 at 525; Sethi, *supra* note 19 at 106–08. See also An Hertogen, "Letting *Lotus* Bloom" (2015) 26:4 Eur J Intl L 901.

183. See e.g. Attaran, *supra* note 19 at 529–32; Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 317; Sethi, *supra* note 19 at 118; McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 3.18, 8.68–8.71.

184. Fairley, *supra* note 12 at 230.

185. See *R v Hape*, *supra* note 2 at para 187, Binnie J; Currie & Rikhof, *supra* note 53 at 571–72.

It is conceivable that the underlying reason for both flaws is the Court's theory and not its interpretation of international law. Because the positivist view denies the normativity of international law, it is committed to denying that there can be any supranational standard that governs exercises of sovereignty, including robust international law principles governing jurisdiction and state responsibility.[186] In its place, the first-order territorial principle expresses the need to avoid conflicts of overlapping sovereignties, while the second-order principle of comity governs the extraterritorial conduct of states. This point explains the otherwise perplexing distinction between "prohibitive" and "permissive" rules of international law in the majority judgment.[187] Given the demands of territorial sovereignty under international legal positivism, a permissive rule, such as comity's sanctioning of transnational co-operation, might be required for the assertion of sovereign will outside a state's domain of exclusivity. Thus, all extraterritorial exercises of sovereignty must be restrained for the sake of "peaceable interstate relations", except where permitted by comity.[188]

C. The Sovereigntist Model of the Constitution

The judgment in *Hape* sustains a "sovereigntist" model of the Constitution that "assumes a sharp separation between the internal and the external as domains of peace (constitution), and war (reason of state)".[189] Each realm applies its own, distinct standards of legitimacy: the external realm of interstate relations is constituted and evaluated by norms deriving from the fact of state power, independent of the internal realm of peace, order, and legality. Conceiving the external realm as impermeable to the norms of the internal realm, this model resists subjecting foreign affairs to the standards of legality. Conversely, in *Hape*, the internal standards of trial fairness are said to be "fundamentally different" and insulated from the considerations governing the conduct of foreign affairs.[190] Constitutional rights cannot travel across the impermeable divide that separates the two realms, and this "self-containment"

186. See McLachlan, *Foreign Relations Law*, *supra* note 6 at para 2.27; Mills, *Confluence*, *supra* note 43 at 77.

187. *R v Hape*, *supra* note 2 at paras 36, 39, 65, 101. See Currie, "Weaving a Tangled Web", *supra* note 19 at 70–71, n 67; McLachlan, *Foreign Relations Law*, *supra* note 6 at para 3.23. But see The Honourable Justice Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3 at 15–17 (identifying the origins of the permissive-prohibitive distinction in La Forest J's judgment in *R v Finta*).

188. *R v Hape*, *supra* note 2 at para 50.

189. Poole, "Constitution and Foreign Affairs", *supra* note 51 at 143, 148–50.

190. *Supra* note 2 at para 91.

of domestic norms is characteristic of the nineteenth-century view of classical international law.[191]

Where claims of right are involved, grappling with this internal versus external dichotomy means the adaptation of a mechanism to switch between the registers of legality and sovereignty. As I have argued, the reasoning of the *Hape* majority relies upon the notion of international comity to frame the extraterritorial activity as a reason of state exempt from domestic constitutional standards. On the sovereigntist model, comity, like international law generally, is informed by the needs of state self-interest and power, rather than genuinely legal considerations. Taken seriously, it subjects the claim of constitutional right to a condition precedent, namely the ouster of the reason of state.[192]

This perspective suggests a novel explanation for the delimitation of *Charter* rights in *Hape* and the doctrinal puzzle of *Khadr 2008*'s "innovative"[193] human rights exception. I argue that comity was ousted in *Khadr 2008* not by the fact of human rights violations per se, but because as the decision implies, "the holdings of the United States Supreme Court" effectively acknowledged that no legitimate foreign interest existed.[194] Given that the activities at Guantánamo Bay "violate[d] U.S. domestic law", it would be incongruous to defer to an interest disavowed by a judicial organ of the foreign state.[195] In these circumstances, "the permissive rule might no longer apply and Canadian officers might be prohibited from participating [in investigations abroad]", as LeBel J had anticipated.[196] But equally, neither did the "principle of limited responsibility for justice" that comity represents apply, for the violation of American laws entailed that there was no exercise of authority imposing standards of justice that would ordinarily preclude the extraterritorial reach of Canadian norms. Thus, the ouster of comity rendered its preclusive role inoperative as well, and the Court was free to apply Canadian legal standards to the treatment of Omar Khadr.

For this reason, it is not the international law principles of jurisdiction that determine the extraterritorial scope of the *Charter*, but rather concerns of international comity. This is a surprising, but ineluctable implication of the Court's approach to these rights cases with foreign elements. The outcome of *Khadr 2008* is puzzling if one presumes that it is *international law* that prevents

191. Morgan, *supra* note 60 at 454–55, 466.

192. See Poole, "Constitutional Reason of State", *supra* note 175 at 187.

193. Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 323.

194. *Supra* note 4 at para 26. See also Maria L Banda, "On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence" (2010) 41:2 Geo J Intl L 525 at 541.

195. *Khadr* 2008, *supra* note 4 at para 3.

196. *R v Hape*, *supra* note 2 at para 101.

the *Charter* from applying abroad, so that any ouster of comity considerations cannot render inoperative the restrictive understanding of jurisdiction in *Hape*.[197] However, if the rule prohibiting "extraterritorial enforcement" of the *Charter* is, in reality, the product of *comity considerations*, then the apparent contradiction disappears. As I suggest, the Court's vision of the international realm implies that the territorial principle is an empirical rather than normative feature of the international order.[198] Since, on this view, it is the considerations of comity that guide how states should behave outside their zones of exclusive sovereignty, an exception to "comity concerns" effectively operates as an exception to the rules of enforcement jurisdiction. It thereby removes the prohibition on the extraterritorial application of the *Charter*, irrespective of comity's "non-binding" or extra-legal nature.[199]

Admittedly, this proposed explanation may contradict the Court's own perceived distinction between international law as a "positive legal order" and comity as a non-binding "principle of interpretation".[200] The *Hape* majority did state that "extraterritorial jurisdiction is governed by international law rather than being at the *absolute* discretion of individual states".[201] But if "international law" is merely an emanation of state will, as international legal positivism holds, then the positive legal order and comity are both self-imposed constraints on sovereignty. Any distinction between the restrictive rules of jurisdiction and the principle of comity simply reflects their status as first- and second-order features of the international order. From this perspective, the *Khadr* cases can be understood as connected to the normative underpinnings of *Hape*, rather than as an innovation.

Hape's adherence to a sovereigntist model of the Constitution produces its central contradiction. On the one hand, the judgment ostensibly relies upon international law to determine the scope of the *Charter*, supporting a monist approach to the relationship between the domestic and international orders.[202] As the Court clearly affirmed, customary international law is part of Canadian

197. See Currie, "*Khadr*'s Twist on *Hape*", *supra* note 19 at 323.

198. See also McLachlan, *Foreign Relations Law*, *supra* note 6 at para 2.61; Mills, "Rethinking", *supra* note 51 at 191–93, 234–39.

199. See *Khadr* 2008, *supra* note 4 at para 26.

200. *R v Hape*, *supra* note 2 at para 50.

201. *Ibid* at para 65 [emphasis added].

202. See Patrick Macklem, "The International Constitution" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 261 at 266, 283–85. *Cf* Stéphane Beaulac, "Constitutional Interpretation: On Issues of Ontology and of Interlegality" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 867 at 878–87.

law.[203] This pronouncement appears to embrace a permeable conception of the Constitution, recognizing Canadian sovereignty as partly constituted by the international legal order.[204] On the other hand, the judgment's theoretical presuppositions would deny the international legal order of its normative character. The mutually constitutive understanding of state sovereignty is stymied by an underlying vision of that order which "subrogates law to power", representing "a rejection of . . . the *Grundnorm* at the center of the legal system".[205] The Court's vision of the international order implies that international law is a merely voluntarist and empirical phenomenon, positing a categorical divide between an internal realm of law and an external realm of anarchy.

This contradiction manifests more starkly in *Khadr 2008*, in the form of a doctrinally questionable implication of the "fundamental human rights" exception.[206] The *Hape* judgment reaffirmed the rule that the *Charter* is presumed to provide as much protection as that of the international human rights instruments that Canada has ratified.[207] But as Audrey Macklin points out, this implies that a *Charter* right is breached whenever the human rights exception to *Hape* is triggered, since the *Charter* itself implements Canada's international human rights obligations.[208] The breach of an international obligation would always entail the infringement of a *Charter* right: "the two tests [of application and infringement] collapse into one another".[209] In other words, the Court's reasoning is premised on an artificial distinction between international human rights law and the substance of the *Charter*, which it regards as completely unrelated.[210] This normative separation reflects the impermeable nature of the sovereigntist model, and it further underscores that it is the ambiguous, extra-legal "comity concerns", rather than law, that truly govern the *Charter*'s applicability.[211]

---

203. See *R v Hape*, *supra* note 2 at para 39.

204. See Poole, "Constitution and Foreign Affairs", *supra* note 51 at 150–51. See also Mills, "Rethinking", *supra* note 51 at 193.

205. Jens David Ohlin, *The Assault on International Law* (New York: Oxford University Press, 2015) at 67.

206. *Supra* note 4 at para 18.

207. See *supra* note 2 at para 55, citing *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416.

208. See Audrey Macklin, "Comment on *Canada (Prime Minister) v Khadr* (2010)", Case Comment, (2010) 51 SCLR (2d) 295 at 308.

209. *Ibid* at 309.

210. See Currie & Rikhof, *supra* note 53 at 571. See also McLachlan, *Foreign Relations Law*, *supra* note 6 at para 8.90.

211. See Mills, *Confluence*, *supra* note 43 at 15, 87.

In the result, *Hape* effectively excludes extraterritorial governmental acts from the ambit of legality. The decision decouples the distribution of constitutional authority within the domestic sphere from its distribution in the arena of foreign relations; in the former, the courts may review executive action, while in the latter, the executive is supreme.[212] By permitting unconstrained executive action abroad, the judgment undermines the rule of law. As Thomas Poole remarks, the proper view is surely that "in foreign affairs, judicial review addresses not [merely] legislative but *governmental* acts".[213] Instead, *Hape* constructs a zone of legally uncontrolled state action outside the domestic sphere, exemplifying the traditional approach to foreign relations law that dismissed international law as "non-law" or created "law-free zones" in the conduct of foreign affairs.[214] It portrays such extraterritorial acts as constituted not by law, but exclusively by sovereign power. The effect of *Hape* was not just to diminish the territorial scope of *Charter* rights, but described more accurately, to imply that extraterritorial state activity is not subject to constraint because such acts occur by reason of state.[215]

In this respect, *Hape* is arguably inconsistent with developments that have subjected aspects of foreign relations to judicial review, beginning with Wilson J's influential opinion in *Operation Dismantle v The Queen*.[216] In that foundational case, the Court held that Cabinet decisions over foreign affairs are justiciable and could be scrutinized for *Charter* compliance.[217] Although Wilson J agreed that the claims in question did not engage section 7 of the *Charter*, she pointedly declined to exempt such "weighty matters of state" from the regular methodology for the adjudication of rights claims.[218] Analogizing the difficulties of the novel claim to more prosaic cases in tort, her opinion can be read as attempting to facilitate the "normalization" of foreign affairs.[219] Following this approach, Canadian courts have affirmed the justiciability of the subject matter of foreign affairs.[220] In contrast, the Supreme Court of Canada's

212. See Paul, "Transformation", *supra* note 148 at 32–33.

213. Poole, "Constitution and Foreign Affairs", *supra* note 51 at 166 [emphasis in original].

214. McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 1.33, 2.61. See also Keitner, *supra* note 23 at 110–11.

215. See Poole, "Constitutional Reason of State", *supra* note 175 at 184, 186.

216. [1985] 1 SCR 441, 18 DLR (4th) 481 [*Operation Dismantle* cited to SCR]. See also McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 6.30–6.35.

217. See *Operation Dismantle*, *supra* note 216 at 455, Dickson J; *ibid* at 490–91, Wilson J.

218. *Ibid* at 471–72.

219. See *ibid* at 476–79. See generally Ganesh Sitaraman & Ingrid Wuerth, "The Normalization of Foreign Relations Law" (2015) 128:7 Harv L Rev 1897.

220. See e.g. *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, 199 DLR (4th) 228 (CA); *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015

classical, positivist vision of the international order in *Hape* and the private international law cases presupposes the primacy of sovereignty over law. That vision ultimately supports a sovereigntist model of the Constitution that would, in principle, render the domain of foreign relations impermeable to any standards of legality.

V. An Alternative Approach to Extraterritoriality

A. Justice Bastarache's Concurrence

In light of the apparent deficiencies of the sovereigntist model of the Constitution, the *Hape* majority's approach should be reconsidered. Under the recent jurisprudence of other Commonwealth countries, considerations of comity no longer operate to exclude judicial review of foreign affairs.[221] For instance, in *Habib v Commonwealth*, the Federal Court of Australia held that although international comity "is a fine and proper thing", it provides "no basis whatsoever" for holding foreign affairs issues to be non-justiciable.[222] If reliance on international comity to invoke a reason of state is increasingly outmoded and at odds with the courts' gradual departure from the classical view of the international legal order, what are the alternatives?

Perhaps Bastarache J's concurring opinion in *Hape* provides a basis for a more coherent approach to rights cases with foreign elements. It disaggregates the questions of the *Charter*'s extraterritorial applicability, the prima facie infringement of a right, and the justification of a rights limitation.[223] Like the majority, he began by observing that the Constitution "define[s] the sphere of legitimate governmental action"; but for him, this did not appear to be a

FCA 4 at paras 59–70. See also Gib van Ert, "The Domestic Application of International Law in Canada" in Bradley, *Handbook*, *supra* note 6, 501 at 514.

221. See e.g. *Habib v Commonwealth of Australia*, [2010] FCAFC 12; *Moti v The Queen*, [2011] HCA 50; *Belhaj v Straw*, [2017] UKSC 3. See generally Oonagh E Fitzgerald, "The Globalized Rule of Law and National Security: An Ongoing Quest for Coherence" (2014) 65 UNBLJ 40 at 71–78; Rayner Thwaites, "The Changing Landscape of Non-Justiciability" [2016:1] NZLR 31.

222. *Supra* note 221 at para 37.

223. See Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Markham, ON: LexisNexis Canada, 2017) (distinguishing a prima facie "infringement" from a "violation" of a *Charter* right, where the latter refers to a limitation of a right that is not justified under section 1 at 546–47).

territorial sphere, but a normative sphere of governmental responsibility.[224] In his words, whether the *Charter* applies—whether conduct falls within the scope of section 32(1)—depends on "*who* acts, not *where* they act".[225] The approach thus begins with a basic principle of the rule of law: that state conduct is reviewable wherever it occurs.[226] In contrast to the majority, the concurrence clearly considered that the interests of transnational co-operation and the obligation to respect human rights could be reconciled within the methodology of the *Charter* itself.[227] On this view, the *Charter* is capable of accommodating the complexities that foreign elements cases introduce to rights adjudication.

To determine whether a prima facie infringement of a right occurred, Bastarache J proposed that where Canadian officials abide by foreign laws and procedures while operating abroad, courts may presume that those activities were *Charter*-compliant. However, where a claimant demonstrates that the protection of individual rights afforded by the foreign law "is inconsistent with basic Canadian values", the onus is shifted to the government "to justify its involvement in the activity".[228] More importantly, he argued that the *Charter* itself permits "a reasonable margin of appreciation" for differences between legal regimes across societies:[229] "Minor differences in protection can be justified on the basis for the need for Canadian officials to participate in fighting transnational crime, and *comity*. Substantial differences require greater justifications, but there will still be a favourable presumption for laws and procedures of democratic countries."[230] The reference to "comity" here as part of the justification for tolerating national differences in rights protection merits attention. Implicit within Bastarache J's proposal, I claim, are two distinct ideas about foreign elements constitutionalism, each related to a potential alternative conception of international comity. In the remainder of this paper, I will briefly outline these two ideas underlying his proposed framework.

224. *R v Hape*, *supra* note 2 at para 125. But see *ibid* at para 87, LeBel J. See especially Bomhoff, "Reach of Rights", *supra* note 63 at 63–69.

225. *R v Hape*, *supra* note 2 at para 161 [emphasis in original]. This view mirrors his earlier concurring opinion in *R v Cook*, *supra* note 59 ("[s]ection 32(1) defines the application of the *Charter* according to *who* acts, not *where* they act" at para 118 [emphasis in original]).

226. See Poole, "Constitution and Foreign Affairs", *supra* note 51 at 165–66.

227. See *R v Hape*, *supra* note 2 at para 163, Bastarache J.

228. *Ibid* at para 174.

229. *Ibid* at para 172.

230. *Ibid* at para 173 [emphasis added].

B. Foreign Elements and Subsidiarity

The first idea focuses on Bastarache J's remark that the *Charter* is "flexible enough to permit a reasonable margin of appreciation".[231] It contemplates that "substantial differences" in rights protections between different countries are acceptable, given the need for transnational co-operation and comity. The threshold of "substantial inconsistency" required for a *Charter* breach would be determined having "regard to comity and the determination that the foreign law is not inconsistent with fundamental human rights".[232] Upon the demonstration of an infringement, the government's burden of justification is proportionate to the degree of difference between Canadian laws and foreign laws.[233] In principle, the *Charter* is applicable to Canadian officials anywhere, though the particular substance of its protections may be attenuated outside the domestic context.[234]

Being the only opinion to propose that a margin of appreciation be applied to extraterritorial investigative activities, the issue arises as to how it could be justified in principle. Of course, the *Charter* is itself silent on the methodology for adjudicating a rights case with foreign elements. The concurrence did not elaborate further upon the rationale for tolerating certain departures from Canadian standards of justice, but Bastarache J expressed his agreement with the majority that "comity demands respect for a foreign state's choice of criminal procedure".[235] As I shall argue, his conception of comity is more akin to the principle of subsidiarity, as opposed to an exclusionary principle which removes extraterritorial activity to an extra-legal zone of sovereign relations. International comity, the stated basis for the margin of appreciation technique he proposes, is supported by the notion of subsidiarity.

As the concurrence implies, the reasons for acting with comity—for deferring to foreign laws and procedures—do not arise solely from the territorial principle. While there is a need to balance transnational co-operation and individual rights, the application of *Charter* standards to Canadian officials "does not automatically result in an interference with the sovereign authority of foreign states".[236] Instead, Bastarache J seems to view comity as a matter of institutional competence; it is the relative proximity of the host state's authorities to the investigation, the need to effectively fight transnational crime, and reasons of

231. *Ibid* at para 172.

232. *Ibid* at para 171. See also *ibid* at paras 169, 173–74.

233. See *ibid* at paras 169, 174.

234. See *ibid* at paras 176, 178.

235. *Ibid* at para 124.

236. *Ibid* at para 162.

practicality that justify deference to foreign legal procedures.[237] Consequently, he emphasizes that deference to foreign laws and procedures is not valuable in itself. Respect for different procedures is valuable only "*to a point*", that is, insofar as it incorporates the protection of individual rights.[238] Put differently, comity is said to justify deference to foreign authorities "only by derivation from what is owed to the persons subject to the authorities".[239]

It is possible to discern the logic of subsidiarity in this conception of comity. In its vertical aspect, subsidiarity is concerned with the distribution of authority between local and supranational associations.[240] Despite its universality, the normative reach of international law is limited. It follows that the international legal system ought to be deferential toward municipal systems regarding matters most effectively regulated by subsidiary, local institutions.[241] However, it is the horizontal aspect that is implicated by the problem confronted by the concurrence: how to determine when limits of interstate comity are reached. As Timothy Endicott argues, comity between two states is a "horizontal analogue" of subsidiarity, which calls for respect for a foreign authority, on the basis that "things will go less well if the first authority is not treated as an authority".[242] Like Bastarache J's understanding of comity, the rationale for horizontal subsidiarity is contingent on the perceived competence of the foreign authority. The benefits of international co-operation, among others, can be better achieved without inordinately second-guessing the other sovereign's laws and procedures.[243]

Consistent with this conception, the concurrence endorses a margin of appreciation in rights cases with foreign elements. Developed by the European Court of Human Rights, the technique of a margin of appreciation is claimed to sustain "a vision of subsidiarity in international life" and inter-institutional comity.[244] By tolerating differences among member states' specifications of their rights obligations, it "acknowledges that respect must be given to the legitimate

237. See *ibid* at paras 168–69, 172.

238. *Ibid* at para 173 [emphasis in original]. See also Endicott, *supra* note 78 at 12.

239. Endicott, *supra* note 78 at 13.

240. See generally Paulo G Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97:1 AJIL 38.

241. See *ibid* at 57–58. See also Mills, *Confluence*, *supra* note 43 at 99–100, 103–05.

242. Endicott, *supra* note 78 at 9–10.

243. See *ibid* at 9.

244. Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2005) 16:5 Eur J Intl L 907 at 912, 918–22 (discussing normative arguments in favour of the doctrine, including institutional advantages, democratic accountability, fairness in attributing responsibility, and inter-institutional comity). See also Carozza, *supra* note 240 at 72–73.

variation in national interpretation and implementation of some rights".[245] It tolerates lawful divergence among states, but premised on the understanding that it promotes shared values and legal obligations.[246] It is inherent in the concept of a margin of appreciation that the margin is never unlimited, for intervention is warranted where the subsidiary authority is unable or unwilling to realize those rights.[247] Accordingly, the subsidiarity principle is said to have a "dual character, simultaneously acknowledging the value of pluralism" but also "acting as a justification, where necessary, for universal regulation".[248]

From this perspective, the concurrence can be understood as incorporating a horizontal form of subsidiarity. In order to establish an infringement, the rights claimant in a foreign elements case must show a *substantial* inconsistency with *Charter* protections. This approach reflects "substantive subsidiarity", which qualifies the intensity of the review a court conducts in rights adjudication.[249] It defers to certain departures from Canadian standards of justice on the basis of comity, which is not found in a domestic *Charter* case. In this, one can nonetheless discern an implicit recognition that both the domestic and foreign legal orders are oriented toward a common objective, the promotion of fundamental human rights norms.[250] As mentioned, the reason for deferring is not respect for the foreign state's territorial sovereignty in itself. It is rather to account for legitimate diversity in the local specification of norms which are, in reality, a shared responsibility between Canadian law and foreign laws,[251] for human rights "are endowed with an *erga omnes* character" and confer an interest on every state.[252] Hence, when the foreign state fails to adequately promote this common good, the subsidiary principle similarly justifies recourse to the Canadian standards of rights protection.[253]

Understood in this way, Bastarache J's proposal situates *Charter* rights within a permeable model of the Constitution. Although ostensibly grounded in

245. Mills, *Confluence*, *supra* note 43 at 104.

246. See Shany, *supra* note 244 at 910.

247. See *ibid*; Carozza, *supra* note 240 at 66–67.

248. Mills, *Confluence*, *supra* note 43 at 105.

249. Samantha Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?" (2016) 61:1 Am J Juris 69 at 80. See *ibid* at 80–82.

250. See *R v Hape*, *supra* note 2 at para 169, Bastarache J.

251. See *ibid* at para 174.

252. Cedric Ryngaert, "Universal Jurisdiction over International Crimes and Gross Human Rights Violations" in Giuliana Ziccardi Capaldo, ed, *The Global Community Yearbook of International Law and Jurisprudence 2015* (Oxford: Oxford University Press, 2016) 275 at 276–77.

253. See Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed (Oxford: Oxford University Press, 2015) at ch 6.

domestic constitutional norms, it presumes that foreign authorities are equally charged with the shared project of human rights protection.[254] This generates a vision of the external realm that is radically different from that of the majority judgment. In contrast to international legal positivism, which constructs "a conceptual barrier between the realms of the international and the national", it recognizes the mutually constitutive relationship between the international and various municipal legal orders.[255] From the perspective of the *Charter*, itself an internal implementation of international human rights norms, the external dimension of this shared project justifies deference to other subsidiary local authorities in discharging their responsibility for the same norms.[256] The margin of appreciation technique thus provides an alternative outlook on what the Constitution entails in its outward-facing aspect. It treats the extraterritorial character of the impugned state conduct not as part of a dichotomy between an internal realm of legal control and an external realm of sovereign relations, but as part and parcel of the framework of rights adjudication itself, as discussed in the next section.

C. Foreign Elements and Context

According to Bastarache J, in some circumstances, the government may be required "to *justify* its involvement in the [extraterritorial] activity".[257] It should be noted that the rationale underlying the tolerance of national differences in legal procedure differs from the justification of limitations on rights,[258] so that the government's onus to justify proceeds upon the finding of a substantial inconsistency with a *Charter* right.[259] The concurrence calls for a two-step process for resolving claims of constitutional right in cases with foreign elements. Once the threshold question of a substantial inconsistency is resolved, the exercise of justification for the prima facie infringement focuses on "the incorporation of legitimate justifications . . . pursuant to ss. 1 and 24(2)".[260] The second idea

254. See *R v Hape*, *supra* note 2 (Bastarache J stating "I prefer to continue to rely on the *Charter*" at para 125).

255. Mills, *Confluence*, *supra* note 43 at 99. See also Poole, "Constitution and Foreign Affairs", *supra* note 51 at 150–55.

256. See *R v Hape*, *supra* note 2 at para 55, LeBel J. See also *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 348–50, 38 DLR (4th) 161; Beaulac, *supra* note 202 at 882–85.

257. *R v Hape*, *supra* note 2 at para 174 [emphasis added].

258. See Besson, *supra* note 249 at 85.

259. See *R v Hape*, *supra* note 2 at para 174.

260. *Ibid* at para 173, Bastarache J.

latent in the concurrence, then, is an understanding of comity that permits it to be incorporated into this exercise, as a concept that denotes the government's foreign policy objectives.[261]

This view resonates with what McLachlan calls a "diplomatic conception" of foreign relations law.[262] That conception "sees the principal function of foreign relations law to be diplomatic, that is to say: to promote the conduct of foreign relations *between* states".[263] It focuses on "the actual conduct of diplomatic relations" and the manner in which legal doctrines, such as state immunity, facilitate the state's foreign policy objectives.[264] More significantly, as McLachlan explains, the diplomatic conception "may have wider implications for the approach of national courts in deciding cases that engage the interests of foreign states and, in turn, may affect the foreign relations interests of the home state".[265] Justice Bastarache's concurrence, I suggest, locates one such implication in the justification of rights-limiting measures under section 1 of the *Charter*.

To be sure, it is unclear whether recourse to section 1 justification would have been possible on the facts of *Hape*. Though Bastarache J stated that "[f]lexibility in this case is permitted by s. 1", he did not address whether the impugned conduct was prescribed by law, whether Canadian law or Turks and Caicos law.[266] Still, the Court rightly acknowledged that transnational co-operation is an important governmental objective. Indeed, the majority's discussion of comity was sensitive to the policy objective of promoting mutual legal assistance "in 'an era characterized by transnational criminal activity'".[267] This judicial recognition of a compelling governmental objective in foreign affairs has been exhibited in other cases. For instance, in the extradition context, the Court explicitly accepted that as a matter of comity, "it is important for Canada to maintain good relations with other states".[268] Using the lens of the diplomatic conception of foreign relations law, the government's foreign policy

261. For discussion of the concept of constitutional objectives and the role of foreign policy objectives in the German, French, and Indian constitutional orders, see Larik, *supra* note 6 at ch 1.

262. McLachlan, "Five Conceptions", *supra* note 44 at 36.

263. *Ibid* at 34 [emphasis in original].

264. *Ibid.*

265. *Ibid* at 35.

266. *R v Hape*, *supra* note 2 at paras 169, 173.

267. Fairley, *supra* note 12 at 235. See also *R v Hape*, *supra* note 2 at paras 52, 98–100.

268. *United States v Burns*, 2001 SCC 7 at para 136. See also *Cotroni*, *supra* note 55 at 1485–86.

interests can be treated as the referents of international comity, which should inform the *Oakes* justification analysis.[269]

Through this method, the Court assimilates the foreign elements in a rights dispute to the *context* that determines the scope and content of the right in a particular case. As some have argued, a constitutional right is not fully defined until constituted by its delimitation in a specific context.[270] By forming part of the justification of a rights limitation, the governmental interest in foreign affairs alters the balance of the interests at stake and can thereby specify the intensity of the *Charter* protection. Unlike the majority judgment in *Hape*, this approach would not treat extraterritorial state action as exceptional. Instead, the foreign element is "integrated into the normally applicable doctrinal framework" for delimiting constitutional rights, namely, the *Oakes* test or what has been described as the "balancing of interests" paradigm.[271] In this way, the foreign element in a rights case becomes simply another relevant feature of the factual scenario in which the justification analysis takes place. This normalization of foreign affairs is more consistent with the spirit of *Operation Dismantle*. Rejecting the proposition that national defence matters should be immunized from review as a "political question", Wilson J stated that section 1 of the *Charter* was the "mechanism through which the courts are to determine the justiciability of particular issues".[272]

In effect, the diplomatic conception has the potential to provide a "divided and tailored" approach to the extraterritorial reach of *Charter* rights.[273] Compared to the conception of comity under the sovereigntist model, it is more consistent with what Chimene Keitner refers to as the "conscience" approach to constitutional rights.[274] The applicability of each right would be based not on territorial location, but rather on reasons pertaining to the government's interests in acting abroad or in deferring to the norms and procedures of a foreign state in a given case. As a result, it contemplates that cases implicating foreign relations may be evaluated differently from purely domestic cases,

269. See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

270. See e.g. Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, UK: Cambridge University Press, 2009) at 123–27; Bradley W Miller, "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93 at 96. See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at paras 122–24, Côté and Brown JJ, dissenting.

271. Bomhoff, "Reach of Rights", *supra* note 63 at 53. See also Attaran, *supra* note 19 at 532–33; Larik, *supra* note 6 at 37, 43, 64–65.

272. *Operation Dismantle*, *supra* note 216 at 491.

273. McLachlan, *Foreign Relations Law*, *supra* note 6 at paras 8.93–8.94.

274. See Keitner, *supra* note 23 at 66–68.

without relegating them to a pre-legal zone.[275] Importantly, however, it upholds the powerful idea that it is constitutional norms that legitimate and define the boundaries of state conduct, irrespective of geographical location.[276]

I have suggested that the references to international comity in Bastarache J's opinion can be understood as a proxy for the government's asserted foreign affairs interests, accounted for as the context of the rights dispute. This approach notably contrasts with the majority's use of the permissive and preclusive functions of comity to hold that extraterritorial activity is a political reason of state exempt from legal constraint. Here, even where the government discharges its onus to justify a rights infringement, such a justification occurs within the normally applicable legal framework of the *Charter*. As articulated by Bastarache J, then, the obligation to justify promotes a permeable model of the Constitution that accounts for certain valuable, alternative aspects of comity, while subjecting extraterritorial state action to the requirements of legality.

Conclusion

Hape raises many interesting issues concerning the interaction of the Canadian constitutional order with the international order. The increasing scholarly interest in foreign relations law, particularly in Commonwealth countries, has enabled greater awareness of the manner in which law has traditionally been excluded from the foreign affairs domain. As this reappraisal of the judgment has argued, the legacy of the traditional outlook continues to influence the adjudication of rights cases with foreign elements. Underlying its reliance on the notion of international comity is a positivistic vision of the international order, which imposes a divide between an external realm of sovereign power and an internal realm of peace, order, and legality. The result is an implicit commitment to a sovereigntist model of the Constitution that treats foreign affairs as exceptional and excludes extraterritorial state action from the constraints of the *Charter*.

In the past decade, however, courts in other Commonwealth jurisdictions have gradually attenuated the various principles and doctrines of abstention by which they formerly declined to adjudicate the conduct of foreign relations.[277] In cases such as *Habib*, *Moti*, and *Belhaj*, the courts have questioned the non-justiciability of foreign relations and sought to normalize the review of this

275. See Robert J Currie, "*Schreiber v Canada (Attorney General)*", Case Comment, (1999) 8:1 Dal J Leg Stud 207 at 219; Currie, "*Charter* Without Borders", *supra* note 60 at 270–71.

276. See Keitner, *supra* note 23 at 68.

277. See Fitzgerald, *supra* note 221 at 71.

previously impenetrable domain.[278] Comity, these developments imply, can no longer be easily invoked to exclude an effective remedy in foreign elements cases. Whether this nascent change in attitude will unsettle *Hape* and the exclusionary outlook that underlies it remains to be seen.

278. See the text accompanying note 221.