

THE CANADIAN *CHARTER* AND PUBLIC INTERNATIONAL LAW: REDEFINING THE STATE'S POWER TO DEPORT ALIENS[©]

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This article considers the relationship between international and domestic law in deportation proceedings. The argument is made that, generally, Canadian law should be interpreted consistently with Canada's obligations at international law, as reflected in conventions and custom. More specifically, the article proposes that Canada's obligation at international law to protect the family and the child be recognized in Canadian law as one of the principles of fundamental justice under section 7 of the *Charter*. The protection of the family is engaged by the deportation of domiciled aliens because, by definition, these deportees have been in Canada for a long period of time and have fully assimilated into Canadian society: deportation will, therefore, have an adverse impact on the aliens' family life and their children. Indeed, the adverse effect of deportation on families and children is increasingly recognized, by courts and commentators, as a violation of internationally protected human rights. If the Canadian *Charter* is interpreted consistently with the growing body of law surrounding these international human rights, a compelling case can be made against the power of the State to deport domiciled aliens from Canada.

Cet article examine le rapport entre le droit international et le droit interne quant à l'expulsion des étrangers. Généralement, l'interprétation du droit canadien devrait être en conformité avec les engagements assumés par le Canada en droit international public et coutumier. L'article précise que le Canada devrait honorer ses engagements internationaux tout en reconnaissant la protection de la famille et de l'enfant comme un des principes de justice fondamentale en vertu de l'article 7 de la *Charte*. La protection de la famille survient lors de l'expulsion d'un étranger intégré, c'est-à-dire, un étranger qui se trouve au Canada depuis longtemps et qui s'est intégré dans la société canadienne. Il est évident que l'expulsion des étrangers intégrés a un impact négatif sur leur vie familiale et sur leurs enfants. D'ailleurs, cette conséquence est considérée par les tribunaux et la doctrine comme une violation des droits de la personne lesquels sont explicitement reconnus en droit international. L'interprétation de la *Charte* canadienne, en conformité avec ces droits de la personne garantis en droit international, s'oppose au pouvoir de l'État d'expulser des étrangers intégrés du Canada.

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I. INTRODUCTION

In 1988 Mr. Justice Gérard La Forest of the Supreme Court of Canada spoke at the Conference of the Canadian Council on International Law and made the following observations:

Until the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, our courts resolved the disputes that came before them almost solely by reference to the statutes and case law of Canada and England. Only the most limited reliance was placed on other Commonwealth or American sources, and virtually never did our courts stray further than this. The *Charter* changed all this. In the last six years the Supreme Court of Canada has become one of, if not the most, cosmopolitan of national courts in terms of the sources to which we have turned in dealing with the appeals that come before us.²

Indeed, the use of international materials in the *Charter* era was inevitable given the legislative history of the *Charter*. Most of the rights and freedoms protected in the *Charter* are also contained in international human rights instruments: the *International Covenant on Civil and Political Rights*, the *International Covenant on Social, Economic and Cultural Rights*, the *Universal Declaration on Human Rights*, and the *European Convention on Human Rights* were particularly influential in the drafting of the *Charter*.³

However, to make full use of international law in constitutional litigation, mere awareness of the phenomenon described by La Forest J.

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

² G.V. La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada" (Proceedings of the 1988 Conference of the Canadian Council on International Law, Ottawa, 1988) 230 at 230.

³ A. Bayefsky & M. Cohen, "Charter of Rights and Freedoms and Public International Law" (1983) 61 *Can. Bar Rev.* 265 at 271-73.

The following are treaties to which Canada is a State Party and to which references in this article are made: *International Covenant on Civil and Political Rights with Optional Protocol* 19 December 1966, Can. T.S. 1976 No. 47 [hereinafter ICCPR]; *International Covenant on Economic, Cultural and Social Rights*, 16 December 1966, Can. T.S. 1976 No. 46 [hereinafter ICECSR]; *International Convention on the Elimination of All Forms of Racial Discrimination*, March 1966, Can. T.S. 1970 No. 28 [hereinafter ICERD]; *Convention Relating to the Status of Refugees*, 28 July 1951, Can. T.S. No. 6 [hereinafter *Refugee Convention*]; *Convention on the Rights of the Child (with Reservations and Statement of Understanding)*, 20 November 1989, Can. T.S. 1992 No. 3; and *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [hereinafter *UN Charter*].

Resolutions supported by Canada and referred to in this article: *Universal Declaration of Human Rights*, UNGA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc.A/810 (1948) at 71 [hereinafter *Universal Declaration*]; Organization of American States, *American Declaration of the Rights and Duties of Man*, OEA/Ser.L/V/II.23/, doc.21 rev.6 (1948) [hereinafter *American Declaration*]; and *Declaration on the Rights of the Child*, UNGA Res. 1386, UN GAOR, 14th Sess., Supp. No. 16 at 19, UN Doc. A/4354 (1959) at 19.

Treaties to which Canada is not a State Party and are referred to in this article: *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5 [hereinafter ECHR]; *American Convention on Human Rights*, 22 November 1969, OAS T.S. No. 36, 9 I.L.M. 673 [hereinafter *American Convention*]; *African Charter of Human and Peoples' Rights* (1992), 31 I.L.M. 59 [hereinafter *African Charter*]; and *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, *The United Nations and Human Rights 1945-1995* (New York: UN Dept. of Public Information, 1995) at 383 (not yet in force) [hereinafter *Convention on Migrant Workers and Their Families*].

is not enough. Rather, it is necessary first, to understand the theoretical justification for introducing international law in *Charter* cases and second, to consider the persuasive impact international law may have in a given context.

The purpose of this article is also twofold. First, the relationship between international and domestic law will be examined from a theoretical perspective. Various theories surrounding the implementation of international law are canvassed. Special consideration is given to the use of international human rights law (as set out in treaties and custom) in the general context of domestic *Charter* litigation. Second, this article applies the theory developed in Part II to a specific context, where both domestic and international law meet *via* the *Charter*. The context chosen for this article is immigration law, and more specifically, the expulsion or deportation of aliens by a State. Deportation, meaning “the removal of a person from a State by its unilateral act,”⁴ is an inherently international issue since it necessarily involves relations between sovereign States, namely the expelling State, in which the alien resides, and the home State, where the expelled alien originated. The expelling State is asserting its sovereignty by removing the alien from its borders while the State of origin is obliged to receive “on its territory such of its nationals as are not allowed to remain on the territory of other states.”⁵ However, as Parts III-V of this analysis indicate, both domestic law and international law restrict the exercise of the deportation power such that it cannot be arbitrary or unjust, or carried out in an unfair manner. In the domestic context, *Charter* challenges have arisen where domiciled aliens, *i.e.*, immigrants who have been in Canada for a long period of time and assimilated themselves with Canadian society, have been ordered deported. The *Charter* challenges have, for the most, been based on alleged violations of liberty and security of the person. Nonetheless, these domestic challenges have been largely unsuccessful, whereas in the international context, and particularly in Europe, a growing body of law suggests that the deportation of domiciled aliens will, more often than not, violate internationally protected human rights. These rights, as set out in numerous conventions, relate to the protection of families and children at international law and weigh against the deportation of domiciled aliens. As a result, for those persons facing deportation from Canada, there is a compelling argument that domestic constitutional law should

⁴ Sir R. Jennings & Sir A. Watts, eds., *Oppenheim's International Law* vol. 1, 9th ed. (Harlow, U.K.: Longman, 1992) at 940, note 1 [hereinafter *Oppenheim*].

⁵ *Ibid.* at 857.

be interpreted consistently with this growing body of international law. However, before considering the issues surrounding deportation, the theoretical underpinnings of the analysis must be established.

II. NATIONAL APPLICATION OF INTERNATIONAL LAW

A. General Principles

The relationship between international and domestic law, as defined by Canadian courts, will vary with the source of international law in question.⁶ Generally, where a rule of customary international law is being considered, the “adoption” theory applies. This means that a rule of custom is automatically incorporated into domestic law without an act of incorporation (unless there is a conflict with statutory law or with established principles of the common law).⁷ Where conventional international law is concerned, the “transformation” approach is taken. That is, to become part of the law of Canada, a treaty must be implemented by domestic legislation.⁸

B. Customary International Law

Assuming that the adoption theory applies in Canada, its application depends on the ability of domestic courts to successfully identify the existence of an international rule of custom. The Supreme Court of Canada held in *Reference Re Newfoundland Continental Shelf*

⁶ Article 38 of the *Statute of the International Court of Justice* (see *UN Charter, supra* note 3) identifies the following as sources of international law: “international conventions” (art. 38(1)(a)); “international custom, as evidence of a general practice accepted as law” (art. 38(1)(b)); and “general principles of law recognized by civilized nations” (art. 38(1)(c)). Article 38(1)(d) indicates that “judicial decisions” and the “teachings of the most highly qualified publicists of the various nations” are “subsidiary means for the determination of rules of law.” With regard to art. 38(1)(a), note that the term “treaty” is used interchangeably with other terms such as “convention,” “Charter,” “protocol,” and “covenant” to indicate an international agreement. See International Law Commission, [1966] Y.B.I.L.C. II at 188.

⁷ This theory was approved by Lord Denning in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] 1 All E.R. 881 at 889 (C.A.).

⁸ See generally, on this topic, H.M. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada* 5th ed. (Toronto: Emond Montgomery, 1993) at 147-48; and A. Bayefsky, “International Law in Canadian Courts” (Canadian Council on International Law, XIXth Annual Conference, Ottawa, 1990) 273 at 274.

⁹ [1984] 1 S.C.R. 86.

that international custom is evidenced by “substantial uniformity or consistency, and general acceptance.”¹⁰ This is a restatement of the general rule that customary international law is created by two conditions: 1) sufficient and settled state practice; and 2) *opinio juris* subjective element whereby states “must feel that they are conforming to what amounts to a legal obligation.”¹¹ Proof of state practice can be found in “treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations.”¹² Once a rule of international custom is identified, the adoption theory dictates that domestic law (where the common law is unclear and statutory provisions are ambiguous) be interpreted consistently with the customary rule.

C. Conventional International Law to which Canada is a Party

In accordance with the division of powers between the federal and provincial governments of Canada under the *Constitution Act 1867*,¹³ the power to implement treaties is arguably shared by both governments. According to the Privy Council’s holding in the *Labour Conventions Case*,¹⁴ if the subject matter of the treaty falls under provincial jurisdiction the federal Parliament cannot enact legislation to implement the treaty. Although this case has not been expressly overruled, its authority has been questioned in a number of subsequent cases.¹⁵ However, regardless of whether or not there exists a federal treaty-implementing power, there is the further problem of determining exactly what will constitute implementing legislation. On the one hand,

¹⁰ *Ibid.* at 118.

¹¹ *North Sea Continental Shelf Cases* (Federal Republic of Germany, Denmark and Federal Republic of Germany, Netherlands), [1969] I.C.J. Rep. 3, para. 77.

¹² Bayefsky & Cohen, *supra* note 3 at 284.

¹³ (U.K.), 30 & 31 Vict., c. 3.

¹⁴ *A.G. (Canada) v. A.G. (Ontario)*, [1937] A.C. 326.

¹⁵ See *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 [hereinafter *Vapor Canada*] (held that s. 7 of the *Trade Marks Act* R.S.C. 1970, c. T-10 (now R.S.C. 1985, c. T-13) did not implement the *International Convention for the Protection of Industrial Property*); *Schneider v. R.*, [1982] 2 S.C.R. 112 (held that the *Narcotic Control Act* R.S.C. 1970, c. N-1 (now R.S.C. 1985, c. N-1) did not implement the *Single Convention on Narcotics Control*); and *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 [hereinafter *Crown Zellerbach*] (held that the *Ocean Dumping Control Act* R.S.C. 1985, c. O-2 implemented the *London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*).

there is authority for the proposition that legislation which implements a treaty must contain an express declaration that it is giving effect to Canada's international obligations.¹⁶ On the other hand, a relaxed standard also exists whereby the absence of an express declaration may not prevent a court from holding that the legislation in question was meant to implement treaty obligations.¹⁷

In addition to the rule that only implemented treaties are part of domestic law, there is a common law presumption that Parliament will not "legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law."¹⁸ Consequently, Canadian courts will construct implementing legislation consistently with the treaty or convention in question. However, where there is a conflict between domestic law and the treaty, the former prevails. An additional qualification to the presumption is that an international convention will be consulted for interpretive purposes only where the court first finds an "ambiguity, either patent or latent"¹⁹ in the domestic implementing legislation.²⁰ However, authority also exists whereby reference to an international agreement can be made without a preliminary finding of ambiguity in the implementing legislation.²¹

Even in the absence of implementing legislation, it is still presumed that Canada's legislators will not legislate in violation of Canada's international legal obligations. However, since the unimplemented treaty is not a part of the domestic law, there may be a

¹⁶ *Vapor Canada*, *supra* note 15 at 169-72.

¹⁷ *Crown Zellerbach* *supra* note 15 at 408. (In considering the question of implementation, the court looked at the similarity in the language of the domestic law with that of the *Convention* and the connection between changes to the domestic law and changes to the *Convention*). Bayefsky, *supra* note 8 at 275, argues that the requirement for an express reference to a treaty in implementing legislation is reasonable only in cases where federal implementing legislation infringes on provincial jurisdiction.

¹⁸ *Daniels v. R.*, [1968] S.C.R. 517 at 541. This presumption applies equally with respect to customary international law. See also *Salomon v. Commissioners of Customs and Excise* [1966] 3 All E.R. 871 at 874 (C.A.), Denning, L.J.

¹⁹ *Schavernoeh v. Foreign Claims Commission* [1982] 1 S.C.R. 1092 at 1098 [hereinafter *Schavernoeh*].

²⁰ *Ibid.* The *Schavernoeh* approach was affirmed in *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141 at 173 in which Laskin C.J., writing for the majority, refused to resort to the unimplemented *Inter-American Communications Convention 1937* for the purposes of interpreting the *Broadcasting Act* R.S.C. 1970, c. B-11 (now R.S.C. 1985, c. B-9) because there was no ambiguity in the domestic law.

²¹ *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, Gonthier J.

stronger requirement of finding “patent ambiguity”²² in domestic law before courts resort to the treaty for interpretive purposes.

D. *Conventional International Law to which Canada is not a Party*

Canadian courts can also make use of international conventions to which Canada is not a Party. Such non-binding treaty law, often closely resembling conventions to which Canada is a Party, becomes an additional tool for interpreting domestic law.²³ However, the role of such non-binding treaties is likely less persuasive than the role played by those agreements which have been ratified by Canada.²⁴

E. *Charter and International Law*

1. *Charter and custom*

Given that the *Charter* is “indissolubly linked by language and ideology to important international instruments and principles to which Canada subscribes,”²⁵ the resort to international sources of law is inevitable if it is to be interpreted “properly.” Further, assuming that the adoption theory applies, customary international human rights law has significant potential to define the scope of rights and freedoms constitutionally entrenched in the *Charter*. Support for the proposition that the *Charter* should be interpreted consistently with norms of international custom, in the realm of human rights, is found in section 26 of the *Charter*. “The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” Thus, as Bayefsky and Cohen have argued,²⁶ this section gives constitutional protection to any rights and freedoms of customary international law, which, under an adoption theory “exist in Canada.” Further support for this argument comes from

²² Bayefsky, *supra* note 8 at 277.

²³ Bayefsky & Cohen, *supra* note 3 at 301.

²⁴ *Ibid.* at 308-09.

²⁵ *Ibid.* at 267.

²⁶ *Ibid.* at 280.

the United States, which also favours incorporation of customary international law as part of its "supreme federal law."²⁷

In order to use custom as a means of interpreting *Charter* rights, the courts must still solve the problem of proving that the international custom exists. To assist in the determination of whether a right has achieved status as a customary norm of international law, the decisions of national and international courts may be considered. Among the human rights judicially recognized as customary international law are: freedom from torture,²⁸ freedom from prolonged arbitrary detention,²⁹ freedom from arbitrary imprisonment,³⁰ freedom from slavery,³¹ and freedom from racial discrimination.³² Once identified, the custom can be used to fill in the gaps in unsettled areas of the common law and give meaning to ambiguous statutory provisions.³³

2. *Charter* and international conventions to which Canada is a party

Despite the theoretical distinctions that can be made between implemented and unimplemented treaties and the various justifications given for consulting treaties, judicial use of international law in *Charter* cases has tended to ignore these technical principles. Rather, the dissent of Dickson C.J. in *Reference Re Public Service Employees Relations Act* establishes the legal justification for using conventional international law in interpreting the *Charter*:

[T]he similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the *Bill of Rights* or decisions of the courts of other

²⁷ In *The Paquete Habana* 175 U.S. 677 at 700 (1900), the Supreme Court held that customary international law is part of domestic law to be applied by domestic courts. See also, R.B. Lillich, "The United States Constitution and International Human Rights Law" (1990) 3 Harv. Hum. Rts. J. 53 at 70.

²⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876 at 884 (2d Cir. 1980).

²⁹ *Fernandez-Roque v. Smith*, 622 F. Supp. 887 at 903 (N.D. Ga. 1985).

³⁰ *Fernandez v. Wilkinson*, 654 F.2d 1382 at 1388 (10th Cir. 1981), aff'd on other grounds *Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

³¹ *Barcelona Traction, Light and Power Co. (Belgium. Spain)*, [1970] I.C.J. Rep. 3 at 32.

³² *Ibid.*

³³ P.J. Duffy, "English Law and the European Convention on Human Rights" (1980) 29 I.C.L.Q. 585 at 599.

³⁴ [1987] 1 S.C.R. 313 [hereinafter *Public Service Employees Reference*]

jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. ... Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. ... *I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.*³⁵

However, the scope of these comments was restricted in an important way as Dickson C.J. continued:

In short, though I do not believe that the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for the interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.³⁶

The legitimacy, and apparent limitations, of using international conventional law was reaffirmed by Dickson C.J., this time writing for the majority, in *Davidson v. Slight Communications Inc.*³⁷ No mention is made in these passages—which set the ground rules for judicial treatment of international law in *Charter* litigation³⁸—of the presence or absence of implementing legislation. The reason for this may be that although Canada has ratified a large number of important international human rights conventions, there is no federal or provincial statute, including the *Charter* itself, which expressly implements them.³⁹ Although some have argued that the *Charter* implements by “implication” the provisions of various human rights treaties to which Canada is a Party,⁴⁰ judicial treatment of the question suggests that

³⁵ *Ibid.* at 348-49 [emphasis added].

³⁶ *Ibid.* at 349-50.

³⁷ [1989] 1 S.C.R. 1038 at 1056 [hereinafter *Davidson*].

³⁸ See La Forest, *supra* note 2 at 232.

³⁹ See W.A. Schabas, *International Human Rights Law and the Canadian Charter* (Toronto: Carswell, 1992) at 20.

⁴⁰ See Bayefsky & Cohen, *supra* note 3 at 303-05 where it is argued that certain provisions of the *Charter* may be construed, by comparing the language of the *Charter* with that of an international convention, as implementing legislation. For example, s. 15(1) of the *Charter*, which prohibits discrimination on the basis of enumerated grounds, could be seen as implementing art. 26 of the ICCPR, *supra* note 3, which prohibits, in a more open-ended manner, “any” discrimination. Thus, by considering s. 15(1) as giving effect to the ICCPR, courts may interpret the listed grounds of discrimination in s. 15(1) as exemplary and not exhaustive.

international human rights conventions are unimplemented, yet very useful aids in interpreting *Charter* rights and freedoms.⁴¹

As such, the role of international law in *Charter* jurisprudence should not be underestimated. Despite the lack of comment on the issue of implementation of human rights treaties, the courts have not imposed a pre-requisite finding of “ambiguity” before resorting to the text of international documents.⁴² Indeed the “references to Canadian human rights treaties [by Canadian courts] have generally been unprincipled, and therefore unpredictable.”⁴³ Thus, the willingness to consider international conventional law is not impeded by the constitutional rule that unimplemented treaties are not part of the domestic law of Canada and therefore “non-binding.” Rather, the common law presumption that Canada’s legislators do not intend to violate the country’s international obligations still operates implicitly through Dickson C.J.’s comments in *Public Service Employees Referencand Davidson*. This explains the frequent and consistent use by the Supreme Court of Canada of the ICCPR and the *Universal Declaration* in the context of interpreting rights and freedoms guaranteed by the *Charter*.⁴⁴

3. *Charter* and international conventions to which Canada is not a party

It is not surprising that, in a judicial setting which invites consideration of foreign legal materials, Canadian courts have also made frequent use of international conventions to which Canada is not a Party.

⁴¹ Since the *Charter* came into effect in 1982 the only case finding that a convention on international human rights was implicitly implemented is arguably *Singh v. Canada (Employment and Immigration)*, [1985] 1 S.C.R. 177 [hereinafter *Singh*]. In that case Wilson J. writing for two other members of the court, approved of Pigeon J.’s dissent in *Ernewein v. Canada (Employment and Immigration)*, [1980] 1 S.C.R. 639 at 658, in which he wrote: “It will be seen that the provisions of the Convention [Relating to the Status of Refugees] were adopted and became part of the law of Canada by being thus referred to in an Act of Parliament [now the *Immigration Act* R.S.C. 1985, c. I-2].”

Further, in *R. v. Keegstra* [1990] 3 S.C.R. 697, Dickson C.J. (although he did not go as far as holding that domestic criminal legislation was an express implementation of international conventional law) did write at 754: “Canada, along with other members of the international community, has indicated [in the ICCPR and ICERD] a commitment to prohibiting hate propaganda, and in my opinion this Court must have regard to that commitment in investigating the nature of the government objective behind s. 319(2) of the *Criminal Code* [R.S.C. 1985, c. C-46].”

⁴² Bayefsky, *supra* note 8 at 277.

⁴³ *Ibid.*

⁴⁴ La Forest, *supra* note 2 at 233-34.

In fact, some 85 per cent of the Supreme Court of Canada references to international human rights law are in relation to the ECHR, and the jurisprudence associated with it.⁴⁵ The relevance of considering the ECHR is clear:

The European Convention is the forerunner of the Covenant on Civil and Political Rights, the latter duplicating many of its terms. The sophisticated quasi-judicial and judicial system associated with the European Convention and not with the Covenant makes the jurisprudence of the European Convention helpful in understanding Canada's obligations under the Covenant. Furthermore, much of Canadian legal tradition is inherited from the United Kingdom. That state is itself a party to the European Convention and the Convention has been used in British courts to interpret British law.⁴⁶

The use of United States judicial decisions by Canadian courts interpreting constitutional protections is even more extensive than the use of European sources.⁴⁷ The American jurisprudence is useful as it provides a "framework for analysis"⁴⁸ but, because of the fundamental differences between Canadian and American societies and legal traditions, the American experience cannot be seen as a "master in the development of *Charter* jurisprudence."⁴⁹

In addition to the general relationship that international human rights law has with the purpose and objectives of the *Charter*, there are specific provisions in the *Charter* which invite consideration of foreign legal sources. Sections 1 and 7 of the *Charter* are such provisions, both of which are discussed in Part III.

III. DEPORTATION: CASE STUDY

The general theory behind the use of international law in *Charter* litigation serves as the necessary backdrop for the "deportation case study" of this article. That is, to properly consider the ways in which international human rights law can be used to challenge a deportation proceeding under the *Charter*, it is necessary to understand how and why international legal materials are utilized by Canadian courts. In the context of deportation, it is necessary first, to consider the governing domestic legislation (*i.e.*, the *Immigration Act*). Second, the analysis will

⁴⁵ Bayefsky, *supra* note 8 at 279.

⁴⁶ *Ibid.* at 279-80, note 16.

⁴⁷ La Forest, *supra* note 2 at 236.

⁴⁸ *Ibid.* at 240.

⁴⁹ *Ibid.* at 237.

deal almost exclusively with the special problems raised by the deportation of domiciled aliens (*i.e.*, aliens who have been in Canada, legally as permanent residents or illegally without status, for long periods of time and have developed significant ties with the jurisdiction). Third, the analysis will be contained under section 7 of the *Charter* and the related Canadian jurisprudence. Fourth, the unsettled and, arguably, restrictive aspects of Canadian law in the area of deportation will be addressed, by considering more expansive approaches adopted by other courts and jurisdictions in the international community. It is the last part of the analysis which serves as the focus of this article.⁵⁰

A. Domestic Law and Deportation

1. *Immigration Act*, common law, and deportation

Deportation, a term which is often substituted for expulsion, involves “the exercise of State power which secures the removal, either ‘voluntary,’ under threat of forcible removal, or forcibly, of an alien from the territory of a State.”⁵¹ Aliens are distinguished from nationals or citizens; the former are received by a State as a matter of discretion whereas the latter have the right to remain in the State.⁵² Thus, only aliens and not citizens are subject to deportation.⁵³ Deportation must also be distinguished from exclusion, which is the refusal to allow an alien to enter a State.⁵⁴

⁵⁰ For a discussion on the domestic law regarding the deportation of permanent residents see R.P. Cohen, “Fundamental (In)Justice: The Deportation of Long-term Residents from Canada” (1994) 32 *Osgoode Hall L.J.* 457.

⁵¹ G.S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Clarendon, 1978) at 201.

⁵² *Oppenheim supra* note 4 at 896-99. Nationality is the chief link between individuals and international law; it is the means by which protection is afforded by states to individuals. Nationality can be acquired by birth, naturalization, reintegration, annexation, and cession. In the Commonwealth, nationality, as it regards citizenship, is of primary relevance in international law (at 851-81).

⁵³ A citizen can nonetheless be extradited pursuant to an extradition treaty in which one State agrees to have a person within its borders sent to another State where that person was allegedly involved in criminal activity. See *Kindred et al., supra* note 8 at 472-73.

⁵⁴ *Oppenheim supra* note 4 at 940, note 2.

Under section 32(2) of the *Immigration Act*, a permanent resident⁵⁵ shall be deported if the alien falls into any of the categories set out in section 27(1). The various categories include a person who has committed certain offences in Canada or abroad,⁵⁶ engaged in subversive political activity,⁵⁷ obtained landing by way of false documentation or information,⁵⁸ or wilfully failed to be self-supporting.⁵⁹ Although all permanent residents can appeal a deportation order on legal or factual grounds, not all are entitled to be heard on equitable grounds of appeal.⁶⁰ Further, a domiciled alien who has been in Canada on a long-term basis but without legal status is not entitled to appeal a deportation order on any grounds.⁶¹ Thus, for many domiciled aliens, statutory appeal procedures are inadequate and/or non-existent. Extending constitutional protections to domiciled aliens would overcome any such statutory deficiencies.

Nonetheless, support for the domestic legislation is rooted in the principles of the common law which survive the *Charter* era as indicated by La Forest J. in *Kindler v. Canada (Minister of Justice)*:

The government has the right and duty to keep out and expel aliens from this country if it considers it advisable to do so. This right, of course, exists independently of extradition. If an alien known to have a serious criminal record attempted to enter into Canada, he could be refused admission. And by the same token, he could be deported once he entered Canada.⁶³

⁵⁵ Section 2(1) of the *Immigration Act*, *supra* note 41, provides that a permanent resident is a person who a) has been granted landing, b) has not become a Canadian citizen, and c) has not ceased to be a permanent resident.

⁵⁶ *Ibid.*, s. 27(1)(d).

⁵⁷ *Ibid.*, s. 27(1)(a).

⁵⁸ *Ibid.*, s. 27(1)(e).

⁵⁹ *Ibid.*, s. 27(1)(f).

⁶⁰ *Ibid.*, s. 70(1)(a) allows permanent residents to appeal a deportation order on grounds of fact and/or law. Section 70(1)(b) provides for an appeal on compassionate grounds, namely "having regard to all the circumstances of the case" the permanent resident should not be deported. However, s. 70(4) provides that for certain persons ordered deported a s. 70(1)(b) appeal is not permitted. Such persons include individuals to whom a security certificate has been issued pursuant to s. 40.1(1) and persons responsible for human rights abuses or terrorist activity.

⁶¹ *Ibid.*, s.32(7) does provide however, that a departure order can be substituted for a deportation order in respect of s. 27(2) aliens (*i.e.*, visitors who have overstayed).

⁶² [1991] 2 S.C.R. 779.

⁶³ *Ibid.* at 834.

In *Singh*, it was held that “[a]t common law an alien has no right to enter or remain in Canada except by leave of the Crown.”⁶⁴

2. *Charter* and deportation

The common law position distinguishing between aliens and citizens, with regard to mobility rights, is reinforced by section 6 of the *Charter*:

6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Nonetheless, the fundamental and legal rights in the *Charter* (sections 2 and 7 to 14) are extended to “everyone.” In the immigration context these rights are often invoked by aliens who have been ordered to leave the country. The status of aliens claiming protection against deportation from Canada can vary, and different concerns arise depending on whether the person is a refugee claimant,⁶⁵ permanent resident,⁶⁶ or permanent resident seeking new status as a refugee.⁶⁷ For the purposes of the discussion that follows, emphasis will be placed on domiciled aliens, including permanent residents, ordered deported, but reference will be made on occasion to other categories of aliens.

Challenges have been made, albeit unsuccessfully, by aliens facing deportation from Canada. The challenges made under various provisions of the *Charter* include section 11(h) (the right not to be tried

⁶⁴ *Supra* note 41 at 189. See also *R. v. Governor of Pentonville Prison* [1973] 2 All E.R. 741 (C.A.) and *Prata v. Canada (Manpower and Immigration)* [1976] 1 S.C.R. 376 in favour of this common law position.

⁶⁵ *Singh*, *supra* note 41 held that a refugee claimant has the right to an oral hearing in accordance with the procedural requirements of fundamental justice under s. 7 of the *Charter*.

⁶⁶ *Chiarelli v. Canada (Employment and Immigration)* [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*] held that it is not a violation of s. 7 of the *Charter* to deport a permanent resident convicted of serious offences.

⁶⁷ *Grewal v. Canada (Employment and Immigration)* [1992] 1 F.C. 581 (C.A.) held that it is not a violation of s. 7 of the *Charter* to order the deportation of a permanent resident whose subsequent refugee claim was denied.

and punished for an offence more than once);⁶⁸ section 12 (the right not to be subjected to cruel and unusual punishment);⁶⁹ and section 15 (the right to equal protection and benefit of the law).⁷⁰ The most commonly used section in challenging a deportation order under the *Immigration Act* is, however, section 7 of the *Charter*⁷¹ which states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The jurisprudence in this area of domestic immigration law is inconsistent in many respects and, as argued in Part IV, there is guidance to be found in international law.⁷² But with regard to the domestic position, under section 7 of the *Charter*, aliens have argued that deportation violates their right to life, liberty, or security of the person. The landmark decision in this area of the law is *Singh*, a case involving the deportation of refugee claimants who feared political persecution in their home countries. The claimants had been unsuccessful in establishing status as “Convention refugees.”⁷³ Wilson J., who wrote for three judges, found that the claimants’ right to security of the person had been violated and that the requirements of fundamental justice required that the claimants have an oral hearing before they could be denied refugee status. The significance of this decision is that “security of the person” can be engaged by state-imposed psychological stress felt by

⁶⁸ In *Hurd v. Canada (Employment and Immigration)* [1989] 2 F.C. 594 (C.A.), the court held that deportation is not a form of punishment and therefore does not try a permanent resident more than once for criminal conduct.

⁶⁹ In *Chiarelli*, *supra* note 66, the Supreme Court of Canada held that deportation is not punishment and therefore does not violate s. 12 of the *Charter*.

⁷⁰ *Ibid.* The Supreme Court of Canada held that differential treatment of criminals who are citizens (and not deported) and those who are permanent residents (and subject to deportation) does not violate s. 15 of the *Charter*.

⁷¹ See B. Jackman, “Advocacy, Immigration and the *Charter*” 9 Imm. L.R. (2d) 286 at 288-90.

⁷² See also Cohen, *supra* note 50 at 486-500.

⁷³ The definition of a *Convention* refugee is taken from the *Refugee Conventions* *supra* note 3, and is incorporated into s. 2(1) of the *Immigration Act* as follows:

“Convention refugee” means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (i) is outside the country of his nationality and is unable, or by reason of such fear, is unwilling to avail himself of the protection of that country, or (ii) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

Section 6(2) of the *Immigration Act* however, allows for a broader meaning to be given to “refugee” whereby asylum may be granted to displaced and persecuted persons who do not meet the strict test under the *Refugee Conventions* *supra* note 3.

aliens who, in this case, feared punishment abroad. The limitation of the case is that it was based on the procedural content of the principles of fundamental justice; it is clear that the aliens had no substantive right *per se* to seek asylum in Canada.

With regard to aliens with permanent resident status, the decision of the Supreme Court in *Chiarelli* negatively answers the question whether deportation violates section 7 of the *Charter*. The permanent resident in *Chiarelli* had been convicted of possession of narcotics for the purposes of trafficking and ordered deported under section 32(2) of the *Immigration Act*. An appeal on equitable grounds was not available. In considering section 7 of the *Charter*, Sopinka J., writing for the majority, held that it was not necessary to decide whether deportation for serious offences can be conceptualized as a deprivation of liberty. Further, with regard to the principles of fundamental justice, Sopinka J. held:

[I]n determining the scope of principles of fundamental justice as they apply to this case, the court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country. ... One of the conditions Parliament has imposed on a permanent resident's rights to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. ... There is nothing inherently unjust about a mandatory [deportation] order.⁷⁴

Beyond the fact that a permanent resident has violated section 27(1)(d)(ii) of the *Immigration Act*, Sopinka J. held that there are no "aggravating or mitigating circumstances"⁷⁵ to consider when giving effect to a deportation order. In a subsequent case, *Nguyen v. Canada (Employment and Immigration)*,⁷⁶ also involving the deportation of a permanent resident under section 32(2), Marceau J. of the Federal Court of Appeal wrote in *obiter*:

While Sopinka J., in writing the judgment of the Supreme Court in *Chiarelli* ... has not considered it necessary to take a firm position on whether the issuance of a deportation order would affect the liberty of the individual within the meaning of section 7 of the *Charter*, it seems to me, with respect, that forcibly deporting an individual against his will

⁷⁴ *Chiarelli*, *supra* note 66 at 733-34. See also *Hoang v. Canada (Employment and Immigration)*, (1990) 13 Imm. L.R. (2d) 35 (F.C.A.), where it was held that deportation for serious offences is not a deprivation of an alien's liberty under s. 7 of the *Charter*.

⁷⁵ *Chiarelli*, *supra* note 66 at 734.

⁷⁶ [1993] 1 F.C. 696 (C.A.) [hereinafter *Nguyen*].

has the necessary effect of *interfering with his liberty, in any meaning that the word can bear.*⁷⁷

The court went on to hold that there was no violation of the principles of fundamental justice and hence, no section 7 violation caused by the deportation of the permanent resident. In both *Nguyen* and *Chiarelli*, an appeal from the deportation order on compassionate grounds had been precluded by the issuance of a security certificate.⁷⁸

3. Section 7 of the *Charter* and international law

In light of the above analysis, two issues arise for domiciled residents facing deportation from Canada: 1) whether their right to life, liberty or security of the person is violated by the deportation order; and 2) whether the violation is in accordance with the principles of fundamental justice. In both of these respects, section 7 of the *Charter* has potential to be significantly influenced by international human rights law. Before discussing in detail how international law can be used to support *Charter* challenges to deportation, one must establish a framework for analysis. This framework identifies how international law can assist, first, in interpreting the scope of the right to “life, liberty and security of the person” and, second, in giving meaning to the “principles of fundamental justice.”

a) *Scope of section 7*

With regard to the first part of the framework, international human rights law has already been used to interpret the scope of section 7. In *Singh*, Wilson J. referred to article 25(1) of the *Universal*

⁷⁷ *Ibid.* at 703, note 5 [emphasis added].

⁷⁸ See also *supra* note 60. Note that in *Canepa v. Canada (Employment and Immigration)* [1992] 3 F.C. 270 (C.A.) [hereinafter *Canepa*] it was also held that in light of *Chiarelli*, deporting a permanent resident for serious offences does not violate the principles of fundamental justice nor can it be considered a deprivation of liberty. The court in *Canepa* refused to consider the personal circumstances of the deportee under s. 7 of the *Charter* even though an appeal was available on equitable grounds under s. 70(1)(b) of the *Immigration Act*, *supra* note 41. However, under s. 12 of the *Charter* the “personal merits and demerits” of the deportee were considered, but the deportation order was upheld even though the deportee had been here for twenty years, had family here, did not speak the language of the State of origin, and most of the offences in question were for breaking and entering.

Declaration in interpreting “security of the person” under the *Charter*.⁷⁹ In holding that the deportation of refugees infringes the security of their person, she also referred to Canada’s “willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees.”⁸⁰

In *R. v. Jones*,⁸¹ Wilson J., writing in dissent, broadly formulated the right to liberty, to include parental freedom to choose how to educate one’s children, and in doing so referred to article 8(1) of the ECHR and article 2 of the First Protocol to the ECHR.⁸²

In *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*,⁸³ a case also dealing with parental decision-making and freedom regarding child-rearing, Lamer C.J. referred to article 9(1) of the ICCPR, article 5(1) of the ECHR, and article 3 of the *Universal Declaration* in formulating “liberty” as freedom from physical restraint.⁸⁴ In considering the international conventional law, he wrote:

I am fully aware that the weight to be given to the foregoing may be uncertain, but nevertheless I believe that it provides an *additional indication, at least, of the scope that the framers of the Charter may have intended* to give to the expression “right to liberty” in the context of s. 7.⁸⁵

The relevance of these decisions in the context of deportation challenges is the approval by the judiciary of using international human rights law to support definitions of “liberty” and “security of the person.”

⁷⁹ *Supra* note 41 at 207.

⁸⁰ *Ibid.* at 193.

⁸¹ [1986] 2 S.C.R. 284 [hereinafter *Jones*].

⁸² *Supra* note 3, art. 8(1) protects a person’s “right to respect for his private and family life, his home and his correspondence.” Article 2 protects the “right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

⁸³ [1995] 1 S.C.R. 315 [hereinafter *Children’s Aid*]. Wilson J.’s formulation of liberty in *Jones*, *supra* note 81 was adopted by La Forest J., writing for three judges, in the *Children’s Aid* case. La Forest J. also held that parental liberty under s. 7 of the *Charter* does encompass the right to deny one’s children lifesaving medical treatment.

⁸⁴ ICCPR, *supra* note 3, arts. 9(1) and 5(1) protect the “right to liberty and security of person” in the context of arrest and detention; art. 3 protects the “right to life, liberty and security of person” with no reference to specific context.

⁸⁵ *Children’s Aid supra* note 83 at 350 [emphasis added]. Lamer C.J. also referred to art. 7 of the *American Convention* (“right to personal liberty” in criminal context), arts. 1 and 25 of the *American Declaration* (“right to life, liberty and security of his person” and criminal due process rights). Lamer C.J. used these international agreements to support a definition of liberty that is restricted to the “physical dimension of the word ‘liberty’” (*supra* note 83 at 348). Lamer C.J. held that liberty under s. 7 of the *Charter* does not include the parental right to deny children life-saving medical treatment for religious reasons.

In particular, *Singh* is useful as it directly relates to the immigration context, although it is limited in many ways to the special circumstances faced by refugees at international law.⁸⁶ It does, however, confirm a definition of “security of the person” as freedom from state-imposed psychological stress.⁸⁷ Both *Jones* and *Children’s Aid* are useful because they recognize liberty interests under domestic and international law. Whether liberty is construed broadly, to include “autonomy in making decisions of fundamental personal importance”⁸⁸ or narrowly, to include freedom from physical restraint,⁸⁹ the deportation of a domiciled resident is likely an infringement thereof. On the one hand, the forcible removal of a domiciled alien—having substantial family, social, and community ties in Canada—has an obvious physical impact on the deportee’s mobility rights. On the other hand, just as *Jones* and *Children’s Aid* addressed the question of state interference with parental liberty, deportation can also seriously interfere with a parent-alien’s autonomy and personal choice regarding his or her family life. However, as discussed in Part IV, below, the impact may not be only on the deportee but also on the deportee’s children, whose rights are also protected at international law. Further, where a domiciled alien is deported without regard to “mitigating” or “personal” circumstances, it may amount in practice to the deportation of the rest of the family, including dependent children who may be citizens of Canada. Moreover, state-ordered deportation engages “security of the person” by imposing psychological stress on a domiciled alien who is forcibly removed from family, children, and community.

⁸⁶ The main protection available for refugees is the right of non-refoulement set out in the *Refugee Convention* *supra* note 3, art. 33. It prohibits a State from returning a *Convention* refugee to a country where the refugee’s life or freedom is threatened by persecution. Many have argued that this principle exists as a norm of customary international law but it is not applicable to aliens in general. See on this topic, G. Stenberg, *Non-Expulsion and Non-Refoulement* (Uppsala, Sweden: IUSTUS Forlag, 1989) at 267-80.

⁸⁷ See *Rodriguez v. British Columbia (A.G.)* [1993] 3 S.C.R. 519 at 587-88 [hereinafter *Rodriguez*] and *R. v. Morgentaler* [1988] 1 S.C.R. 30 at 173 [hereinafter *Morgentaler*].

⁸⁸ *Morgentaler* *supra* note 87 at 166, Wilson J. See also La Forest J.’s judgment in *Children’s Aid*, *supra* note 83 at 364-66, approving of Wilson J.’s broad formulation of liberty.

⁸⁹ For judgments finding a narrow definition of liberty see: *Children’s Aid*, *supra* note 83 at 347-48, Lamer C.J.; *Morgentaler* *supra* note 87 at 51, Dickson C.J.; and *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123 at 1177-78, Lamer J. [hereinafter *Re Criminal Code*].

b) *Principles of Fundamental Justice*

The second way in which international law can influence the interpretation of section 7 was approved of by Lamer J., as he then was, in *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486:

[S]s. 8 to 14 [of the *Charter*] provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).⁹¹

The principles of fundamental justice are found in the "basic tenets of our legal system"⁹² and acquire meaning in the context of a given case. By considering international customary and conventional law one can identify the principles of fundamental justice which are inextricably linked to the inherent dignity of all persons. In fact, the protection of human dignity is a principle of fundamental importance which lies not only at the essence of a free and democratic society, but also at the heart of the *Charter* itself. As such, the notion of human dignity is vital to the interpretation of all *Charter* protections, including section 7.⁹³ Respect for human dignity also represents the genesis of such international instruments as the *UN Charter*, the *Universal Declaration*, and the *ICCPR*.⁹⁴ Once the principles of fundamental justice have been identified, it is necessary to balance the interests of the state with those of the individual. This "balancing of interests" must be consistent with the aforementioned principles of fundamental justice.⁹⁵ Thus, to determine whether the deportation of an alien violates the principles of fundamental justice, it is necessary to balance the interests

⁹⁰ [1985] 2 S.C.R. 486 [hereinafter *Re B.C. Motor Vehicle Act*].

⁹¹ *Ibid.* at 503 [emphasis added].

⁹² *Ibid.*

⁹³ The importance of human dignity to *Charter* interpretation is widely recognized: *Morgentaler*, *supra* note 87 at 166, Wilson J.; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346, Dickson C.J.; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, Dickson C.J. [hereinafter *Oakes*]; and *Re B.C. Motor Vehicle Act*, *supra* note 90 at 512.

⁹⁴ See the Preambles of these instruments, *supra* note 3.

⁹⁵ See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 539; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 226, regarding the balancing of competing interests; and *Rodriguez*, *supra* note 87 at 593-94.

of the deportee with those of the expelling State. Finally, in Part IV, below, the argument is made that contra *Chiarelli*, deportation of a domiciled alien, such as a permanent resident, can violate the principles of fundamental justice, especially where the decision to deport has an impact on children and family life.

4. Section 1 of the *Charter* and international law

Should a court find that deportation is a violation of liberty or security of the person contrary to the principles of fundamental justice, there is the possibility that the deportation could be justified under section one of the *Charter*⁹⁶:

The *Canadian Charter of Rights and Freedom* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, in considering what constitutes a “reasonable limit” justified in other free and democratic societies, the principles and standards set out in the ICCPR, ECHR, *Universal Declaration*, *American Declaration*, and *American Convention* are particularly insightful.⁹⁷ Articles 8 to 11 of the ECHR, for example, guarantee certain freedoms but allow limitations “prescribed by law” and “necessary in a democratic society.” The similarity in wording between the *Charter* and the ECHR is striking in this respect. Further, the interpretation of section 1, in accordance with the test set out in *Oakes*,⁹⁸ is particularly influenced by international law when the courts consider the following question: are there pressing and substantial government objectives which justify imposing restrictions on *Charter* rights and freedoms? In the analysis that follows the argument is

⁹⁶ Since both ss. 1 and 7 of the *Charter* involve a balancing of state interests with individual interests, authority is divided as to whether a breach of s. 7 (fundamental justice) can ever be justified by s. 1 (*Oakes* test). That a s. 7 breach cannot be so justified is supported by *Re Criminal Code*, *supra* note 89 at 1223, Wilson J.; *R. v. Swain*, [1991] 1 S.C.R. 933 at 1034, Wilson J.; and *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 151-52, McLachlin J. However, that a s. 7 violation can be justified, where an independent principle of fundamental justice is violated, is supported by *R. v. Heywood*, [1994] 3 S.C.R. 761 at 789-90, Cory J.

⁹⁷ Schabas, *supra* note 39 at 37-38.

⁹⁸ *Supra* note 93 at 138-39. In order to be justified under s. 1, a limitation on a *Charter* right or freedom must meet the following requirements: 1) the limitation must have a sufficiently important objective which justifies the infringement; 2) the measures used must be rationally connected to the objective sought; 3) the measures used must impair the right or freedom as little as possible; and 4) there must be proportionality between the effects of the restrictive measures and the objective being sought.

made that, in light of these international conventions, the deportation of domiciled aliens does not meet such pressing objectives and cannot be characterized as a reasonable limit.

IV. DEPORTATION AND CUSTOMARY INTERNATIONAL LAW

A. General Principles

Part III of this article illustrates how Canadian law distinguishes between aliens and citizens with regard to their mobility rights. This distinction, however, does not give rise to any number of ways in which aliens may be differentiated from citizens of the country in which they live. Rather, international human rights law set out in the *Universal Declaration* and the ICCPR and reflected in national legislation such as the *Charter*, apply equally to aliens and nationals. Fundamental human rights which exist at customary international law “have the effect of restricting the exercise of sovereignty by the territorial state.”⁹⁹ Thus, while the deportation of aliens by States is recognized at international law, the power to expel aliens is not completely discretionary, neither in form nor in substance. The power at international law to expel or deport aliens can be summarized as follows:

The right of states to expel aliens is generally recognised. ... On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its rights by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the

⁹⁹ Kindred *et al.*, *supra* note 8 at 542.

manner in which it effects an expulsion.¹⁰⁰

Goodwin-Gill writes that the State's power "must be exercised in good faith and not for some ulterior motive, such as genocide, confiscation of property, or the surrender of an individual to persecution."¹⁰¹ The justification for deportation consists in protecting the interests of the State from the continued presence of the alien.¹⁰² Under Canadian domestic law, the justification offered for the deportation of permanent residents is derived: 1) from the common law principle that aliens have no right to remain in Canada; and 2) from the provisions of the *Immigration Act*. Canadian law therefore incorporates international custom and does not deport permanent residents, or other domiciled aliens, arbitrarily. Moreover, the requirement at customary international law that deportation be justified also necessitates a balancing of interests, on the part of both the deporting State and the alien. Goodwin-Gill writes:

The principle of good faith and the requirement of justification, or 'reasonable cause', demand that due consideration be given to the interests of the individual, including *his basic human rights, his family, property, and other connections with the State of residence, and his legitimate expectations*. These must be weighed against the competing claims of 'ordre public.'¹⁰³

¹⁰⁰ *Oppenheim supra* note 4 at 940 [footnotes omitted]. This article is concerned with the substantive aspects of the deportation power (*i.e.*, why and in what circumstances an alien is deported) and not the procedural aspects of how a person is deported (*i.e.*, due process and adequate appeal provisions in domestic immigration law). But for a thorough discussion on the manner and form of expulsion see Goodwin-Gill, *supra* note 51 at 262-81.

See as well, "General Comment 15(27)" (The Position of Aliens under the Covenant), adopted by the Human Rights Committee under the ICCPR, at its 696th meeting on 22 July 1986. In that Comment, the Committee made the following observations, at para. 10: "Article 13 [of the ICCPR] directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law,' its purpose is clearly to prevent arbitrary expulsion."

As well, the Committee wrote, at para. 5:

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. *However, in certain instances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition or inhuman treatment and respect for family life are* [emphasis added].

¹⁰¹ Goodwin-Gill, *supra* note 51 at 228.

¹⁰² *Ibid.* at 229-62.

¹⁰³ *Ibid.* at 262 [emphasis added].

This balancing of individual and state interests is precisely the sort of consideration which is called for under section 7 of the *Charter*. However, as indicated in *Chiarelli*, aside from the fact that an alien has breached s. 27(1) of the *Immigration Act* there are no “mitigating or aggravating circumstances” considered by the courts. The *Chiarelli* position sanctions the fundamental importance of the State’s power to expel while seemingly ignoring the alien’s competing interests. In order to extend constitutional protections to permanent residents facing deportation from Canada, it is incumbent upon the courts to adequately consider the interests of the individual, whose ties with the State are through home, family, and society. This can be accomplished if the courts are persuaded, insofar as aliens are concerned, of the following: “[L]e désir de l’étranger de vivre en compagnie de sa famille n’est que l’expression légitime d’un droit élémentaire de la personne: celui de mener une vie familiale normale.”¹⁰⁴

B. *United States Practice*

Instruction regarding the extension of constitutional protections to aliens can be taken from United States jurisprudence which serves as an important and persuasive source of law for Canadian courts. In fact, the influence of “American constitutionalism”¹⁰⁵ on international human rights law has been referred to as the “Overseas Trade in the American *Bill of Rights*”¹⁰⁶. Indeed, Canadian courts are joined by courts in Europe and around the world in their frequent references to United States Supreme Court precedents.¹⁰⁷ As Professor Henkin explains:

Americans were prominent among the architects and builders of international human rights, and American constitutionalism was a principal inspiration and model for them. As a result, most of the *Universal Declaration of Human Rights* and later the *International Covenant on Civil and Political Rights* are in their essence American constitutional rights projected around the world.¹⁰⁸

¹⁰⁴ H. Labayle, «Le droit de l’étranger à mener une vie familiale normale» (1993) 9(3) Rev. fr. Droit adm. 511 at 511.

¹⁰⁵ L. Henkin, “Rights: American and Human” (1979) 79 Colum. L. Rev. 405 at 407.

¹⁰⁶ A. Lester, “The Overseas Trade in the American *Bill of Rights*” (1988) 88 Colum. L. Rev. 537.

¹⁰⁷ Lillich, *supra* note 27 at 55-59.

¹⁰⁸ Henkin, *supra* note 105 at 415. See also Lillich, *supra* note 27 at 56.

In the area of immigration law, where constitutional protections are sought by aliens, American jurisprudence is of particular significance given that:

Before the courts of the United States it has been argued that the resident alien, of all people, will frequently have established strong family ties and acquired property interests, and that these and other relevant considerations together amount to a 'vested right of residence' worthy of greater protection than is provided by mere procedural guarantees.¹⁰⁹

The "reluctance to use the right of expulsion in relation to domiciled aliens"¹¹⁰ is more apparent in American courts than in Canadian courts, since the latter persistently refuse to characterize deportation as true punishment or deprivation of liberty.¹¹¹ Early evidence of the American reluctance can be found in Hand J.'s recommendation against the deportation of a convicted alien in *U.S. ex rel. Klonis v. Davis (Labor)*:¹¹²

At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. *However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples...* That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.¹¹³

In *Harisiades v. District Director of Immigration and Naturalization*¹¹⁴ which upheld the deportation of a domiciled alien for membership in the Communist Party, Douglas J., of the United States Supreme Court, wrote in dissent:

An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of

¹⁰⁹ Goodwin-Gill, *supra* note 51 at 259 [emphasis added].

¹¹⁰ Oppenheim, *supra* note 4 at 943, note 13.

¹¹¹ See Part III of this article.

¹¹² 13 F.2d 630 at 630-31 (2d Cir. 1926).

¹¹³ *Ibid.* at 630-31 [emphasis added]. The recommendation against deportation was entered too late in this case and thus not effective in barring the deportation.

¹¹⁴ 342 U.S. 580 (1951).

all lands. If those rights, great as they are, have constitutional protection, *I think the more important one—the right to remain here—has a like dignity*.¹¹⁵

Both of these judicial opinions go a long way towards recognizing that at some point an alien is said to have “assimilated” with the State in which he or she resides. Once assimilation is established, deportation must be equated with “banishment,” to use a term which appears frequently in Douglas J.’s dissent. A more recent decision supporting this general theory of “assimilation” (a theory which commentators refer to as the “participation model” of aliens’ rights¹¹⁶) is *Plyler v. Doe*.¹¹⁷ In that case a Texas statute,¹¹⁸ which denied public education to children who were not legally admitted into the United States, was found to violate the Equal Protection Clause of the Fourteenth Amendment.¹¹⁹ The United States Supreme Court found that the denial of public education to undocumented alien children did not further a substantial goal of the State, but victimized “innocent children.”¹²⁰ Although the parents of the children could be held accountable for their illegal entry into the United States, the children “can affect neither their parents’ conduct nor their own status.”¹²¹ Because of the fundamental importance of having an educated populace, the court held that, overall, the societal costs would be significant if the class of aliens in question were denied an education.¹²² The court recognized the future role these aliens had as participants in American society and found in favour of allowing them to contribute to the “progress of the Nation.”¹²³ The court concluded in a similar vein:

¹¹⁵ *Ibid.* at 599 [emphasis added].

¹¹⁶ “Developments in the Law: Immigration Policy and the Rights of Aliens” (1983) 96 Harv. L. Rev. 1286 at 1303-08.

¹¹⁷ 457 U.S. 202 (1983) [hereinafter *Plyler*].

¹¹⁸ Tex. Educ. Code Ann. § 21.031 (Vernon Supp. 1981).

¹¹⁹ U.S. Const. amend. XIV provides that “[n]o State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Due process protections for aliens in the United States, even aliens in the country illegally, have been recognized for a long time. See *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *Wong Wing v. United States*, 163 U.S. 228 (1896); and *Yick Wov. Hopkins*, 118 U.S. 356 (1886).

¹²⁰ *Plyler*, *supra* note 117 at 224.

¹²¹ *Ibid.* at 220, citing *Trimble v. Gordon*, 430 U.S. 762 at 770 (1977). Section 33(1) of the *Immigration Act*, *supra* note 41, is incompatible with this view, as it provides for the expulsion of dependent alien children where a deportation order has been made against the alien-parent.

¹²² *Ibid.* at 221.

¹²³ *Ibid.* at 220.

In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.¹²⁴

If read broadly, *Plyler* can be used in deportation cases where an alien-parent's conduct or status creates hardship for dependent family members. As Peter Schuck asks: "[c]an the Court's 'innocent children' rationale [in *Plyler*] be harmonized with its willingness to allow the routine deportation of children who are not only innocent of their parents' wrongdoing but are United States citizens?"¹²⁵ In the Canadian context, the decision can be used to "mark a fundamental break with classical immigration law's concept of national community"¹²⁶ and to broaden the scope of State "power to decide who is entitled to the benefits of membership."¹²⁷ This means recognizing that all domiciled aliens have a stake in the national community, even if convicted of crimes, as the claimants in *Chiarelli*, *Nguyen*, and *Canepa* were. When convicted of criminal offences, domiciled aliens must serve their sentences as all other convicted criminals do, but not be subject to banishment where it is shown that for all practical purposes the alien has "assimilated" into Canadian society. Moreover, where the effects of deportation are likely to have an impact on dependents and, in particular, "innocent children," the argument against deportation is compelling. In such cases, the principles of fundamental justice, informed by the theory of "assimilation" will require, in most circumstances, that the alien be permitted to remain in Canada.

C. Australian State Practice

Australian practice in the area of deportation has also given rise to jurisprudence which emphasizes the "absorption" of aliens into the Australian community as the test for limiting the expulsion power of the

¹²⁴ *Ibid.* at 230.

¹²⁵ "The Transformation of Immigration Law" (1984) 84 Colum. L. Rev. 1 at 55. See also *supra* note 121.

¹²⁶ *Ibid.* at 54.

¹²⁷ *Ibid.*

State. David Wood comments on the nature of the Australian power to deport:

As a constitutional issue, debate in Australia has centered on the question of how the Commonwealth's immigration power is to be interpreted. Two views of the power have found favour in the High Court. According to the wide view, irrespective of how long an immigrant has permanently resided in Australia, he never gets beyond the reach of the power. In the words of the well-known aphorism of Isaacs J (as he then was), "Once an immigrant; always an immigrant". By contrast, according to the narrow view of the immigration power, at some point an immigrant becomes "absorbed" into the Australian community and passes beyond its scope.¹²⁸

Although Canadian courts most often refer to American jurisprudence in interpreting constitutional provisions, the Supreme Court of Canada also considers relevant the jurisprudence of other Commonwealth countries having the same British legal traditions as our own.¹²⁹ Thus, the significance of the Australian "absorption" theory should not be overlooked when advancing *Charter* arguments against deportation.

The absorption theory was adopted in *Kuswardana v. Minister for Immigration and Ethnic Affairs*,¹³⁰ where the Federal Court considered the position of the High Court of Australia regarding the scope of the legislative immigration power. The court in *Kuswardana* held that "the legislative power does not extend to the exclusion or deportation of a person who has become established as a member of the Australian community."¹³¹ This proposition is based on the principle, endorsed by some courts, that an immigrant (and potential deportee) ceases to be an immigrant once the person becomes a member of the Australian community.¹³² Those who have become members of the Australian community have been referred to by the High Court of Australia as including: "persons who had made their home in Australia and become part of its people;"¹³³ "a person whose permanent home is in Australia

¹²⁸ "Deportation, The Immigration Power, and Absorption into the Australian Community" (1986) 16 Fed. L. Rev. 288 at 288-89 [footnotes omitted].

¹²⁹ See for example *Carey v. Ontario*, [1986] 2 S.C.R. 637 [hereinafter *Carey*] where the Supreme Court of Canada surveyed the law in England, Australia, Scotland, New Zealand, and the United States. La Forest, *supra* note 2 at 239 comments that in, *Carey*, the "analysis of the foreign materials played an essential, and not merely a supporting, role in the Court's decision."

¹³⁰ (1981), 35 A.L.R. 186 [hereinafter *Kuswardana*]. See *contra*, *Pochi v. Minister for Immigration and Ethnic Affairs* (1982), 43 A.L.R. 261 where the High Court of Australia refused to adopt the "absorption" theory.

¹³¹ *Supra* note 130 at 202.

¹³² *Ex parte Walsh and Johnson*, and in *re Yates* (1925), 37 C.L.R. 36 at 110 (Aust. H.C.).

¹³³ *Ibid.* at 62, Knox C.J.

and who is therefore a member of the Australian community;"¹³⁴ "those who belong to the Australian community;"¹³⁵ and "a full member of the Australian community."¹³⁶

In order to gain recognition as a member of Australian society a number of factors are considered. Generally, a five-year period is set by the Department of Immigration and Ethnic Affairs in Australia as the minimum amount of time during which absorption can occur.¹³⁷ Further, family connections¹³⁸ and economic ties¹³⁹ with the jurisdiction are very important to establishing community membership. Moreover, the presence or absence of criminal activity is not determinative in and of itself. Rather, the seriousness of and/or circumstances surrounding the criminal offences are weighed against the backdrop of family, employment, and community relations.¹⁴⁰

¹³⁴ *Ibid.* at 63.

¹³⁵ *Koon Wing Lau v. Calwell* (1949), 80 C.L.R. 533 at 577, Dixon J.

¹³⁶ *R. v. Director-General of Social Welfare for Victoria; and Ex parte Heffernan* (1975), 133 C.L.R. 369 at 373, Gibbs J.

¹³⁷ Wood, *supra* note 128 at 294.

¹³⁸ See *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1982) 71 F.L.R. 198 where the Australian Federal Court considered the hardship that would be endured by the family (in this case a wife and five children) of the deportee as the most important factor against deportation.

¹³⁹ See Wood, *supra* note 128 at 296, notes 21 and 22.

¹⁴⁰ See *Re Kurtovic and Minister for Immigration, Local Government and Ethnic Affairs* (1989), 86 A.L.R. 99 (Aust. Fed. Ct.) where the alien-deportee had been convicted of manslaughter, was ordered deported, and then had his deportation order revoked in 1985. It was a condition of the revocation that he not commit a further offence. In 1988, a new deportation order was issued even though the alien had not been convicted of any further offence. Einfeld J. considered a number of factors which weighed against the new deportation order. Specifically, Einfeld J. wrote, at 111-12:

The psychiatric and other expert evidence tendered overwhelmingly supports the conclusion that the applicant's crime was one of emotion and passion; that he has learned the significance of its horror; that he is remorseful for what he did; that the rest of his former family are not in danger; that other recidivism is unlikely; and that he wants to make a good and lawful Australian resident or citizen. It seems to me reasonable to assume that some or all of these very important developments were caused or contributed to by the revocation of the deportation order and the maintenance of that revocation after the extraordinary intervention of the Court of Criminal Appeal. Although these matters are not "detrimental" in the usual sense, I think that they are relevant to and should be considered in this context, as well as in the assessment of the extent of unfairness of the deportation order in issue here.

The fact of employment is also an important element to consider in the process of aliens becoming "absorbed" into society. For example, as set out in the *Convention on Migrant Workers and Their Families* *supra* note 3, art. 2, special rights apply to a "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." The *Convention*, art. 22, addresses a comprehensive set of rights, including the right

The absorption theory is useful in characterizing the liberty interests of an individual deportee and balancing them against the interests of the State, under sections 1 and 7 of the *Charter*. Thus, whenever an alien, who has become a full member of Canadian society, is subject to deportation, consideration must be given to the interference with the individual's family and community life. Such consideration should be constitutionally protected, regardless of the absence or presence of statutory appeals under the *Immigration Act*

V. DEPORTATION AND INTERNATIONAL CONVENTION

A. General Principles

By looking to international conventional law, a strong argument is made that, contra *Chiarelli*, personal and mitigating circumstances should always be considered in the deportation context. Instruction can be taken from the decision of the Iran-United States Claims Tribunal in *Rankin v. Iran*,¹⁴¹ where it was held that:

According to the practice of States, the writings of scholars, the decisions of international tribunals, and bilateral treaty provisions ... international law imposes certain restraints on the circumstances and the manner in which a State may expel aliens from its territory. A claimant alleging expulsion has the burden of proving the *wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations*.¹⁴²

This decision is significant insofar as it recognizes that the expulsion of aliens can violate international customary and conventional law. With regard to the latter, restrictions on the right to expel an alien can be express. Article 13 of the ICCPR provides that an alien "lawfully in the territory" can be expelled "only in pursuance of a decision reached in accordance with law." Article 22(9) of the *American Convention* prohibits the "collective expulsion of aliens."¹⁴³ Also, to expel aliens

against arbitrary and collective expulsion. Assuming the Convention is ratified by Canada and eventually comes into force, domiciled aliens may rely on their status as migrant workers, and argue that they, and the members of their families, should not be expelled.

¹⁴¹ (1987), 17 Iran-U.S. C.T.R. 135. The Tribunal was set up to address claims of wrongful expulsion of American nationals arising as a result of the Islamic Revolution.

¹⁴² *Ibid.* at 142 [emphasis added].

¹⁴³ Although Canada is not a Party to the *American Convention*, *supra* note 3, it is a member of the Organization of American States (OAS). This means that individuals can complain of violations of the *American Declaration*, *supra* note 3, by OAS members to the Inter-American

who are identified as a single ethnic or racial group would contravene article 4 of the ICERD, which prohibits State authorities from promoting or inciting “racial discrimination.”

The expulsion of aliens may also undermine treaty provisions which apply to “everyone.” In particular, where domiciled aliens are deported, the impact on family members, especially children, is an important concern. Once an alien has been “absorbed” by the community and established family relations, deportation can seriously interfere with the protection of other family members’ rights. Further, deportation in such circumstances, violates the liberty of the deportee to make a choice of fundamental personal importance—to raise a family—while restricting his or her physical mobility. The severance of close family relations and banishment to a strange, foreign State will also violate the psychological integrity of the deportee. In light of these concerns, it is relevant to consider exactly what are Canada’s international obligations to the Family and the Child.

B. *International Instruments and Canada’s Obligations to Protect the Family*

1. Resolutions

The Preamble of the *Universal Declaration* begins: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all *members of the human family* is the foundation of freedom, justice and peace in the world.”¹⁴⁴ Article 16(3) of the *Universal Declaration* provides that the family is the “natural and *fundamental group unit of society* and is entitled to protection by society and the State.”¹⁴⁵ Article 25(1) provides for the right to “health and well-being of the family” and article 25(2) provides that childhood is entitled to “special care and assistance.” Article VII of the *American Declaration* provides that “all children have the right to special protection, care and aid.”

Principle 1 of the *Declaration of the Rights of the Child* provides that all the rights set forth in the *Declaration* are to be enjoyed “without any exception whatsoever.” Principle 6 of the *Declaration* provides that a

Commission of the OAS, which publishes reports of such complaints. See Kindred *et al.*, *supra* note 8 at 613.

¹⁴⁴ *Supra* note 3 [emphasis added].

¹⁴⁵ *Ibid.* [emphasis added].

child “shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security.” Principle 8 provides that “[t]he child shall in all circumstances be among the first to receive protection and relief.”

2. Conventions

Article 23(1) of the ICCPR repeats exactly article 16(3) of the *Universal Declaration*. Article 24 of the ICCPR provides that every child has the right, without discrimination, to “measures of protection” on the part of family, society, and the State. Article 10(1) of the ICECSR provides that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.” Article 10(3) of the ICECSR provides for “special measures of protection and assistance” for children and young persons “without any discrimination for reasons of parentage or other conditions.”¹⁴⁶ Article 12(2)(a) provides that steps be taken by State parties to provide “for the healthy development of the child.”

The Preamble of the *Convention on the Rights of the Child* recognizes the family as the “fundamental group of society and the natural environment for the growth and well-being of all of its members.” Article 8 protects the child’s right to preserve family relations. Article 9 stipulates that a child shall not be separated from his or her parents except where “such separation is necessary for the best interests of the child.” Article 16 provides that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home.” Article 22 provides that States Parties obtain information necessary for the reunification of refugee children with their families.

C. Regional Instruments and Obligations of Other States to Protect the Family

Article 19 of the *American Convention* essentially repeats what article 24 of the ICCPR states. Article 18 of the *African Charter* states that the “family shall be the natural unit and basis of society. It shall be

¹⁴⁶ Section 33(1) of the *Immigration Act* *supra* note 41, appears to violate this provision because alien children can be deported due to their parents’ status as aliens. Children whose parents are nationals cannot be deported.

protected by the State which shall take care of its physical health and morals.” Article 44(1) of the *Convention on Migrant Workers and Their Families* repeats the text of Article 23(1) of the ICCPR “recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Finally, article 8(1) of the ECHR, which has generated important case law in the area of deportation, stipulates: “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”

D. *National Application of Instruments*

This survey of international instruments reveals how fundamental the protection of the family is to human rights law. Presuming that Canada’s legislators do not intend to violate Canada’s obligations at international law, it is important that domestic law also protect children and families. Indeed, section 7 of the *Charter* requires that the principles of fundamental justice be respected. Since these principles are rooted in the dignity and worth of all human beings and the values and principles essential to free and democratic societies, the integrity of the family unit is arguably one such principle.

To support this proposition the ICCPR, ICECSR, and *Convention on the Rights of the Child* even if they remain unimplemented in a technical sense, still represent Canada’s obligations at international law. *Charter* protection is meant to be at least as great as these international protections. Further the use of the ECHR, *American Convention*, *African Charter*, and *Convention on Migrant Workers and Their Families* which Canada is not a Party can still be used to interpret domestic law in this area.

In particular, the ECHR and the related jurisprudence of the European Court of Human Rights, can be used to interpret Canada’s obligations to the Family and Child. Although the ECHR is usually considered non-binding, conventional international law for Canadian purposes, the argument has been made that the ECHR has attained the status of customary international law.¹⁴⁷ This is supported by the fact that the ECHR has been “incorporated into the great majority of newly independent Commonwealth countries.”¹⁴⁸ Anthony Lester, who refers

¹⁴⁷ Duffy, *supra* note 33 at 599-605.

¹⁴⁸ Lillich, *supra* note 27 at 59.

to the European Court of Human Rights¹⁴⁹ as “the strongest international court of human rights,”¹⁵⁰ observes:

There are some twenty-six Commonwealth countries whose independence constitutions guarantee fundamental rights and freedoms modelled on the European Convention ... In this way, the Parliament of Westminster has exported the rights and freedoms of the Convention to the common-law countries of the new Commonwealth on a scale without parallel in the rest of the world.¹⁵¹

To consider the ECHR and related jurisprudence as international custom would mean, under an adoption theory, that norms established by the ECHR are automatically part of Canadian law. Nonetheless, the position adopted by the courts is that the ECHR is a useful, yet non-binding tool of interpretation.

1. *European Convention on Human Rights* and protection of the family

Article 8 of the ECHR and article 23 of the ICCPR contain similar language which recognizes the importance of the family in the fabric of society. However, article 8(2) of the ECHR goes on to state:

There shall be no interference by a public authority with the exercise of this right [to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the absence of Canadian decisions on article 23 of the ICCPR, the decisions of the European Court on article 8 of the ECHR are persuasive. In a landmark decision, *Berrehab v. The Netherlands*,¹⁵² the European Court found a breach of article 8 flowing from the deportation of a domiciled alien. Mr. Berrehab, a Moroccan citizen, resided in Amsterdam and had married a Dutch national. They had one child but eventually divorced. After the divorce Mr. Berrehab was denied a renewal of his residence permit and ordered deported. Mr. Berrehab and his ex-wife complained to the European Commission of Human Rights of a violation of article 8. In finding in favour of Mr. Berrehab, the European Court considered that “the legitimate aim pursued [by the State] has to be weighed against the seriousness of the interference with

¹⁴⁹ [hereinafter *European Court*].

¹⁵⁰ Lester, *supra* note 106 at 560.

¹⁵¹ *Ibid.* at 541.

¹⁵² (1988), 11 E.H.R.R. 321.

the applicants' right to respect for their family life."¹⁵³ The court held that the Dutch government's aim in preserving the country's economic well-being was outweighed by the extent of interference with Mr. Berrehab's family. In addition to the "close ties" between the child and Mr. Berrehab, the court noted that the alien had a home and held employment in the State. Finally the court held that "a proper balance was not achieved between the interests involved and there was therefore a disproportion between the means employed and the legitimate aim pursued."¹⁵⁴

In *Moustaquim v. Belgium*,¹⁵⁵ the alien, a Moroccan national, had been issued a residence permit in Belgium where his parents and seven siblings also resided. During the nineteen years Mr. Moustaquim spent in Belgium, he developed a lengthy criminal record both as a minor and an adult. He was eventually sentenced to two years in prison for some twenty-two charges including theft, assault, and aggravated theft. A deportation order was issued after part of the prison sentences had been served. Mr. Moustaquim sought to have the deportation order revoked. The court, in considering the State's submissions on the alleged danger Mr. Moustaquim posed to the Belgian community, held: "The Court did not in any way underestimate the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens."¹⁵⁶ Having said that, the court indicated that the government's aim had to be "necessary in a democratic society." This requirement was not met because the interference with the alien's family life outweighed the State's interests. In particular the court pointed out that

at the time the deportation order was made, all the applicant's close relatives [his parents and his brothers and sisters] had been living in ... [Liège for a long while] ... Mr. Moustaquim himself ... [was less than two years old] when he arrived in Belgium. He had spent about twenty years there with his family or not far away from them ... and had received all his schooling in French. His family life had thus been seriously disrupted by the deportation measure.¹⁵⁷

¹⁵³ *Ibid.* at 331, para. 29.

¹⁵⁴ *Ibid.* Note the striking similarity in the language used by the court under art. 8(2) and the language employed by Canadian courts under s. 1 of the *Charter* (see *supra* note 98).

¹⁵⁵ (1991), Eur. Ct. H.R. Ser. A, No. 193 [hereinafter *Moustaquim*].

¹⁵⁶ *Ibid.* at 14.

¹⁵⁷ *Ibid.*

In *Beldjoudi v. France*,¹⁵⁸ an Algerian citizen was ordered deported after being convicted of numerous serious offences, including assault, battery, theft, aggravated theft, and criminal damage. His sentences amounted to over ten years of imprisonment. He had married a French national, did not have any children, and although born and raised in France, he had lost his French nationality.¹⁵⁹ His parents and four siblings also lived in France. Mr. Beldjoudi and his spouse claimed that the deportation violated their right to family life and the court found in their favour. In holding that the deportation was not proportionate to the government's aim in protecting the *ordre public* the court considered: a) the fact that the alien had spent all his life in France (over forty years); b) the admittedly serious nature of the alien's criminal activity; c) the marriage to a French national; d) the lack of knowledge of the language spoken in Algeria; and e) the lack of any ties, outside of nationality, with Algeria.¹⁶⁰

In a separate opinion, De Meyer J. wrote that, in spite of Mr. Beldjoudi's long record of relatively serious offences, "he can be sufficiently punished for these by the criminal law." In a concurring opinion, Martens J. based his reasons on the interference with Mr. Beldjoudi's private life under article 8(1). His judgment is based on a theory of "integration with the community," which is very similar to the absorption theory found in Australian law. Martens J. wrote:

In a Europe where a second generation of immigrants is already raising children ... it is high time to ask ourselves whether this ban [on the expulsion of nationals] should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and conversely, become completely segregated from their country of origin) ... I believe that an increasing number of member States of the Council of Europe accept the principle that such "integrated aliens" should be no more liable to expulsion than nationals.¹⁶¹

Of course, as the Australian experience has shown in Part IV, above, evidence of family ties will go a long way towards establishing that a person has become integrated with the community in question. The analysis in *Berrehab Moustaquim*, and *Beldjoudi* is essentially based on a two-step process: first, a violation of the right to family life is found and second, the breach is not justified because the interference with the

¹⁵⁸ (1992), Eur. Ct. H.R. Ser. A, No. 234-A [hereinafter *Beldjoudi*].

¹⁵⁹ *Ibid.* at 9, para. 9. Mr. Beldjoudi and his Algerian born parents were deemed to have lost French nationality when, after Algeria became independent on 3 July 1962, they had not made a declaration recognizing French nationality before 27 March 1967.

¹⁶⁰ *Ibid.* at 27-28.

¹⁶¹ *Ibid.* at 37 [footnotes omitted].

individual's rights outweighs, or is disproportionate to, the State's interests in protecting the *ordre public*¹⁶² Under section 7 of the *Charter* a similar two step process is involved: first, a deportee must establish a violation of liberty or security of the person; and second, the person must show that the principles of fundamental justice, informed by article 23 of the ICCPR and related international obligations, do not favour the State's interests. If the analysis then proceeds to section 1, the same balancing of State and individual interests take place as under article 8(2) of the ECHR. And as the European experience suggests, the State is hard pressed to justify a serious interference with an alien's family and private life.

2. Relationship between article 23 of the ICCPR and article 8 of the ECHR

The Australian Human Rights Commission has had occasion to comment on the interpretation of article 23 of the ICCPR, to which Australia is also a State Party. In a report entitled "Deportation and the Family"¹⁶³ the Commission made a recommendation against a deportation order issued by the Australian government. The deportee, Mr. Booker, was convicted of various criminal offences for which his prison sentences totalled three years. He was the biological father of one child who lived with his former common law wife. He lived with another woman, Mrs. Roth, who had children from another marriage. It was on the basis of this latter relationship that Mr. Booker, Mrs. Roth, and the children claimed that the deportation order violated article 23 of the ICCPR. In finding a violation of the ICCPR the Commission wrote:

If anything, *the scope of Article 23 of the ICCPR is greater than that of Article 8 of the European Convention*, and there can be no basis for holding that a narrower interpretation of the concept of the family than is the case in Europe. Accordingly, ... Mr. Booker and Mrs. Roth and her children are a family entitled to the protection of Article 23 of the ICCPR.¹⁶⁴

¹⁶² In *Lamguindaz v. U.K.* (1993), 17 E.H.R.R. 213 the court also found a breach of art. 8 of the ECHR. The case involved the deportation of a Moroccan citizen with a long criminal record. Although a friendly settlement was reached between the parties, the court did find a violation of art. 8. In particular, the court wrote of the deportee, at 217: "Although he is *legally an alien*, his family and social ties are therefore in the United Kingdom and his nationality status does not reflect his *actual position in human terms*" [emphasis added].

¹⁶³ Australian Human Rights Commission, "Deportation and the Family: A report on the complaints of Mrs. M. Roth and Mr. C.J. Booker" (Report No. 8) (Canberra: C.J. Thompson, September 1984).

¹⁶⁴ *Ibid.* at 7 [emphasis added].

This broad interpretation of the scope of Article 23 is also consistent with the views of the Human Rights Committee established under the ICCPR.¹⁶⁵ In its “General Comment 19(39)” (article 23),¹⁶⁶ the Human Rights Committee wrote:

Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. ... The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23.¹⁶⁷

In addition to article 23 of the ICCPR, the Australian Human Rights Commission considered Principles 1 and 6 of the *Declaration of the Rights of the Child*. The Commission found that Mr. Booker's deportation order violated both of these Principles:

The evidence ... indicates that Mrs. Roth's children now see Mr. Booker in the role of father. If he is deported they will be discriminated against by losing that support and guidance which a father can offer. ... Mr. Booker is now in the position of a parent to these children and is anxious for them to grow up in his care and under his responsibility. ... If he is deported, their rights to his care and guidance will be destroyed.¹⁶⁸

Clearly, the Commission's principal concern was for the international rights of the family and child in a situation where a domiciled alien was facing deportation.

¹⁶⁵ Article 28 of the ICCPR establishes a Human Rights Committee composed of nationals of the States Parties. Under art. 40(1), States Parties are required to submit reports to the Committee on the measures they have adopted to recognize the rights in the ICCPR. Article 40(4) provides that the Human Rights Committee shall study reports submitted by the States Parties and transmit “such general comments as it may consider appropriate.” Since its inception, the Committee has adopted a number of “General Comments” on the protection of families, children, and aliens under the ICCPR: see *supra* note 100 and *infra* note 168.

¹⁶⁶ Adopted at the Human Rights Committee's 102d meeting on 24 July 1990.

¹⁶⁷ *Ibid.*, paras. 2-3. As indicated above, *supra* note 140, the *Convention on Migrant Workers and Their Families* reiterates the principle contained in art. 23 of the ICCPR.

¹⁶⁸ *Ibid.* at 11-12, paras. 31-32. See also “General Comment 17(35)” (article 24), adopted by the Human Rights Committee under the ICCPR, at its 891st meeting on 5 April 1989. The following observations were made on the protection of alien children, at para. 5:

The Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. ... Reports by State parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.

By using the jurisprudence of the European Court in conjunction with the interpretations of the Australian Human Rights Commission,¹⁶⁹ and the comments of the Human Rights Committee under the ICCPR, the case for constitutional protection of domiciled aliens ordered deported from Canada is persuasive.

3. Observations of the Committee on the Rights of the Child: Canada

The case for constitutional protection of domiciled aliens is further supported by the observations of the Committee which oversees the *Convention on the Rights of the Child*. On 9 June 1995, the Committee on the Rights of the Child adopted a number of critical observations regarding Canada's deportation practices and their impact on the *Convention* rights of children.¹⁷⁰ One of the Committee's principal subjects of concern was that the best interests of the Child were not sufficiently protected in the immigration and deportation context. Specifically, the Committee made the following observations:

The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. Nevertheless, the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugees or immigrant children. It is particularly worried by the resort of immigration officials to measures of deprivation of liberty of children for security or other related purposes and by the insufficient measures aimed at family reunification with a view to ensuring that it is dealt with in a positive, humane and expeditious manner. *The Committee specifically regrets the delays in dealing with reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada as in cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order.*

As well, the Committee made a number of suggestions and recommendations on the protection of children in the deportation

¹⁶⁹ For another report of the Australian Human Rights Commission finding a breach of art. 23 of the ICCPR and the *Declaration on the Rights of the Child* supra note 3, (where domiciled aliens are deported) see: The Human Rights of Australian-Born Children: A report on the complaints of Mr. and Mrs. Yilmaz (Report No.15) (Canberra: Australian Government Publishing Service, August 1985).

¹⁷⁰ Under art. 44 of the *Convention on the Rights of the Child* supra note 3, States Parties are required to submit reports on the measures they have adopted in recognition of the rights set out in the *Convention*. The Committee on the Rights of the Child, established under art. 43 of the *Convention*, studies the States' reports and makes official commentaries available. The report entitled "Concluding observations of the Committee on the Rights of the Child: Canada" was adopted by the Committee at its 233d meeting, held 9 June 1995.

¹⁷¹ *Ibid.*, para 13 (i.e., reference to Committee on the Rights of the Child report) [emphasis added].

context. In particular, the Committee recommended that “[s]olutions be sought to avoid expulsions causing the separation of families, in the spirit of article 9 of the Convention.” In addition, the Committee recommended that Canada

pay particular attention to the implementation of article 22 of the Convention as well as of the general principles of the Convention, in particular the best interests of the child and respect for his or her views, in all matters relating to the protection of refugees and immigrant children, including in deportation proceedings.¹⁷²

The recommendations made by the Committee on the Rights of the Child suggest that, in the deportation context, Canada is not meeting its international obligations to protect families and children. The Committee's comments therefore support the basic position advanced in this article. That is, in order to meet its obligations at international law, in respect of the family and child, Canada should better protect domiciled aliens who are facing deportation. As already indicated, the protection afforded by the Canadian State should be constitutional in nature and based on the recognition of substantive *Charter* rights. Moreover, to assist in the interpretation of these rights, the jurisprudence of other jurisdictions, namely Europe and Australia, is instructive.

VI. CONCLUSION

At the beginning of this analysis, the “international” character of the deportation power was asserted. At the end of the analysis, which has canvassed the interests on the part of both the deportee and the expelling State, it is important to further recognize the interests of the State of origin of the expelled alien. As *Oppenheim* indicates, the State receiving the expelled alien, “by virtue of its right of protection over nationals abroad”¹⁷³ can make diplomatic representations to the deporting State in order to obtain reasons for the deportation.¹⁷⁴ The accountability of the deporting State to other States for unjust or arbitrary expulsions further supports this article's scrutiny of questionable deportation orders in respect of domiciled aliens.

Parts IV and V emphasize the interests of the domiciled alien with regard to the State in which the alien has resided for some time. The

¹⁷² *Ibid.*, para. 24.

¹⁷³ *Oppenheim*, *supra* note 4 at 943.

¹⁷⁴ *Ibid.* at 943-44.

terms “participation,” “membership,” and “integration” are used to characterize the substantial connections the alien has developed with the expelling State. Family connections, in particular, give rise to special protections under the principles of fundamental justice, enshrined in the *Charter*, and under international human rights treaties, to which Canada is a Party. Nonetheless, the characterization of exactly what interests are at stake is a complex task, which one European commentator summarizes as follows:

Ayant conservé la nationalité de leur État d’origine et menacés d’une mesure d’éloignement, ces derniers [les immigrés dits de la «seconde génération»] sont susceptibles d’invoquer leur droit à mener une vie familiale normale pour y échapper. Il est permis de penser qu’en réalité ils mettent moins en avant leur vie en famille que leur situation personnelle, résultant d’une immersion complète dans la société de l’État d’accueil et d’une rupture quasi complète, mis à part le lien de nationalité, avec un État d’origine dont ils ignorent tout, de la langue à la culture ou aux moeurs. A la charnière de la vie familiale ... et de la vie privée ... il y a là une problématique lourde de conflits potentiels et qui n’est malheureusement pas près de disparaître.¹⁷⁵

Although these comments are made in the context of the ECHR, they equally apply to the Canadian context and help conceptualize the deportation of domiciled aliens, or “étrangers intégrés,”¹⁷⁶ as banishment, in every sense of the word.

In order to adequately protect the dignity and inherent worth of all aliens, and in particular of those facing deportation, it is imperative that new arguments be advanced before the courts. These arguments are based on a growing body of international law which recognizes the need to protect families and children in the face of deportation proceedings. Indeed, unjustified interference with a domiciled alien’s private and family life should give rise to a cause of action against the expelling State. In Canada, the plaintiff alien can invoke the *Charter*, in conjunction with customary and conventional international law, to argue that deportation is unconstitutional. Moreover, the mere novelty of the deportee’s action, as against the expelling State, should not act as a legal barrier.¹⁷⁷ Rather, the development of the law, on both domestic and

¹⁷⁵ Labayle, *supra* note 104 at 522.

¹⁷⁶ Beldjoudi, *supra* note 158 at 36, Marten J.

¹⁷⁷ See, for example, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, where Wilson J. wrote:

As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat.” Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

This passage was cited with approval by Cory J. in *Canadian Council of Churches v. Canada*

international levels, is encouraged when national courts, and legislators, are persuaded to consider progressive norms of customary and conventional international law. In short, “the construction of a comprehensive international human rights regime protecting aliens ... is an art as well as a science, one in which the skills of imaginative advocates are as important as the work of enlightened draftsmen.”¹⁷⁸

(Employment and Immigration)[1992] 1 S.C.R. 236 at 257.

¹⁷⁸ R.B. Lillich, *The human rights of aliens in contemporary international law* (Oxford: Manchester University Press, 1984) at 98.