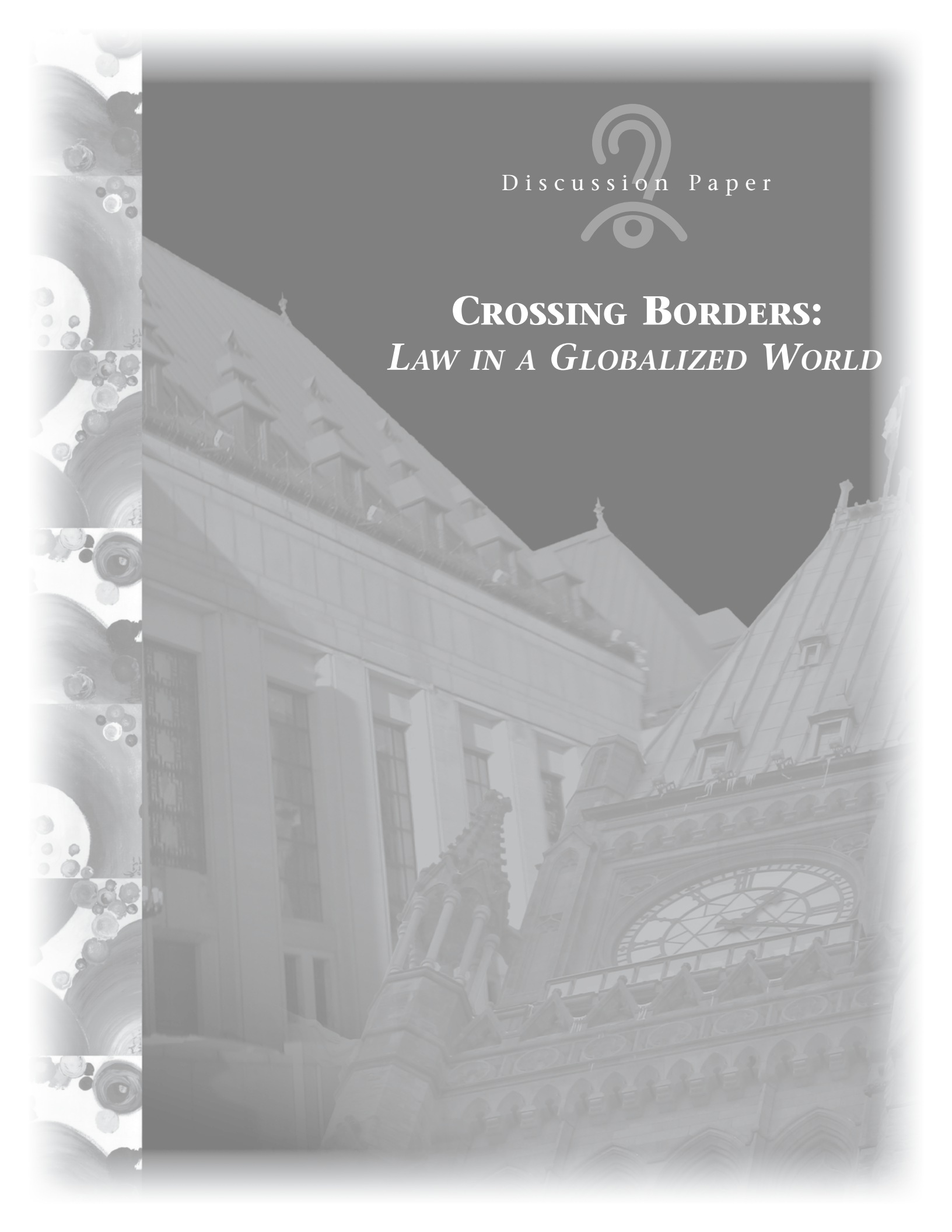
Discussion Paper

Crossing Borders:
Law in a Globalized World

Law Commission of Canada
Commission du droit du Canada

Canada



Discussion Paper

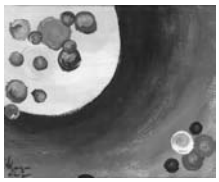
CROSSING BORDERS:
LAW IN A GLOBALIZED WORLD

Cover design:

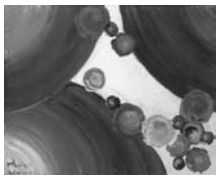
The art used for the strip on the left side of the cover was produced by Morgan Harper, a student from Ancaster High School, Ontario for the 2005 Roderick A. Macdonald Contest on Canadians as Citizens of the World. Her description follows:

After doing some research on globalization I decided to do a series of three paintings on what I thought were the key elements of globalization. For all my paintings I chose a rather simplistic colour scheme because what I got out of my research was that in order for globalization to work it needs to be something that is internationally recognized and understood. That reasoning also ties into why I only chose circles because a circle, to me, represents something that is simple, continuous and ever evolving. Globalization is a process that is very beneficial to the international community and it is essentially the key to future world economic development. Also, globalization is something that is ever evolving and we will continue to develop new communication and technological skills into the future; and, that is why the circle stood out the most to me.

For my first painting in the series, the symbol that I tried to focus on the most was the circle and how that could be transformed. I wanted it to represent a light bulb, a somewhat abstract light bulb, because a light bulb can represent knowledge, ideas and imagination. Globalization is the result of human innovation and technological progress and in order to make globalization an international tool we need to focus on the spreading of knowledge and technological advances. Many developing countries are falling behind those that are developed because they do not have the resources and knowledge and training to keep up with the developed countries. There needs to be a globally recognized set of information, communication tools and training processes in order to close this gap.



The theme of my second painting ties into that of my first. Again I continued with circles, but this time I chose only to do a half circle to represent a net or barrier. It is clear that the income gap between rich and poor countries has been widening for many decades. The international community needs to work on narrowing those gaps by providing international support systems and social safety nets. Those developing countries may feel discouraged and fearful of globalization and the international community needs to provide support of those countries and the proper knowledge, skills, technology and training necessary to lift that burden.



The last painting in my series, following with the circle theme, is of many circles, or countries or communities, if you will, to represent the need to come together and embrace globalization. Institutions and organizations around the world need to come together to develop an international standard for technology, communication and education. There is no benefit to larger, more developed countries setting the standards when those standards are useless to those countries that are struggling to keep up. That is the way to ensure all people in all countries have access to the benefits of globalization.

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Canada

Preface

Along with increased movement of goods, services, people and technologies across borders, recent decades spawned a steadily dawning recognition that certain issues cannot be dealt with by single states. Since 1945, with the end of World War II, many countries have favoured treaty negotiation as the way to deal with cross-border and global issues, and to establish accepted standards of conduct in many areas like human rights, the environment and trade. These developments have encouraged the emergence of new and complex systems of multi-actor, multi-level governance, in which the state and state law, while still occupying prominent roles, are no longer the sole controllers of events.

What does this mean for Canadians? While it is true that different people interpret globalization in different ways, the more important point is that Canadian laws and their application are being put to the test under new and dynamic conditions. The facets of globalization may differ, but it affects law-making and enforcement in one over-reaching way: a straining of the democratic principles of transparency, participation and accountability occurs, as states strive to deal with expanding and layered issues that reach far beyond territorial boundaries. In short, our approach to managing laws and policies made in Canada may not have evolved sufficiently to recognize the ever-growing interrelatedness between the domestic and the international.

In this discussion paper, the Law Commission of Canada invites Canadians to participate in a nationwide reflection on law and law-making in the context of globalization.

How does one tackle an issue as potentially broad as globalization? It took a great deal of thinking and rethinking to properly capture the issues involved in such a complex topic on which many others are doing important work. The project has evolved greatly since the beginning for the most part due to the number of people who participated at various stages and took the time to provide thoughtful comments.

The Law Commission of Canada is greatly indebted to a few key individuals who had a direct hand in this process. Stephen Clarkson from the University of Toronto and Stepan Wood from Osgoode Hall Law School, who were Law Commission Virtual Scholars in Residence, did a great deal of research and consultation in preparing a key background paper for this project. We are very grateful for their dedication to this topic. Craig Forcese from the University of Ottawa understood the evolution that had occurred in the project and prepared the final draft. We are also indebted to Lisa Keller from Meta4 Creative Communications who provided us with a more

accessible plain language version that will serve as the basis for a booklet. The winners of one of our annual Relationships in Transition competitions launched this project with their excellent research papers on *Governing for the World*. We also want to thank the numerous people who generously provided their comments throughout and those who attended our study panels, roundtables and workshops.

The Law Commission also wants to thank the high school students who participated in the 2005 Roderick A. Macdonald Contest on the topic of *Canadians as Citizens of the World* and the jury members who helped choose the winners. Throughout this discussion paper, you will find excerpts from the students' submissions. We especially thank Morgan Harper from Ancaster High School, whose artistic rendition of the project graces the front cover.

As always, the Commissioners are grateful for the work performed by all members of the staff at the Law Commission of Canada. We owe a special thanks to Lorraine Pelot, Senior Research Officer at the Law Commission, who coordinated the project and the preparation of this discussion paper.

The Law Commission's mandate is to engage Canadians in the renewal of the law. We hope that you will take this opportunity to participate in the democratic process and provide us with your comments:

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Executive Summary

Canada is among the most trade-dependent nations in the world. It is an active and enthusiastic participant in international organizations of all kinds and is party to hundreds of international treaties. Canada is also psychologically and culturally a global society. Canadians care about this country's place in the world. Further, a sizable minority of Canadians was born outside Canada, and almost all Canadians trace their lineage to another country of origin.

Yet, despite these facts, the implications of globalization for law reform in Canada are not often closely analyzed. Canadian laws and the Canadian legal system do not operate in isolation. Globalization presents both new challenges and new opportunities for Canadian law.

In this project, the Law Commission of Canada is not addressing Canada's foreign policy positions on substantive issues such as human rights, security or trade. Nor is it resolving debates lying at the core of the globalization issue, including the impacts of globalization on development, social equity, and the environment. The mandate of the Commission is to review the law of Canada and its effects, and to propose improvements, modernization and reform ensuring a more just legal system. To this end, the Commission has embarked on a study of globalization as it affects the effectiveness and legitimacy of the Canadian legal system.

This discussion paper divides the implications of globalization for law reform into two broad classes, as follows:

- *Law-Making, Legitimacy and Accountability*. Legal globalization affects the relationship between Canada's three branches of government, most notably Parliament and the executive. The international law-making process is driven by the executive; it lacks formal mechanisms for input from interested parties, including parliamentarians and members of the public. Federal executive branch dominance in this area also has implications for Canadian federalism; a system in which domestic law-making is divided between federal and sub-federal levels of government. This section discusses the following questions: Who, in Canada, is involved in the creation of international law? How is this international law received into the fabric of Canadian law? What implications do these issues have for questions of legitimacy and democratic accountability in Canada?

- *Sovereignty, Jurisdiction and Uneven Access to Just Outcomes*. Legal globalization proceeds at different rates in different areas. In some areas, there is a robust system of international law, readily observed by states. In other areas, international law and international enforcement are lacking, putting pressure on domestic legal systems to offer remedies for wrongs committed internationally. This section discusses the following questions: What are the challenges raised by a global system in which law has evolved faster in some areas than others? How has Canadian domestic law responded? Are there new tensions between sovereignty and justice?

Introduction

Canada is among the most trade-dependent nations in the world. It is an active and enthusiastic participant in international organizations of all kinds, and is party to hundreds of international treaties. Many federal (and increasingly sub-national) government departments are involved in international relations, maintaining a constant chatter and exchange of information, ideas and policies across international borders.

Canada is also psychologically and culturally a global society. Canadians care about this country's place in the world, and are readily attracted to the ideal of the gentle, mild-mannered middle power punching above its weight class. Moreover, the world has a place in Canada: a sizable minority of Canadians was born outside Canada, and almost all Canadians trace their lineage to another country of origin.

These observations are also made by the Canadian government to explain the importance of foreign policy and international relations to Canadians. But the implications for law reform in Canada often escape fulsome discussion. Certainly, the economic dimensions of globalization, such as free trade agreements, generate intense debate, and polar positions are taken on the impacts of trade on economic prosperity and equality. But globalization is rarely considered a phenomenon that affects how laws are made and applied in Canada.

In this discussion paper, the Law Commission takes up this issue, and asks Canadians to participate in a conversation on law in our globalized nation. We begin by discussing what is meant by "globalization", and continue by setting out the manner in which we intend to approach the issue.

Canada is quickly becoming the embodiment of globalization, and immigration is a positive global reach into our future.

Christopher Brideau, Jenna Gonzalez and Kaitlin Perri, Moncton High School, Moncton, NB

PART ONE: GLOBALIZATION AND ITS CHALLENGES

I. DEFINING GLOBALIZATION

"Globalization" is a new expression, originating in the 1960s but bursting into ordinary parlance only in the 1990s. Since 1990, the term has appeared almost 19,000 times in Canadian newspapers. And yet, despite its prevalence, "globalization" is a word without a single, precise meaning.

A. The Imprecise Meaning of Globalization

Literally defined, globalization is the "act of becoming global". As such, it suggests a process by which the "local" and "diverse" become the "transnational" and "harmonized".

Government policy-making now almost always involves an alphabet soup of international institutions and agreements. Canada is party to hundreds of treaties, many of which oblige this country to adopt or modify its laws. It is also a member of key multilateral "clubs" – the United Nations, the G8, the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), La Francophonie, the Commonwealth, the Organization of American States, and many others.

Globalization is, however, more than a technocratic process of policy and law harmonization. In practice, it is closely associated with economic liberalization: the elimination of inter-state trade barriers and the expansion of international markets. Québec's *Le grand dictionnaire terminologique*, for instance, defines globalization as "a process of market integration, resulting from free trade, the expansion of competition and the consequences of information technology and global communication."[1]

Colloquially, globalization also includes social and cultural transformation (see textbox on opposite page). In fact, globalization is used to describe the ills of an international system that is, ironically, imperfectly "globalized". The internationalization of law and governance does not progress at the same pace in every area. Deep economic integration produced by free trade agreements does not guarantee the harmonization of enforceable standards in other areas. In a commonplace complaint reflecting this point, critics single out multinational corporations as, on the one hand, the proponents

of globalized, transnational markets, and, on the other, as the willing beneficiaries of incomplete and poorly-enforced systems of transnational human rights, labour and environmental regulation.

The Many Faces of Globalization

The term "globalization" may be used to describe a vast array of phenomena affecting all domains of human affairs, including:

- ***Psychic globalization:*** a growing collective consciousness of humanity, the planet earth and its ecosystems as a single community with a shared fate;
- ***Political globalization:*** the rise of transnational political regimes in which governments, commercial interests, nongovernmental organizations and other parties establish new norms for global trade, treatment of the environment and human rights;
- ***Economic globalization:*** the global spread of free trade rules and ideology, a spectacular increase in transnational investment and a massive expansion of world trade in goods and services;
- ***Societal globalization:*** massive transnational movements of people and networks of individuals and a huge proliferation of transnational personal interaction in cyberspace;
- ***Technological globalization:*** the instantaneous, worldwide connectivity now provided by information technology, particularly in the industrialized world;
- ***Legal globalization:*** harmonization of national laws, proliferation of international law, the increasing use by commercial actors of international arbitration and of foreign and international law in domestic courts and the global transmission of certain legal norms;
- ***Globalization of health and disease:*** heightened societal vulnerability to rapidly-spreading epidemics like HIV/AIDS, SARS or influenza that cause devastation that respects no borders;
- ***Cultural globalization:*** the growing global domination of American (and to a lesser extent European) entertainment industries and cultural products;
- ***Ecological globalization:*** the emergence and rapid intensification of global environmental degradation, from ozone depletion to climate change to biodiversity loss;
- ***Criminal globalization:*** the emergence of global networks of sex trades, drug trafficking and terrorism, as well as the expansion of international white-collar corporate crime and the rapid spread of Internet crime;
- ***Military globalization:*** the rise of humanitarian intervention, a burgeoning global arms trade, and a "war on terror" fought in a global theatre.

S. Clarkson and S. Wood, *Governing Beyond Borders: Law for Canadians in an Era of Globalization* (Background Paper, Law Commission of Canada, 2005). [unpublished]

B. Globalization as Politics

Globalization, then, is not just about harmonizing legal standards, economic practices and cultural understandings across borders. It is also a power struggle over which standards, practices and understandings should be universal. It is, in other words, a very political phenomenon in which proponents of market liberalization are pitted against their antagonists – a shifting alliance of activists in areas such as labour, human rights, the environment, consumer rights and nationalism and organizations collectively labelled "anti-globalization".

In fact, the positions of both the "globalization" proponents and the "anti-globalization" activists betray the insufficiency of the globalization label. Many of those described as anti-globalist contest the virtues of liberalized markets for goods, services and capital. This position puts them at odds with the view that such liberalization necessarily fuels prosperity and progress on many different fronts. At the same time, many "anti-globalization" activists call instead (or in addition) for rigorous enforcement of global human rights, environmental, labour, consumer or other similar standards, a position consistent with a broad definition of legal globalization.

Meanwhile, governments in developed countries and many private sector enterprises loudly espouse the virtues of market globalization, but retreat from this position in sensitive areas such as agriculture. Representatives of developing nations demand market access for their agricultural products in the developed world as a *quid pro quo* for any further liberalization of markets for other goods and services. All governments are wary in varying degrees of other transnational commitments in human rights, environmental, labour and consumer areas, sometimes in good faith and sometimes not.

In fact, debates over globalization are less about whether there should be a "global village" and more about what rules should govern it. This has at least two important implications for domestic law-making and law reform.

[...] [G]lobal citizens are people who are informed of issues both domestic and international, which affect people around the world. They are people who believe in social justice, diversity and have respect for others' beliefs and values. They are also people who are politically active, for they try to take action when it is needed, look for solutions for issues and try to participate in any way they possibly can...a perfect example of people showing their commitment to being global citizens would be the 1999 Seattle protest... Issues like fair trade and who should be making the rules when it comes to trade, either unelected corporate officials or elected officials who represent the people... A great example of people [having their say] in matters that would affect them would be through protest, like in the Seattle protest, or through other means like organizing walk outs, sit-ins, petitions addressed to the local government... or most importantly through elections...

Eza Hamid, Grade 12, David and Mary Thomson Collegiate Institute, Scarborough, ON

II. LEGITIMACY AND ACCOUNTABILITY

First, to the extent that globalization is truly a contest over the nature of a global society and not over its existence, the debate raises questions of "legitimacy". How does one assess the legitimacy of a particular legal standard, economic practice or cultural understanding when, at one and the same time, it is both nominated for global prominence and condemned as wrong-headed?

A. Defining Legitimacy

Legitimacy attaches to a given outcome when, by reason of law or custom, the result is viewed as valid, or at least justifiable. Yet law and custom vary from place to place and time to time, creating different views on legitimacy. This is a peril cured at least in part by a focus on procedure. So long as common views on the legitimacy of a procedure exist, outcomes from this procedure are defensible. Within a democratic society, procedures themselves are accorded legitimacy when they meet democratic expectations; that is, when the electorate as a whole has at least an indirect role in governance.

In Canada, we often describe democratic governance as based on three branches of government: the legislature, the executive and the judiciary. The long legacy of constitutional development in both this country and in the United Kingdom ensures that the traditionally most important decisions – such things as law and taxation – are publicly debated by the people's representatives, assembled in legislative bodies and subject to periodic renewal through elections. In a modern, liberal democracy, it is expected that elected representatives of the people will exercise the authority of the state or oversee the activities of those who do. This democratic imprimatur guarantees the decisions of government legitimacy, if not always an enthusiastic reception. Legitimate decision-making, in turn, requires transparency, participation, accountability, effectiveness and coherence. Democratic governance involves rules and processes to ensure adherence to these principles by those with decision-making powers in a democratic society.

Where democratic accountability or the other principles are perceived to be missing, questions of legitimacy are often raised. In modern Canada, post-*Canadian Charter of Rights and Freedoms*, the role of courts in governance has expanded enormously, prompting repeated objections from some politicians and commentators. Repeated complaints have also been raised about a "democratic deficit" in the federal system: a sidelining of Parliament fuelled by the expansion of executive government. At its practical pinnacle, this executive includes a small number of elected politicians, assembled as the Cabinet. Many of these ministers, according to some critics, see Parliament as a minor obstacle to be overcome in governance rather than the central forum of democratic accountability.

According to these critics, the result of both of these phenomena is to reduce the power of an elected House of Commons in favour of an unelected judiciary and an unduly autonomous executive branch.

Organs of Democratic Governance in Canada

The Supreme Court of Canada has observed, "[o]ur democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts" *(New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389). The Crown and the executive are often lumped together, producing three branches: the executive, the legislature and the judiciary. While the separation of powers between these branches is not strict in Canada, each does have its own (idealized) function: "[i]n broad terms, the role of the judiciary is … to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy" (*Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 469–70).

B. Globalization, Legitimacy and Accountability

Globalization affects democratic accountability, potentially exacerbating concerns about the legitimacy of government decision-making.

1. The Democratic Deficit in International Organizations

[Intergovernmental organizations] themselves are considered 'undemocratic' since they operate with little transparency or public and parliamentary scrutiny. They are seen as being governed by an elite group of national officials who are instructed by their respective executives, and by international secretariats whose staffs at times act independently of the top [intergovernmental organization] management.

E. Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95 *AJIL* 489 at 490.

First, the very manner in which intergovernmental organizations function raises concerns about democratic accountability. These institutions often conduct their activities insulated from real scrutiny by a broader public. Likewise, except in rare circumstances – such as the negotiations of the treaties governing the International Criminal Court or the ban on landmines – international treaty-making, for many, is an obscure process. Negotiations are typically held behind closed doors, and treaties are usually concluded by the negotiating states without any real public process.

It is also of note that some international standards or decisions are made by private sector entities. Classic examples include industry or corporate codes of conduct governing production standards or ethical behaviour, and private international commercial arbitration to settle international contractual disputes between private parties. As with their domestic counterparts, questions of legitimacy are raised by these dispute resolutions and standard-setting practices: when does a private international standard or dispute become so important in scope or implication that it should attract broader public participation?

> Governments around the world have accepted the standards put forward by non-governmental organizations such as the International Organization for Standardization (ISO) as the appropriate international standards for goods or services. With these in place, governments do not have to engage in the complex process of creating their own standards, and need not develop the requisite expertise. On the other hand, the widespread, albeit voluntary, adoption of these standards by markets may occur with little input from governments.

2. Executive Branch Dominance in International Law-Making and "Locking-In" Policy Directions Through International Commitments

Second, in international law-making, the executive branches of state governments play a greater role than the other branches. Legislative bodies usually exercise little control over international policy-making.

The impact of this truncated democratic process is most controversial when international obligations entered into by the executive compel states to apply policies that would otherwise be carefully scrutinized by Parliaments, citizens or even successive executives. Outright repudiation of existing international agreements may be expensive to both the economy and to the credibility of countries like Canada. International agreements may, therefore, lock in the decisions of past executives, constraining states to a given policy course, and making it nearly impossible for new governments to alter paths and embark on new policy directions.

For reasons like these, the WTO and free trade agreements in particular are frequently criticized as constraining the "sovereignty" of their members – the freedom to choose a given policy path. Critics complain that the bodies created by these accords are non-transparent and unaccountable organizations that impose a narrow trade perspective on domestic law-making.

3. A Hypothetical Example

Consider the following hypothetical example, involving standard-setting by an international organization. The United Nations Security Council is the most powerful organ of the United Nations. It is empowered to make binding international legal orders in the exercise of its peace and security powers under Chapter VII of the *Charter of the United Nations* – the treaty establishing the UN. The Security Council has 15 members, five of whom are permanent; the balance sit on the Council for two years before being replaced by other states. Canada occasionally holds one of these rotating seats.

In the wake of the terrorist attacks of September 11, 2001, the Security Council exercised its Chapter VII authority, and called on all states to criminalize terrorism in their domestic laws. (This call is not hypothetical: it is known as Resolution 1373). But imagine that in 2007, after another terrorism event, the Security Council issues Resolution 1779 requiring all states to introduce rules in their domestic laws allowing victims to sue terrorists for compensation for terrorist

acts. The Counter-Terrorism Committee of the Security Council then prepares a list of terrorists and of acts it considers terrorist events for which compensation may be sought.

There is no prior consultation with interested parties, nor even any real notice of the resolution's imminent passage. Canada is a member of the Security Council at the time Resolution 1779 is issued, and is represented there by its ambassador to the United Nations. The latter is a diplomat responding to instructions from the Department of Foreign Affairs, and ultimately the federal Cabinet. Civil lawsuits allowing the collection of damages are a provincial responsibility under Canada's Constitution. Because of concerns about the implications of the resolution under Canadian constitutional law, Canada abstains from voting.

Nevertheless, under the *Charter of the United Nations*, the resolution is binding on Canada. The federal government therefore moves quickly, notifying the provinces of the existence of the Security Council resolution and requesting that each province enact law that permits anti-terrorism lawsuits. Several provinces balk. They are reluctant to tie a right to compensation to a list of terrorists and terrorist acts kept by the Security Council, a political, international body that lacks basic guarantees of due process.

Concerned that Canada is now not in compliance with the resolution, the federal government decides to circumvent provincial resistance by issuing a regulation under the *United Nations Act*[2], a brief federal statute empowering the federal executive to implement Security Council resolutions into Canadian law. This regulation creates a civil cause of action for terrorism in Canada's federal court. The provinces' objections to this step are rejected. Meanwhile, there is no need to seek a blessing from the federal Parliament, and it is not consulted. Because the regulation implements a mandatory Security Council resolution, prior public consultation is perfunctory.

This scenario is not far-fetched. In the last several years, the federal government has responded to Security Council resolutions using regulations under the *United Nations Act* without any recourse to Parliament. These actions did not raise the federal/provincial constitutional issues that arose in the example. Nevertheless, domestic enactment of potent law by executive fiat at the behest of an international body clearly raises concerns of democratic legitimacy.

International trade policy is increasingly intersecting with domestic social and economic policy. While individual nations used to have complete sovereignty over policies related to intellectual property, services and telecommunications, for example, international agreements are setting new boundaries for those nations that sign trade agreements. Legislators and voters are frequently frustrated when options for solutions to domestic challenges are met with lawsuits based on these international agreements. This is especially so in cases where they feel they have had little input or choice in developing the international agreement.

P. Torsney, "The World Trade Organization and Parliamentarians" (2003) 26:3 *Canadian Parliamentary Review* 12 at 12.

III. SOVEREIGNTY, JURISDICTION AND UNEVEN ACCESS TO JUST OUTCOMES

The second implication of globalization for domestic law and law-making stems from its unevenness. As Canada's Foreign Affairs Minister observed in 2002, international law is to law what Swiss cheese is to cheese: cheese, but full of holes.[3] If the process of international law-making and globalization is imperfect, proceeding rapidly in some areas and slowly or not at all in others, globalization leaves in its wake eddies and cross-currents creating significant governance issues and legal quandaries. As states globalize in the economic area, dismantling at least some trade barriers and codifying standards that facilitate certain types of international commerce, other areas remain more closely guarded by state sovereignty.

A. The Tension Between Sovereignty and Justice

Sovereignty in its purest form means autonomy from foreign constraints. In modern times, it is an unrealized concept in almost every area. It is true, however, that states are freer on some matters than in others. In some areas, there are no truly global, shared standards. In other areas, even where international law exists, adherence is haphazard. Binding international dispute settlement, for instance, is a key component of the WTO regime. It is less common in international environmental, labour or human rights law.

In underdeveloped areas of international law, globalized, transnational constituencies exist. Webbed together by the communications revolution, these players – civil society groups and their grassroots partners – and at times governments themselves, turn increasingly to domestic legal instruments in an effort to convert social justice and foreign policy objectives into justiciable norms and rights. Put another way, at the same time that globalization prompts shared trans-boundary standards, it induces the intervention of domestic legal systems to plug holes in those areas neglected by globalization.

The result is a confusing patchwork of both transnationalized and domestic law and justice, a legal system that is quasi-globalized. By way of illustration, consider the following hypothetical example.

B. A Hypothetical Example

A mine tailings dam operated by a Canadian company in Manzo fails, prompting an enormous toxic spill that flows downriver into neighbouring Domur. In response, the Manzoan government immediately orders the closure of the mine and freezes the company's Manzoan assets in anticipation of these monies being used to finance the clean-up. It then assigns ownership of the mine to a Manzoan entrepreneur with strong ties to the government. Meanwhile, the Domurian government arrests two of the company's employees who had travelled downriver to monitor the spill, charging them under Domurian law with illicit entry into the country. These employees are mistreated while awaiting trial and are released only after the forceful intervention of the Canadian embassy.

In the aftermath of these events, the Domurian villagers downstream of the spill seek compensation. No international tribunal exists with jurisdiction to hear their complaint. The villagers choose to bring a lawsuit against the Canadian company in Canada for the injuries suffered from the spill. The Canadian court declines jurisdiction, indicating that, as the accident occurred in Manzo and the injury in Domur, the courts of Manzo or Domur are best suited to hear the case. The plaintiffs bring the case in Domurian court. The lawsuit is promptly dismissed. The villagers accuse the Canadian company of bribing government and judicial officials. These concerns are communicated to Canadian authorities by international environmental groups. In response, the Canadian government mounts an investigation of the company, as required by an international treaty on bribery of foreign public officials. Because of the difficulty in proving the bribery allegations, the government ultimately declines to prosecute.

Distressed by this outcome, Canadian civil society groups clamour for a more effective response to the environmental catastrophe from the Canadian government. The government notes that it has no domestic laws allowing it to regulate the affairs of Canadian companies operating overseas. Instead, it refers the groups to the Canadian "Contact Point" for the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Corporations. The OECD Guidelines are a non-binding code of conduct promising ethical and environmentally-sound behaviour by companies. The Canadian Contact Point is a civil servant in International Trade Canada whose role is to facilitate dialogue between companies and complainants. Because the company refuses to cooperate in the mine spill case, nothing comes of the process.

The lack of international and domestic legal obligation on TNCs [transnational corporations] and the lack of international legal obligation on states to regulate the extraterritorial activities of corporate nationals result in a regulatory void or 'governance gap'. The outcome is that corporations that operate outside of their national jurisdictions may commit, aid or abet, or be complicit in violations of international human rights or humanitarian law with impunity.

G. Gagnon, A. Macklin and P. Simons, *Deconstructing Engagement*, Public Law Research Paper No. 04-07 (University of Toronto, January 2003) at 12, online: http://www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf

At about the same time, the two company employees wronged by the Domurian government seek compensation for the injuries received while they were imprisoned. Their lawsuit goes nowhere in Domur itself. In response, they bring suit against Domur in a Canadian court. The Canadian court promptly dismisses the matter, noting that under both international and Canadian law, a foreign sovereign state is strictly immune to such lawsuits in Canadian courts.

At the urging of the employees and their families, the Canadian government considers bringing Domur to the International Court of Justice (ICJ) – the institution empowered to hear disputes between states. However, the Canadian government quickly concludes that Domur has not accepted the "compulsory" jurisdiction of the ICJ to hear any dispute about its conduct. The Canadian government does not pursue the case.

The two employees turn to the United Nations Human Rights Committee, established by the *International Covenant on Civil and Political Rights*. Domur is one of the countries that has acceded to the protocol to this treaty, allowing the Committee to hear complaints about violations from individuals. The Committee finds in favour of the employees, and issues a "view" calling on Domur to compensate the two Canadians. The Domurian government ignores this request.

Meanwhile, the Canadian company brings a complaint under Chapter 11 of the North American Free Trade Agreement (NAFTA), an international treaty of which Canada and Manzo are both members. It alleges that the Manzoan actions in response to the tailings spill violated the minimum standard of treatment owed to it as a Canadian investor in Manzo and also constituted expropriation. The company wins the case, on the strength of the Manzoan government's apparently underhanded transfer of ownership to the entrepreneur. Manzo pays damages to the company.

C. Central Issues

The facts are obviously imaginary, but this scenario illustrates the real jurisdictional complications associated with globalization, and the uneven justice available to those involved in and implicated by, transnational activities. Different actors in this hypothetical scenario are entitled to different remedies in different international and national venues that vary in potency. In both the hypothetical situation and in reality, there are clear instances where rights exist and wrongs are committed, but the quasi-globalized legal system provides no enforceable remedy, whether domestic, foreign or international.

IV. IMPLICATIONS FOR LAW REFORM

The Law Commission of Canada is not charged with assessing the substantive merits of Canadian foreign policy. Nor is it resolving debates that lie at the core of the globalization issue, including those over the impacts on global development, social equity, and the environment. But, the Commission is mandated to review the law of Canada and its effects, and to propose improvements, modernization and reforms that ensure a more just legal system. As this introduction has urged, Canadian laws and the Canadian legal system do not operate in isolation. Globalization presents both new challenges and new opportunities for Canadian laws and law-making.

For this reason, the Commission has embarked on a study of globalization as it affects the effectiveness and legitimacy of the Canadian legal system. The remainder of this discussion paper expands on this introduction by dividing the implications of globalization for law reform into two broad classes. These are:

- *Law-Making, Legitimacy and Accountability.* Legal globalization affects the relationship between Canada's three branches of government, most notably Parliament and the executive. The international law-making process is driven by the executive; it lacks formal mechanisms for input from interested parties, including parliamentarians and members of the public. Federal executive branch dominance in the area also has implications for Canadian federalism; a system in which domestic law-making is divided between federal and sub-federal levels of government. This section discusses the following questions: Who, in Canada, is involved in the creation of international law? How is this international law received into the fabric of Canadian law? What implications do these issues have for questions of legitimacy and democratic accountability in Canada?

- *Sovereignty, Jurisdiction and Uneven Access to Just Outcomes.* Legal globalization proceeds at different rates in different areas. In some areas, there is a robust system of international law, readily observed by states. In other areas, international law and international enforcement are lacking, putting pressure on domestic legal systems to offer remedies for wrongs committed internationally. This section discusses the following questions: What are the challenges raised by a global system in which law has evolved faster in some areas than others? How has Canadian domestic law responded? Are there new tensions between sovereignty and justice?

PART TWO: LAW-MAKING, LEGITIMACY AND ACCOUNTABILITY

I. THE SEPARATE SPECIES OF LAW

In the modern legal system, two different (and at times separate) species of law exist: international and domestic.

A. Domestic Law

Domestic law is the body of principles most people encounter most of the time. In Canada, domestic law exists as legislation enacted by the legislatures or made as regulations by the executives. Outside Québec, domestic law also comes in the form of the common law, a body of principles developed by courts through the application of precedent, and persisting most vigorously in the private law areas of torts, contracts and property. At the pinnacle of domestic law is constitutional law. In Canada, constitutional law comes in both written and unwritten forms. Written constitutional law is essentially entrenched legislation, incapable of amendment without special procedures, and given pre-eminence over conflicting statutory law. Unwritten constitutional law also has this primacy, but is the product of judicial decision-making.

B. International Law

International law also comes in different flavours. The two most significant sources of international law are treaties and "customary international law". Put simply, treaties are law-making contracts between states. When the treaty binds two states, it is known as a "bilateral" treaty. When it binds a larger number of states, it is called a "multilateral" treaty. There is no magic to the term "treaty". Treaties go by a variety of alternate names, including convention, covenant, protocol, agreement, charter, and statute. While there are historical reasons for the use of these terms, the international legal effect of a treaty does not vary according to the word used to describe it.

There are literally thousands of treaties, webbing the world together in a complicated pattern of bilateral and multilateral international legal obligations. Some constitute an exchange of promises between states as to how they will act on the international plane. They affect a state's foreign policy without necessitating changes to domestic law. Others require states to change their internal policies, practices and often laws in order to meet obligations set out in the treaty.

Support for Democratizing International Organizations

[…] [W]e asked Canadians how much role the public should have in decision-making in international organizations. When we presented respondents with three different levels of democratization, a strong majority opted for the middle position… Canadians do not want to leave things to government (or international organizations) alone, about 1/3 would like the public to be actively involved, but about three in five opt for more transparency and publicity. So long as there is accountability and transparency, Canadians neither believe that one needs to introduce processes for deep forms of public participation, nor believe that international organizations should function according to rules of managerial and corporate governance, whereby the public is shut out. Canadian expectations, therefore, are reasonable: most do not expect to be actively involved in decision-making at an international level, but they do expect the kind of transparency that allows them to hold their government accountable.

R. Wolfe and M. Mendelsohn, "Embedded Liberalism in the Global Era: Would Citizens Support a New Grand Compromise?" (2004) 59:2 International Journal 261 at 276.

Customary international law is a very different concept. Treaties are binding on the states that are parties to them, and generally on no others. Customary international law binds all states, excepting only those that have been sufficiently persistent in rejecting it prior to its emergence as a binding norm. The content of a treaty is discerned from its text. Customary international law is much more amorphous. It is formed by general and consistent state practice, undertaken by states with a sense of legal obligation (called *opinio juris*). When these two ingredients – state practice and the *opinio juris* – become sufficiently widespread among the states of the world (a threshold not clearly defined by international law), the practice in question is said to become legally binding as customary international law.

A commonly cited example is the *Universal Declaration of Human Rights*. Originally introduced as a resolution of the UN General Assembly in 1948, the Declaration was intended as a purely aspirational document, without legal force. It was, in other words, "soft" law, a concept discussed in greater detail below. Over time, however, a combination of state practice and an emerging view on the legally obligatory nature of the rights found in the document have prompted many to consider the Declaration customary international law, in whole or at least in part. In 1995, a Canadian minister reported that: "Canada regards the principles of the *Universal Declaration of Human Rights* as entrenched in customary international law binding on all governments".[4]

II. LAW-MAKING AND QUESTIONS OF LEGITIMACY

A. Domestic Law-Making

Domestic law-making is a closely regimented process. We do not set out these procedures in detail in this discussion, instead providing only simplified descriptions.

Domestic statutes are passed by the federal and sub-national legislatures, according to their respective powers under Canada's Constitution. At the federal level, the Parliament is divided into two houses – the Commons and the Senate – and, under the rules of procedure in each chamber, proposed laws are debated and reviewed in both plenary sessions and in parliamentary committees. Members of the public with an interest in the proposed law may appear before these committees to present their views. Parliamentary law-making is generally both open and participatory, giving it credibility and democratic legitimacy.

Most successful bills are presented to Parliament by the executive – the government – and are almost without exception shepherded through the parliamentary process with the support of the governing party. Until recently, the governing party in Parliament held a majority in the Commons and an overwhelming majority in the Senate, and therefore government bills faced relatively few obstacles.

The executive itself has substantial law-making power delegated to it by Parliament in statutes in the form of regulation-making powers. Federal regulation-making is a reasonably transparent process, including the opportunity for interested parties to comment on the proposal. Should it choose, Parliament could pass new laws retracting the regulation-making authority of the executive, or negating a regulation. Indeed, under recent amendments to federal law, either house of Parliament may revoke a federal regulation by mere resolution to that effect, thereby enhancing the legitimacy of regulatory law-making.

Common law is the product of the courts, applying past precedents to new cases. Common law is not, however, the whimsical creation of a few judicial minds. First, precedent does matter, and the judicial appeal hierarchy serves to standardize understandings about the content of that common law and rein in aberrant approaches. Second, common law is subordinate to statutory law. Parliament is free to abrogate a rule of common law by legislating in the area.

B. International Law-Making

The process by which international law is made differs dramatically from domestic law-making. In contrast to domestic law, there is very little vetting or discussion of international law by legislators or the public before, during or after the law-making process. The absence of close oversight of international law-making by elected legislators raises obvious questions of domestic democratic legitimacy.

1. Treaties

(a) Negotiating Treaties

Treaties are the product of negotiations between sovereign states. There is no single way in which an international treaty is negotiated. With many multilateral treaties, the text is first negotiated over the course of many years, then progresses to larger "preparatory conferences" and

> Treaties may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and agreement of the states concerned. Treaties may be drafted as between states, or governments, or heads of states, or governmental departments, whichever appears the most expedient.
>
> M. Shaw, *International Law*, 9th ed. (Cambridge: Cambridge University Press, 2003) at 815.

eventually to full-fledged international conferences at which the states of the world gather to hammer out the final details.

(b) Treaty Negotiation as an Executive Branch Prerogative

International negotiations are the prerogative of governments, represented by executive branch officials (sometimes supplemented by representatives from industry or non-government organizations with a special interest in the treaty).

Under Canadian law, the Minister of Foreign Affairs is charged with "conduct[ing] and manag[ing] international negotiations as they relate to Canada" and with "fostering the development of international law and its application in Canada's external relations".[5] In practice, specialized federal departments play important and often pre-eminent roles in negotiating treaties within their area of expertise and responsibility, with Foreign Affairs Canada acting in a coordinating capacity. Negotiations are conducted by officials, and only rarely (and at the last stages) by ministers themselves. Treaties are signed by government representatives given the "full powers" to do so by the federal Cabinet.

The executive branch of the federal government in fact controls all stages of the [treaty-making] process. This control extends to the content of the negotiations, which are often conducted in secret. Moreover, this secrecy is a significant factor in the federal government's negotiating strategy. Nothing, or almost nothing, is made public before the parties have reached an agreement in principle on the content or even the wording of the treaty.

Library of Parliament. *International Treaties: Canadian Practice* (April 2000, PRB 00-04E).

Government departments do consult with interested parties and members of the public on issues of public policy, including foreign affairs and trade. Nevertheless, treaty negotiation is not always a transparent process. In fact, efforts by members of the public (or even parliamentarians) to obtain information about treaty or other international negotiations may be rebuffed by the government. Canada's *Access to Information Act* does not apply to intergovernmental organizations nor to government positions taken during international negotiations.[6]

Some states may include in their delegations members of the legislative branch. In Canadian practice, however, legislators appear to be rarely involved in direct treaty negotiations.

Questions for further discussion:

1. *Who should negotiate Canada's treaties? Should there be a formal role for parliamentarians and non-governmental representatives? If so, what should this role be?*

2. *Is the government's current approach to public consultations on Canada's international negotiating positions sufficient? With whom should the government consult? What should Parliament's role be? Should the process be a formal or informal one? Should the approach differ depending on the type of treaty, its potential impact or other factors?*

3. *More generally, what steps should the government take to communicate both internally and externally the scope and nature of current and upcoming international obligations to Parliament, sub-national authorities and Canadians?*

(c) Treaty Negotiation as a Federal Monopoly

Canada's Constitution divides power between the federal and provincial governments, each (theoretically, at least) maintaining sole jurisdiction over certain areas. For example, the provinces control education, property and civil matters, and the provision of health services, while banking, criminal law, copyright and the military are federal concerns. There is no specific constitutional provision that dictates which level has control over international affairs. In practice, the federal government has claimed and assumed the role of Canadian representative in the international sphere. Still, the federal level cannot pass domestic laws in areas within provincial jurisdiction, even in matters related to international law. Consequently, the federal government needs the help of the provinces to enact legislation giving domestic effect to international commitments in areas of provincial jurisdiction.

The scope of involvement in international matters by other levels of government (provincial, territorial, Aboriginal, municipal) is a point of political controversy. Since the 1960s, Québec in particular has rejected the federal monopoly on treaty-making.

In 2004, the Bloc Québécois proposed a private member's bill (Bill C-260) in the House of Commons on treaty negotiation and treaty-making. The bill barred the Canadian government from negotiating or concluding a treaty "without consulting the government of each province" if the treaty dealt with an area within provincial jurisdiction or affected the legislative authority of the provinces. The bill was defeated in September 2005. In speaking against it, government MPs expressed the view that consultation with the provinces was already sufficient.

Some observers question whether provinces are sufficiently involved in the treaty-making process. Focusing specifically on trade matters, a Library of Parliament publication commented that "although the provinces are usually kept informed of negotiations on trade agreements, they are only minor participants and, except in rare instances, are completely excluded from the decision-making process".[7]

[…] [T]he federal government accepts that provincial governments are essential to the development of a Canadian position at meetings of many international organizations. They consider that the primary role of representation is exclusively federal, but they do accept that effective negotiating positions cannot be adopted without close cooperation with provincial officials. To do this, they have been willing to adopt a variety of approaches with a view to ensuring that the Canadian position reflects provincial views and will be acceptable to provincial governments. However, they have been unwilling to formalize these arrangements in any kind of public document, still less to enshrine them in legislation or in a constitutional disposition. This reluctance continues to be a source of discontent with provincial officials. In some areas and for some provinces, particularly Québec, the tension between the federal monopoly on international representation and the international dimensions of provincial jurisdiction thus remains a serious point of contention.

A. de Mestral, "The Provinces and International Relations in Canada" in J.-F. Gaudreault-DesBiens and F. Gélinas, eds. *Le fédéralisme dans tous ses états : Gouvernance, identité et méthodologie / The States and Moods of Federalism: Governance, Identity and Methodology* (Cowansville: Éditions Yvon Blais, 2005) 321.

"The implication that the bill [Bill C-260] is needed to guarantee consultations with the provinces on treaties in areas of provincial jurisdiction is simply wrong. Nothing could be further from the truth.

The practice of the Government of Canada is well established. There are consultations with the provinces at every stage in development of a treaty in areas of provincial jurisdiction.

…Simply put, the federal government would not be in a position to ratify a treaty if it could not be reasonably sure that the treaty will be implemented. Thus, when Canada wants to ratify a treaty involving obligations within provincial jurisdiction, the federal executive necessarily consults the provinces.

In addition, before such treaties are ratified, the federal government requests the provinces' written confirmation that they will implement those treaties and that their legislation is in conformity with the obligations contained in those treaties.

…It is not uncommon for representatives of provinces and territories to join Canadian negotiating delegations on treaties involving provincial and territorial jurisdictions."

Remarks from Liberal MP Wajid Khan, *House of Commons Debates* (18 May 2005), 1st Sess., 38th Parl. 1840-1845.

The same questions arise with respect to Aboriginal governments. Both federal and provincial governments have been negotiating self-government agreements with Aboriginal peoples. In the 1995 Federal Policy Guide on *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, the government specifies the various areas over which Aboriginal governments and institutions may negotiate jurisdiction. The policy specifically excludes Powers Related to Canadian Sovereignty, Defence and External Relations, including international/diplomatic relations and foreign policy, international treaty-making, and international trade. In a number of recent self-government agreements, however, the federal government has formalized the consultation process in areas specified in the agreement such as fisheries. It has also done so in cases where rights under the agreement are affected by international agreements. For example, the *Labrador Inuit Land Claims Agreement* reads as follows:

> 17.27.3 Before consenting to be bound by an International Agreement that may affect a right under the Agreement of the Nunatsiavut Government, an Inuit Community Government or Inuit, Canada shall Consult the Nunatsiavut Government either directly or through a forum.

Question for further discussion:

4. *What are the advantages and disadvantages of the current consultation process with the provincial, territorial and Aboriginal governments? Should it be improved? Should there be a formal, mandatory means of involving sub-national levels of government in treaty negotiations concerning matters within their jurisdiction?*

(d) The Ratification Process: Who Binds Canada?

As a matter of international law, international treaties bind a state once it has signified consent to be bound. How this consent is expressed varies, but usually takes the form of a simple signature by the accredited government representative or, more frequently with multilateral treaties, signature followed by "ratification". International law does not dictate the procedure to be followed in completing this ratification. Each state's domestic law governs this process.

In Canada, signifying consent to be bound is the purview of the Governor in Council – essentially the federal Cabinet – operating pursuant to its "royal prerogative". As a result, the executive may choose to sign and ratify an international treaty, binding Canada as a matter of international law without any recourse to Parliament.

Other countries have taken different approaches to law-making. Under the U.S. Constitution, for example, the U.S. government may enter an international instrument of ratification only when a treaty is approved by a two-thirds vote of the U.S. Senate. However, ratification by the Senate is not required for agreements qualified as executive agreements, often used by the United States to bind itself internationally.

Nor is this federal monopoly accepted by all constitutional scholars and provinces within Canada. Some observers argue that, under Canada's Constitution, provinces should be able to negotiate and approve treaties within their sphere of jurisdiction. Belgium, for example, grants sub-federal legislatures substantial power to approve international agreements within their zones of jurisdiction. In 1993 reforms, Belgian regions and communities were granted the power to directly negotiate and bind their own territory in matters related to their areas of jurisdiction. A comprehensive procedure was instituted to ensure a certain degree of coherence in foreign policy between the entities.

Democratic reforms in Australia

Under the 1996 reforms, all proposed treaty actions must, according to administrative practice rather than legislation, be tabled in Parliament at least 15 sitting days before binding action is taken, although there is some flexibility when circumstances require a shorter or longer time period. Each treaty is tabled with a National Interest Analysis (NIA), a public document prepared by the responsible line agency in consultation with the Department of Foreign Affairs and Trade (DFAT) that sets out the reasons for the proposed treaty action, its obligations and costs, and documents the consultation that has taken place. The tabled treaty (and NIA) is then sent for scrutiny to JSCOT [the Joint Standing Committee on Treaties], a large all-party committee supported by a small secretariat. JSCOT is empowered to inquire into and report upon any treaty matter, whether bilateral or multilateral, and including treaties in the process of being negotiated as well as those that have already been concluded. It can accomplish this mandate through several means, including the holding of public hearings across Australia and the review of submissions from parliamentarians, non-governmental organizations, academics and industry groups, as well as individual citizens. At the completion of its inquiry, JSCOT prepares a report for Parliament containing its advice on whether the treaty should bind Australia and on any other issues that emerged during the review process. These reports, as well as the treaty text, the NIA, the hearing transcripts, and even the submissions received by JSCOT, are all made available to the public (and the world) through the Committee's website, thereby serving as a useful resource on a treaty's contents and consequences. To bolster these reforms, Australia also created an on-line treaty database, providing free public access to treaty texts, their ratification records, and NIAs, as well as information on multilateral treaties under negotiation, consideration or review by the Australian government. (footnotes omitted)

J. Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55 ICLQ 121.

Questions for further discussion:

5. *Should there be a formal process of Parliamentary endorsement before the federal executive branch binds Canada as a matter of international law? If so, what form should this process take?*

6. *Should the Canadian approach to ratification require that sub-national governments themselves endorse a treaty on matters within their own jurisdiction, prior to Canada binding itself in international law? Would the consent of the executives suffice, or would the legislatures be required to provide the requisite consent? What would happen if some sub-national governments approved, but others rejected a treaty?*

7. *To what extent, if any, should sub-national governments have the power to negotiate directly and ratify treaties that are within their sphere of jurisdiction?*

2. Customary International Law

Unlike treaties, customary international law is not the direct result of inter-governmental negotiations. It develops more organically, through the cumulative actions of the state members of the international community, undertaken with the required sense of legal obligation (or *opinio juris*). Unlike domestic common law, no hierarchy of courts is empowered to rule definitively on the existence of a customary rule. In practice, international customary law is often recognized in response to advocacy by powerful and/or influential states, vigorous civil society groups, academic scholarship, and the occasional rulings of tribunals like the International Court of Justice. In some cases, international lawyers, tribunals and states perform only the most perfunctory (if any) empirical analysis of state practice and *opinio juris* before declaring a principle customary international law. The development of customary international law is, therefore, neither very certain, nor very democratic; international law has no clear rules on when and how these norms arise.

Canada's position in participating in and responding to the question of customary international law is formulated by the federal government. But increasingly, Canadian courts have taken positions on whether particular rules are customary international law.

Question for further discussion:

8. *What process should Canada use to develop its position on which norms have customary international law status?*

3. "Soft" Law

Before leaving international law-making, a word should be said about "soft law". As the previous discussion of the history of the *Universal Declaration of Human Rights* suggests, the international community at times proposes principles that are not binding law. The UN General Assembly and other international organizations regularly issue declarations and pronouncements that often look and feel like real law. But because those bodies are not empowered to create binding law, these instruments are called "soft" law.

It is true that over time, some of these norms evolve into binding international law – particularly in the form of customary international law. However, other principles remain soft law. Yet, even when these principles are not legally binding, they sometimes have enormous moral force. For instance, a resolution of the UN General Assembly, of the UN Human Rights Commission, or an assessment of a country's human rights performance by one of the bodies established by human rights treaties, have no legal force. Nevertheless, they may affect the behaviour of states intent on avoiding embarrassment and retaining credibility.

In any given year, Canada may expend more effort to negotiate and take positions on soft law instruments than to negotiate binding treaties. Canada also invests resources and time anticipating and responding to the non-binding resolutions and determinations of international organs, such as the human rights bodies charged with reviewing this country's human rights performance. Canadians and non-governmental groups may also focus substantial effort on these principles, sometimes acting with, and sometimes in opposition to, the government. In some cases, the government consults with interested Canadians prior to taking positions on soft law issues. Rarely is Parliament involved in the process. A Senate bill proposed in the last Parliament would have required the government to provide Parliament with reports submitted to the UN on the progress made by Canada in giving effect to the provisions of international human rights instruments to which it is party to and any response by UN bodies to these reports. The bill was unsuccessful.

Questions for further discussion:

9. *How should Canada develop positions on soft law instruments? Should the same process be used for soft law and treaties? Should these positions be devised in close consultation with stakeholder groups, parliamentarians and officials from other levels of government?*

10. *What are the pros and cons of the government's current approach to preparing reports on performance to international bodies? When Canada reports to international bodies charged with assessing Canada's compliance with international obligations, with whom should it consult? What process should be followed?*

11. *Should there be a formal domestic mechanism to review whether Canada is meeting its obligations?*

Soft law is usually the product of international organizations – agencies in which states participate. But as noted earlier, private standard-setting institutions may sometimes be involved in developing law-like standards. Corporate codes of conduct governing company ethical behaviour are one example. These codes have no direct legal force unless incorporated by reference into contracts or law. In some instances, standards set by private bodies may be incorporated into an international legal regime. The WTO *Agreement on Technical Barriers to Trade*, for instance, accepts that non-governmental "standardizing bodies" may establish "technical regulations" for commercial product standards. Questions arise as to who has access to the formulation of these standards. For example, while business interests may be represented, consumer groups are rarely able to participate.

The questions of where private standards suffice, and where more mandatory legal instruments are required, are difficult ones in both domestic and international legal systems. Since at least the 1990s, policy-makers, companies and non-governmental organizations have debated whether voluntary corporate codes of conduct dealing with human rights and environmental performance eliminate the need for more direct regulation of companies. When the foreign operations of companies are at issue, these debates quickly evolve into a discussion about the merits of "extraterritorial" regulation: the regulation of the overseas activities of private actors. Extraterritorial regulation is a matter discussed at the end of this paper.

III. INTERNATIONAL LAW AS PART OF CANADIAN LAW

As already discussed, for the most part, the executive branch of the federal government negotiates treaties and other international instruments on behalf of Canada. Once a treaty is signed and ratified, Canada is bound and must comply with it or risk being found in contravention. The government must ensure that domestic law does not run counter to international law. How does international law interact with domestic law? The answer depends on the source of the international law: does it come from treaties or from customary law?

A. Receiving Treaties into Domestic Law and Questions of Legitimacy

1. "Dualism" and the Separate Solitudes of Domestic and International Law

Canada traditionally considers domestic law and treaty law as two distinct universes. By approaching these two spheres of law as separate solitudes, Canada is a "dualist" jurisdiction. An international treaty may require Canada, as a matter of international law, to change its domestic law. But in the dualist tradition, that treaty has no direct effect in domestic law until domestic legislation is passed to "transform" or "implement" it into Canadian law.

2. Dualism as a Rational Reaction to Democratic Legitimacy Questions in International Law-Making

At one level, dualism is a sensible philosophy. It seems a necessary response to the Canadian system, where Parliament and the provincial legislatures make laws but where the federal executive branch dominates treaty-making. If treaties entered into by the federal executive had immediate and direct effect as the laws of Canada, the government's treaty-making power could enable the executive to do an end-run around Parliament's federal law-making monopoly. By concluding an international treaty requiring, for instance, extended patent protection, the executive would essentially legislate a matter otherwise governed by an Act of Parliament, in this case the *Patent Act*. In this way, the executive would short-circuit Parliament's supremacy in law-making.

Moreover, if treaties had immediate effect as laws, the federal executive could also dance around the division of powers in the *Constitution Act, 1867* by employing its treaty-signing powers to legislate in provincial areas.

To avoid these problems, Canadian law insists that treaties be transformed into domestic federal law by an Act of Parliament. In constitutional law, when a treaty deals with provincial matters, it is the provincial legislatures who must legislate the treaty into domestic law. Put another way, dualism responds to concerns about the democratic legitimacy of the treaty-making process by factoring elected legislatures back into the equation.

3. The Dualist Dilemma

Dualism may be driven by legitimate concerns. It does, however, create real problems. When Parliament fails to implement treaty law into domestic law the result is an unfortunate legal quandary: Canada is bound by the treaty as a matter of international law, and yet its policy-makers need not abide by the treaty under the terms of domestic law. This problem is remedied if the federal government delays ratification until Parliament and the provincial legislatures revise laws to bring them into compliance with the anticipated international obligation. There are, however, a few instances where Canada's domestic laws remain unmodified, even as new treaties are ratified.

Subsequently, when legislators become sensitive to allegations of non-compliance with Canada's international obligations, they can enact legislation transforming treaty obligations into domestic law. But in so doing, federal and provincial legislators must curb their discretion and implement an agreement ratified only by the federal executive branch. Little practical room remains for a legislator intent on observing Canada's international obligations to query, amend or reject a bill implementing an international obligation.

In summary, when the federal government exercises its power to conclude an international treaty, Parliament and provincial legislatures may face a dilemma in cases where the law is not consistent with the treaty. They may choose to disregard that international obligation, preserving their supreme law-making role in Canadian democracy at the potential cost of Canada's adherence to an international rule of law. Alternatively, they may implement these international requirements into domestic law, but with their role limited to stamping "approved" onto a treaty concluded exclusively by the federal executive branch. As globalization increases, this dilemma will become progressively more acute.

4. The Uncertainties of Dualist Reception

Other problems arise in connection with the concept of the implementation of international law into domestic law. There are no clear rules on when a treaty has been "transformed" or "implemented" into Canadian law. In many cases, existing statutes already conform to these obligations; in other cases, Canada can meet its international obligations through the formulation of policies. When the law needs to be changed subsequent to the treaty, there are clear ways to achieve this; for instance, when legislation names a treaty in its text, or appends it as a schedule to the law. But should such a definite reference be required

for implementation? Should a statute's silence or lack of sufficient detail necessarily mean non-implementation of a treaty obligation?[8]

Consider this example: Article 3 of the *Convention on the Rights of the Child* specifies that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Canadian law is replete with references to the "best interests of the child", albeit without express reference to the Convention. Yet, in a decision addressing an immigration law matter, the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* concluded that the treaty had never been implemented.[9]

Explicit implementation of international treaty provisions into domestic legislation has the important advantage of enhancing transparency, accessibility and understanding of the treaty norm among Parliamentarians, litigants, the courts and officials responsible for the administration of the legislation.

E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense out of the Nonsensical", (Paper presented at the annual meeting of the Canadian Council of International Law, Ottawa, 2004).

The Court did not describe how this implementation might be achieved. However, its approach seems to suggest that for Article 3 to be implemented, every time a statute gives power to a government official, the statute would have to include some reference to the "best interests of the child" standard. Put another way, implementing Article 3 would require changes to a great number of Canada's statutes.

5. Recent Judicial Reactions to Dualism

Setting the bar high for what courts accept as implementation has consequences. Courts are increasingly prepared to view even unimplemented international treaties as important interpretive aids in understanding Canadian statutes. But this may produce awkward law.

Consider, for instance, the Supreme Court of Canada's decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[10] In that case, the Court considered whether deportation to torture violated Canadian constitutional law. Canadian immigration law at the time permitted deportation of refugees on national security grounds even when their "life or freedom would be threatened". It was silent on the question of torture. But the United Nations Convention Against Torture – a treaty which Canada has ratified – expressly bars deportation to torture. The Supreme Court assumed that since this specific prohibition was not replicated in Canadian immigration law, it had not been implemented. It then concluded that, despite this problem, international law still informed the content of the *Canadian Charter of Rights and Freedoms*. Yet in describing the requirements of the Charter right, the Court failed to meet the requirements of the treaty itself: while the treaty contains an absolute ban on deportation to torture, the Charter right developed by the Court permits such removal in "exceptional circumstances". The result is a Canadian rule that, while motivated in part by an unimplemented international treaty, is not compliant with it.

6. The Problem of Partial Application

The *Suresh* approach creates real problems: courts are now prepared to seek inspiration from unimplemented treaties. Yet, because Canada's dualist tradition means these treaties are not really the law of Canada, courts may ignore the actual requirements of these treaties and devise some hybrid standard. The end product may be the worst of both worlds: the partial application of treaties never concretely implemented by the legislature, but in a manner that does not actually comply with Canada's international obligations.

Questions for further discussion:

12. *How should Canada deal with the dilemmas of dualism? Should treaty dualism be replaced by a more "monist" approach to treaty law: automatic implementation of treaty law into the law of Canada? If so, how would this be achieved? To preserve the role of legislatures, would this change necessitate a more formal means of parliamentary/sub-national approval of treaties before the government binds Canada as a matter of international law?*

13. *What standards should be applied in deciding whether a treaty has been implemented into domestic law?*

14. *What status should be accorded to an unimplemented treaty by the courts?*

B. Reception and Legitimacy of Customary International Law

1. The Incorporation of Customary International Law

Canada's approach to customary international law is very different from its "dualist" treaty reception doctrines. Once a rule becomes recognized as customary law, it is *automatically* part of common law. With customary international law, in other words, Canada is a "monist" rather than a "dualist" jurisdiction.

But, like the rest of the common law, directly-incorporated customary international law can always be displaced or overturned by a statute that is inconsistent with it.

The Ontario Court of Appeal recently summarized the rule this way: "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary

legislation. As much as possible, domestic legislation should be interpreted consistently with those obligations."[11]

2. Issues Raised by the Incorporation of Customary International Law

Several obvious issues are raised by this approach. First, when a legislature does legislate in a manner that displaces customary international law, Canada may be subsequently in violation of its international obligations.

Second, if customary international law is part of the common law of Canada, its existence as domestic law is a matter determined by the courts exclusively. This customary international law is itself created by the international system in an organic rather than negotiated fashion. If customary international law is subsequently incorporated directly into Canadian law by the courts, there may never be any clear and direct input by political branches of government into the rules by which law in Canada is made binding.

On a third, related point, since the content of customary international law is sometimes uncertain (and disputed), courts asked to apply it as the domestic law of Canada rely on expert testimony (often competing) from international lawyers and academics, raising further questions of legitimacy.

But how offensive these last two phenomena are to Canada's democratic order may be debated. Certainly, the common law tradition in Canada accepts that courts should have a law-making role, applying a domestic law developed by judges and not legislators. Is this tradition suddenly illegitimate when judges rely on outside experts to guide their deliberations?

Question for further discussion:

15. *What rules should apply governing the acceptance of customary international law into the law of Canada?*

PART THREE: SOVEREIGNTY, JURISDICTION AND UNEVEN ACCESS TO JUST OUTCOMES

We turn now to the second implication of the globalization of law reform. As noted in Part One, the process of international law-making and globalization is imperfect, proceeding rapidly in some areas and slowly or not at all in others. States globalize in the economic area, dismantling trade barriers and codifying standards that facilitate international commerce. At the same time, they resist globalization in other areas, invoking state sovereignty. The result is a patchwork of globalized, quasi-globalized and purely national standards that raise key questions about law.

I. JUSTICE AND INTERNATIONAL WRONGS

International law traditionally was the "law of nations" – a body of principles designed to address states' relationships with one another. Disputes arising from these relationships were settled, if they were settled at all, through negotiation, mediation, arbitration or, in extreme cases, armed conflict. In this classic law of nations, international law said relatively little about the rights and duties of individuals. That situation has now changed.

Since the end of the Second World War, international law has broadened its reach to include such issues as human rights. Trade and investment law has also expanded, extending new rights to economic actors. There are now many more circumstances in which mistreatment of persons by states (and also by individuals) may be regarded as a violation of international law. International law, in other words, includes a concept of injustice. Remedies for these wrongs are, however, uneven.

II. CREATING INTERNATIONAL REMEDIES

International remedies can be assessed with reference to three scenarios: state-state disputes; state-individual disputes; and, individual-individual disputes.

The peaceful settlement of disputes between states is a long-standing preoccupation of international law. However that law cannot compel sovereign states to participate in dispute resolution if they choose not to. This fact has greatly limited the effectiveness of the planet's key international court – the International Court of Justice (ICJ).

Key International Courts and Tribunals

The world's key international courts and tribunals include:

- ***International Court of Justice:*** The ICJ was created in the 1940s as the United Nations' judicial organ. It has the broadest "subject-matter" jurisdiction of any international court, and is capable of hearing disputes on any matter of international law between states. It can also provide "advisory" opinions to organs of the United Nations upon request.
- ***International Tribunal on the Law of the Sea:*** ITLOS hears certain disputes concerning the interpretation of the United Nations Convention on the Law of the Sea.
- ***World Trade Organization:*** The WTO trade agreements provide for the settlement of disputes that arise under the WTO's various trade rules through dispute settlement panels, and on appeal, before an "Appellate Body".
- ***International Criminal Court:*** The ICC has jurisdiction to try persons accused of war crimes, crimes against humanity, and genocide. It builds on the experience of the International Criminal Tribunal for the former Yugoslavia and its counterpart for Rwanda. The latter two tribunals continue to exist, as do special "hybrid" domestic/international tribunals hearing cases in Sierra Leone, East Timor and Kosovo.
- ***Regional Courts and Tribunals:*** There are several regional courts and tribunals, of varying stature and effectiveness. Examples include the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights. The mandate and powers of these regional bodies are established by the treaties that govern them.

The ICJ has only limited jurisdiction over disputing sovereign states: it can only hear a case when all states involved in the matter consent. Unfortunately, states often decline to give this permission. In its almost sixty-year history, the Court has issued remarkably few decisions.

In fact, the ICJ's output is now dwarfed by the several hundred cases that have been brought before the 11-year-old World Trade Organization (WTO) and its dispute panels and Appellate Body. The WTO creates a potent system for the settlement of trade disputes between the WTO's 148 Member-states. In the WTO system, states are reasonably quick to protest actions by other states that they see

as inconsistent with international trade rules (and often economically disadvantageous to the protesting state).

States are much more reluctant to challenge those actions of fellow states that are inconsistent with international human rights standards. Some international human rights treaties anticipate states being able to complain about another state's performance under the treaty to a so-called "treaty body" established by the convention. These treaty bodies – organizations like the United Nations Human Rights Committee or the Committee Against Torture – are not courts, nor arbitral bodies with binding decision-making authority. At best, they issue "views" presenting their conclusions on a state's human rights performance. These documents have moral force, but are not binding in law. Even so, to date, there has not been a single instance of a state bringing an "inter-state" complaint to one of these treaty bodies.[12]

This pattern of relatively potent dispute settlement in the area of economic rights and weaker dispute settlement in other areas also exists in state-individual disputes. These involve efforts by individuals to hold states to account.

The most potent system of state-individual dispute settlement concerns disagreements between foreign investors and states. Investor-state dispute mechanisms are commonplace, and are found in treaties like the NAFTA and many of the estimated 2,000 bilateral investment treaties that link together the states of the world. Investor-state dispute settlement systems allow foreign investors to sue states before international arbitration bodies when certain economic rights are impaired. Typically, this happens when an asset is expropriated or the state violates a standard of "minimum treatment". Decisions issued by these arbitral bodies are binding, and can usually be enforced in the domestic courts of many of the world's countries.

The situation is very different in non-investment areas. In many circumstances, no international tribunal exists that allows an individual to bring complaints about a state. For instance, there is no wide-scale, international, individual complaints mechanism in existence through which individuals can complain about a state's environmental performance.

Some human rights treaties do create complaints mechanisms, allowing individuals to protest mistreatment by their states before "treaty bodies" like the UN Human Rights Committee. These complaint mechanisms are, however, voluntary: states choose whether they will allow the mechanisms to apply to them. Many states refuse to participate, a practice that makes it impossible for people injured by some of the world's worst human rights-abusing nations to bring any sort of international complaint. Even when states do accept these complaint mechanisms, the treaty bodies are not able to issue binding

Canada has ratified the "optional protocol" to the *International Covenant on Civil and Political Rights*. This means that individuals may bring complaints to the UN Human Rights Committee alleging violations of human rights by Canada. Dozens of cases have been brought against Canada. Most have been unsuccessful, but the UN Human Rights Committee has found some to have merit. In some instances, Canadian governments have complied with views issued by the Committee. In other instances, they have ignored them. In the 2002 *Ahani* case, the Human Rights Committee requested that Canada refrain from deporting the complainant until it had time to review his claims that his deportation to torture would violate Canada's international obligations. Canada refused, and the Ontario Court of Appeal concluded that the Committee's request was not legally binding in Canadian (or international) law.

***Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (C.A.).**

legal decisions. Instead, they issue "views" – reports that may make recommendations, but are often ignored.

Regional human rights courts, competent to issue binding legal determinations, exist in some parts of the world. Canada has, however, so far declined to participate in the *American Convention on Human Rights*. This is the treaty that creates the regional court for the Americas, the Inter-American Court of Human Rights. The federal government has been discussing with the provinces possible accession to this agreement for many years.

More progress has been made in the area of international criminal law, which mainly involves state complaints against individuals. Persons committing crimes against humanity, war crimes, or genocide are now subject to prosecution before the International Criminal Court, so long as either their state of nationality or the state in which the crimes took place had no party to the treaty creating the Court.

Moreover, this international criminal law has been "internalized" in some countries. In 2000, for example, Canada passed the *Crimes Against Humanity and War Crimes Act*.[13]

Acting Locally, Thinking Globally in Criminal Law

In October 2005, the first-ever charges were brought under Canada's *Crimes Against Humanity and War Crimes Act*, directed at a failed refugee claimant from Rwanda who was an alleged participant in the 1994 Rwandan genocide. Reflecting the international nature of these events, it is expected that the Canadian court charged with adjudicating this trial will be guided, in part, by the jurisprudence of the *ad hoc* international criminal tribunals established in the mid-1990s to try crimes committed in the former Yugoslavia and in Rwanda. Not everyone is pleased by this possibility: some defence lawyers wonder if some of the doctrines developed by these international tribunals are compatible with the standards of justice traditionally applied in Canadian criminal trials.

As a final point on international remedies, it should come as no surprise that, because of its historical focus on states, international law contains few means for individuals to complain about the actions of other individuals. Victims of crimes against humanity, war crimes, or genocide, might urge prosecutions of perpetrators before the International Criminal Court, but they cannot compel a response. No international body is able to hear their cases directly, nor to order damages for the injuries they have suffered at the hands of other individuals.

In commerce, international law is more accommodating. A commercial dispute between foreigners may be settled via a private international arbitration. Then, treaties like the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) in most instances require national courts to give force to these arbitral decisions.

Overall, then, international remedies are applied very unevenly. In trade, investment and criminal law, states and individuals make greater use of them and decisions are more binding. This differs from the international remedies in fields such as human rights and the environment. These are less accessible to individuals, infrequently used by states, and the decisions are not legally binding. Very few international remedies exist for individuals seeking redress from other individuals.

Questions for further discussion:

16. *Should Canada promote greater use and effectiveness of international remedies both domestically and internationally?*

17. *Should Canada give more domestic legal force to non-binding decisions rendered by international treaty bodies? For example, should Canada be more willing to accord "views" of international human rights treaty bodies more legal force in domestic law?*

18. *Should the government do more to publicize the existence of international remedies?*

III. CREATING DOMESTIC REMEDIES

A single key point emerges from the preceding discussion: there is no natural correspondence between the rights created in international law and the availability of an international remedy. Remedies are more common and most rigorous in the area of economic rights for investors. Remedies are poor or non-existent in other areas. Globalization has, in other words, deepened and enriched international dispute settlement in economic matters, and neglected remedies in other areas.

In these circumstances, it is not surprising that those whose international rights are violated but who have no access to international remedy often seek solutions in domestic venues, bringing civil law-suits – so-called "transnational" litigation. In so doing, they confront significant hurdles.

A. International Complaints in Domestic Courts

1. The Problem of Jurisdiction Over the Wrong

International wrongs are not necessarily also wrongs in domestic law. International law sometimes guarantees rights that are not easily converted into rights for which people can claim remedies in domestic law.

For instance, the NAFTA guarantees that NAFTA states will meet a "minimum standard of treatment" of investors from other NAFTA states. NAFTA tribunals have concluded that this minimum standard is violated when the investor is treated in a "grossly unfair, unjust or idiosyncratic, [or] discriminatory" manner. When they suffer improper treatment of this kind, investors may be able to claim damages in NAFTA proceedings. While some grossly unfair government actions may be so egregious as to allow compensation in Canadian law, the NAFTA minimum standard of treatment appears to be much more expansive than any right existing in Canadian law (at least any right allowing monetary damages).

International human rights law often insists on effective domestic remedies for human rights violations. Article 14 of the United Nations Convention Against Torture, for instance, requires each state to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation".[14] However, torture per se is not a civil cause of action in Canada. Instead, acts of torture would be compensated, if at all, as the result of a common law "tort" action.

The key point is that there is no automatic overlap between international and domestic rights nor between the remedies promised by international law and those available in domestic law. Domestic courts may, in other words, lack "subject-matter jurisdiction".

Some states have greater correspondence between international and domestic rights, and allow domestic remedies for international wrongs. In its *Alien Tort Claims Act*, for instance, the United States allows foreign plaintiffs to bring tort claims in U.S. federal court for violations of "the law of nations or a treaty of the United States". The U.S. *Torture Victims Protection Act* allows a civil lawsuit in U.S. federal courts against individuals who, on behalf of foreign governments, have tortured the plaintiffs.

Relying on these two laws, many lawsuits have been brought in U.S. courts by victims of notorious human rights abusers and others complicit in their crimes. The defendants are sometimes not in the United States, so the plaintiffs' success in these trials is often simply

a moral victory. In other instances, the defendants have assets in the United States that may be seized to compensate the plaintiffs should they succeed in the lawsuit.

Question for further discussion:

19. *Should Canada create civil causes of action tied to international wrongs? If so, how should it do so? Would this require each province to act, since the provinces have constitutional jurisdiction over "civil rights and property"?*

2. The Problem of Jurisdiction Over the Wrong-Doer

"Subject-matter jurisdiction" may be a significant problem. But when the prejudice is one of torture, for example, the problem can often be overcome by bringing a lawsuit in tort. A more pressing problem is "personal jurisdiction" – the absence of court jurisdiction over the defendant.

a) Convincing the Court to Hear the Case

Domestic courts may decline to hear a lawsuit motivated by an international wrong on several grounds. First, a Canadian court will refuse to hear a case unless there is some link between the wrong and Canada. If the defendant is located in Canada, that link may exist to one or other Canadian court. If not, then courts may insist on some other tie to Canada – such as evidence that some of the harm suffered took place in Canada. This requirement presents an obvious limit on most international complaints brought in Canada.

Even if this requirement is met, Canadian courts retain a residual discretion to dismiss a case on the basis that the matter is best heard in a foreign court. Courts applying this *forum non conveniens* doctrine often point to the fact that events constituting the wrong took place overseas, or that witnesses are located overseas, or that the language of most of the evidence is foreign, to justify their decision to refuse a case. On the other hand, some Canadian courts have declined to dismiss a case on *forum non conveniens* grounds when they are persuaded that it would be impossible for the plaintiffs to receive a fair trial in the overseas court.

Questions for further discussion:

20. *Should Canada be prepared to accord Canadian courts jurisdiction to hear civil trials that deal with the most serious violations of international rights, irrespective of where they occur?*

21. *What implications should transnational litigation have for Canadian rules of evidence, when witnesses and evidence may be located elsewhere and not be easily brought to Canadian courts?*

b) The Shield of State Immunity

Venue problems are compounded by special rules on immunity when the defendant is a foreign state. In international law, sovereign states are usually immune from criminal prosecutions or civil actions in the courts of other states. "State immunity" is justified as a necessary reflection of "sovereign equality of states": the notion that all states are equally sovereign, and that the courts of one state are in no position to adjudicate the actions of another state. A more practical justification for "state immunity" is the fear of tit-for-tat retaliations: if courts in one state were to rule on the actions of another state, the latter could be expected to retaliate in its own courts.

"State immunity" is not, however, absolute. Certain exceptions are recognized, both in international treaties on state immunity and in the Canadian statute codifying state immunity in Canadian law. State immunity does not apply, for instance, to a proceeding involving a commercial transaction between a state and a person. State immunity also does not apply to a lawsuit concerning the death or injury to a person, or damage to property, if these wrongs were done by the defendant state in the territory of the state in which the lawsuit is brought.

Recently, debate has centred on whether state immunity should apply when the case concerns human rights abuses like torture, or crimes against humanity, war crimes, or genocide. In the famous 1999 *Pinochet case*[15], the United Kingdom's highest court, the House of Lords, concluded that Chile's former dictator, Augusto Pinochet, was not entitled to state immunity from criminal prosecution in Europe for torture in Chile, because Chile had ratified the UN Convention Against Torture and thereby acknowledged that torture was not a proper state activity.

State immunity has, however, stood in the way of domestic legal action in other cases. Recently, Belgium sought to initiate a criminal prosecution against the then-Congolese foreign minister, alleging crimes against humanity and war crimes. The Democratic Republic of the Congo sued Belgium in the ICJ, claiming that a domestic Belgian prosecution would violate state immunity, because a sitting foreign minister was absolutely immune to any legal proceeding in the courts of another state. The ICJ agreed, concluding that state immunity in domestic (although not in international) courts applied to any serving foreign minister, head of state or head of government for civil or criminal liability, even with respect to such grave charges as crimes against humanity and war crimes.

In Canada, a recent effort to sue the Iranian state in an Ontario court for compensation for torture of the plaintiff in Iran also failed. The Ontario Court of Appeal concluded that torture was not one of the exceptions permissible under Canada's statute on state immunity.

Suing Iran in Canada: A Tale of Two Lawsuits

Two lawsuits brought recently against Iran in Ontario courts illustrate the difficulties of transnational litigation. In *Bouzari v. Iran*, ((2004) 71 O.R. (3d) 675 (C.A.)), an Iranian emigrant (and new Canadian citizen) brought suit in Ontario against Iran for torture suffered in that country as a consequence of a soured business deal with an Iranian government-affiliated enterprise. The Ontario Court of Appeal dismissed the case, concluding that Iran was protected by the doctrine of state immunity. The commercial context sparking the torture did not suffice to bring the lawsuit within one of the exceptions to state immunity: commercial activities by the defendant state.

But in a second case, *Crown Resources Corp. S.A. v. National Iranian Drilling Co.*, ([2005] O.J. No. 3871 (S.C.J.)), a Canadian corporation with a contractual dispute with a state-owned Iranian company persuaded an Ontario court to hear the case. The court concluded that state immunity did not apply because of the commercial nature of the dispute. Moreover, Ontario was the appropriate forum for the case to be heard, despite the fact that much of the dispute concerned activities in Iran, because the plaintiff would not be able to obtain a fair trial in Iran.

In summary, under the Canadian state immunity statute, a state committing human rights abuses in its territory is immune to a lawsuit brought in the courts of another state, but a state violating a commercial agreement with a foreign company is not.

Question for further discussion:

22. *In what circumstances should Canada limit state immunity? If it does, how should it do so in a fashion that responds to the rules of state immunity that exist in international law? What would be the impact on a state's diplomatic relations?*

c) Enforcing an Adequate Remedy

Even if a plaintiff is able to circumvent jurisdictional obstacles, mount a successful lawsuit, and receive an award of damages, enforcing that court order may be difficult. The defendant may have few or no assets in Canada and foreign courts may refuse to honour the Canadian judgment. The reverse may also be true: the case may be heard overseas, and the defendant's assets may be in Canada. Yet, as a matter of international law, Canadian courts are not obliged to recognize foreign judgments (although they often do so). There is no international treaty yet in force with wide membership that requires courts to recognize the damage awards of foreign courts for such things as personal injuries.

The situation is quite different when it comes to enforcing arbitral rulings concerning an international contract. As already noted, private parties may agree to have disputes under the contract submitted to private international commercial arbitrations. Here, the widely-ratified United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) requires national courts to give force to these arbitral decisions in most instances. Furthermore, the new *Convention on Choice of Court Agreements* will allow contracting parties to agree to have disputes covered by this Convention settled in the courts of a particular state, and then enforce that judgment in other states that are parties to the treaty.

Question for further discussion:

23. *Should Canada take the position domestically and internationally that damages awarded in a fair, foreign trial concerning an international wrong of whatever character (and not just concerning contractual matters) may be enforced by a domestic court? What are some of the advantages and disadvantages?*

B. Domestic Regulation of International Conduct

Governments have sometimes become more directly involved in regulating overseas conduct, extending their laws "extraterritorially" to people and events located outside their borders.

The United States has been most active in this area, most notably in competition law. But Canada too has certain extraterritorial laws. Some reflect what is known as the "universal principle" of state jurisdiction in international law: that there are some international wrongs so offensive that every state should be entitled to make commission of those wrongs a crime, without regard to where and by whom they are committed. Thus, as already noted, in Canadian criminal law, a person who has committed a war crime, a crime against humanity, or genocide can be prosecuted in Canada, even when those events take place entirely overseas.

As part of its international treaty obligations, Canada has agreed to criminalize some other forms of internationally wrongful conduct committed overseas. Some terrorism offences, for example, have extraterritorial reach in the *Criminal Code of Canada*, as does the crime of torture. Likewise, the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* requires Canada to make it a crime for a person to bribe a foreign public official.

In other circumstances, Canada has chosen voluntarily to extend its laws extraterritorially to its *own* nationals engaged in acts viewed as pernicious. Put another way, Canada has responded to its own values by choosing to regulate extraterritorially. For instance, the Criminal Code makes certain acts of pedophilia a crime in Canada, even when committed by a Canadian national while overseas.

On the whole, however, Canada has been quite conservative in extending its laws beyond its borders. In recent years, controversy has arisen over Canada's failure to regulate the overseas activities of its resource companies, some of which have been accused of serious human rights and environmental delinquency in their foreign operations. In response to these complaints, the government has called repeatedly for voluntary compliance by these companies with "codes of conduct" that often pledge companies to meet international standards. A key example is the OECD *Guidelines for Multinational Enterprises*. However, even when the standards set out in this or other codes are adequate, there is no legal enforcement and very few (if any) legal consequences for non-compliance.

The government has resisted calls for extraterritorial regulation by pointing to the possibility that extraterritorial laws might conflict with the jurisdiction of other states. When events take place overseas,

In an ideal world, we wouldn't have boundaries between countries; everyone would be peaceful, with a global perspective of their actions, making borders unnecessary. Regrettably, though we all live on the same planet, few view their priorities on a planetary perspective, choosing to restrict their focus to national or local matters. Yet, it is unrealistic and naïve for us to consider the actions of one Canadian can not affect the life of another a distance away....Yet, as people travel easily throughout the world, national laws do not follow them....The violation of human rights while traveling abroad in an effort to protect the rights of children and women is a reasonable limit to put on a tourist. It is demonstrably justified because of positive effect it will have on those being exploited for sexual purposes. The limit is reasonable because it only restricts those intending to take advantage of the commercial sexual exploitation in other countries. Ergo, I believe the use of extra-territorial legislation on Canadian citizens while traveling abroad, especially to developing nations is a reasonable limit.

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evidence is located outside of Canada and foreign jurisdictions may have to cooperate in the collection of this evidence. When they do not, it may be difficult to apply the law fairly, as measured by conventional standards of proof.

[…] [G]overnments are responsible for establishing the societal 'rules of the game', which these companies must follow, both domestically and internationally through regulation and legislation. Governments can also influence corporate governance in terms of export credit financing and other non-legislative initiatives. Many governments also require environmental and social impact assessments as a pre-condition of approving natural resource development activities. External financial institutions like export credit agencies or the World Bank also provide important financing for corporate activities and thus are in a position to provide financial incentives for certain behaviours, which may or may not include social and environmental considerations. NGOs and civil society actors also can have important watchdog functions, particularly in terms of identifying unrecognized social and environmental impacts and monitoring corporate compliance.

W. Flanagan, and G. Whiteman, *Canada and Brazil: A Study in Citizenship and Global Good Governance,* (Research Paper, Law Commission of Canada, 2003) [unpublished] at 29-30.

Regulating Canada's Mining Companies: Competing Views

In June 2005, the House of Commons Sub-Committee on Human Rights and International Development released a report on Canadian mining companies and international corporate social responsibility. Reviewing reports of poor environmental and human rights practices by some companies, the Sub-Committee recommended, among other things, that the government "[e]stablish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies". In its October 2005 response, the government declined to do so:

> The primary responsibility for the promotion and protection of human rights and the environment rests with states. States implement their international obligations relating to human rights and the environment through a variety of measures, including through the adoption of domestic legislation. … Canadian law does not generally provide for extraterritorial application. Extending the application of Canadian legislation abroad could raise several problems, including conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states. Canada has objected to the extraterritorial application of other states' laws and jurisdiction to Canadians and Canadian businesses where there is no sufficient nexus to those states or where the action undermines Canadian legislative authority or Canadian policy in the area.

Canada, *Mining in Developing Countries – Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade*. (Ottawa: Department of Foreign Affairs and International Trade, October 2005) at 8-9, online: http://www.dfait-maeci.gc.ca/tna-nac/documents/scfait-response-en.pdf

The government also sometimes argues that more extensive use by Canada of extraterritorial regulation would undermine the credibility of its own efforts to discourage the application of foreign extraterritorial laws in Canada.

This Canadian opposition to foreign extraterritoriality has come in different forms. For instance, on occasion, Canada has introduced "blocking" legislation preventing Canadians from cooperating with foreign extraterritorial regulation affecting Canada. It has also

sometimes communicated its objections by intervening directly in U.S. courts that are applying what Canada regards as extraterritorial laws.

A Canadian oil company is currently being sued in the United States under the *Alien Tort Claims Act* for alleged complicity with human rights abuses in Sudan, including war crimes and genocide. In response, the Canadian government has actively sought the dismissal of the case. In a February 2005 letter, the Canadian Embassy to the United States wrote:

> Canada reiterates its overriding concerns regarding the extraterritorial application of the *Alien Tort Claims Act* to activities of Canadian corporations that take place entirely outside the US and in particular, the current application of the *Alien Tort Claims Act* against a Canadian corporation, Talisman Energy…Canada is opposed, in principle, to broad assertions of extraterritorial jurisdiction over Canadian individuals and entities arising out of activities that take place entirely outside of the state asserting jurisdiction.

Questions for further discussion:

24. *Should Canada be more active in regulating the overseas activities of Canadian actors? If so, what values should prompt this extraterritorial regulation: established international human rights norms; established international labour rights; domestic environmental standards, etc.?*

25. *To determine if a law should have extraterritorial scope, should there be different considerations for civil and criminal law matters?*

26. *Procedurally, how would extraterritorial regulation work? How can difficulties in enforcement and evidence-gathering across borders be resolved?*

27. *How should Canada respond to the application of foreign extraterritorial laws to Canadians? What principles should guide this determination?*

Conclusion

This discussion paper has highlighted issues for law and law-making raised by the uneven process of legal globalization. In so doing, it points to issues that will only become more pressing with time, as global links increase and deepen.

> "Redefining national boundaries and the violent upheavals that sometimes accompany it, the opening of markets, the speed and convergence of our systems of communication, mean that the map of the world is changing day by day, before our eyes, and that some countries may be wondering about where they fit in. The stakes are high: they include taking part in increasing globalization while at the same time protecting features that enrich humanity with our own perceptions of the world."
>
> Canada, "Installation Speech – The Right Honourable Michaëlle Jean, Governor General of Canada on the occasion of her Installation" (Ottawa, 27 September 2005).

"We are the students for teaching peace. A group of over 30 students from Nova Scotia and across Canada travelling to Serbia to attend a peace conference"…"There's a lot of ignorance about this country and this part of the world, so one of the things that I'm really hoping to do when I go back home is to try and educate my friends, my peers and people in my school about this country and… to tell them the truth about it" …"We took our holiday and we did something and that makes me so happy. I never want to be a do-nothing person again."

Students for Teaching Peace, Eastern Shore District High School, Musquodoboit Harbour, NS

The changing world – and the accelerated global engagement it requires – also has implications for the way our system of democratic law-making functions, and for law and justice in Canada. It is time for Canadians to voice their views on these issues. We invite all Canadians to respond to the matters and questions raised in this document. Please write, fax, e-mail or phone the Law Commission at:

By Mail: **Law Commission of Canada**
Suite 1124, 222 Queen Street
Ottawa, Ontario
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By Telephone: (613) 946-8980

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Endnotes

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5 *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, paragraph 10(2)(c).

6 The *Access to Information Act*, R.S.C. 1985, c. A-1 includes exemptions to disclosure in ss. 13 and 15 that could both be used to bar release of information on international negotiations.

7 Library of Parliament, *International Treaties: Canadian Practice* (April 2000, PRB 00-04E).

8 These points were made by Professor Armand de Mestral of McGill University at the October 2005 Conference of the Canadian Council on International Law.

9 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

10 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

11 *Bouzari v. Iran* (2004), 71 O.R. (3d) 675 at para. 65-66 (C.A.). See also *Jose Pereira E Hijos S. A. v. Canada* (*Attorney General*), [1997] 2 F.C. 84 at para. 20 (F.C.T.D.).

12 Note, however, that at the regional level, in the context of the European Court of Human Rights, there have been many instances of inter-state complaints.

13 *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c.24.

14 In *Bouzari v. Iran*, an Iranian emigrant (and new Canadian citizen) brought suit in Ontario against Iran for torture suffered in that country as a consequence of a soured business deal with an Iranian government-affiliated enterprise. The Court of Appeal of Ontario was of the view that: " Canada's treaty obligation pursuant to Article 14 does not extend to providing the right to civil remedy against a foreign state for torture committed abroad," a view disputed by some commentators.

15 *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, [2000] 1 A.C.147.

QUESTIONS FOR DISCUSSION

LAW-MAKING, LEGITIMACY AND ACCOUNTABILITY

Treaty Negotiation (pp. 18-19)

1. *Who should negotiate Canada's treaties? Should there be a formal role for parliamentarians and non-governmental representatives? If so, what should this role be?*

2. *Is the government's current approach to public consultations on Canada's international negotiating positions sufficient? With whom should the government consult? What should Parliament's role be? Should the process be a formal or informal one? Should the approach differ depending on the type of treaty, its potential impact or other factors?*

3. *More generally, what steps should the government take to communicate both internally and externally the scope and nature of current and upcoming international obligations to Parliament, sub-national authorities and Canadians?*

The Role of Sub-national Governments (p. 21)

4. *What are the advantages and disadvantages of the current consultation process with the provincial, territorial and Aboriginal governments? Should it be improved? Should there be a formal, mandatory means of involving sub-national levels of government in treaty negotiations concerning matters within their jurisdiction?*

Ratification (pp. 22-23)

5. *Should there be a formal process of Parliamentary endorsement before the federal executive branch binds Canada as a matter of international law? If so, what form should this process take?*

6. *Should the Canadian approach to ratification require that sub-national governments themselves endorse a treaty on matters within their own jurisdiction, prior to Canada binding itself in international law? Would the consent of the executives suffice, or would the legislatures be required to provide the requisite*

consent? What would happen if some sub-national governments approved, but others rejected a treaty?

7. *To what extent, if any, should sub-national governments have the power to negotiate directly and ratify treaties that are within their sphere of jurisdiction?*

Determination of Customary Law (p. 23)

8. *What process should Canada use to develop positions on which norms have customary international law status?*

Approach to Soft Law and Review Mechanisms (p. 24)

9. *How should Canada develop positions on soft law instruments? Should the same process be used for soft law and treaties? Should these positions be devised in close consultation with stakeholder groups, parliamentarians and officials from other levels of government?*

10. *What are the pros and cons of the government's current approach to preparing reports on performance to international bodies? When Canada reports to international bodies charged with assessing Canada's compliance with international obligations, with whom should it consult? What process should be followed?*

11. *Should there be a formal domestic mechanism to review whether Canada is meeting its obligations?*

Implementation of Treaties (p. 29)

12. *How should Canada deal with the dilemmas of dualism? Should treaty dualism be replaced by a more "monist" approach to treaty law: automatic implementation of treaty law into the law of Canada? If so, how would this be achieved? To preserve the role of legislatures, would this change necessitate a more formal means of parliamentary/sub-national approval of treaties before the government binds Canada as a matter of international law?*

13. *What standards should be applied in deciding whether a treaty has been implemented into domestic law?*

14. *What status should be accorded to an unimplemented treaty by the courts?*

Acceptance of Customary Law (p. 30)

15. *What rules should apply governing the acceptance of customary international law into the law of Canada?*

SOVEREIGNTY, JURISDICTION AND UNEVEN ACCESS TO JUST OUTCOMES

International Remedies (p. 35)

16. *Should Canada promote greater use and effectiveness of international remedies both domestically and internationally?*

17. *Should Canada give more domestic legal force to non-binding decisions rendered by international treaty bodies? For example, should Canada be more willing to accord "views" of international human rights treaty bodies more legal force in domestic law?*

18. *Should the government do more to publicize the existence of international remedies?*

Remedies in Canada (pp. 37-38)

19. *Should Canada create civil causes of action tied to international wrongs? If so, how should it do so? Would this require each province to act, since the provinces have constitutional jurisdiction over "civil rights and property"?*

20. *Should Canada be prepared to accord Canadian courts jurisdiction to hear civil trials that deal with the most serious violations of international rights, irrespective of where they occur?*

21. *What implications should transnational litigation have for Canadian rules of evidence, when witnesses and evidence may be located elsewhere and not be easily brought to Canadian courts?*

State Immunity (p. 40)

22. *In what circumstances should Canada limit state immunity? If it does, how should it do so in a fashion that responds to the rules of state immunity that exist in international law? What would be the impact on a state's diplomatic relations?*

Enforcing Remedies (p. 40)

23. *Should Canada take the position domestically and internationally that damages awarded in a fair, foreign trial concerning an international wrong of whatever character (and not just concerning contractual matters) may be enforced by a domestic court? What are some of the advantages and disadvantages?*

Regulating Overseas Activities (p. 43)

24. *Should Canada be more active in regulating the overseas activities of Canadian actors? If so, what values should prompt this extraterritorial regulation: established international human rights norms; established international labour rights; domestic environmental standards, etc.?*

25. *To determine if a law should have extraterritorial scope, should there be different considerations for civil and criminal law matters?*

26. *Procedurally, how would extraterritorial regulation work? How can difficulties in enforcement and evidence-gathering across borders be resolved?*

27. *How should Canada respond to the application of foreign extraterritorial laws to Canadians? What principles should guide this determination?*

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