COMPARATIVE CHERRY-PICKING IN A MILITARY JUSTICE CONTEXT: THE MISPLACED QUEST TO GIVE UNIVERSALLY EXPANSIVE MEANING TO INTERNATIONAL HUMAN RIGHTS

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ABSTRACT

This Article identifies, describes, and provides two military justice examples of a phenomenon that is labeled as "comparative cherry-picking," whereby scholars and jurists rely upon extrajurisdictional law in their efforts to promote more expansive human rights protections. The Article then discusses some of the seemingly overlooked pitfalls of the comparative cherry-picking phenomenon, including treaty denunciation, "cheap talk," human rights backsliding, and desuetude. All of these may result in counterproductive advocacy strategies by human rights activists when increases to international human rights standards would, in turn, lead to decreases in levels of state protection of human rights. Thus, in addition to demonstrating the flaws with the comparative cherry-picking phenomenon as a matter of positive international law, this Article also demonstrates how the phenomenon can be ultimately damaging to the cause of those who care about human rights protections.

I. INTRODUCTION

International human rights, in the abstract, are unquestionably a communal good—something to be promoted.[1] Perhaps because of this fact, there is a strong tendency among some scholars and lobbyists to advocate for expansive interpretations of domestic and

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1. *See, e.g.*, Duncan Hollis, *What's Wrong with International Human Rights Law?*, OPINIO JURIS (Sept. 11, 2013), http://opiniojuris.org/2013/09/11/whats-wrong-international-human-rights-law/ ("[I]t's almost taboo to challenge the concept of international human rights itself. After all, since we're all humans, who could oppose the idea that we all have (and are entitled to) certain universal rights?").

international human rights.[2] In marshaling their arguments in favor of broad individual rights, these advocates will often point to extrajurisdictional sources to suggest that conventional interpretations of certain rights are deficient or incorrect.[3]

This type of reasoning can represent what I will call "comparative cherry-picking," whereby only the most expansive aspects of human rights doctrines from around the world are packaged together and offered as either positive or normative interpretations of given international human rights. In either case, such scholarship and jurisprudence fail to consider, first, the reality that similarly worded rights may mean different things in different legal contexts and second, that there are typically valid reasons (consistent with the goal of advancing respect for international human rights) for different, rather than universally lofty, interpretations of a given right within different instruments. In other words, the idea that extrajurisdictional sources can create or give a universalized meaning to a particular international human right is misplaced both as a matter of international law and—if one seeks to expand respect for international human rights—as a matter of theory.

Through examination of two case studies involving domestic military justice laws, this Article discusses the internationally recognized right to a fair trial by an independent and impartial tribunal and will demonstrate that the right's demands are not universal, but heavily contingent upon the domestic and international legal regimes that apply in particular contexts. Part II of this Article introduces the first case study—Canadian military summary trials—and deconstructs recent attempts by commentators to use jurisprudence of the European Court of Human Rights (ECtHR) to ascribe overly expansive fair trial obligations to Canada. Although these commentators deploy extrajurisdictional international human rights law (IHRL) as an argument to insist that Canadian summary trials are unfair, the analysis in Part II reveals that summary trials are consistent with both domestic constitutional law and any inter-

2. *See, e.g.*, Christine Boyle & Emma Cunliffe, *Right to Counsel During Custodial Interrogation in Canada: Not Keeping up with the Common Law Joneses*, *in* Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions 79, 79–91 (Paul Roberts & Jill Hunter eds., 2012) (relying on legal developments in other domestic jurisdictions to argue that a Canadian right to have counsel present during custodial interrogations by police should exist).

3. *Id.*

national law that is actually binding on Canada—specifically, the International Covenant on Civil and Political Rights (ICCPR).[4]

Part III of this Article introduces a second military justice case study involving the Canadian Federal Court's 2013 decision in *Tindungan v. Canada (Minister of Citizenship and Immigration)*[5]—another example of an instance where domestic constitutional and international human rights to a fair trial have been conflated and confused. In that case, the American military justice system was found not to "meet basic fairness standards that are internationally recognized to be fundamental to any tribunal system"[6] largely because the American system was not compatible with the Supreme Court of Canada's jurisprudence on fair military trials. However, as the analysis in Part III shows, the American court martial system discussed in *Tindungan* complies with U.S. constitutional law and the ICCPR, although it might not meet all of the requirements of Canadian constitutional or European human rights law. Thus, *Tindungan* provides another example of the problematic tendency of jurists to perceive extrajurisdictional law, including domestic ones, as capable of creating the complete content of internationally recognized human rights.

With the above two case studies as background, Part IV illustrates in broader terms why facile attempts to create universally expansive international human rights can actually be counterproductive by undermining, rather than promoting, respect for human rights. In support, Part IV discusses four possible adverse consequences of the comparative cherry-picking phenomenon: states' denunciation of or withdrawal from international human rights treaties; increased "cheap talk" (referring to a state's ratification of a treaty when it has no intent to comply with the treaty);[7] human rights backsliding (wherein governments react to new international standards by weakening human rights protections);[8] and desuetude

4. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

5. Tindungan v. Canada (Minister of Citizenship & Immigration), 2013 FC 115 (Can.).

6. *Id.* para. 154.

7. *See* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1828 (2003) (suggesting that states will engage in "cheap talk" when the "membership in a treaty is costless or nearly so"). Such low costs will be found in cases where the substantive obligations that the treaty imposes are not onerous or when the probability of more onerous treaty obligations actually being enforced against the state is low. *Id.*

8. Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding* 4 (UC Berkeley Pub. Law, Research Paper No. 2229072, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229072.

(abandonment of a legal rule through nonenforcement or noncompliance).[9] As Part IV shows, one or several of these consequences can reasonably be expected to manifest in some circumstances when international human rights law obligations are interpreted too expansively, which, in turn, can lead to a net loss in overall levels of respect for and adherence to human rights standards.

The goal of this Article is not to promote stagnation or to argue against any expansion of international human rights standards, but rather to signal a note of caution to those who engage in unrestrained advocacy in favor of the highest standards of human rights protections. By identifying and describing, in a military justice context, the phenomenon of comparative cherry-picking by scholars, jurists, and advocates of expansive international human rights, this Article will show how the phenomenon is problematic and why a more traditional understanding of the sources of international law is perhaps needed to actually promote respect for (or at least avoid undermining) international human rights, including the right to a fair trial.

II. Understanding the IHRL and Domestic Law Governing Canadian Summary Trials

Before embarking on the first military justice case study, it would be helpful to define the term "military justice system" so that the context within which the two ensuing case studies arise can be better understood. Military justice systems provide a critical means through which many states promote the maintenance of order, discipline, efficiency, and morale among members of their armed forces.[10] A military justice system often exists "as a parallel system of justice that operates separately from ordinary . . . criminal systems."[11] A typical military justice system will permit military authorities to initiate charges against personnel who allegedly

9. Michael J. Glennon, *How International Rules Die*, 93 Geo. L.J. 939, 939 (2005).

10. *See, e.g.*, Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice ("UCMJ") over Civilians and the Implications of International Human Rights Law*, 17 Cardozo J. Int'l & Comp. L. 59, 61–62 (2009) ("[O]rder and discipline has [sic] been traditionally maintained over troops through the military justice system."); *see also* National Defence Act, R.S.C. 1985, c. N-5, § 203.1 (Can.) ("Purposes and Principles of Sentencing by Service Tribunals": "The fundamental purposes of sentencing are to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale.") (This recently enacted provision was not yet in force as of October 24, 2014.).

11. Stigall, *supra* note 10, at 62.

breach the applicable code or law that governs military conduct[12] and provides for means through which such charges can be adjudicated.[13] Ultimately, and regardless of whether one characterizes these systems as penal, disciplinary, or criminal in nature, they are all essentially designed to shape the conduct of armed forces personnel by sanctioning undesirable conduct.[14] The importance of such military justice systems as a means of controlling armed forces cannot be understated:

> Simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. It is also key to ensuring compliance of states and their armed forces with the normative requirements of international human rights and international humanitarian law.[15]

Given the prominent role military justice systems play in the maintenance of discipline, efficiency, and morale of armed forces, it is not surprising that such a system exists under Canadian law.[16]

As I have described elsewhere,[17] there are two types of service (or military) tribunals in Canada: courts martial and summary trials.[18] Courts martial are akin to civilian criminal trials in many ways: they involve professional judges,[19] prosecutors,[20] and (unless an accused

12. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. § 830 (2012) (providing for the preference of charges by one who has personal knowledge of, or has investigated, the matters set forth in the charges).

13. *See, e.g.*, Defence Act 1954 (Act. No. 18/1954) (Ir.), *available at* http://www.irishstatutebook.ie/1954/en/act/pub/0018/print.html (citing the legislative authorities for the Irish Defence Force to dispose of charges by summary proceeding and courts martial).

14. *See, e.g.*, Sections 80–85 of the Armed Forces Discipline Act 1971 (N.Z.) (providing examples of the punishments that can be imposed as sanctions against those who have been found guilty of offenses at courts martial).

15. Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. Int'l L. & Int'l Rel. 1, 12 (2008); *see also* Peter Rowe, The Impact of Human Rights Law on Armed Forces 67 (2006) (describing the requirement for a military justice system to benefit from the "*quid pro quo* for prisoner of war status," which requires "that individuals can be punished under their own disciplinary system for breaches of international humanitarian law (or the laws of war) and that a superior officer is responsible for those under his command").

16. For the complete legislative text relating to Canada's military justice system, see National Defence Act, R.S.C. 1985, c. N-5, pt. III (Can.) ("Code of Service Discipline").

17. Mike Madden, *Keeping up with the Common Law O'Sullivans? The Limits of Comparative Law in the Context of Military Law Reforms*, 51 Alberta L. Rev. 125, 130–32 (2013).

18. National Defence Act § 2 (definition of "service tribunal").

19. *Id.* §§167(1), 174.

20. *Id.* § 165.11.

person does not desire the assistance of counsel) defense lawyers;[21] they adhere to formal rules of evidence;[22] and they provide for appeals to a higher court.[23] However, there are many uniquely military features to courts martial as well: the judge and prosecutor are legally trained officers in the Canadian Forces,[24] and the proceedings involve typical military formalities, such as saluting the military judge when he or she enters the court martial.[25] Over the last twenty years, several changes to military law have been made to (among other things) better guarantee the independence of military judges who preside at courts martial.[26] It is now generally accepted—even by the most strident critics of Canada's military justice system—that courts martial are fair trials that comply with the requirements of Canada's Constitution.[27]

Summary trials—the focus of the present case study—are proceedings not easily compared to civilian criminal trials. A summary trial is "intended as an expedient and fair means to deal with minor service offences at the unit level," so that any breaches of discipline can be promptly addressed, and any offenders can be

21. For a description of the Director of Defense Counsel Services' responsibility to provide representation to accused persons, see *id.* § 249.19, .21.

22. *See id.* § 181 (requirement for courts martial to follow rules of evidence "established by regulations made by the Governor in Council"); *see also* Military Rules of Evidence, C.R.C. 2014, c. 1049 (Can.) (providing the rules that have, in fact, been established by regulations).

23. *See* National Defence Act §§ 60–71 (codifying the process of appeals to a higher court).

24. *Id.* § 165.21, .15.

25. Nat'l Def. of Can., Court Martial Procedures: Guide for Participants and Members of the Public 2 (2012) ("Everyone rises whenever the military judge or members of the court martial panel enter the courtroom, and the military members wearing headdress salute the court.").

26. *See, e.g.*, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, S.C. 1998, c. 35 (Can.) (creating the position of the Chief Military Judge and providing for the appointment of tenured Military Judges to preside at courts martial); An Act to Amend the National Defence Act (Court Martial) and to Make a Consequential Amendment to Another Act, S.C. 2008, c. 29 (Can.) (amending the National Defence Act to allow, in most circumstances, the accused to choose whether to be tried by a general court martial with a panel or by a standing court martial with a judge sitting alone).

27. *See, e.g.*, the following:

> Military judges have now acquired the last missing component of their judicial independence. They are appointed during good behaviour and their retirement is set at age 60. . . . [M]ilitary judges were able to secure the guarantees of judicial independence necessary to the exercise of a jurisdiction in criminal law akin to provincial courts and superior courts of criminal jurisdiction.

Gilles Létourneau, Introduction to Military Justice: An Overview of the Military Penal Justice System and Its Evolution in Canada 47 (2012).

quickly returned to duty within their units.[28] "The purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict."[29]

This desire to realize fair and expedient justice is at the root of many procedural features of summary trials.[30] For instance, the presiding officer at a summary trial is generally the commanding officer of the accused person[31] or another officer within the accused person's chain of command.[32] The accused person does not have a right to be represented by counsel at a summary trial,[33] but will be assisted throughout the trial process by an assisting officer appointed by the commanding officer.[34] Summary trials proceed in a generally inquisitorial fashion, with the presiding officer actively seeking to discover all of the facts of the case (both incriminating and exculpatory) during a trial.[35] There are no formal rules of evidence applicable at summary trials.[36] There is also no right to appeal a summary trial decision to a higher court, although an accused person can request the decision to be reviewed by the presiding officer's superior in matters of discipline—a more senior, but still nonjudicial, officer in the offender's

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28. Nat'l Def. of Can., Office of the Judge Advocate Gen., Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Justice in the Canadian Forces: A Review from 1 April 2009 to 31 March 2010, at 13 (2010).

29. Queen's Regulations and Orders for the Canadian Forces, art 108.02, *available at* http://www.admfincs.forces.gc.ca/qro-orf/index-eng.asp [hereinafter QR&O].

30. *See generally* Kenneth W. Watkin, Canadian Military Justice: Summary Proceedings and the Charter 33–86 (Oct. 1990) (unpublished LL.M. thesis, Queen's University). After describing the history and character of Canadian summary trials, Watkin, who became the Canadian Judge Advocate General from 2006 to 2010, concludes as follows:

> The unique structure and considerable flexibility of summary proceedings [are] particularly well suited to the disciplinary and operational needs of the Canadian Forces. The summary trial emphasizes personal control by military commanders of their subordinates. It reinforces the trained habit of obedience which is essential to the maintenance of discipline. Summary proceedings, by virtue of their integration within the unit structure, offer an extremely "portable" trial process which can be readily employed any where that Canadian Forces personnel are serving.

Id. at 85–86.

31. National Defence Act, R.S.C. 1985, c. N-5, § 163(1) (Can.).

32. *Id.* §§ 163(4) (referring to delegated officers), 164(1) (referring to superior commanders).

33. QR&O, *supra* note 29, art. 108.14, note (B).

34. *Id.* art. 108.14(1)–(5).

35. *Id.* art. 108.21(2).

36. *Id.* art. 108.21(1).

chain of command.[37] As such, summary trials clearly differ in many respects from typical civilian criminal trials.

On the other hand, notwithstanding the unique features of Canadian summary trials, the consequences of a conviction at summary trial can be very similar to those that would follow from a criminal conviction in a civilian court. For instance, a commanding officer who presides at a summary trial can impose a punishment of detention up to thirty days on an offender,[38] served in a military detention barrack.[39] Additionally, some convictions for service offenses rendered by summary trials will continue to result in criminal records[40] even after the most recent amendments to the National Defence Act (NDA) come into force.[41] Thus, there are many recognizable elements of criminal-like law within Canada's military justice system at the summary trial level.

Furthermore, sufficient procedural protections for accused persons have been incorporated into the summary trial regime to ensure that these proceedings respect an accused person's rights in a way that is compliant with both Canadian constitutional law and the IHRL that is binding on Canada. For instance, a measure of quasi-judicial independence is provided for within the Queen's Regulations and Orders for the Canadian Forces, stipulating that "[t]he conduct of the proceedings of a summary trial is the sole responsibility of the officer presiding at the trial and *no superior authority shall intervene in the proceedings*."[42] Similarly, a presiding officer is required to swear an oath to "administer justice according to law, without partiality, favour or affection."[43] Finally, an accused person is afforded the right to elect trial by court martial in all but the least serious of cases,[44] where this election likely acts as a waiver

37. *Id.* art. 108.45.

38. National Defence Act, R.S.C. 1985, c. N-5, 163(3)(a) (Can.).

39. *Id.* § 220(4).

40. *See* Criminal Records Act, R.S.C. 1985, c. C-47, § 4(1) (Can.) (providing for the times before which an individual convicted of a service offence under the National Defence Act (NDA) can apply for a criminal record suspension).

41. *See* An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, S.C. 2013, c. 24, § 75 (Can.). This provision would deem many offenses under the NDA not to be "offences" for the purposes of the Criminal Records Act; however, convictions for certain offenses at summary trial (regardless of sentence) and for all offenses at summary trial that result in a sentence of detention would remain "criminal" offenses.

42. QR&O, *supra* note 29, art. 108.04 (emphasis added).

43. *Id.* art. 108.27.

44. *Id.* art. 108.17. An accused person has a right to elect trial by court martial except where two conditions are met: first, the accused must be charged with one of the five most minor offenses; second, the circumstances must be such that a presiding officer would not

of the exercise of certain rights, such as the right to counsel and the right to trial by an independent tribunal.[45] These important procedural safeguards must be considered for any determination regarding the fairness of summary trials.

A. *Criticisms of the Canadian Summary Trial Regime*

Very little exists by way of written academic commentary on the Canadian military justice system. Over the last decade, however, two authors—Michel Drapeau[46] and Gilles Létourneau[47]—have published a series of books on military law[48] and appeared as witnesses with subject-matter expertise at parliamentary committee hearings during debates about military justice law reforms.[49] Since these two commentators have essentially been the only ones, outside of the Canadian military, to offer recent comment on

require powers of punishment greater than a twenty-five percent fine of basic monthly pay if the accused person were to be found guilty of the offense. *Id.* For all other offenses and in all other cases, one has the right to elect trial by court martial. *Id.*

45. An excellent explanation about how an election to trial by summary trial instead of court martial represents a waiver of one's rights to counsel and to trial by an independent tribunal can be found in Jeff Orr & Stuart Beresford, *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Armed Forces Law Reform Bill*, Ministry Just.—Tahu o te Ture (Feb. 23, 2007), http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/armed-forces-law-reform-bill. This legal opinion to the attorney general of New Zealand affirmed that proposed changes (contained in a 2007 bill) to New Zealand's military justice system, including changes to a summary trial system that is substantially similar to Canada's current system, were consistent with international and domestic human rights law requirements. *Id.* Specifically, with respect to waivers, the legal opinion found that a properly informed election (about the right to trial by court martial and the consequences of being tried by summary trial—no representation by counsel and no independent judge) to be tried by summary trial amounted to a waiver of the rights to legal counsel and to trial by an independent tribunal in a manner that was consistent with human rights law. *Id.* paras. 117–25.

46. Michel Drapeau is an adjunct Professor at the University of Ottawa's Faculty of Law. He served in the Canadian Forces for thirty-four years between 1959–1993, before attending law school and being admitted as a lawyer to the Bar of Ontario in 2002. *Michel William Drapeau*, Michel Drapeau L. Off., http://mdlo.ca/our-team/michel-w-drapeau/ (last visited Mar. 20, 2014).

47. Gilles Létourneau is a retired judge of Canada's Federal Court of Appeal and Court Martial Appeal Court. He holds a law degree from Laval University and has both a Masters degree and a Doctoral degree in law from the London School of Economics. Létourneau, *supra* note 27, at vii–viii.

48. *Id.*; Gilles Létourneau & Michel Drapeau, Military Justice in Action: Annotated National Defence Legislation (2011); Gilles Létourneau & Michel Drapeau, Canadian Military Law Annotated (2006).

49. Drapeau gave evidence at the *50th Meeting of the H. of Commons Standing Comm. on Nat'l Def.*, 40th Parl. (2011) (Can.), and at the *65th Meeting of the H. of Commons Standing Comm. on Nat'l Def.*, 41st Parl. (2013) (Can.) [hereinafter *65th Meeting Comm. on Nat'l Def.*]. Létourneau also gave evidence at the latter meeting. *65th Meeting Comm. on Nat'l Def.*, *supra.*

Canada's military justice system, any criticism of the summary trial system by Drapeau or Létourneau merits special consideration.

Drapeau has written numerous editorial and opinion pieces that complain of unfairness in the summary trial system. For instance, he suggests that "summary trials are conducted as if the law and lawyers were irrelevant and, in a manner, that seems to go against basic Canadian legal rights available to civilians."[50] More specifically, Drapeau opines, "the determination of these criminal charges should be made through a fair hearing by an independent and impartial tribunal, which is far from being the case."[51]

Létourneau is equally unequivocal in his assessment of the summary trial system: "I think the system is unconstitutional . . . . [O]ur soldiers in uniform are still denied fair treatment at summary trial."[52] Létourneau suggests elsewhere that, in the absence of counsel for the accused at a summary trial and with only an assisting officer to help the accused to prepare, "[o]ne is under the impression here of witnessing the wanderings of the blind leading the lame down a dark corridor."[53] Essentially, both commentators contend that summary trials are unconstitutional and violate the right to a fair trial by an independent and impartial tribunal.

When one probes further in an effort to understand the reasoning behind these criticisms of the Canadian summary trial system, however, it becomes evident that the military tribunals are not being assessed by Drapeau and Létourneau in relation to their compliance with Canadian law or even international treaty law that is binding on Canada, but rather with extrajurisdictional international law. In a typical opinion piece, for example, Drapeau claims the following:

> [T]he summary trials system is allowed to survive unscathed despite being decried as being unconstitutional by a mounting chorus of dissent and protest by an impressive number of Parliamentarians, legal scholars, and legal practitioners in Canada. All of this while a wide body of jurisprudence from the European Court of Human Rights . . . has labelled summary trials proceedings as lacking the attributes of a fair, independent, and impartial tribunal . . . .[54]

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50. Michel Drapeau, *Military Summary Trials: A Victorian System of Justice*, 17 ESPRIT DE CORPS, no. 9, 2010, at 16, 19.

51. *Id.*

52. *65th Meeting Comm. on Nat'l Def.*, *supra* note 49, at 12.

53. LÉTOURNEAU, *supra* note 27, at 35.

54. Michel Drapeau, *Time to Rebrand JAG as CF Legal Adviser*, HILL TIMES, Mar. 4, 2013, at 13, 13.

In the same opinion piece, Drapeau recommends amending the NDA "to bring it more in line with the Charter of Rights and Freedoms and universal human rights standards."[55] Similar references to European law, and specifically to the European Convention on Human Rights (ECHR),[56] can be found throughout Drapeau's writings on Canadian military justice. In another article titled, *Canada's Military Justice System: Further and Further Behind International Norms*, he describes summary trials as a "Victorian system of justice already declared as being non-compliant with the ECHR."[57] This statement clearly suggests that the ECtHR has somehow ruled upon the compliance of the Canadian summary trial system with international law—something that has not occurred. Finally, at a Canadian Parliamentary committee hearing, Drapeau was directly confronted with information that former Chief Justice of Canada, Brian Dickson, and former Chief Justice of the Ontario Superior Court, Patrick LeSage, had independently reviewed the Canadian military justice system and found that the summary trial process was "likely to survive a court challenge."[58] Drapeau was then asked why the committee should disregard the views of "these respected Canadian jurists."[59] He answered the question by insisting that he still viewed the summary trial system as unconstitutional:

> My opinion is based, among others, primarily on the quite abundant jurisprudence from the European Court of Human Rights. They have said that according to the European Convention on Human Rights, to have a trial of a quasi-criminal or criminal nature whereby you can sentence somebody to a loss of liberty when that individual goes before a tribunal that is not chaired by someone who is legally trained, has no right to counsel, has no transcript, and has no right to appeal is not constitutional. It's the only place in Canada where this exists.[60]

Drapeau's statements imply that the ECtHR has assessed the Canadian summary trial system, determined that it is inconsistent with the ECHR, and therefore also determined that the system violates the Canadian Constitution.

Although Létourneau has not commented upon the Canadian summary trial system as frequently as Drapeau, the former none-

55. *Id.*

56. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

57. Michel Drapeau, *Canada's Military Justice System: Further and Further Behind International Norms*, 18 Esprit de Corps, no. 10, 2011, at 38, 41.

58. *65th Meeting Comm. on Nat'l Def., supra* note 49, at 4–5.

59. *Id.* at 5.

60. *Id.*

theless also displays a tendency to conflate Canadian law with law that applies elsewhere. For instance, when giving evidence before a parliamentary committee shortly after his retirement from the Court Martial Appeal Court, Létourneau stated the following:

> [C]hanges have taken place in Ireland, Australia, New Zealand, France, Belgium, Austria, the Czech Republic, Germany, Lithuania, and the Netherlands, and despite the fact that the requirements of independence, impartiality, fairness, and justice are the same in Canada as they are in England—and if anything, they are more compelling here, because in Canada they are entrenched in the Constitution—our soldiers in uniform are still denied fair treatment at a summary trial.[61]

Thus, both Létourneau and Drapeau seem to apply the same general syllogism in their analysis of Canadian summary trials: (1) European countries have changed their summary trial systems; (2) these changes were required by European law in order to comply with state obligations to provide fair trials by independent and impartial tribunals; (3) either European law applies directly in Canada or the content of European law is the same as the content of similar laws in Canada; and (4) therefore, Canada is bound by law to change its summary trial system.

The agenda that Drapeau and Létourneau are attempting to advance through their criticisms of the Canadian summary trial system is laudable: both commentators clearly feel that summary trials could become fairer through progressive changes to military legislation, a proposition with which it would be difficult to argue.[62] It should be noted, however, that the purpose of this Article is not to suggest anything to the contrary, since only in the rarest of theoretical circumstances could one convincingly argue that a particular law (such as the NDA that governs summary trials) is perfect and would not benefit from some form of change or development. Rather, the purpose of this Article is to highlight a phenomenon whereby jurists draw upon and (mis)represent as binding, extrajurisdictional sources of international or domestic law in their attempts to create or give effect to expansive conceptions of the right to a fair trial. The Drapeau and Létourneau criticisms of Canadian summary trials provide two examples of this phenomenon in action.

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61. *Id.* at 12.

62. *But see* Rowe, *supra* note 15, at 66 ("[T]he attitude of members of the armed forces is worth considering. Where the armed forces consist of volunteers only [as in Canada,] it is reasonable to infer that the disciplinary system is acceptable to them, otherwise they would not have joined.").

B. *Deconstructing Criticisms of the Canadian Summary Trial Regime*

As most international and comparative law scholars would immediately recognize, there is a fundamental flaw in the syllogism that seems to underpin the Drapeau/Létourneau critique of Canadian summary trials: international and domestic law that is binding on European states is not the same as international and domestic law that is binding on Canada. More specifically, in a military justice context, the substantive content of the right to a fair trial by an independent and impartial tribunal under the ECHR is different from similarly worded rights under both the ICCPR[63] and the Canadian Charter.[64] To develop this argument, the ensuing discussion begins by examining the content of the right to a fair trial under the ECHR but stresses that this European variant of the right is inapplicable in Canada. Next, this Section discusses the less-developed content of the right under the ICCPR (a treaty to which Canada is a party) and the minimal content of any such right under customary international law to demonstrate that Canadian summary trials comply with all applicable international human rights to a fair trial. Finally, this Section explains how summary trials are consistent with Canadian constitutional law. The goal of this Section is to illustrate the positive error inherent in Drapeau's and Létourneau's claims that Canadian summary trials are unconstitutional because they violate universal or international human rights law.

1. Broad Content, Limited Reach: The ECHR Right to a Fair Trial

Article 6(1) of the ECHR is phrased similarly to Article 14(1) of the ICCPR and Section 11(d) of the Canadian Charter, and provides that, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[65] All three legal instruments provide for fair trials by independent and impartial tribunals. However, a comprehensive—and distinctly European—body of jurisprudence has emerged from the ECtHR regarding this

63. ICCPR, *supra* note 4, art 14(1).

64. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 11(d) (U.K.). The Charter is Canada's constitutionally entrenched bill of rights.

65. ECHR, *supra* note 56, art. 6(1).

right,[66] including two significant decisions that specifically discuss the right in the context of military summary proceedings.[67]

The ECtHR's leading case on summary trials is *Thompson v. United Kingdom.* Lance Corporal Thompson was a solider in the British Army in 1996.[68] He went missing from his unit in December of that year before civilian police arrested and returned him to his unit, where he faced a charge of being absent without leave (AWOL).[69] It is unclear whether Thompson elected to be tried by summary trial: at the ECtHR, he maintained that he had never been offered an election to trial by court martial, but the U.K. government claimed that an election was offered to Thompson before his summary trial.[70] Thompson was eventually tried by his commanding officer at a summary trial on February 13, 1997.[71] He pled guilty to the AWOL charge and was sentenced to twenty-eight days of detention.[72] In Thompson's subsequent complaint to the European Commission of Human Rights[73] on May 16, 1997, he alleged that he was subjected to an unfair trial contrary to Article 6(1) of the ECHR because, among other issues, the summary trial presided over by his commanding officer was not an independent and impartial tribunal.[74]

At the relevant time, British law provided for summary trials that were in many respects similar to present-day Canadian summary trials: the accused needed to be offered an election to trial court martial before detention could be imposed as a punishment, but

66. *See* HUDOC Database, European Court of Human Rights, *available at* http://hudoc.echr.coe.int (last visited Aug. 10, 2014). As of August 10, 2014, the European Court of Human Rights (ECtHR) decisions database indicates that the Article 6 right to a fair trial has factored into 24,381 decisions of the Chamber or Grand Chamber of the Court.

67. Thompson v. United Kingdom, No. 36256/97, at *5 (Eur. Ct. H.R. June 15, 2004) (HUDOC, Case Law, Judgments), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61816; Bell v. United Kingdom, No. 41534/98, at *4–5 (Eur. Ct. H.R. Jan. 16, 2007) (HUDOC, Case Law, Judgments), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79030.

68. *Thompson*, at *2.

69. *Id.* at *2–3.

70. *Id.* at *3.

71. *Id.*

72. *Id.*

73. The European Commission of Human Rights originally played a screening role with respect to applications received under the ECHR and was responsible for referring appropriate cases to the ECtHR. *See* ECHR, *supra* note 56, art. 25. However, the commission's role was eliminated through Protocol 11 to the ECHR, which came into force on November 1, 1998. All applications before the commission on that date, including Thompson's application, were then transferred to the ECtHR for consideration. *See Thompson*, at *1.

74. *Thompson*, at *7–8.

not in cases where more minor punishments would have been appropriate;[75] commanding officers could impose up to sixty days of detention as punishment at summary trials;[76] and there was no right of appeal from a decision made by summary trial, although superior military authorities could review the decision and alter the finding or punishment.[77]

In *Thompson*, the ECtHR clearly established that these features of a military summary trial are incompatible with Article 6(1) of the ECHR.[78] The Court found that the right to a fair trial was engaged in *Thompson*, as he faced a punishment of up to sixty days of detention, which brought the offense into the realm of "criminal" charges contemplated by Article 6(1).[79]

The ECtHR observed that, even if Thompson elected to be tried by summary trial, such an election could not amount to a waiver of his right to a fair trial for four reasons:[80] first, Thompson would likely have been influenced by the fact that it was his commanding officer—a direct superior—who was offering him the election;[81] second, Thompson would likely have been influenced by the much lighter maximum punishment that a summary trial could impose on him as compared to the maximum punishment at court martial;[82] third, the court martial system in place at the time as an alternative to summary trial was also unfair from an ECHR Article 6(1) perspective;[83] and fourth, Thompson was not afforded sufficient opportunity to consult with counsel about any election that might have been offered to him.[84] All of these factors, the ECtHR reasoned, would have perverted any "free and unambiguous" election to trial by court martial that may have been offered to Thomp-

75. *Id.* at *4–5.
76. *Id.* at *5.
77. *Id.*
78. *Id.* at *10.
79. *Id.* at *6–9.
80. *Id.* at *9–10 (explaining why an election to be tried by summary trial cannot serve to waive one's right to a fair trial under the ECHR).
81. *Id.*
82. *Id.*
83. *Id.*; *see also* Findlay v. United Kingdom, 1997-I Eur. Ct. H.R. 263, 280–83 (holding that a British Army court martial was not a trial by an independent and impartial tribunal because the convening officer—a superior within Findlay's chain of command—who appointed the triers of fact was superior in rank to all of these court martial members, supervised some of them directly, and ultimately had the power to confirm or vary aspects of the court martial's decision); Grieves v. United Kingdom, 2003-XII Eur. Ct. H.R. 247, 267–71 (making a similar finding that British Naval courts martial lack independence and impartiality due to the role played by members of the chain of command in the proceedings).
84. *Thompson*, at *9–10.

son;[85] so, even if Thompson elected to be tried summarily, it could not amount to a waiver of Thompson's right to a fair trial.

Finally, on the substance of Thompson's complaint that his commanding officer was not an independent and impartial tribunal, the ECtHR ruled in Thompson's favor:

> Most fundamentally, the Commanding Officer was central to the prosecution of the charge against the applicant . . . and, at the same time, he was the sole judge in the case. In such circumstances, the Court finds that the summary trial presented even clearer structural independence and impartiality problems than those established in the above-cited *Findlay* case.[86]

In other words, if British Army courts martial were incompatible with the ECHR Article 6(1) due to the involvement that members of the chain of command could have upon the prosecution (as found by the ECtHR in *Findlay*),[87] then summary trials were even more incompatible with the right to a fair trial by an independent and impartial tribunal. At Thompson's summary trial, his commanding officer could do much more than just influence the outcome of the case: as the presiding officer, his commanding officer was actually the sole arbiter of the outcome of the case. As a result, the ECtHR found that British law violated Article 6(1) of the ECHR.[88] This finding was echoed in *Bell*, a more recent decision involving similar facts.[89]

As the *Thompson* and *Bell* cases demonstrate, the ECtHR takes a very strict view of a state's obligations under Article 6(1) of the ECHR to provide fair trials by independent and impartial tribunals. No exception to the right, in recognition of the dual (disciplinary-criminal) nature of the proceedings or the pressing need for discipline and order within armed forces, was recognized by the ECtHR for military tribunals. Thus, if jurisprudence of the ECtHR was binding on Canada as a matter of either international or domestic law and based on the above description of Canadian summary trials that are presided over by members of an accused person's chain of command, one could argue that such summary trials do not comply with the ECHR requirements.

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85. *Id.*

86. *Id.* at *10.

87. *Findlay*, 1997-I Eur. Ct. H.R. at 280–83.

88. *Thompson*, at *11.

89. Bell v. United Kingdom, No. 41534/98, at *11 (Eur. Ct. H.R. Jan. 16, 2007) (HUDOC, Case Law, Judgments), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79030.

In reality, however, jurisprudence of the ECtHR has no legal force in Canada because Canada is not a party to the ECHR. The ECHR, while properly categorized as a source of international law,[90] is a regional—not a universal—international human rights instrument.[91] Its reach is restricted to matters within the jurisdiction of the European states party to the treaty.[92] Therefore, it is illogical to even speak of Canadian compliance with the ECHR by, for instance, suggesting that Canadian summary trials are a "Victorian system of justice already declared as being non-compliant with the ECHR,"[93] since a state can never be compliant with a treaty it has not ratified—that is, a treaty that imposes no obligations on the state.[94]

The preceding discussion demonstrates a fallacy inherent in one part of the syllogism that is often applied by critics of the Canadian summary trial system by illustrating that European law—namely the jurisprudence of the ECtHR—is not binding on Canada. Nonetheless, in recognition of the possibility that these military justice critics may simply be suggesting that the substantive content of European law, while not directly applicable in Canada, is the same as that of domestic and international law applicable to Canada, this Article assesses the legitimacy of the Canadian summary trial sys-

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90. *See* Statute of the International Court of Justice, 2007 I.C.J. Acts & Docs. 59, art. 38(1)(a).

91. This point has been effectively made by Rebecca Young in her work describing the use (and perhaps the overuse) of the ECtHR jurisprudence and the absence of meaningful references to human rights jurisprudence of the African Commission on Human and Peoples' Rights by the International Criminal Court, as follows:

> The underlying reasons for this are obvious—the European human rights jurisprudence is the most developed, the most discussed in secondary source material and the most readily available in the two working languages of the Court. Given such temptation, it is necessary that the Court ensures that where it does focus on the human rights jurisprudence of a single regional system that such focus is properly justified as reflecting that the jurisprudence most relevant and useful in the particular case. It is particularly important to guard against a common presumption in human rights law that European law is automatically readily transferable to other contexts, whereas African human rights law is assumed to be more backwards.

See Rebecca Young, *'Internationally Recognized Human Rights' Before the International Criminal Court*, 60 INT'L & COMP. L.Q. 189, 204 (2011).

92. ECHR, *supra* note 56, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

93. Drapeau, *supra* note 57, at 41.

94. *See* Sarah Elizabeth Kreps & Anthony Clark Arend, *Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes*, 16 DUKE J. COMP. & INT'L L. 331, 333 (2006) ("A state is said to be complying with a treaty or rule of customary international law if it is acting in accordance with the legal obligations established in that particular source of law.").

tem in reference to customary international law and treaty law that are binding on Canada.

2. Thin to Nonexistent: The Right to a Fair Trial Under Customary International Law

Commentators disagree about whether a right to a fair trial by an independent and impartial tribunal exists under customary international law. For instance, in an essay from 2009, the then president of the International Criminal Tribunal for Yugoslavia, Patrick Robinson, writes, "[t]hat the provision of Article 14 [of the ICCPR] on the right of an accused to a fair trial reflects customary international law is beyond dispute."[95] This assertion by Judge Robinson is disproven, however, by claims such as those by Oona Hathaway (in an influential empirical study of state compliance with human rights treaties)[96] when she discusses civil liberty rights and the right to a fair and public trial, noting that both rights "are covered by decades-old international treaty instruments, but neither of which is regarded as a norm of customary law."[97]

Hathaway's claim echoes the American Restatement (Third) of the Foreign Relations Law of the United States,[98] which, at Section 702, does not list the right to a fair trial as one of the six *jus cogens* human rights existing under customary international law.[99] Yet, one scholar has observed that:

> Such discussion and controversy regarding section 702 as there was during debates of it centered not around the abuses listed, but, quite expectedly, on the abuses not listed. . . . It was important that a statement be included to the effect that human rights are a matter of customary international law and thus are binding on states that are not signatories to various bilateral and multilateral agreements. Yet it was equally important for the credibility of the Restatement (Third) that the section not boldly hold out certain rights, which in some parts of the world community

95. Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 Berkeley J. Int'l L. Publicist 1, 5 (2009).

96. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002). As of November 30, 2013, this article is identified within the HeinOnline Database as having been cited by 236 other articles within the database.

97. *Id.* at 1965–66.

98. Restatement (Third) of Foreign Relations Law of the United States (1986). Although work has begun on a fourth restatement of the law, the third remains the most recent published restatement.

99. *Id.* § 702. The six enumerated *jus cogens* human rights in Section 702 are prohibitions against genocide, slave trade, murder/disappearance, torture, prolonged detention, and systematic racial discrimination. *Id.*

> are not protected, as having attained the status of customary law rights.[100]

Accordingly, there may well have been arguments in favor of including the right to a fair trial within the Restatement, but the drafters apparently concluded that the right has not attained the status of a peremptory norm of customary international law.

Thus, while the right to a fair trial is prominent in international law,[101] it remains difficult to ascertain whether the right is so widely recognized through state practice and *opinio juris* to form part of customary international law.[102] Even if a customary right to a fair trial exists, perhaps the substantive content of the right is limited: it places a general obligation on states to ensure that trials are fair, but it is not so sophisticated as to outline the particular ways in which any particular fairness criteria must be met. For instance, even if a customary right to a fair trial existed that included requirements, such as those listed at Article 14(3)(a)–(g) of the ICCPR, to guarantee trial fairness, there is no internationally recognized standard of what amounts to a trial without "undue delay"[103] or what constitutes "adequate time"[104] for the preparation of a defense under customary international law.

Given the uncertain status and substantive content of any customary right to a fair trial, two relevant propositions can be made to the present case study. First, customary international law (that is

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100. Daniel T. Murphy, Commentary, *The Restatement (Third)'s Human Rights Provisions: Nothing New, but Very Welcome*, 24 INT'L LAW. 917, 922 (1990).

101. The right is articulated in the ICCPR, *supra* note 4, art. 14(1); ECHR, *supra* note 56, art. 6(1); African Charter on Human and Peoples' Rights (Banjul Charter), § 7(1)(b), (d), *adopted* June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights § 8(1), *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36.

102. The following excerpt explains the necessary preconditions for recognition of a rule of customary international law:

> State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked . . . . [T]he acts concerned [must] amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, paras. 74–77 (Feb. 20).

103. Article 14(3)(c) provides that, in the determination of criminal charges, everyone has the right "[t]o be tried without undue delay." ICCPR, *supra* note 4.

104. Article 14(3)(b) provides that, in the determination of criminal charges, everyone has the right "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." *Id.*

binding on Canada)[105] dealing with the right to a fair trial clearly has different, less elaborate content than regional European treaty law. Second, Canadian summary trials are likely fully compliant with this customary international body of law. In other words, even though Canadian summary trials do not fulfill every fairness requirement that has developed under European law through the jurisprudence of the ECtHR, they nonetheless provide basic guarantees of fairness (through, among other things, the oath that presiding officers are required to swear, the regulatory prohibition that bars superior authorities from intervening in the proceedings, and the right to elect trial by court martial in many cases) that are sufficient to meet the requirements (if any exists) of customary international human rights law.[106]

3. The Lowest Common Denominator? The ICCPR's Article 14(1) Right to a Fair Trial

Canada is a party to the ICCPR,[107] including the First Optional Protocol to the convention.[108] Thus, Canada recognizes the ICCPR's Article 14(1) right to a fair trial: "[I]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[109] Canada also recognizes the competence of the U.N. Human Rights Committee (HRC) to receive and consider complaints that states have violated any of the rights set forth in the ICCPR.[110] However, the Article 14(1) right is phrased in broad and abstract terms, and there remains substantial uncertainty about the scope and meaning of the right. Do armed forces disciplinary proceedings such as Canadian summary trials amount to determinations of either "criminal charges" or "rights and obligations in a suit at law"? Furthermore, even if Article 14(1) applies to such proceedings, then can a commanding officer who adjudicates

105. Where there is no evidence of Canada objecting to any rule of customary international law dealing with the right to a fair trial, any such rule would be binding on Canada: "customary rules are binding upon all states except for such states as have dissented from the start of that custom." MALCOLM N. SHAW, INTERNATIONAL LAW 91 (6th ed. 2008).

106. *See supra* notes 42–45 and accompanying text.

107. ICCPR, *supra* note 4.

108. Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) [hereinafter Optional Protocol to ICCPR].

109. ICCPR, *supra* note 4, art. 14(1).

110. Optional Protocol to ICCPR, *supra* note 108, art. 1.

a matter be considered sufficiently independent and impartial as to satisfy Article 14(1)'s requirements?

These questions highlight the largely undefined nature of state obligations under Article 14(1) of the ICCPR. No international court with specialized responsibility for enforcing the ICCPR has ever pronounced on the full meaning of Article 14(1) because no such court exists. Furthermore, although the HRC has the responsibility for monitoring the implementation of the convention[111] and it can receive communications (complaints) regarding a state's failure to implement the convention,[112] the HRC's enabling provisions within the ICCPR create a decidedly soft dispute resolution mechanism rather than a court-like adjudicative body.[113] It is therefore difficult to argue that the HRC has authority to issue binding orders to states party to the convention or that its interpretations of the rights set forth in the ICCPR are infallibly authoritative.[114] Nonetheless, while recognizing that states might dispute the level of obligation that attaches to opinions of the HRC, it is clear that the HRC has a certain specialized, although not entirely judicial, role to play in the interpretation of the ICCPR.[115] In light

111. *See* ICCPR, *supra* note 4, art. 40(2). The mandate of the U.N. Human Rights Committee (HRC) is also described on its U.N. High Commissioner for Human Rights website: "The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties." *U.N. Human Rights Committee: Monitoring Civil and Political Rights*, OFFICE HIGH COMMISSIONER FOR HUM. RTS., http://www2.ohchr.org/english/bodies/hrc/index.htm (last visited Sept. 9, 2014).

112. ICCPR, *supra* note 4, art. 41.

113. The HRC asserts that its opinions "represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument" and that its decisions are binding on states party because of Article 2(3)(a) of the ICCPR. U.N. Human Rights Committee, General Comment No. 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, paras. 13–14, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008). Nonetheless, Articles 40–42 of the ICCPR seem more concerned with arriving at an "amicable solution" to a complaint by a state party than with issuing directions to states. *See* ICCPR, *supra* note 4, arts. 40–42.

114. In fact, Article 4(2) of ICCPR's First Optional Protocol seems to explicitly contemplate the possibility that a state will disregard any suggestion by the HRC that the state has violated an individual's rights: "Within six months [of being notified of a complaint by the HRC], the receiving State shall submit to the Committee written explanations or statements clarifying the matter *and the remedy, if any, that may have been taken* by that State." Optional Protocol to ICCPR, *supra* note 108, art. 4(2) (emphasis added).

115. The Canadian Federal Court has remarked, as follows, that the HRC is more of an advocacy group with aspirational views of international human rights law than anything else:

> In so far as the Comments of the United Nations Committees are concerned, as the respondents observed, these are recommendations made by groups with advocacy responsibilities. While they clearly reflect the views of knowledgeable indi-

of this reality, it is important to consider how the HRC views the right to fair trial by an independent and impartial tribunal under Article 14(1) of the ICCPR.

The HRC periodically "publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work."[116] In 2007, the HRC published General Comment Number 32 (GC 32), "Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial," which, while speaking generally about the right to a fair trial in the context of civilian justice systems throughout the world, also included several comments about the right relevant to military justice systems.[117]

Most explicitly, GC 32 affirmed that Article 14 applies to all courts and tribunals, "whether ordinary or specialized, civilian or military," while suggesting that the trial of civilians in military courts should be exceptional.[118] Civilians cannot be tried summarily within the Canadian military justice system[119] and can be tried only by courts martial under exceptional circumstances,[120] so the HRC's guidance regarding civilians is probably not problematic for Canada.[121] The assertion that Article 14 applies to all military

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viduals, they do not reflect the current state of international law, but more the direction that those groups believe the law should take in the future.

Amnesty International Canada v. Canada (Canadian Forces), [2008] 4 F.C.R. 546, para. 239 (Can.).

116. *Human Rights Committee: Introduction*, Office High Commissioner for Hum. Rts., http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx (last visited Sept. 9, 2014).

117. *See* U.N. Human Rights Committee, General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, para. 22, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter U.N. HRC: General Comment No. 32].

118. *Id.*

119. National Defence Act, R.S.C. 1985, c. N-5, §§ 163(1)(a), 164(1)(a) (Can.) (prescribing the classes of people who can be tried by Canadian summary trials; the list does not include civilians).

120. *Id.* Section 60 of the NDA lists the classes of people who can be tried by courts martial. Only civilians with a clear connection to the military, such as civilians who accompany a unit or element of the Canadian Forces that is on active service somewhere, would be liable to be tried by courts martial, arguably to their benefit so that Canadian instead of a foreign criminal process would apply to them while outside of Canada. *Id.* § 60.

121. However, for an excellent discussion of the many circumstances in which it is entirely appropriate and desirable for military courts to have jurisdiction over civilians, see generally Gibson, *supra* note 15, at 22–36. The following is particularly relevant:

> Clothing military courts with jurisdiction to try civilians accompanying the force for offences committed outside the territory of the national state is not allocating 'certain categories of offence' to military courts *in abstracto.* Rather, it focuses on the geographic *locus* in which offences are committed, in circumstances where there is no legal or practical alternative to the exercise of jurisdiction over civilian nationals by a military court and in which the consequence of failure to exercise

tribunals, however, must be further unpacked to be properly understood, particularly because GC 32 states that Article 14 will not apply to certain military disciplinary proceedings:

> [T]here is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, *such as disciplinary measures not amounting to penal sanctions being taken against a civil servant, a member of the armed forces, or a prisoner.*[122]

In other words, if the types of punishments imposed at Canadian summary trials do not amount to truly penal sanctions, then even the HRC would concede that Article 14 of the ICCPR does not apply to these trials.

The possibility of detention as a punishment at summary trials in Canada could potentially bring summary trials within the scope of Article 14. However, the punishment of detention in Canada has a uniquely rehabilitative focus that is distinct from criminal sentences of imprisonment: detention "seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society."[123] In this sense, detention—at least for the ICCPR purposes—might be conceptualized more as a return to basic military training than as a penal form of imprisonment. However, as Peter Rowe correctly notes, it can be "difficult to draw a clear line between those punishments which might be considered to be criminal and those which, although described as disciplinary, are in reality little different from criminal punishments."[124] Rowe seems to conclude that punishments of detention, where soldiers are kept in locked rooms, would amount to penal sanctions that would trigger Article 14(1) of the ICCPR, but lesser punishments wherein soldiers are ordered to remain, but are not physically locked, within certain confines would not amount to penal sanctions; yet he recognizes the uncertainty of these conclusions.[125] Regardless, if the punishment of detention that presiding officers can impose at Canadian summary

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> jurisdiction would either result in impunity for the commission of crimes, or be less advantageous to the individual concerned if they were to be tried in the justice system of the local state.

Id. at 33–34.

122. U.N. HRC: General Comment No. 32, *supra* note 117, para. 17 (emphasis added).

123. QR&O, *supra* note 29, art. 104.09, note (A).

124. Rowe, *supra* note 15, at 74.

125. *See id.* at 75–77.

trials is not a "penal sanction," but rather a rehabilitative disciplinary sanction, then Canadian summary trials would be beyond the scope of the ICCPR's Article 14.

Even if detention were deemed a "penal sanction" to trigger the application of Article 14 of the ICCPR, one must still determine whether trials by members of an accused person's chain of command run afoul of the "independent and impartial tribunal" guarantee that Article 14 provides. On this point, the HRC offers the following guidance:

> The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys *in specific cases* judicial independence in deciding legal matters in proceedings that are judicial in nature.[126]

As this observation indicates, Article 14(1) of the ICCPR does not require officers who preside at summary trials on an ad hoc basis to have the same kind of permanent independence from the executive and legislative branches of government that would be required of tenured sitting judges in a civilian criminal justice system.[127] Rather, GC 32 recognizes that Article 14(1) will be satisfied if a sufficient measure of judicial independence is provided to these presiding officers in each specific case that comes before them for adjudication.[128]

This judicial independence is provided for in Canada within the Queen's Regulations and Orders for the Canadian Forces, stipulating that "[t]he conduct of the proceedings of a summary trial is the sole responsibility of the officer presiding at the trial and *no superior authority shall intervene in the proceedings*."[129] The Queen's Regulations and Orders for the Canadian Forces also requires the presiding officer to swear an oath to "administer justice according to law, without partiality, favour or affection."[130] Thus, even if Article 14(1) applies to lower-level military discipline proceedings (a question that can be answered only by first characterizing summary trials as either penal or disciplinary matters), the HRC's guidance still seems to suggest that Canadian summary trials may be consistent with the Article 14(1) demands.

126. U.N. HRC: General Comment No. 32, *supra* note 117, para. 18 (emphasis added).
127. *Id.*; ICCPR, *supra* note 4, art. 14(1).
128. ICCPR, *supra* note 4, art. 14(1); U.N. HRC: General Comment No. 32, *supra* note 117.
129. QR&O, *supra* note 29, art. 108.04 (emphasis added).
130. *Id.* art. 108.27.

As such, Canadian summary trials are probably—in one way or another—compliant with the HRC's view of the demands of the ICCPR's Article 14(1) right to a fair trial by an independent and impartial tribunal. Nonetheless, importantly, even the HRC's view of the right would not be conclusive. As the Canadian Federal Court properly observed in *Amnesty International Canada v. Canadian Forces*,[131] the opinions of the HRC are aspirational, rather than positive, statements of international law:

> In so far as the comments of the United Nations Committees are concerned, as the respondents observed, *these are recommendations made by groups with advocacy responsibilities.* While they clearly reflect the views of knowledgeable individuals, *they do not reflect the current state of international law, but more the direction that those groups believe the law should take in the future.*[132]

In other words, even if the HRC perceives that Canadian summary trials would not comply with Article 14(1) of the ICCPR, one must be careful to not ascribe too much importance to such a conclusion because it would mean at most that Canada has not attained the aspirational standard for fair trials that the HRC seeks to promote.

4. Reasonable Limits, Demonstrably Justified: Summary Trials Under Canadian Constitutional Law

Having found that Canada's summary trial regime likely complies with all IHRL that is binding on Canada, one might further inquire about the regime's conformity with domestic constitutional law, particularly with the Canadian Charter's right to a fair trial by an independent and impartial tribunal.[133] Although the Canadian right is articulated in textual language almost identical to that within the ICCPR and ECHR, there are important differences in the way in which the Canadian right is interpreted and applied. The right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" under Section 11(d) of the Charter has been thoroughly reviewed by the Supreme Court of Canada.[134] As a result, the Court has crafted a comprehensive framework for applying the right.

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131. Amnesty International Canada v. Canada (Canadian Forces), [2008] 4 F.C.R. 546, para. 239 (Can.).

132. *Id.* (emphasis added).

133. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 11(d) (U.K.).

134. *Id.*; *see infra* notes 135–40 and accompanying text.

For example, in the foundational Charter case addressing the requirements of independence and impartiality, *Valente v. The Queen*,[135] the Supreme Court of Canada found three essential conditions of judicial independence: security of tenure, financial security, and institutional independence of the tribunal.[136] A more detailed explanation of how these essential conditions can be met was provided in *In Re Remuneration of Judges of the Provincial Court (PEI)*,[137] wherein security of tenure was interpreted as requiring that judges could be removed (fired) only for cause, after a full judicial inquiry;[138] institutional independence was more appropriately termed "administrative independence" and referred to judicial freedom to determine assignment of judges, allocation of court rooms, and supervision of administrative court staffs;[139] and lastly, financial security encompassed an elaborate requirement for objective determination of judicial salaries that could not, as a matter of constitutional law, be permitted to fall below a minimum level.[140]

Clearly, the level of judicial independence that Canada's Constitution demands of those who preside over trials of offenses is much more elaborate than the levels demanded by both the ICCPR and ECHR, particularly with respect to determinations of judicial salaries. It is equally clear that Canadian summary trial presiding officers do not possess this level of judicial independence: as officers in the Canadian Armed Forces, their salaries are set by regulation,[141] they have no enduring administrative independence from the executive branch of government,[142] and they serve at the pleasure of Her Majesty, which is to say, they can be released from the military for a variety of reasons, subject only to principles of

135. Valente v. The Queen, [1985] 2 S.C.R. 673 (Can.).

136. *Id.* at 675–77.

137. In Re Remuneration of Judges of the Provincial Court (PEI), [1997] 3 S.C.R. 3 (Can.).

138. *Id.* at 80–81.

139. *Id.* at 81.

140. *Id.* at 87–90.

141. *See Pay Policy for Officers and Non-Commissioned Members*, Nat'l Def. & Canadian Armed Forces, http://www.forces.gc.ca/en/about-policies-standards-benefits/ch-204-pay-policy-officers-ncms.page (last updated June 23, 2014).

142. *See* National Defence Act, R.S.C. 1985, c. N-5, § 18 (Can.) (providing that all orders and instructions necessary to give effect to the decisions of the Government of Canada shall normally be issued by the Chief of the Defence Staff, who operates "under the direction" of the Minister of National Defence; clearly establishing civilian control over the Canadian Forces, through the elected member of the executive branch of government who serves as Minister of National Defence).

procedural fairness derived from Canadian administrative law.[143] In other words, a summary trial by an accused person's commanding officer does not, at first glance, seem to comply with the independence requirements of Section 11(d) of the Canadian Charter of Rights and Freedoms.

One must be careful not to jump to the conclusion, however, that summary trials are unconstitutional simply because they do not respect Section 11(d) of the Charter. The right to a trial by an independent and impartial tribunal under the Charter, like many Charter rights, can be subject to reasonable limits that are prescribed by law and demonstrably justified in a free and democratic society.[144] In light of the pressing state interest that obviously exists in swiftly maintaining or restoring military discipline in the face of alleged minor service offenses and the extensive procedural protections that are offered to accused persons at summary trials,[145] any limit on the right to a trial by an independent and impartial tribunal—if not waived by an accused person when the individual elects summary trial over court martial[146]—would likely be justified under the Charter. This conclusion was explicitly reached by former Chief Justice of Canada Brian Dickson[147] and must have been implicitly affirmed by former Chief Justice of the Ontario Superior Court Patrick LeSage,[148] when each of these respected jurists inde-

143. For a thorough discussion of some of the complexities of the employment relationship that exists between a member of the Canadian Forces and the Crown, see R.J. Stokes, *'Sergeant Dunsmuir': The Crown-Soldier Relationship in Canada*, 24 Canadian J. Admin. L. & Prac. 57 (2011).

144. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 11 (U.K.).

145. *See supra* notes 42–45 and accompanying text.

146. *See* Orr & Beresford, *supra* note 45, paras. 117–25.

147. The following excerpt is from Judge Dickson's report:

> On the assumption that detention as a form of punishment can be justified for military and disciplinary reasons, we are persuaded that a reviewing court would take this consideration into account in evaluating the constitutionality of the summary trial process. At the very least, if a court concluded that certain of the legal rights protected by the *Charter* had been infringed, such an infringement might be justified under s. 1 of the *Charter* if sufficient proof could be adduced to justify detention as a tool of military discipline.

Brian Dickson et al., Report of the Special Advisory Group on Military Justice and Military Police Investigation Services 59 (1997). Former Chief Justice Dickson made these statements in the context of his recommendation to *retain* detention for periods of up to thirty days as a punishment at summary trials, contrary to the recommendation of the Judge Advocate General of the day, who supported abolishment of the punishment of detention. *Id.* at 57–59.

148. "I am satisfied, as was former Chief Justice Dickson, that 'the summary trial process is likely to survive a court challenge as to its constitutional validity.'" Patrick J. LeSage, Report of the Second Independent Review Authority to the Honourable Peter G. MacKay Minister of National Defence 12 (2011) (citation omitted).

pendently reviewed the Canadian military justice system and both concluded that summary trials would likely survive any constitutional challenge.

The recognition that summary trials limit Charter rights but would nonetheless be considered constitutional by virtue of Section 1 of the Charter also underpins the following testimony by a senior official within the Canadian Office of the Judge Advocate General during a recent House of Commons committee hearing about changes to the NDA:

> We're not in the business of running an unconstitutional justice system. . . . [W]e have placed great weight in the independent assessment of the three very august external reviewers who have looked at the system and concluded that on balance, it is fair and constitutional.
>
> How did they come to that conclusion? . . . Of course they engaged in a section 1 charter analysis. I have to say that, unfortunately, if one is going to conduct a measured, balanced, and sophisticated assessment of this issue, you have to engage in a section 1 analysis. Having done that, they concluded that although there were certainly concerns about limitations on some charter rights, that on balance those limitations are justified by section 1, having regard to the pressing and substantial nature of the concerns that then animate the system.[149]

Thus, even though most lawyers and commentators with knowledge of the Canadian military justice system all recognize that summary trials may not meet all of the requirements for an independent tribunal that have been established by Canadian jurisprudence, some of the most esteemed among this group have equally recognized that summary trials are nonetheless constitu-

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149. *An Act to Amend the National Defence Act: Hearing on Bill C-15 Before the H. of Commons Standing Comm. on Nat'l Def.*, 41st Parl. 15 (2013) (statement of Colonel Michael R. Gibson, Deputy J. Advocate General of Military J., Office of the J. Advocate General, Department of Military Defence) (Can.). The following is a more detailed explanation from Colonel Gibson:

> There are a couple of really important things to note. Nobody is subject to what's called a true penal consequence, following the definition given by the Supreme Court of Canada in the Wigglesworth case of 1988. Nobody's subject to a true penal consequence, detention, reduction of rank, or significant fine unless they have first been offered the election between the summary trial and court martial and they've elected to be tried by summary trial.
>
> The effect of that election is a waiver of certain constitutional rights. The Supreme Court of Canada has said that one can waive constitutional rights, in the Korponay case of 1982. Chief Justice LeSage in his review specifically alluded to that. To be effective, that waiver has to be fully informed and has to have the benefit of advice. In fact, there is a right under the QR and O article 108.18, and also a duty on the director of defence counsel services under article 101.20 to provide legal advice to the accused and his or her assisting officer in respect of that election.

Id.

tional, since any limits that they place on the rights of accused persons are prescribed by law and could be demonstrably justified in the unique context of military disciplinary proceedings.

C. *Misplaced Criticism: Domestically and Internationally Compliant Summary Trials*

As the above analysis demonstrates, there are many different yardsticks that can be used to assess whether a particular type of trial is a fair trial by an independent and impartial tribunal, and different legal regimes can permit exceptions to the application of such rules under different circumstances. It is not the goal of this Article to propose which interpretation of the right to a fair trial by an independent and impartial tribunal is the correct one; the content of a right will need to depend on the purpose that the right strives to achieve and on realistic understandings of the work that the right is capable of doing in different environments. There is likely no universally correct way to think of a right to a fair trial by an independent and impartial tribunal, given that some legal, social, and political climates will call for a very elaborate interpretation of the right, while others may require only an abstract and less detailed interpretation.

The preceding case study of Canadian summary trials, however, should illustrate that these proceedings are compliant with Canadian constitutional law and with both applicable treaty-based and customary international law relating to fair trials. Therefore, as a matter of positive international law—and notwithstanding the laudable motives of those who seek to improve Canadian military law—those critics of the Canadian summary trial regime who conclude that it violates domestic or international law because the system does not meet the full range of fair trial standards set by the ECtHR are, quite simply, wrong. The application of nonbinding, extrajurisdictional sources of law taints the analysis performed by these critics and ultimately undermines their conclusions that the system breaches constitutional and international law. These critics have, unfortunately, engaged in comparative cherry-picking in a way that has caused them to use the wrong yardstick when measuring the compliance of Canada's summary trial system with binding human rights laws.

III. Extrajurisdictional Law and the American Court Martial System

A second example wherein extrajurisdictional law is used to assess the fairness of military tribunals is the Canadian Federal Court's *Tindungan* decision. Tindungan, an American Army deserter, sought refugee status in Canada by arguing—among other things—that he would face persecution if he returned to the United States and that any state protection from persecution was inadequate because the American court martial system (by which he would be tried on charges of desertion) was unfair.[150] Tindungan was initially denied refugee status by the Canadian Immigration Review Board's Refugee Protection Division because there was "no serious possibility that he would be persecuted if he returned to the United States, and because adequate state protection exists there."[151] Nevertheless, the Canadian Federal Court that judicially reviewed the Immigration Review Board's decision ultimately ruled in Tindungan's favor after finding that the American military justice system was unfair when compared with Canadian constitutional jurisprudence on military tribunals and internationally recognized human rights standards.[152] As the ensuing discussion demonstrates, *Tindungan* is remarkable (at least in the context of this Article) because of the kind of comparative cherry-picking that manifests in the decision: numerous sources of extrajurisdictional law were drawn upon by the court, and the application of these extrajurisdictional human rights standards seem to have determined the outcome of the case.

A. *An Overview of the* Tindungan *Decision*

The crux of Tindungan's refugee claim was that he would be targeted for differential prosecution (in a manner that would amount to persecution) for the offense of desertion if he returned to the United States because he had spoken publicly on several occasions about his political and moral opposition to the actions of the U.S. armed forces.[153] Tindungan argued that state protection from persecution was necessarily inadequate within a justice system that permits such differential prosecutions.[154] In advancing his

150. Tindungan v. Canada (Minister of Citizenship & Immigration), 2013 FC 115, paras. 8–37 (Can.).
151. *Id.* para. 7.
152. *Id.* paras. 144–67.
153. *Id.* para. 38.
154. *Id.* para. 80.

argument, Tindungan alleged, among other things, that U.S. courts martial were not independent and impartial tribunals and that these courts martial therefore failed to meet "basic internationally recognized fairness requirements."[155] Although the Immigration Review Board's initial decision found that "adequate" state protection from persecution existed within the U.S. military justice system in spite of differences between American and Canadian courts martial,[156] Tindungan argued "it [was] an error to conclude that a system which fails to meet basic fairness standards internationally recognized to be fundamental to any tribunal system can nonetheless provide 'adequate' [state] protection."[157] The Canadian Federal Court seized on this argument and observed that "[p]resumably, then, a tribunal system that fails to be in accordance with the [*Canadian Charter of Rights and Freedoms*], the *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights*, and the *Universal Declaration of Human Rights* must be inadequate."[158] As these excerpts from *Tindungan* indicate, the question of American court martial compliance with various sources of extrajurisdictional domestic and international law was very much at issue in the Canadian Federal Court's decision.

Tindungan—through the expert opinion evidence of Professor Eugene Fidell—essentially identified three concerns with the American court martial system: first, U.S. military judges who preside at courts martial do not have sufficient independence from the executive branch of government because they are appointed by the Judge Advocate General; second, in any court martial that uses a panel of lay fact finders (i.e., the "members" of the court martial), these members are appointed by a senior officer within the accused's chain of command; and third, unlawful command influence (i.e., the influencing of a court martial outcome by a senior, but nonjudicial, officer within the accused's chain of command) is sometimes alleged, or found to have existed, within court martial proceedings.[159] Professor Fidell correctly concludes that the American court martial system "would not pass muster"[160] when assessed under the constitutional standard for independence applied to Canadian courts martial (as articulated by the Supreme Court of

155. *Id.*
156. *Id.*
157. *Id.* para. 81.
158. *Id.* para. 83.
159. *Id.* para. 158.
160. *Id.*

Canada in *Généreux v. The Queen*[161]) or the standard articulated for European military tribunals by the ECtHR.[162] The Canadian Federal Court agreed with Professor Fidell and went one step further in finding that "it is an error in law to conclude that a system which fails to meet basic fairness standards that are internationally recognized to be fundamental to any tribunal system can, nevertheless, provide adequate state protection."[163] In the end, the Immigration Review Board's decision was overturned and remitted for reconsideration.[164]

B. *Critiquing the Indiscriminate Use of Extrajurisdictional Law in* Tindungan

As indicated above, the Canadian Federal Court in *Tindungan* purported to assess the fairness of American courts martial based on "internationally recognized fairness requirements"[165] and made reference to the Canadian Charter, the ICCPR, the ECHR, and the Universal Declaration for Human Rights as if these instruments provided an authoritative yardstick for measuring internationally recognized fair trial requirements.[166] Nonetheless, as Canada's Immigration and Refugee Protection Act (IRPA)[167] and decisions of the Supreme Court of Canada, Federal Court of Appeal, and Federal Court (that are all cited within *Tindungan*)[168] make clear, assessments about the adequacy of state protection in a refugee hearing are to be conducted in a particular way and cannot be made simply based on loose references to extrajurisdictional law.

The starting point for interpreting any provision of IRPA, including provisions relating to refugee status, is Section 3(3) of IRPA, which requires that the Act be "construed and applied in a manner that . . . ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*" and "complies with international human rights instruments to which Canada is a signatory."[169] Two points are important. First, IRPA requires that decisions be consistent with the Charter but not that they apply full

161. Généreux v. The Queen, [1992] 1 S.C.R. 259 (Can.).

162. *Tindungan*, 2013 FC para. 158. The standard for European military tribunals was set forth by the ECtHR in *Findlay*.

163. *Id.* para. 154.

164. *Id.* para. 180.

165. *Id.* para. 80; *see also supra* note 155 and accompanying text.

166. *See supra* note 158 and accompanying text.

167. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

168. *See, e.g.*, *Tindungan*, 2013 FC paras. 82, 107–108, 120.

169. Immigration and Refugee Protection Act § 3(3)(d), (f).

Charter standards to the laws of other jurisdictions when, for instance, assessing the adequacy of state protection afforded by foreign law to refugee claimants in their home countries.[170] Second, decisions need comply only with international human rights instruments to which Canada is a signatory, while there is no requirement (or statutory authorization) to construe and apply IRPA in a manner that complies with international human rights instruments to which Canada is not a signatory, such as the ECHR.[171]

Guidance about how the adequacy of state protection in the form of fair trials is to be assessed, particularly in cases involving American refugee claimants, can also be found in Canadian case law. For example, in *Canada (Minister of Employment and Immigration) v. Satiacum*,[172] the Federal Court of Appeal noted the following:

> [I]n the absence of proof by the refugee claimant, Canadian tribunals must assume a fair trial. The notion of a fair trial in a fair and independent judicial system must make allowance for the self-correcting mechanisms within the system, e.g., the trial judge's control over the excesses of the participants, and the control of the appellate courts over any errors of the trial judge.[173]

Subsequently, in *Hinzman v. Canada (Minister of Citizenship and Immigration)*,[174] the Federal Court of Appeal reiterated that claimants face difficult challenges when attempting to prove that state protection would be inadequate in relation to highly democratic states as follows:

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170. A majority of the Supreme Court of Canada noted the following:

> Canada can no more dictate what procedures are followed in a criminal investigation abroad than it can impose a taxation scheme in another state's territory. . . . Any attempt to dictate how those activities are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention.

Hape v. The Queen, [2007] 2 S.C.R. 292, 351 (Can.).

171. *See* de Guzman v. Canada (Minister of Citizenship & Immigration), [2006] 3 F.C.R. 655, paras. 88–89, 111–12, wherein a majority of two judges suggested, in *obiter dicta*, that nonbinding international human rights instruments to which Canada is a signatory (i.e., treaties that have been signed but not ratified by Canada) should be used as persuasive sources of interpretation, while a third judge expressed disagreement about even this low level of weight being placed upon such international human rights instruments. The Federal Court of Appeal would surely have afforded even less (if any) weight to international human rights treaties to which Canada is not a signatory, such as the ECHR.

172. Canada (Minister of Emp't & Immigration) v. Satiacum (1989), 99 N.R. 171 (Can.).

173. *Id.* para. 25.

174. Hinzman v. Canada (Minister of Citizenship & Immigration) (2007), 282 D.L.R. 4th 413 (Can.).

> The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada.[175]

The above survey of Canadian jurisprudence on state protection for refugee claimants is not intended to be exhaustive, but it clearly highlights the substantial onus that rests on refugee claimants from the United States who assert that there is an absence of adequate protection against persecution in their home country. It also demonstrates that a court's focus during this inquiry should be on obvious departures from principles of fairness within a justice system as a whole. The question is not, "would this type of justice system 'pass muster' in Europe, or comply with every facet of Canadian constitutional jurisprudence?" but rather, "is this system fair by relevant international standards, keeping in mind the onus on the claimant to demonstrate unfairness?"

In light of this statutory and appellate-level guidance about how state protection from persecution is to be assessed in refugee proceedings, one begins to appreciate the unusual nature of the Canadian Federal Court's use of international human rights law and Canadian constitutional law in *Tindungan*. Despite frequent use of the phrase, "fails to meet basic fairness standards that are internationally recognized to be fundamental to any tribunal system,"[176] (and other variants of this language)[177] within the *Tindungan* decision, the only standards that the court found the American court martial system failed to meet were the standards set by the ECtHR for European military tribunals[178] and the standards set by the Supreme Court of Canada for Canadian courts martial.[179] There is no discussion or analysis within *Tindungan* about the content or meaning of the ICCPR's right to a fair trial by an independent and impartial tribunal (although the ICCPR is the only relevant international human rights treaty to which Canada is a party—and the United States is a signatory), nor is there any discussion about the

175. *Id.* para. 46.

176. Tindungan v. Canada (Minister of Citizenship & Immigration), 2013 FC 115, para. 154 (Can.).

177. For example, "clearly does not comply with such standards." *Id.*

178. *Id.* para. 158.

179. *Id.*

various decisions of the U.S. Supreme Court that have affirmed the constitutional legitimacy of the American court martial system.[180]

The flaws in the Canadian Federal Court's use of domestic and international human rights law sources are reasonably obvious in this case and mirror some of the flaws found in certain criticisms of the Canadian summary trial system. Specifically, the Canadian Federal Court cites ECtHR case law as if it is binding on Canada as the single most authoritative source of IHRL relating to military tribunals, when, in fact, interpretations of the ECHR (a treaty that is neither signed nor ratified by Canada) have at most a gentle persuasive force in Canada for IRPA purposes. Furthermore, contrary to the Supreme Court of Canada's jurisprudence regarding extraterritorial application of the Charter in *Hape v. The Queen*,[181] the Canadian Federal Court in *Tindungan* seeks to apply the full panoply of Canadian court martial Charter jurisprudence—*holus-bolus*—to American courts martial, instead of simply ensuring that its decision on granting refugee status is consistent with the Charter.

Meanwhile, the Canadian Federal Court neglects to assess how the American court martial system would be viewed under the ICCPR. Given the relatively primitive content of the right to a fair trial under Article 14(1) of the ICCPR and the fact that no conclusive interpretation of the right can be said to prevail, it is not immediately obvious that the American court martial system would breach any aspect of Article 14(1), even considering the features of the system that are impugned in *Tindungan*. It is beyond the scope of this Article to engage in a full assessment of the extent to which American military tribunals comply with the ICCPR, but for present purposes, it is sufficient to note that such an assessment was omitted altogether from *Tindungan* when it was, arguably, the only appropriate yardstick for measuring internationally recognized fair trial standards. In the end, the *Tindungan* decision represents simply another example of the comparative cherry-picking phenomenon in action: the Canadian Federal Court uses inappropriate extrajurisdictional law to assess the fairness of the American court

180. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743, 758 (1974) (emphasizing that the military is a "specialized society separate from civilian society" and that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it"). For a more recent affirmation of the constitutionality of courts martial, see Weiss v. United States, 510 U.S. 163 (1994) (affirming that the fixed-term appointment process for military judges who preside at courts martial did not violate any provision of the U.S. Constitution).

181. *See supra* note 170 and accompanying text.

martial system, while ignoring binding international human rights law and American domestic constitutional and human rights law.

Having now discussed two different military justice case studies wherein actors attempt to use extrajurisdictional domestic or international human rights law as a means to advocate for or reason toward more expansive fair trial rights within military proceedings, it is possible to examine the possible or likely consequences of this comparative cherry-picking phenomenon to ascertain how it might weaken respect for international human rights on a broad scale.

IV. Unintended Consequences: The Potential Adverse Impact of Comparative Cherry-Picking

It seems counterintuitive that pressure, advocacy, or other mobilization in favor of more expansive international human rights could lead to a net decrease in respect for, or adherence to, these rights. Nonetheless, a methodical application of international law and international relations theory to the types of situations that are discussed in the preceding case studies reveals that comparative cherry-picking could lead—through a variety of different processes—to the undermining, rather than the advancement, of respect for international human rights. The Article next discusses the phenomena of state withdrawal from treaty regimes, incentivizing "cheap talk," human rights backsliding, and desuetude in order to demonstrate how these phenomena can reasonably be expected to result—in at least some cases—from the kind of overambitious reliance on extrajurisdictional law that characterized the earlier case studies in this Article. Ultimately, this discussion should call into question any conventional wisdom suggesting that an increase in the substantive demands of IHRL will necessarily result in better human rights protection and should signal a note of caution to those who engage in comparative cherry-picking as means of expanding protection for international human rights.

A. *Treaty Denunciation and Withdrawal from International Human Rights Regimes*

In extreme cases, successful efforts to broaden the scope of international human rights treaties through expansive interpretations of the rights contained within those treaties can lead to a backlash

that ultimately results in states withdrawing from the treaty regimes.[182] The process through which this scenario can materialize (and has, in fact, materialized) will be described in detail in this Section, but needless to say, it can lead to a hollow victory for those who champion human rights, by increasing the scope of individual protections under a given treaty right but at the same time reducing the number of states that consent to be bound by the treaty in question.

Laurence Helfer, in an insightful case study involving three commonwealth Caribbean countries (Jamaica, Trinidad & Tobago, and Guyana),[183] has identified a concrete example of this kind of human rights backlash that led to the denunciation of human rights treaties by each of the three states,[184] arguably because of the "overlegalization" of the respective human rights regimes.[185] Helfer begins his case study with an overview of relevant international law and international relations theory, wherein he notes that "states consciously draft treaties that—with a few notable exceptions—are only partially legalized to strike a balance between the protection of individual liberties and other important societal objectives."[186] States do this, Helfer argues, because of "the domestic political costs of protecting individual liberties. Altering domestic policies to conform to international human rights standards is not costless."[187] Andrew T. Guzman and Katerina Linos have echoed this observation, noting that the protection of "human rights inevitably involves some form of trade-off. Granting criminal defendants more rights may limit victims' rights; wider access to food and water may require higher taxes; [and] increased protection of free speech may require a relaxation of hate speech codes."[188] The general point here is an important but often overlooked one: while we might all agree in the abstract that greater protection for human rights is a good thing, there is likely to be significant disagreement about what must be sacrificed to achieve this increased protection for human rights in a world of finite resources.

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182. See *infra* notes 190–93 and accompanying text.

183. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

184. *Id.* at 1881–82.

185. *Id.* at 1891–94.

186. *Id.* at 1853–54.

187. *Id.* at 1852.

188. Guzman & Linos, *supra* note 8, at 5–6.

Helfer further explains the legalization process by noting that when "a treaty's obligation, precision, or delegation levels increase over time, government discretion to achieve countervailing societal objectives in tension with human rights diminishes."[189] Any increases in obligation ("the binding nature of an institution's or a regime's rules"),[190] precision ("the specificity of those rules"),[191] and delegation ("the authority granted to neutral third parties to interpret and implement those rules, to resolve disputes related to them, and (sometimes) to create new rules")[192] over time will raise the overall level of legalization of the treaty. This can eventually lead to overlegalization when "a treaty's augmented legalization levels require more extensive changes to national laws and practices than was the case when the state first ratified the treaty, generating domestic opposition to compliance or pressure to revise or exit from the treaty."[193] In other words, increases in the legalization of an international human rights regime may initially contribute to increased protection for human rights, but these increases can eventually reach a tipping point after which the regime will be perceived as overlegalized and states may begin to withdraw from the regime.

Helfer then applies this theory of overlegalization to the situations of three commonwealth Caribbean countries. After tracing the historical evolution of jurisprudence and *dicta* emanating from the Judicial Committee of the Privy Council, the HRC, and the Inter-American Commission on Human Rights about procedural limitations on the use of capital punishment under IHRL,[194] Helfer notes that "Caribbean governments and the Caribbean public began to perceive human rights tribunals as obstacles to imposing capital sentences and death row defendants as abusers of the tribunals' procedures."[195] Helfer theorizes[196] that this type of overlegalization of capital punishment procedures caused Jamaica to denounce "the ICCPR's First Optional Protocol, eliminating the right of individuals to petition the Human Rights Committee" when their rights are allegedly breached.[197] The overlegalization

189. Helfer, *supra* note 183, at 1854.
190. *Id.* at 1839.
191. *Id.*
192. *Id.*
193. *Id.* at 1854.
194. *Id.* at 1867–79.
195. *Id.* at 1879.
196. *Id.* at 1891–94.
197. *Id.* at 1881.

also caused Trinidad & Tobago to denounce both the First Optional Protocol and the American Convention on Human Rights.[198] Additionally, it caused Guyana to denounce the First Optional Protocol to re-accede to the treaty on the same day, but with a death penalty reservation.[199] As Helfer's case study demonstrates, efforts by human rights bodies such as the HRC and Inter-American Commission on Human Rights to expand procedural protections for those on death row in Caribbean countries had a counterproductive effect when—instead of generating a "compliance pull"[200] toward the elevated procedural standards—the efforts led to a full or partial abandonment of either international human rights treaties or their enforcement protocols by some of the affected states.

Although Helfer's theory about the effects of overlegalization looked at only international human rights standards relating to the death penalty, the theory could equally be applied to fair trial standards under IHRL. Suppose, for instance, that critics of the Canadian summary trial system successfully persuaded the HRC that Article 14(1) of the ICCPR sets a standard for military tribunals that is identical to the (currently more protective) standards articulated by the ECtHR under Article 6(1) of European Convention, thereby (arguably)[201] increasing the level of precision of Article 14(1)'s obligations. Canada is a highly democratized country, with a military justice system that is respected and emulated throughout much of the world,[202] but Canada would nonetheless probably fail

198. *Id.*

199. *Id.* at 1881–82.

200. The term "compliance pull" refers to a rule's ability to generate compliance with the standard articulated within the rule. *See* Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 482 (2005) ("A 'fair' legal obligation exerts a 'compliance pull' that leads states to comply with it."); *see also* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1860–61 (2002) ("International law succeeds when it alters a state's payoffs in such a way as to achieve compliance with an agreement when, in the absence of such law, states would behave differently. In other words, international law succeeds when promises made by states generate some compliance pull.") (footnotes omitted).

201. If one acknowledges that the HRC has virtually no enforcement authority and is predominantly an advocacy group that attempts to aspirationally develop, rather than positively state, international human rights law, then pronouncements of the HRC could only minimally, if at all, increase the level of precision of a treaty obligation. For a more nuanced discussion of this point, see *supra* notes 131–32 and accompanying text.

202. The following is from a Parliamentary speech relating to then-proposed amendments to the Irish military justice system: "A comparative study of the Canadian, British, Australian and other common law systems, as well as careful consideration of human rights norms and the ordinary criminal justice system in Ireland, influenced the formulation of these proposals." 185 No. 20, SEANAD DEB., Defence (Amendment) (No. 2) Bill 2006: Sec-

to meet these different standards. Less democratic countries (with less firmly entrenched concepts of the rule of law) would struggle to a much greater degree to achieve this hypothetical Article 14(1) standard. More to the point, many countries from across the full spectrum of democratization might perceive the increased legalization of the ICCPR as an improper imposition of international legal obligations onto states that have not consented to be bound by the obligations.

In more recent times, one might consider the experience of the United Kingdom with decisions of the ECtHR, which, unlike the HRC, actually has the power to issue binding judgments on states party to the treaty. In reaction to several high-profile decisions of the ECtHR, some British politicians now believe that the court has overlegalized the original human rights regime that was set forth in the ECHR to the extent that withdrawal from the treaty is being seriously considered.[203] This contemporary British example helps to demonstrate that the idea of treaty withdrawal in the face of rising and unpalatable legal obligations under a human rights treaty remains extant in certain cases.

It would be impossible to predict whether, or how many, states would denounce the ICCPR, or withdraw from the treaty and then re-accede with initial or strengthened reservations pertaining to their military justice systems, if the scope of Article 14(1) of the treaty were enlarged to match the scope of Article 6(1) of the ECHR. However, as Helfer's case study signals, withdrawal from a treaty regime is a realistic possibility that states may be inclined to consider in the event that international human rights obligations are excessively expanded through the efforts of actors from outside of the executive branch of a state's government, whether by resort

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ond Stage (Feb. 6, 2007), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2007020600008?opendocument (Ir.). For a further example of the influence that Canada's military justice system is having in Uganda, see Ronald Naluwairo, *Military Courts and Human Rights: A Critical Analysis of the Compliance of Uganda's Military Justice with the Right to an Independent and Impartial Tribunal*, 12 Afr. Hum. Rts. L.J. 448 (2012) (wherein the author—perhaps himself succumbing to the allure of comparative cherry-picking—uses Canadian law as a key standard by which he assesses the fairness of the Ugandan military justice system).

203. *See, e.g.*, Nicholas Watt & Owen Bowcott, *Tories Plan to Withdraw UK from European Convention on Human Rights*, Guardian (London), Oct. 3, 2014, http://www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights; *see also* James Kirkup, *Britain May Need to Withdraw from European Convention on Human Rights, Says Cameron*, Telegraph Online (Sept. 29, 2013, 11:53 AM), http://www.telegraph.co.uk/news/politics/conservative/10342403/Britain-may-need-to-withdraw-from-European-Convention-on-Human-Rights-says-Cameron.html (discussing the U.K. conservatives' desire to withdraw from the ECHR).

to comparative cherry-picking or otherwise. Those who seek to advance respect for international human rights, therefore, may have cause to question whether unbridled advocacy for expansive human rights standards is, in all cases, an effective means of achieving the desired result.

B. *Incentivizing Cheap Talk: State Motives for Ratifying Lofty Human Rights Treaties*

A second pitfall of the comparative cherry-picking phenomenon is the potential that it creates for incentivizing "cheap talk"—the empty, meaningless ratification of international human rights treaties by states seeking to improve their international reputations.[204] The problem of cheap talk is not new to international law scholars. John O. McGinnis and Ilya Somin, for instance, have observed that, particularly in the context of multilateral international human rights treaties, "the assent of many democratic nations to multilateral human rights treaties is cheap talk, insofar as that assent does not commit them to making the provisions of those treaties a part of their domestic law."[205] In the domain of international criminal law, other scholars have commented on the fact that states tend to ratify the International Criminal Court's enabling treaty either out of a sincere commitment to the values that are represented in the treaty or "as a form of cheap talk in order to be seen as supportive of human rights and to avoid being publicly castigated for not supporting the treaty."[206] Although states would ideally ratify only treaties that they want and intend to implement in domestic law, one must realistically acknowledge that many states will ratify treaties for other purposes.

As Hathaway has observed, however, not all treaties create equal incentives for cheap talk, since treaties serve both "instrumental and expressive" functions.[207] Thus, while treaties, on the one hand, create binding law, they also:

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204. The following is a description of the "institutional" theory of international treaty law that is predicated on the importance of state reputations: "the institutional model is left, then, with reputation as the primary anchor of compliance for all but those countries for which compliance is costless: States comply with human rights treaties to obtain or maintain a reputation for compliance and hence good international citizenship." Hathaway, *supra* note 96, at 1951–52.

205. John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 Notre Dame L. Rev. 1739, 1769 (2009).

206. James Meernik & Rosa Aloisi, *I Do Declare: Politics, Declarations and the International Criminal Court*, 9 Int'l Crim. L. Rev. 253, 267 (2009).

207. Hathaway, *supra* note 96, at 1940.

> [D]eclare or express to the international community the position of countries that have ratified. The position taken by countries in such instances can be sincere, but it need not be. *When countries are rewarded for positions rather than effects—as they are when monitoring and enforcement of treaties are minimal and external pressure to conform to treaty norms is high—governments can take positions that they do not honor, and benefit from doing so.*[208]

Hathaway further theorizes that this emphasis on human rights positions, rather than on effects in the international arena, can help to explain one of the most counterintuitive findings of her empirical study of human rights treaty compliance, namely, "why treaty ratification might sometimes be associated with worse human rights practices than otherwise expected."[209] Hathaway's research suggests that treaty ratification, in and of itself, has limited inherent value and that efforts to ensure compliance with the instrumental goals of a treaty will sometimes be undermined by the kind of rewards that the treaty's expressive function tends to generate for some states.

One can draw upon Hathaway's research in order to hypothesize, more specifically, when states are likely to ratify treaties with which they do not intend to (or cannot) comply. Hathaway's theory implies that at least two forces tend to incentivize cheap talk: high rewards for the taking of positions, and weak monitoring and enforcement mechanisms within a treaty regime.[210] Thus, other things being equal, because an expansion of the treaty obligations will heighten the position-taking reward for states that ratify the treaty, an expansion of a treaty's obligations through lofty interpretations of its individual human rights protections can lead to an increase in cheap talk or an increase in the likelihood that states will ratify the treaty without intending to comply with its obligations. In other words, the more ambitious that a treaty is in its attempts to secure protection for human rights, the more likely it is that states will disingenuously ratify the treaty.

This increased incentive for cheap talk will be even higher within human rights treaty regimes, such as the ICCPR's regime, that have limited monitoring and enforcement mechanisms. As Hathaway observes:

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208. *Id.* at 1941 (emphasis added).

209. *Id.* Hathaway makes this finding elsewhere in her article: "countries with poor human rights ratings are sometimes *more* likely to have ratified the relevant treaties than are countries with better ratings, a finding that is largely unexplained by either the normative or the rationalist theories." *Id.* at 1978.

210. *See supra* note 208 and accompanying text.

> There is arguably no area of international law in which the disjuncture between the expressive and instrumental aspects of a treaty is more evident than human rights. Monitoring and enforcement of human rights treaty obligations are often minimal, thereby making it difficult to give the lie to a country's expression of commitment to the goals of a treaty.[211]

Human rights treaties also suffer from an additional enforcement problem that does not exist with, for example, international trade treaties, because the threat of reciprocal breaches of a treaty by another party state is ineffective as a means of encouraging compliance with the treaty. Rather than encouraging compliance, the threat by one state that it will breach the human rights of its own citizens if a second state does not improve its human rights practices would likely result in only successively worsening global human rights protections.[212]

Although Hathaway discusses only how the cheap talk phenomenon can underpin a state's initial ratification of a treaty, there is no principled reason why the phenomenon could not equally manifest in relation to a state that is already party to a treaty. For instance, a state that initially ratifies a human rights treaty out of a sincere desire to implement the treaty might subsequently conclude—particularly if the treaty's apparent obligations become overlegalized—that the cost of compliance is no longer worthwhile. Nevertheless, given the reputational benefits that might be associated with continued participation in the treaty regime, the state may be unwilling to denounce the treaty and would remain a party even though the state has no intention of fulfilling the expanded assertions of the treaty's obligations. In such a case, a state would be engaged in cheap talk every bit as much as a state that initially ratifies a treaty without intending to implement the treaty's obligations.

If this theory about cheap talk in relation to international human rights treaties is applied to the two military justice case studies that are discussed in this Article, it becomes apparent that advocates for more expansive fair trial rights in Canadian and American

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211. Hathaway, *supra* note 96, at 2007. Hathaway further suggests that "human rights treaties can take on the character of 'charitable' enactments that . . . as a result, often suffer from indifferent enforcement and have little impact." *Id.* (citation omitted).

212. The following explains this proposition:

> The familiar incentives to comply, known as the Three Rs of Compliance, are reciprocity, retaliation, and reputation. These do not predict much compliance-pull in the human rights area. When a state deprives its citizens of fundamental rights, other states are unlikely to reciprocate or retaliate by violating their own citizens' rights.

Guzman & Linos, *supra* note 8, at 9.

military justice systems may inadvertently end up creating or increasing state incentives to engage in cheap talk. For instance, if critics of the Canadian summary trial regime or Canadian judges who opine on the fairness of the American court martial system are effectively able to raise the fair trial standards associated with international treaty rights, such as the ICCPR's Article 14(1) right, then these actors will have also elevated the reputational benefits that flow to any state purporting to support the heightened standards. States with primitive, or even sophisticated, military justice systems that are unlikely to be able to meet the new international standard might nonetheless ratify or remain party to the ICCPR to benefit from their positions of support for the treaty, regardless of their practices in contravention of the treaty. Therefore, advocates for higher IHRL standards may achieve only limited successes in increasing actual levels of human rights protections in some countries (although there is no guarantee that their efforts will be effective in any country), but they will also likely contribute to increased instances of cheap talk by many other states about treaties such as the ICCPR.

Hathaway's theory about cheap talk thus creates an interesting paradox for advocates of expansive human rights protections. On the one hand, aspirational efforts to raise human rights treaty standards could lead some states to sincerely improve their human rights practices, but it could lead other states to ratify or remain party to relevant treaties only for the purposes of gaining reputational benefits, without actually changing any aspect of their human rights practices. To be clear, the cheap talk theory does not suggest that states will worsen their human rights practices in response to lofty treaty standards that offer substantial positional rewards,[213] so the dangers associated with incentivizing cheap talk through successful comparative cherry-picking are perhaps not overly severe. Nonetheless, one must acknowledge the harm to a treaty's overall legitimacy that would result from widespread but insincere ratification of the treaty, particularly where such a scenario could eventually lead to application of the desuetude doctrine, discussed below. For those who engage in comparative cherry-picking as a strategy for broadening human rights protection, an understanding of the cheap talk phenomenon (and the additional incentive to engage in cheap talk that is created by any expansion

213. However, this suggestion that human rights practices will suffer some of the time when standards are raised lies at the heart of the "human rights backsliding" theory, discussed in the next Section of this Article.

of human rights treaty obligations) may require these individuals to re-evaluate the effectiveness of their strategy. More specifically, jurists who comment upon the Canadian summary trial and American court martial systems should probably be aware of the potentially adverse overall impact that their advocacy or jurisprudence may have on the legitimacy of human rights treaty regimes around the world, particularly if they succeed in raising international human rights treaty standards through their misplaced uses of comparative law.

C. *Human Rights Backsliding: One Step Forward, One or More Steps Backward?*

A third potential consequence of the comparative cherry-picking phenomenon is the potential of creating "human rights backsliding,"[214] or the process through which "governments react to international standards by providing fewer or weaker human rights protections."[215] The theory of human rights backsliding is novel and has not yet been fully developed in the academic literature, but it nonetheless describes a reactive process that could easily take place if advocates of expansive human rights protections are successful in raising international human rights standards.

Essentially, the human rights backsliding theory is predicated on the notion that "an international signal regarding 'proper' or 'expected' human rights conduct will empower local interest groups, giving them a domestic political advantage and, therefore, draw local human rights policy closer to the standard specified in the international agreement."[216] Yet, as Guzman and Linos point out, this mechanism can limit the scope of particular rights (specifically in cases where the international standard is not as precise or demanding as existing domestic standard) just as easily as it can expand other rights: the "gravitational pull on policy" by international standards is not a universally upward pull.[217] Basically, the human rights backsliding theory predicts that some states will improve their human rights practices, but others may weaken such practices, all in response to and in compliance with changes to an international standard. In this sense, an international human

214. *See generally* Guzman & Linos, *supra* note 8 (discussing a tendency for high-performing states to weaken their domestic human rights regimes relative to prior behavior or relative to what they would otherwise have done).

215. *Id.* at 4.

216. *Id.* at 11.

217. *Id.*

rights standard—rather than simply representing a "floor" below which protections must not drop—essentially becomes both a ceiling and a floor at the same time for high-performing and low-performing states, respectively.

This simple theoretical premise is supported by examples wherein Guzman and Linos purport to have identified the human rights backsliding phenomenon in action. For example, in the United Kingdom, hearsay and confrontation protections for criminal defendants have recently been weakened by legislative changes that appear to be, among other things, reactions to decisions of the ECtHR.[218] When the ECtHR clarified that a right to cross-examine witnesses during a trial is not always provided for within Article 6 of the ECHR, the United Kingdom subsequently began permitting out-of-court statements to be introduced by the prosecution under certain circumstances.[219] In other words, even though the right to cross-examine a witness during a trial was historically provided for under U.K. law, the gravitational pull of ECtHR jurisprudence (permitting less protection for the defendant) probably contributed to human rights backsliding within the United Kingdom. Guzman and Linos also describe examples wherein same-sex marriage rights and parental benefit rights in various countries have been reduced, apparently both as a result of and to fall more in line with international human rights tribunal decisions that established minimum levels of protections in these areas.[220]

Again, the phenomenon of human rights backsliding creates a paradox for those who seek to increase global levels of human rights protection. By engaging in comparative cherry-picking or any other strategy that could lead to heightened international human rights standards in a particular area, one runs several risks. First, there is a possibility that, where an advance is made toward greater human rights protections on a discrete issue, states will respond by backsliding in a way that gives individuals less protections on other related issues (within the limits of what a treaty allows). States may, for instance, reason that the cost of implementing increased human rights protections to meet a new international standard in one area should be offset by a reduction in

218. *Id.* at 14 ("In short, while Britain likely had multiple reasons to reduce the rights of criminal defendants, the fact that it was out of line with Europe appears to have been part of the decision process.").

219. *See, e.g.*, Criminal Justice Act, 2003, c. 44, § 116(2)(e) (U.K.) (permitting British courts to admit an out-of-court statement in cases where a witness, through fear, does not give, or ceases to give, in-court testimony).

220. Guzman & Linos, *supra* note 8, at 15–19.

costs associated with a drop in human rights protections in another area. Second, while acknowledging that some low-performing states may improve their human rights practices to meet a heightened international standard, there is a risk that high-performing states may weaken their human rights protections to drop them to the minimum level that is articulated by any new international standard. The challenge for those who wish to see a net increase in global human rights protections will thus involve a calculation of whether the benefit of the upward pull of a new international standard on low-performing states outweighs the harm of the same standard's downward pull on high-performing states.

The practical dangers of comparative cherry-picking become evident when this human rights backsliding theory is applied to the two case studies discussed in this Article. If international (i.e., ICCPR) fair trial standards in relation to military tribunals are raised through persistent efforts of Canadian critics and judges, then there is a risk that states—even highly democratic states like Canada and the United States—will meet the new standard while concurrently reducing their human rights protections in other related areas. For instance, a wholesale review of the Canadian and American military justice systems that might hypothetically take place in the wake of a judicial decision or the HRC pronouncement that gives more expansive content to the ICCPR's Article 14(1) right to a fair trial by an independent and impartial tribunal could—while acknowledging the need to meet the new standard—also conclude that standards can safely be dropped in other areas. Perhaps the unanimous verdict that is currently required by Canadian court martial panels to convict an accused person of any offense[221] or the unanimous verdict required by American court martial juries before a death sentence can be imposed[222] could be replaced with simple majority verdicts for conviction. For example, a three-quarter-majority verdict is required before the death penalty can be imposed for most offenses in Ireland,[223] and in the absence of any international human rights standard prohibiting such a move. Or, perhaps the right of an accused person to remain silent that is strongly protected as a matter of Canadian

221. *See* National Defence Act, R.S.C. 1985, c. N-5, § 192(2) (Can.).

222. *See* Joint Service Committee on Military Justice, Manual for Courts-Martial: United States, R.C.M. 921(c)(2)(A), (B), at II-119 (2012).

223. *See* Defence Act 1954 (Act. No. 18/1954) (Ir.), *available at* http://www.irishstatutebook.ie/1954/en/act/pub/0018/print.html.

constitutional law[224] might be weakened (or reasonably limited, to use the language of Section 1 of the Canadian Charter) to allow a military tribunal to draw an adverse inference of guilt in any case wherein an accused person exercises her right to silence (as the law permits in England,[225] and in the absence of any international human rights standard prohibiting such a change).

In this sense, heightened international standards in one area will not yield a net gain to overall levels of human rights protections if the new standards cause backsliding in other areas of protection, or if high-performing states reduce their previous levels of protection while still meeting the new standards. An appreciation for the backsliding potential that can be created by elevated human rights standards is therefore useful to those who would seek to expand global levels of human rights protections through the use of comparative cherry-picking.

D. *Desuetude: What Happens When States Cannot Meet International Standards?*

A final consequence of any successful comparative cherry-picking that results in increased international human rights standards is desuetude, or the abandonment of an international rule that is unachievable (i.e., breached) by or unenforced against a vast majority of states.[226] As Michael J. Glennon notes, the concept of desuetude is recognized in both domestic and international law.[227] In the specific context of international law, however, Glennon suggests that a valid rule is one "that few states often violate,"[228] and he argues that "excessive violation of a rule, whether embodied in custom or treaty, causes the rule to be replaced by another rule that permits unrestricted freedom of action."[229]

Desuetude presents another interesting problem for international human rights advocates and may require them to exercise restraint in their endeavors to raise international standards of protection. An elevation of international treaty standards that can be,

224. *See* Noble v. The Queen, [1997] 1 S.C.R. 874, 875 (Can.); Prokofiew v. The Queen, [2012] 2 S.C.R. 639, 640 (Can.).

225. *See, e.g.*, Criminal Justice and Public Order Act, 1994, 42 Eliz. 2, c. 44, § 36 (U.K.) (permitting triers of fact to draw adverse inferences from an accused's silence in cases where the accused fails or refuses to account for objects, substances, or marks in his possession, including on his clothing or person).

226. *See* Glennon, *supra* note 9, at 939–40.

227. *Id.* at 939.

228. *Id.* at 940.

229. *Id.*

and ultimately is, achieved by a majority of states could be effective in creating a new rule of international law binding on all states party to the treaty. However, an elevation of international treaty standards to a level that states are unable or unwilling to attain would, according to Glennon, lead to a sufficient number of breaches of the new standard that the rule would ultimately fall into desuetude and be replaced by either "no rule or by international law's default rule, the so-called freedom principle, which is functionally identical to no rule."[230] Those who care about the protection of human rights should be concerned about the possible operation of this phenomenon, since advocacy that raises the international bar too high could ultimately cause more harm than good—replacing an existing rule (that may be perceived as inadequate) with no rule (a situation that is likely far less desirable than simply preserving an inadequate rule).

The military justice case studies in this Article provide excellent examples of situations where advocacy efforts or activist jurisprudence run the risk of broadening an international rule beyond levels at which the rule can be sustained. Recalling that a common criticism of Canadian summary trials is that they fail to meet European fair trial standards, one might pause to reflect on the proportion of states party to the ICCPR that would be willing and able to meet the European standard for military tribunals, in the event that critics were ever successfully able to lobby for parity between the ICCPR and ECHR standards. For the purposes of this inquiry, it is perhaps telling that, as Rowe has observed, some ten European countries have already entered reservations to the effect that Article 6 of the ECHR will not apply to their military discipline systems, because "the wider need to enforce the military discipline system prevails over [the] particular human rights of those serving in the armed forces."[231] In other words, many European countries have already signaled their unwillingness to comply with the ECtHR's lofty fair trial jurisprudence relating to military tribunals when these standards originate from within their own regional human rights jurisdiction. If Canada and the United States, two countries with strong democratic governments and respect for the rule of law, also struggle to meet European standards, then it seems likely that the military justice systems of many other less-developed and less-democratic countries would face even larger challenges in meeting this standard. In the end, parity between the ICCPR and

230. *Id.*
231. Rowe, *supra* note 15, at 78.

ECHR fair trial standards for military tribunals would likely yield a sufficient number of breaches of the standard as to trigger the desuetude doctrine, which would replace the (new) European standard with an absence of any standard at all. Clearly, this situation would not be effective in expanding protection for international human rights, notwithstanding the noble motives of those who sought such expansion through inappropriately selective references to comparative law.

V. Conclusion

The phenomenon of comparative cherry-picking has previously not been the subject of much, if any, academic commentary. One of the primary objectives of this Article—via the two military justice case studies—has therefore been to introduce the phenomenon and provide examples of the way in which it operates, often at fundamental inconsistency with basic principles of domestic and international law. A second and perhaps more important goal of this Article is to challenge the underlying premise that appears to be embraced by international human rights commentators and jurists who engage in comparative cherry-picking—specifically, that advocacy or pressure in favor of expanded international human rights standards is necessarily helpful in a quest to actually achieve greater human rights protections.

As the final part of this Article showed, some gains can often be made through the mobilization of comparative legal arguments (that are grounded in either cherry-picking or more rigorous comparative legal scholarship) in favor of expanded human rights protections. However, these gains are less likely to occur when comparative legal arguments misstate or misrepresent the effect of international or domestic law in ways that are obvious to international lawyers (because the arguments will simply be discredited on the basis of their clear inaccuracies).

More to the point, on-the-ground gains to human rights protections will not necessarily result from increases to international standards even in those cases where comparative cherry-picking has led to heightened international standards if these heightened standards cause states to denounce the relevant treaties, engage in cheap talk or human rights backsliding, or abandon the international rule altogether through desuetude. Those who engage in comparative cherry-picking as a means to increase international human rights protections must therefore be careful to ensure that their efforts do not ultimately weaken such protections by setting

the bar too high, lest states determine, one way or another, that they are unwilling or unable to meet the new standards.