

National Application of International Law: The Statutory Interpretation Perspective

STÉPHANE BEAULAC

INTRODUCTION

There is little doubt that, especially in the last five years, there is no legal issue that has gathered more interest in the international legal community of Canada than that of the national application of international law.¹ It would certainly not be wrong to trace this enthusiasm back to the 1999 decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and*

Stéphane Beaulac (Ph.D., Cantab.) teaches international law at the Faculty of Law at the University of Montreal. This article is largely based on a paper presented at a Federal Court of Canada seminar on statutory interpretation and administrative law organized by the National Judicial Institute and held in Montebello, Québec, on 10-12 September 2003.

¹ This issue is also very much alive in other common law countries, such as Australia, Great Britain, and New Zealand. See S.A. Riesenfeld and F.M. Abbott (eds.), *Parliamentary Participation in the Making and Operation of Treaties — A Comparative Study* (Dordrecht: Martinus Nijhoff, 1994); S. Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 *Adelaide L. Rev.* 213; A. Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public L. Rev.* 20; B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997); K. Keith, "The Application of International Human Rights Law in New Zealand" (1997) 32 *Texas Int'l L.J.* 401; K. Keith, "The Impact of International Law on New Zealand Law" (1998) 6 *Waikato L. Rev.* 1; M. Gobbi, "Drafting Techniques for Implementing Treaties in New Zealand" (2000) 21 *Statute L. Rev.* 71; and B.R. Openkin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries — Part I" (2000) *Public L.* 607. For an general assessment of the situation in some countries on the European continent, see B. Conforti, "Notes on the Relationship between International Law and National Law" (2001) 3 *Int'l L. Forum* 18.

Immigration),² where the majority has been interpreted as opening the door to the use of international treaties unimplemented in the domestic legal system.³ It might be more accurate, however, to speak of the domestic use of international law not really as a new issue⁴ but rather as a “sexy” issue in the contemporary legal literature of the so-called globalized world order.

Karen Knop, for instance, examines *Baker* and opines that it shows that the Supreme Court of Canada is moving away from the traditional model of international law in domestic courts.⁵ Developing on Anne-Marie Slaughter’s model of transgovernmentalism⁶

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

³ See, among others, H.M. Kindred, “Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts,” in S.G. Coughlan and D. Russell (eds.), *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Thémis, 2002), 263 at 284, who wrote that the “judgment in *Baker v. Canada* has carried Canadian courts into new territory” and that, indeed, the “role of unimplemented treaties is [now] better defined.”

⁴ Indeed, pre-dating *Baker*, the Canadian Council on International Law [hereinafter CCIL] organized in 1998 a congress on the topic. See CCIL, *The Impact of International Law on the Practice of Law in Canada — Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998* (The Hague: Kluwer Law International, 1999). Going back further to 1996, one may recall that former Justice Gérard La Forest, in “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 *Canadian Y.B. Int’l L.* 89, at 100, famously wrote that Canadian courts “are truly becoming international courts” and that, already in his 1988 paper, “The Use of International and Foreign Material in the Supreme Court of Canada,” in CCIL, *Proceedings of the 1988 Conference of the Canadian Council on International Law* (Ottawa: CCIL, 1988), 230 at 230, the Supreme Court of Canada was one of the most “cosmopolitan of national courts” in regard to the foreign material upon which it relied. Even in the 1970s, Ronald St. J. Macdonald wrote an influential piece entitled “The Relationship between International Law and Domestic Law in Canada,” in R. St. J. Macdonald, G. Morris, and D.M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974), 88, in which he examined the doctrine of incorporation in Canada as well as the domestic status of both conventional law and customary law.

⁵ See K. Knop, “Here and There: International Law in Domestic Courts” (2000) 32 *New York U. J. Int’l L. & Pol.* 501.

⁶ See A.-M. Slaughter, “Governing the Global Economy through Government Networks,” in M. Byers (ed.), *The Role of Law in International Politics — Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 177; and A.-M. Slaughter, “A Typology of Transjudicial Communication” (1994) 29 *U. Richmond L. Rev.* 99.

and Patrick Glenn's comparative law methodology,⁷ she argues in favour of a new approach based on the persuasive value of international law. Stephen Toope, for his part, rejects this suggestion of a mere influential role for international norms and argues that we are, in fact, living in a time of changing metaphors, away from national sovereignty and towards transnationalism — "in this in-between time, international law is both 'foreign' and 'part of us.'"⁸ Toope develops his thoughts further and writes that "international law is both outside and in."⁹ Indeed, he argues that "international law is partly *our* law," which means that the "process of relating international law to domestic law is not a translation of norms from outside."¹⁰

One of the main characteristics of the discourse about the domestic use of international law in Canada is that the scholarship is written by internationalists and is expressed within the international legal framework¹¹ — and, arguably, with the underlying objective of promoting the role of international law in the country's judicial decision-making process. The fact that international lawyers participate most actively in the debate is not at all negative — this is not the point. It is rather the lack of serious and substantive doctrinal input from the point of view of the domestic legal

⁷ See P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261.

⁸ S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Canadian Bar Rev. 534 at 540. Later, he wrote: "The Supreme Court's telling of the story of international law in Canada will depend upon old and new metaphors, the old metaphor of binding law and the new metaphor of persuasive authority. Both metaphors must be employed, but not usually at the same time or in the same way." *Ibid.*, at 541.

⁹ S.J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U. New Brunswick L.J. 11 at 11. See also J. Brunnée and S.J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts," in National Judicial Institute, *Federal Court of Canada Education Seminar: Domestic Impact of International Instruments* (conference held in Ottawa on January 31, 2003) [paper on file with author].

¹⁰ *Ibid.*, at 18 [emphasis in original].

¹¹ For instance, consider the following excerpt from Brunnée and Toope's paper delivered at the Federal Court seminar, where they admit taking the "standpoint of international law" and speak of the "bindingness of international law." They write: "From the standpoint of international law, then, the *Baker* decision puts into the spotlight two questions about the *bindingness of international law*. How should courts approach international treaty norms that are binding on Canada, but, absent implementation, not directly applicable in Canada? How should they approach norms that do not bind Canada internationally but that nonetheless reflect important international values" (*supra* note 9 at 45) [emphasis added].

system, in particular, from the statutory interpretation perspective that perhaps ought to be of concern.

Indeed, the two most authoritative works on legislative interpretation — *Driedger on the Construction of Statutes*¹² by Ruth Sullivan and *Interprétation des lois*¹³ by Pierre-André Côté — give a comparatively small place to this increasingly important feature of today's approach to the construction of statutes.¹⁴ Sullivan's latest edition of *Construction of Statutes* has noticeably included a separate chapter on the role of international law in legislative interpretation,¹⁵ which examines some questions in more detail (presumptions of compliance implementing legislation) but leaves others unaddressed, such as the different status of treaties and customs, judicial notice of such law, the effect of *jus cogens* norms, and the persuasive force of the argument based on international law. On the other hand, a consultation of a few Canadian textbooks and casebooks in international law — for example, *Public International Law*¹⁶ by John Currie and *International Law*¹⁷ by Hugh Kindred *et al.* — shows how the national application of international law is considered at length.¹⁸

The purpose of this article is to bring a new and different perspective to the debate over the domestic use of international law —

¹² R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto and Vancouver: Butterworths, 1994).

¹³ P.-A. Côté, *Interprétation des lois*, 3rd ed. (Montreal: Thémis, 1999).

¹⁴ In the third edition of *Construction of Statutes* (*supra* note 12), Sullivan had three-and-a-half pages on the "Compliance with International Law" in the chapter entitled "Presumption of Legislative Intent" (*ibid.*, at 330-33), as well as eight pages on the use of international conventions as "extrinsic aids" (at 459-66). In the third edition of Côté (*supra* note 13), international law occupied two-and-a-half pages in a sub-section on norms of a higher level, which are considered as contextual elements of legislative interpretation; *ibid.*, at 466-68.

¹⁵ R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ontario and Vancouver: Butterworths, 2002). Chapter 16, entitled "International Law" has twenty pages, three headings, and twelve sub-headings.

¹⁶ J. Currie, *Public International Law* (Toronto: Irwin Law, 2001).

¹⁷ H.M. Kindred *et al.* (eds.), *International Law — Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000).

¹⁸ Both Currie and Kindred *et al.*, *supra* note 16 and 17 respectively, have a separate chapter on the domestic use of international law, of twenty-five pages and eighty pages respectively. Among other important questions, they discuss the interaction of international law and national law, the dualist and monist theories of international law reception, the different status of conventional law and customary law, and the conflicts between international law and domestic statutory law.

one that speaks within the discourse of Canadian internal law and that focuses on the method of legislative interpretation. The argument put forward is that the national application of international law is, as far as Canadian judges and other domestic actors are concerned, a question of statutory interpretation, which must be addressed, rationalized, and understood within that framework. Of course, an exhaustive examination of this issue would look at both conventional norms and customary norms — the two principal sources of international law.¹⁹ The present study, however, is more modest in ambition and, thus, more limited in scope. It concentrates on the domestic use of treaties in Canada, leaving the difficult issue of customary international law for another day. The article begins with a preliminary matter on which is founded the main proposition — the claim that international law “binds” Canada. The hypothesis identified also requires a consideration of the practices of treaty implementation in Canada. Building upon the contextual argument of statutory interpretation, an analytical scheme is then put forward to determine the persuasive force of international law, which is based on the degree of incorporation of treaty norms within the Canadian legal system.

INTERNATIONAL LAW AND CANADIAN JUDGES

It seems that a large part of the polemic among international law scholars revolves around the issue of whether or not “international law” is binding within Canada.²⁰ The traditional stance that international law is not binding was most clearly reiterated by the Supreme Court of Canada in *Ordon Estate v. Grail*,²¹ in the context of the interpretation of a statutory provision prescribing a limitation period for maritime negligence claims. In applying the so-called presumption of conformity with international law, Justices Frank Iacobucci and John Major, for the court, wrote that “[a]lthough international law is *not binding* upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada’s obligations under international instruments

¹⁹ Statute of the International Court of Justice, 26 June 1945, U.N.T.S. 961, Can. T.S. 1945 No. 7 (entered into force on 24 October 1945), at Article 38, enunciates the sources of international law [hereinafter ICJ Statute].

²⁰ See, for instance, G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002), at 4.

²¹ *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

and as a member of the international community.”²² In an article co-authored with Gloria Chao, Justice Louis LeBel reminds us that “international law is generally non-binding or without effective control mechanisms” and thus warns that domestically “it does not suffice to simply state that international law requires a certain outcome.”²³

However, this traditional position has recently been challenged, presumably following the groundbreaking decision in *Baker* and, it seems, as a result of the suggestion by Karen Knop that, because international law is indeed not binding, the comparative law methodology ought to be useful in conceptualizing the national application of international law.²⁴ Indeed, Knop writes that the relevance of international law “is not based on bindingness,” which means that “the status of international and foreign law becomes similar, both being *external sources of law*.”²⁵ In fact, Knop challenges the binding/non-binding distinction — what she calls the “on/off switches for the domestic application of international law”²⁶ — and suggests an alternative approach, which she argues springs from the *Baker* case, “where the authority of international law is persuasive rather than binding.”²⁷

This proposition seemed to “rub”²⁸ the wrong way some international legal commentators in Canada. One of them is Stephen Toope who, in promoting a more direct role for international law in Canada, opines that “the dichotomy that Knop sets up between a

²² *Ibid.*, at 526 [emphasis added].

²³ L. LeBel and G. Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 *Supreme Court L. Rev.* (2nd) 23 at 62.

²⁴ This proposition has prompted stark, and somehow cavalier, criticism from some authors. See, for instance, G. van Ert, *supra* note 20, at 35: “In my view, Knop’s equation of international law with foreign law is simply unsupported by the weight of Anglo-Canadian authority. The rule of judicial notice described above — and much else in this work besides — directly refutes this approach. Knop’s mistake is to assume that international law is not binding, and to derive from that assumption the further view that the relevance of international law in Canada is not based on its bindingness. But international law is binding.”

²⁵ Knop, *supra* note 5, at 520 [emphasis added].

²⁶ *Ibid.*, at 515.

²⁷ *Ibid.*, at 535.

²⁸ “Rub” is indeed the word Toope himself used in describing the effect that Knop’s paper had on him — see Toope, *supra* note 8, at 535.

traditional focus on international law as 'binding' on domestic courts, and international law as 'persuasive authority' is, I think, a false dichotomy.²⁹ Instead, he argues that "international law can be both"³⁰ binding and persuasive because "international law is both 'foreign' and 'part of us.'"³¹ In another article, Toope further argues that "international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law,' because international law is partly *our* law."³² Again, in his presentation with Jutta Brunnée for a Federal Court seminar, he opined:

Our worry is that the majority decision [in *Baker*] places the Supreme Court on a path towards treating all international law as persuasive authority, which the Court *may* use to 'inform' its interpretation of domestic law. In other words, by treating both binding and non-binding international norms in this manner, courts move away from their duty to strive for an interpretation that is consistent with Canada's international obligations. Thus, as appealing as [Knop's] comparative law metaphor may seem at first glance, it too bears risks.³³

In their final analysis, Brunnée and Toope forcefully conclude that "many international legal rules bind Canada: some are part of Canadian law. They should be treated accordingly."³⁴

Whether or not one is in agreement with Knop's comparative law metaphor with respect to all international law norms, strictly speaking, international law does not bind Canada (that is, bind *within* Canada) or bind any sovereign state for that matter.³⁵ The

²⁹ *Ibid.*, at 536.

³⁰ *Ibid.*

³¹ *Ibid.*, at 540.

³² Toope, *supra* note 9, at 18 [emphasis added].

³³ Toope and Brunnée, *supra* note 9, at 46 [emphasis in original].

³⁴ *Ibid.*, at 66 [footnotes omitted].

³⁵ It is useful to distinguish between, on the one hand, international law as a set of rules regulating the relations between states and, on the other, international law as a set of rules that can have an impact on domestic law that governs people. The former is what could be referred to as "international international law" and the latter "domestic international law." Justice Louis LeBel and Gloria Chao called the former "principles of public international law *qua* binding law," as opposed to "their application in the domestic legal order." See LeBel and Chao, *supra* note 23 at 62. On the binding character of international law on sovereign states, see generally I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 1-2.

fundamental reason behind this lack of obligatory legal force relates to the so-called Westphalian model of international relations, which very much remains at the centre of the present state system and, hence, the present international law system.

TENETS OF THE INTERNATIONAL LAW SYSTEM

Although some international law scholars have suggested that “national sovereignty” is a dying metaphor³⁶ — perhaps not dissimilarly to the globalizationist claim of the imminent “end of the nation state”³⁷ or even the triumphantalist claim of the “end of history”³⁸ — the matrix in which international affairs are conducted and in which international law operates remains based on the Westphalian model of international relations, at the centre of which is the “*idée-force*”³⁹ of state sovereignty.⁴⁰ As Richard Falk explains, it is “by way of the Peace of Westphalia that ended the Thirty Years’ War, that the modern system of states was formally established as the *dominant world order framework*.”⁴¹ Similarly, Mark Janis writes that “[s]overeignty, as a concept, formed the cornerstone of the

³⁶ See Toope, *supra* note 8, at 540: “To construct the ‘foreign,’ one must accept the continuing influence of the *dying metaphor of national sovereignty*” [emphasis added].

³⁷ See K. Ohmae, *The End of the Nation State — The Rise of Regional Economies* (New York and London: Free Press, 1996) and J.-M. Guehenno, *The End of the Nation-State* (Minneapolis and London: University of Minnesota Press, 1995), at 108.

³⁸ See F. Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992). The “end of history” thesis holds that the end of the Cold War constitutes compelling evidence that a worldwide consensus has emerged in favour of capitalism and liberal democracy. For a critique of this argument, see J. Derrida, *Specters of Marx — The State of the Debt, the Work of Mourning, and the New International* (New York and London: Routledge, 1994), 56 ff. For an interesting parallel between Fukuyama’s claim and some international law scholarship, see S. Marks, “The End of History? — Reflections on Some International Legal Theses” (1997) 8 *European J. Int’l L.* 449.

³⁹ That is, “*idea-force*.” See A. Fouillée, *L’évolutionnisme des idées-forces* (Paris: Félix Alcan, 1890), at XI.

⁴⁰ See, generally, S. Beaulac, “The Westphalian Legal Orthodoxy — Myth or Reality?” (2000) 2 *J. History Int’l L.* 148.

⁴¹ R.A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Ardsey, US: Transnational Publishers, 1998), at 4 [emphasis added]. See also R. Redtslob, *Histoire des grands principes du droit des gens — Depuis l’antiquité jusqu’à la veille de la grande guerre* (Paris: Rousseau, 1923), at 213: “Avec le traité de Westphalie commence une nouvelle époque dans l’histoire du droit des gens” [footnotes omitted].

edifice of international relations that 1648 raised up. Sovereignty was the crucial element in the peace treaties of Westphalia.⁴²

The international reality consists of a community of sovereign states — sometimes called the society of nations — which are independent from one another and have their own wills and finalities as corporate-like representatives of the peoples living in their territories. The eighteenth-century author Emer de Vattel proposed an international legal framework to regulate the relations between states in his masterpiece *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*.⁴³ His seminal contribution is a scheme in which sovereign states are the sole actors on the international plane and thus the only subjects of international law.⁴⁴ It is also based on the formal equality of states and on a notion of national independence that involves non-interference in the domestic affairs of other states.⁴⁵ This basic theory is still very much underlying modern international law.⁴⁶

Accordingly, the Westphalian model of international relations, which is governed by the Vattelien legal structure, involves an international realm that is distinct and separate from the internal

⁴² M.S. Janis, "Sovereignty and International Law: Hobbes and Grotius," in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994), 391, at 393 [emphasis added]. Likewise, see also T.M. Franck, *The Empowered Self — Law and Society in the Age of Individualism* (Oxford and New York: Oxford University Press, 1999), at 5.

⁴³ E. de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, 2 vols. (London: n.b., 1758). See also the English translation by J. Chitty and E. de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia: Johnson Law Booksellers, 1863).

⁴⁴ On this point, in the modern context of international law, see W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Canadian Bar Rev. 174, at 176.

⁴⁵ See S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 J. History Int'l L. 237.

⁴⁶ See, generally, S. Beaulac, *The Power of Language in the Making of International Law — The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden and Boston: Martinus Nijhoff, 2004). However, see P. Allott, "The Emerging Universal Legal System" (2001) 3 Int'l L. Forum 12, at 17: "International social reality has overtaken international social philosophy. The Vattelien mind-world is withering away under the impact of the new international social reality. The reconstruction of the metaphysical basis of international law is now well advanced. The deconstruction of the false consciousness of politicians, public officials, and international lawyers is only just beginning."

realm.⁴⁷ John Currie explains thus: “Public international law is not so much an area or topic of the law as it is *an entire legal system, quite distinct from the national legal systems* that regulate daily life within states.”⁴⁸ As far as the relation between international law and domestic law is concerned, there is no direct connection because the two systems are distinct and separate⁴⁹ — “public international law exists outside and independent of national legal systems.”⁵⁰ With respect to the issue of the national application of international law, these international law/internal law distinct and separate realms are no doubt behind the following comments by LeBel J. and Gloria Chao: “As the heart of the debate is the tension between the democratic principle underlying the *internal legal order* and the search for conformity or consistency with a developing and uncertain *external legal order*.”⁵¹ Appositely, Karen Knop schematically writes that “domestic law is ‘here’ and international law is ‘there.’”⁵²

This continuing and continuous distinct and separate reality of our modern state system of international relations explains two fundamental principles of international law. The first one is that, on the international plane, a state is not entitled to invoke its internal law — which includes its constitutional structure⁵³ — in

⁴⁷ See S. Beaulac, “On the Saying That International Law Binds Canadian Courts” (2003) 29(3) CCIL Bulletin 1. In fact, even the most forceful advocates of an increased role of international law in Canada acknowledge that “public international law is not a subset of the internal laws of states, but a *separate legal system in its own rights*.” See van Ert, *supra* note 20, at 15 [emphasis added].

⁴⁸ Currie, *supra* note 16, at 1 [emphasis added].

⁴⁹ It follows that the assertion that the legislative power of a sovereign state like Canada is competent to “violate” international law is a meaningless statement based on a flawed question that wrongly assume some kind of inherent connection between the international plane and the national level — see van Ert, *supra* note 20, at 55 ff.

⁵⁰ Currie, *supra* note 16, at 1. *Contra*, see G. Palmer, “Human Rights and the New Zealand Government’s Treaty Obligations” (1999) 29 Victoria U. Wellington L. Rev. 27, at 59: “For many years international law and municipal law have been seen as two separate circles that never intersect. Increasingly, however, the way to look at them, I suggest, is that they are two circles with a substantial degree of overlap and indeed it can be argued that there is only one circle.”

⁵¹ LeBel and Chao, *supra* note 23, at 24 [emphasis added].

⁵² Knop, *supra* note 5, at 504.

⁵³ See R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th ed., vol. 1 (London: Longman, 1992), at 254: “Nevertheless, in principle a state which has incurred international obligations cannot rely on its internal constitutional

order to justify a breach of its international obligations.⁵⁴ The Supreme Court of Canada accepted this basic principle of international law in *Zingre v. The Queen*,⁵⁵ where Justice Robert Dickson quoted and endorsed a statement by the Canadian Department of External Affairs stating that "it is a recognized principle of international customary law that a state may not invoke the provisions of its internal law as justification for its failure to perform its international obligations."⁵⁶ Fundamentally, a state cannot rely on its domestic law to justify a failure to honour its obligations *vis-à-vis* the international community because these norms and duties are part of two distinct and separate legal systems.

The second core principle of international law springing from the international/internal divide is the need to administer the relationship between the two systems. John Currie refers to this feature as the "international-national law interface"⁵⁷ and writes that the relationship "will depend on legal rules that determine, as a matter of law, how one legal system treats another."⁵⁸ As in other Commonwealth countries,⁵⁹ in Canada the reception rules on how international law is applicable in domestic law are a matter of constitutional law. Francis Jacobs explains:

First, the effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is

arrangements as a justification for any failure to comply with those obligations. In respect of treaties this can lead to federal states being unable to become parties" [footnotes omitted].

⁵⁴ The basic authority for this proposition is the arbitration decision in the *Alabama Claims* case (United States/United Kingdom) (1872), Moore, *Arbitrations*, i. 653. This rule was codified in section 27 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), Can. T.S. 1980 No. 37 (entered into force on 27 January 1980) [hereinafter Vienna Convention]. See also P. Daillier and A. Pellet (eds.), *Nguyen Quoc Dinh — Droit international public*, 5th ed. (Paris: Librairie générale de droit et de jurisprudence, 1994), at 272.

⁵⁵ *Zingre v. The Queen*, [1981] 2 S.C.R. 392.

⁵⁶ *Ibid.*, at 410.

⁵⁷ Currie, *supra* note 16, at 193.

⁵⁸ *Ibid.*

⁵⁹ See, for instance, the Australian situation with the *Commonwealth of Australia Constitutional Act*, 63 & 64 Victoria, c. 12 (U.K.), and the decision of the Australian High Court in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273, at 286-87.

governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties which are binding on the State, even if they have not been specifically incorporated into domestic law. But this application of treaties "as such" is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law. *Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances. It does not modify the fundamental principle that the application of treaties by domestic courts is governed by domestic law.*⁶⁰

These constitutional rules are unwritten⁶¹ — perhaps amounting to constitutional conventions⁶² — and come from the British tradition through the preamble to the Constitution Act, 1867,⁶³ which provides that Canada shall have "a Constitution similar in principle to that of the United Kingdom." As Peter Hogg has explained, "Canada's constitutional law, derived in this respect from the United Kingdom, does not recognize a treaty as part of the internal (or 'municipal') law of Canada."⁶⁴

Indeed, it has become an orthodoxy⁶⁵ in Canada that an international treaty⁶⁶ is not part of the law of the land until it has been incorporated domestically, which must be accomplished "by the enactment of a statute which makes the required change in the law."⁶⁷ The basic authority for this proposition undoubtedly remains

⁶⁰ F.G. Jacobs, "Introduction," in F.G. Jacobs and S Roberts (eds.), *The Effect of Treaties in Domestic Law* (London: Sweet and Maxwell, 1987), xxiii, at xxiv [emphasis added].

⁶¹ As Chief Justice Antonio Lamer confirmed in *Re Provincial Court Judges*, [1997] 3 S.C.R. 3, at 68, "the general principle [is] that the Constitution embraces unwritten, as well as written rules."

⁶² Constitutional conventions were considered by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. See also A. Heard, *Canadian Constitution Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

⁶³ Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5.

⁶⁴ P.W. Hogg, *Constitutional Law of Canada*, 3rd (student) ed. (Scarborough, ON: Carswell, 1992), at 285.

⁶⁵ Stephen Toope referred to this principle as "trite law." See Toope, *supra* note 9, at 12.

⁶⁶ It must be emphasized that the present article does not examine the situation with regard to customs.

⁶⁷ Hogg, *supra* note 64, at 285. The suggestion recently made that international treaty norms could be implemented through non-legislative means such as government policy measures, albeit virtuous (perhaps), is unsupported by authority

the decision of the Judicial Committee of the Privy Council in the notorious case *Attorney General for Canada v. Attorney General for Ontario (Labour Conventions case)*.⁶⁸ The implementation requirement for treaties has been reiterated and applied at the Supreme Court of Canada⁶⁹ — Justice Claire L'Heureux-Dubé reaffirmed the rule in the 1999 *Baker* case: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute."⁷⁰ Again, in *Suresh v. Canada (Minister of Citizenship and Immigration)*,⁷¹ in 2002, the Supreme Court wrote: "International treaty norms are not, strictly speaking, binding [*sic*] in Canada unless they have been incorporated into Canadian law by enactment."⁷²

INTERNATIONAL LAW IS NOT AND CANNOT BE "BINDING" IN CANADA

Going back to the two distinct and separate realms of the international and the internal, it is understood of course that each of these legal systems has its own judiciary. At the international level, Article 92 of the Charter of the United Nations⁷³ provides that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations" — it was created with the adoption of the Statute of the International Court of Justice (ICJ Statute).⁷⁴

— see E. Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001) 11 J. Environmental L. & Prac. 399, at 407: "Thus a treaty that has been brought into Canadian law through other measures — such as policy — should be of equal status to treaties implemented by specific legislation."

⁶⁸ *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, at 347 [hereinafter *Labour Conventions*].

⁶⁹ See, for instance, *Francis v. The Queen*, [1956] 618, at 621; *Capital Cities Communications Inc. v. Canada (C.R.T.C.)*, [1978] 2 S.C.R. 141, at 172-73 [hereinafter *Capital Cities*]; *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at 484.

⁷⁰ *Baker*, *supra* note 2 at 861.

⁷¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [hereinafter *Suresh*]. See also S. Beaulac, "The *Suresh* Case and Unimplemented Treaty Norms" (2002) 15 Rev. québécoise d. int'l 221.

⁷² *Suresh*, *supra* note 71 at 38.

⁷³ Charter of the United Nations, June 26, 1945, Can. T.S. 1945 No. 7 (entered into force on 24 October 1945); not published in the U.N.T.S.

⁷⁴ ICJ Statute, *supra* note 19. Its predecessor was the Permanent Court of International Justice of the League of Nations, created pursuant to Article 415 of the Treaty of Versailles, concluded on 28 June 1919 — see the English text of the treaty in C. Parry (ed.), *Consolidated Treaty Series*, vol. 225 (Dobbs Ferry, US: Oceana Publications, 1969), at 189. There has been a proliferation of courts and tribunals at the international level, especially in the past fifteen years, with

At the national level, to take Canada as an example, there exists a whole judicial structure of domestic courts and tribunals,⁷⁵ both provincial and federal, at the pinnacle of which is the Supreme Court of Canada, established pursuant to section 101 of the Constitution Act, 1867⁷⁶ and created in 1875 (along with the ancestor of the Federal Court) with the adoption of the Supreme and Exchequer Courts Act, 1875.⁷⁷

The more important point is that both sets of courts have their own sets of legal norms — that is, the ICJ and the other international courts and tribunals apply international law and the Supreme Court of Canada and the other Canadian courts and tribunals (or any domestic courts of sovereign states) apply their domestic law.⁷⁸ This assertion may sound trite, but, in the present debate over the issue of the internal use of international law, some truisms might need to be recalled from time to time.⁷⁹ Of course, it does not mean that international judicial bodies cannot take into consideration domestic law, which is in fact an explicit source of international law under Article 38(1) of the ICJ Statute⁸⁰ or that

over a dozen international judicial or quasi-judicial bodies established. See C. Brown, "The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze" (2002) 3 *Melbourne J. Int'l L.* 453, at 455-56.

⁷⁵ On the Canadian judiciary, in general, see G.L. Gall, *The Canadian Legal System*, 4th ed. (Scarborough, ON: Carswell, 1995), at 181 ff.

⁷⁶ Constitution Act, 1867, *supra* note 63.

⁷⁷ Supreme and Exchequer Courts Act, 1875, S.C. 1875, c. 11. Now, it is the Supreme Court Act, R.S.C. 1985, c. S-26, which provides for the Supreme Court of Canada.

⁷⁸ For the sake of completeness, it must be added that, of course, Canadian private international law can dictate that foreign domestic law will apply to a particular situation. This does not change the basic proposition, however, because Canadian courts fundamentally resort, even in such cases, to Canadian domestic law in the first instance.

⁷⁹ For instance, see the following statement that appears to run in the face of the general tenets of international law: "The tendency to look to explicitly international forums, such as the International Court of Justice, for the exclusive enforcement of international law is a mistake. International jurisdiction is not confined to internationally constituted courts in the way that jurisdiction over Japan is reserved to Japanese courts. Rather, international and domestic courts share jurisdiction. *Indeed, to distinguish between international and domestic courts is a false dichotomy.*" Van Ert, *supra* note 20, at 5 [emphasis added].

⁸⁰ ICJ Statute, *supra* note 19. Sub-paragraph b of Article 38(1) provides, as a source of international law, "the general principles of law recognized by civilized nations." On general principles of law, see M. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997), at 77 ff.

domestic case law does not influence their decisions as a secondary source of international law⁸¹ and even as evidence of international customs.⁸² Conversely, Bill Schabas rightly points out that Canadian judicial organs may use “international law to the extent that it is also part of the ‘Laws of Canada.’”⁸³

The mutual influence, however, does not modify the basic situation that the international judiciary applies the legal norms of its realm and that national judiciaries apply the legal norms of their realms. The international reality is distinct and separate from the internal reality and, consequently, the actualization of international law through judicial decision-making is distinct and separate from the actualization of domestic law through judicial decision-making. Although this aspect is not usually dwelled upon in judicial decisions, the Supreme Court of Canada has had such an opportunity to consider its role *vis-à-vis* the international legal system in *Reference re Secession of Quebec*.⁸⁴ The *amicus curiae* argued that the court had no jurisdiction to answer questions of “‘pure’ international law.”⁸⁵ The response, which is significant for the present purposes, was that the “Court would not, in providing an advisory opinion in the context of a reference, be purporting to ‘act as’ or substitute itself for an international tribunal.”⁸⁶ Thus, as LeBel J. and Gloria Chao observe, “the key limits to the [Supreme] Court’s use [of these norms] is that it has never seen itself as a final arbiter of international law.”⁸⁷

The acknowledgment that the international legal reality is distinct and separate from the national legal reality, including with

⁸¹ Sub-paragraph c of Article 38(1) of the ICJ Statute provides that judicial decisions, including those of domestic courts, are a subsidiary source of international law. It may be going too far, however, to argue that, through its decisions, “the Supreme Court of Canada not only applies and interprets public international law, *it may also create it*” — see W.A. Schabas, *supra* note 44, at 176 [emphasis added].

⁸² See Brunnée and Toope, *supra* note 9, at 7, where the authors appositely wrote: “Especially in the context of customary international law, domestic courts participate in the continuous weaving of the fabric of international law.” See also A.E. Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95 *American J. Int’l L.* 757.

⁸³ Schabas, *supra* note 44, at 176.

⁸⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁸⁵ *Ibid.*, at 234.

⁸⁶ *Ibid.*

⁸⁷ LeBel and Chao, *supra* note 23, at 59.

respect to their judicial instances, does not mean that the former may not have any effect on the latter.⁸⁸ In *Reference re Secession of Quebec*,⁸⁹ an argument was also made that the court had no jurisdiction to “look at international law”⁹⁰ in order to decide the questions at issue. “This concern is groundless” was the reply: “In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system.”⁹¹ Therefore, treaty norms of the distinct and separate international legal system may have an effect within the Canadian domestic legal system.⁹² It is important to acknowledge, however, that such a legal effect will not at all be automatic or obligatory. Rather, because the two legal systems exist independently, the impact that one can have on the other will be decided by the latter system — that is, by the legal rules of reception already explained earlier in this article with respect to international treaties.

Put another way, domestic courts (such as Canadian courts) interpret and apply domestic law (such as Canadian law), and it is to the extent that the constitutional and other domestic legal rules allow international law to be part of domestic law — and that it has in effect become part of that domestic law — that international treaty norms may have an impact on the interpretation and application of domestic law by domestic courts. In this sense, international law *qua* international law can never “bind” a sovereign state such as Canada, or, more accurately, international law can never be *stricto sensu* “binding” *within* the Canadian legal system because Canadian domestic courts have jurisdiction over Canadian law, not international law.⁹³ What international law can do, and, indeed, should do as much as possible, is to “influence” the interpretation and application of domestic law — the degree of which will depend,

⁸⁸ The position defended here is thus reconcilable with La Forest J.’s comments (*supra* note 4, at 100-1) about the internationalization of our courts.

⁸⁹ *Reference re Secession of Quebec*, *supra* note 84.

⁹⁰ *Ibid.*, at 235.

⁹¹ *Ibid.*

⁹² The Supreme Court of Canada referred to the *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners’ Residences*, [1943] S.C.R. 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; and *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.

⁹³ See S. Beaulac, “Arrêtons de dire que les tribunaux au Canada sont ‘liés’ par le droit international” (2004) 38 *Rev. jur. Thémis*, forthcoming.

in the words of Schabas, on the extent that international law "is also part of the 'Laws of Canada.'"⁹⁴

The "influence" of international law on the interpretation and application of Canadian law can also be put in terms of the determination of the "persuasive force" of international law or the evaluation of the "weight" of the international law argument. This approach to the domestic use of international law is not an endorsement of the proposition put forward by Karen Knop based on the transgovernmental model and the comparative law methodology.⁹⁵ The approach shares, however, the belief that international law, by definition, cannot "bind" the courts of sovereign states. The reason suggested in this article why international law can only be "influential" or "persuasive" is different from Knop's and boils down to the two distinct and separate realities of international law and national law. Canadian courts interpret and apply Canadian law and, with respect to treaties, in order to know what influence the written norms of international law found in them can have on the written norms of Canadian domestic law found in statutes, it is now appropriate to bring the debate within the discourse of legislative interpretation.

INTERNATIONAL LAW AS A CONTEXTUAL ELEMENT OF STATUTORY INTERPRETATION

The argument at the heart of this article is that the use of international law is, as far as Canadian judges and other domestic actors are concerned, a question of statutory interpretation, which must be addressed, rationalized, and understood within this framework. This hypothesis now requires an examination of the general discourse of statutory interpretation and, in particular, the contextual argument, which is considered in some detail. Only then can the main proposal be properly explained, namely, the analytical scheme to decide the persuasive force of international law, which considers the matter in which treaties were implemented and is thus based on the degree of incorporation of treaty norms within the Canadian legal system.

TREATY IMPLEMENTATION PRACTICES

The implementation of treaties is required to bridge the international and the national distinct and separate realms and to give

⁹⁴ Schabas, *supra* note 44, at 176.

⁹⁵ See Knop, *supra* note 5.

legal effect to such international norms at the domestic level.⁹⁶ It will be argued that the manner in which treaty norms are incorporated within the Canadian legal system by the competent legislative authority should determine the persuasive force of the international law argument of contextual interpretation of domestic statutes. Accordingly, it is first necessary to examine in some detail the different legislative practices that are followed to implement international conventions.

Ruth Sullivan identifies two techniques used by legislative authorities to give legal effect to international treaty law in Canada: (1) incorporation by reference and (2) harmonization.⁹⁷ The first technique directly implements the treaty, either by reproducing its provisions in the statute itself or by including the text as a schedule and somehow indicating that it is thus part of the statute.⁹⁸ "When a legislature implements an international convention through harmonization," on the other hand, "it redrafts the law to be implemented in its own terms so as to adapt it to domestic law."⁹⁹

⁹⁶ For the same of completeness, one must mention that it is the very large majority of international treaties that require legislative implementation, but not in any way all of them — see Hogg, *supra* note 64, at 285: "Many treaties do not require a change in the internal law of the states which are parties. This is true of treaties which do not impinge on individual rights, nor contravene existing laws, nor require action outside the executive powers of the government which made the treaty. For example, treaties between Canada and other states relating to defence, foreign aid, the high seas, the air, research, weather stations, diplomatic relations and many other matter, may be able to be implemented simply by the executive action of the Canadian government which made the treaty" [footnotes omitted]. Moreover, treaties relating to war and peace as well as treaties pertaining to territory transfers do not require implementation through legislation. See Brownlie, *supra* note 35, at 48; and R. St. J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dalhousie L.J. 307 at 308-10 and 313-14.

⁹⁷ See Sullivan, *supra* note 15, at 430.

⁹⁸ Indeed, it has become clear with the majority reasons of Iacobucci J. in *Re Act Respecting the Vancouver Island Railway*, [1994] 2 S.C.R. 41, that scheduling an international treaty is not sufficient to directly incorporate it domestically. Using two opinions expressed in *Ottawa Electric Railway Co. v. Corporation of the City of Ottawa*, [1945] S.C.R. 105, Iacobucci J. wrote: "Although divided in the result, I discern a common thread in the judgments of Rinfret C.J. and Kerwin J., namely, that statutory ratification and confirmation of a scheduled agreement, standing alone, is generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself" (at 109). See also *Winnipeg v. Winnipeg Electric Railway Co.*, [1921] 2 W.W.R. 282 (Manitoba C.A.), at 306.

⁹⁹ Sullivan, *supra* note 15, at 434.

Following this classification, one must realize that these practices are not mutually exclusive — that is, international norms in a treaty can be implemented not only by using one or the other technique but also by using a combination of both, where part of the treaty would be directly incorporated in the statute while another part would be incorporated through harmonization. The federal Immigration Act¹⁰⁰ is such a piece of hybrid legislation that it both directly implements and harmonizes Canadian law in view of the Convention Relating to the Status of Refugees.¹⁰¹

Another challenge regarding the implementation of treaties, which is this time due to Canada's federal nature, is that the same treaty — the subject matter of which falls within provincial power — is not necessarily implemented the same way across the country. *Thomson v. Thomson*¹⁰² is an illustration of such a situation, where Justice Gerard La Forest identified the various ways in which the provinces had implemented the Hague Convention of the Civil Aspects of International Child Abduction¹⁰³ — all of the provincial acts, with the exception of Quebec, directly implemented the convention by reference (New Brunswick, Nova Scotia, Saskatchewan, and Alberta incorporated the exact scheme, while Manitoba, Ontario, British Columbia, Prince Edward Island, and Newfoundland incorporated the treaty along with other legislative provisions).¹⁰⁴ As for Canada's civil law jurisdiction, it did not "adopt the integral wording thereof," as L'Heureux-Dubé J. pointed out later in *W. (V.) v. S. (D.)*,¹⁰⁵ hence, implementing the treaty through harmonizing legislation and, thus, "ensuring that the new rules can be applied effectively within the institutional framework of domestic law."¹⁰⁶

¹⁰⁰ Immigration Act, R.S.C. 1985, c. I-2.

¹⁰¹ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force on 22 April 1954).

¹⁰² *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at 601-2 [hereinafter *Thomson*].

¹⁰³ Hague Convention of the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 89, Can. T.S. 1983 No. 35 (entered into force on 1 December 1983).

¹⁰⁴ See M. Bailey, "Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction" (2000) 33 New York U. J. Int'l L. & Pol. 17 at 17-19.

¹⁰⁵ *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108, at 133.

¹⁰⁶ Sullivan, *supra* note 15, at 434.

Parliamentary Intention and Implementation

Given the formal requirement of having legislation transform international treaty norms within the Canadian domestic legal system,¹⁰⁷ the deciding factor in knowing whether or not such incorporation has occurred is the “intention of Parliament.” Relying on Iacobucci J.’s reasons in *Re Act Respecting the Vancouver Island Railway*,¹⁰⁸ Justice J. François Lemieux at the Federal Court in *Pfizer Inc. v. Canada*¹⁰⁹ explained that “whether an agreement is legislated so as to become endowed with statutory force is a matter of *discovering Parliament’s intention*.”¹¹⁰ Thus, when the statute explicitly declares that a certain international convention has “force of law in Canada,”¹¹¹ the implementing requirement is most likely fulfilled.¹¹² Although the language that is used in the act is important, “all of the tools of statutory interpretation can be called in aid to determine whether incorporation is intended.”¹¹³ The old view that “courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation,”¹¹⁴ therefore, appears to be obsolete.

Such an assessment of legislative intention led the Federal Court to hold in *Pfizer*¹¹⁵ that the whole of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)¹¹⁶ was not incorporated in Canada through the World Trade Organization Agreement Implementation Act,¹¹⁷ which even scheduled

¹⁰⁷ See Hogg, *supra* note 64 and accompanying text.

¹⁰⁸ *Re Act Respecting the Vancouver Island Railway*, *supra* note 98, at 110.

¹⁰⁹ *Pfizer Inc. v. Canada*, [1999] 4 F.C. 441 (F.C.T.D.) [hereinafter *Pfizer*].

¹¹⁰ *Ibid.*, at 458 [emphasis added].

¹¹¹ For instance, see section 3 of the United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd supp.); and section 3(1) of the Foreign Missions and International Organizations Act, S.C. 1991, c. 41.

¹¹² Such clear intention to implement, however, is not necessarily conclusive — see *Antonsen v. Canada (Attorney General)*, [1995] 2 F.C. 272 (F.C.T.D.), at 305-6.

¹¹³ *Re Act Respecting the Vancouver Island Railway*, *supra* note 98, at 110. See also *Cree Regional Authority v. Canada (Federal Administrator)*, [1991] 3 F.C. (F.C.A.), at 546-47 and 551-52.

¹¹⁴ *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at 171, *per* Chief Justice Boris Laskin.

¹¹⁵ *Pfizer*, *supra* note 109.

¹¹⁶ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 3 [hereinafter WTO Agreement].

¹¹⁷ World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47.

the relevant international documents. Justice Lemieux reached the following conclusion:

When Parliament said, in section 3 of the WTO Agreement Implementation Act, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the WTO Agreement Implementation Act that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could be only implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the *Constitution Act, 1867*... What Parliament did in approving the Agreement is to anchor the Agreement as the basis for its participation in the World Trade Organization, Canada's adherence to WTO mechanisms such as dispute settlement and the basis for implementation where adaptation through regulation or adjudication was required.¹¹⁸

In short, as in any case in the determination of the intention of Parliament, the statute should be read as a whole, in light of the language used, the objective pursued, and the context, both immediate and extended (including the preamble), of the enactment under examination.¹¹⁹

Passive Incorporation Is Not Implementation

The next important aspect of the implementation requirement question is whether or not what some have called "passive incorporation"¹²⁰ of treaties actually constitutes the transformation of international norms within the Canadian domestic legal system.¹²¹ Such passive incorporation could be said to have occurred where the federal government concludes and ratifies an international agreement on the basis of existing domestic law that already conforms with Canada's new international obligations. In the context of international human rights law, Irit Weiser has considered the issue and attempted to elucidate the effect of such passive

¹¹⁸ *Pfizer*, *supra* note 109, at 460.

¹¹⁹ See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 [hereinafter *Crown Zellerbach*]; and *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

¹²⁰ Also known as "incorporation by complacency."

¹²¹ See J. Ebbesson, *Compatibility of International and National Environmental Law* (London: Kluwer Law International, 1996), at 206.

incorporation on statutory interpretation.¹²² In the context of international environmental law, Elizabeth Brandon writes that, “[g]iven the common government practice of assessing Canada’s legislative framework prior to signing a treaty, significance can be attached to legislative inaction by the government following signature.”¹²³ She opines that “such inaction signals that the existing legislative or policy framework has been deemed adequate to fulfil the treaty obligations.”¹²⁴ Similarly, Jutta Brunnée and Stephen Toope argue that, “[i]n cases where there was no specific legislative transformation but Canadian law is in conformity with a treaty due to prior statutory, common law, or even administrative policy, we suggest that the treaty is also implemented for the purposes of domestic law.”¹²⁵

The contention that passive incorporation actually constitutes the domestic transformation of international treaty norms can be attractive given the claim that the federal government has made on occasion in its reports to international treaty bodies that Canada’s human rights commitments, for instance, have been met on the basis of prior conformity.¹²⁶ This contention would be an error, however, especially in view of the three rationales — separation of powers, federalism, democracy — that underlie the implementation requirement of international treaties. First, it would allow the executive branch of government to determine, in effect, the legal effect of international treaty law within the domestic realm of Canada in blatant violation of the separation of powers in our parliament system of government. Second, it would be the federal government, which is deemed to have sole treaty-making power and

¹²² See I. Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation,” in CCIL, *The Impact of International Law on the Practice of Law in Canada — Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998* (The Hague: Kluwer Law International, 1999), 132, at 137-39.

¹²³ Brandon, *supra* note 67, at 418.

¹²⁴ *Ibid.*

¹²⁵ Brunnée and Toope, *supra* note 9, at 29.

¹²⁶ See, for instance, Canada’s report to the United Nations Human Rights Committee, sitting under the first Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), Can. T.S. 1976 No. 47 (entered into force on 23 March 1976) — Human Rights Committee, *Consideration of Reports Submitted by States under Article 40 of the Covenant: Fourth Periodic Report of States Parties Due in 1995: Canada*, U.N. C.C.P.R.O.R., 1995, U.N. Doc. CCPR/C/103/Add.5.

international personality, that could indirectly transform treaties in Canada through such passive incorporation, with no apparent restriction in regard to the constitutional division of legislative authority. Third, allowing for the incorporation of treaty norms without the participation of the elected assembly of the competent government would create a real democratic deficit, which, in a way, would see the international legal realm, in which citizens have no participation, dictate the democratically legitimate national legal realm.¹²⁷

These may have been some of the considerations that the Ontario Court of Appeal had in mind when considering the argument based on the International Covenant on Civil and Political Rights¹²⁸ in *Ahani v. Canada (Attorney General)*.¹²⁹ The question at issue was whether the Optional Protocol¹³⁰ to this convention was part of the laws of the land. The fact that there is no legislation in Canada transforming these human rights commitments, directly or

¹²⁷ Compare these arguments with the following ones by Brunnée and Toope: "Two considerations suggest that the [passive incorporation] approach is both correct and compatible with legitimate concerns over the proper roles of the executive, legislators, and the judiciary. First, where a treaty does not actually affect domestic law, the concern that the authority of Parliament or the provincial legislature could be usurped by federal executive action seems misplaced. In any event, it remains open to Parliament or provincial legislatures to deviate from treaty provisions through explicit statutory action. Second, where no legislative action is required to bring domestic law in line with Canada's treaty commitments, it seems absurd to insist on explicit statutory implementation. This applies with even greater force when Canada, in international forums, reports its implementation of treaty commitments, as it does regularly, for example, in the human rights context." Brunnée and Toope, *supra* note 9, at 30-31.

¹²⁸ International Covenant on Civil and Political Rights, *supra* note 126.

¹²⁹ *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 [hereinafter *Ahani*]. The *Ahani* case was considered with the *Suresh* case at the Supreme Court of Canada, the decisions in which were handed down on 11 January 2002. Unlike the latter, the petitioner Ahani was not given a new deportation hearing and, having exhausted all domestic remedies, he petitioned the United Nations Human Rights Committee under the Optional Protocol to the International Covenant of Civil and Political Rights, *supra* note 126. The international instance requested Canada to stay the deportation until the full consideration of Ahani's case, which was refused by the federal government. The second Canadian judicial proceeding, which reached the Ontario Court of Appeal (the Supreme Court of Canada refused leave to appeal), was asking for an injunction to suspend his deportation order, which was refused.

¹³⁰ Optional Protocol, *supra* note 126. See, on petitions under the Optional Protocol in general, Schabas, *supra* note 44, at 193-95.

through harmonization, is well documented in legal literature.¹³¹ Both the majority and the dissent reached the inescapable conclusion that these international norms have no legal effect within the Canadian domestic legal system: "Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation. Absent implementing legislation, neither has any legal effect in Canada."¹³² It would lead to an "untenable result," the majority further wrote, to "convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court."¹³³ Justice Marc Rosenberg, in dissent, agreed with the federal government and, thus, the majority of the court on this point.¹³⁴

This clear judicial pronouncement from the authoritative Ontario Court of Appeal will hopefully put to rest the argument that the passive incorporation of a treaty constitutes the transformation of international norms. Yet the legal community of Canada, and especially the judiciary, ought to remain vigilant that the basic rule requiring domestic transformation of international conventions through domestic legislation not be furtively changed through the backdoor with this unsound doctrine.¹³⁵

¹³¹ See, for instance, Kindred, *supra* note 3, at 265: "Yet nowhere to date is there legislation explicitly implementing within Canada such fundamental international human rights conventions as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*" [footnotes omitted]. This is the generally accepted view in Canada, which contrasts with that expressed by van Ert, *supra* note 20, at 186: "It is true that there is no such thing as the ICCPR Implementation Act. To conclude from this, however, that Canadian law does not implement the ICCPR is, at best, an oversimplification and, at worst, simply wrong."

¹³² Ahani, *supra* note 129, at para. 31, *per* Laskin J.

¹³³ *Ibid.*, at para. 33.

¹³⁴ See Justice Rosenberg's reasons, *ibid.*, at para. 73, which read as follows: "On the legal side, they [the federal government *et al.*] invoke the established principle that international conventions are not binding in Canada unless they have been specifically incorporated into Canadian law. The Covenant, while ratified, has never been incorporated into Canadian domestic law and therefore does not create legal obligations enforceable in Canada."

¹³⁵ See B.R. Openkin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries — Part II" (2001) Public L. 97, at 109, who wrote: "A concern that judges should not be seen to be implementing treaties by the 'back door' has been expressed in other cases as well. It demonstrates a judicial sensitivity to the primacy of parliament and the corresponding

STATUTORY INTERPRETATION AND THE CONTEXTUAL ARGUMENT

The different ways in which international treaties can be transformed in Canada through legislation will inform the proposed analytical scheme. The premise here is that international treaty law must be considered in terms of persuasive force (as opposed to being “binding”) within the Canadian domestic legal system — that is, as being influential on the interpretation and application of legislative norms. Therefore, the most appropriate discourse to address, rationalize, and understand the national application of international law is that of the construction of statutes and, specifically, the contextual argument.

If there is a consensus on anything at the Supreme Court of Canada (as well as in lower courts) it is that, when it comes to statutory interpretation, the proper approach is that expressed by Elmer Driedger in his second edition of his celebrated book *Construction of Statutes*: “Today there is only one principle or approach, namely, the words of an act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”¹³⁶ It has now become known as the “modern principle” of legislative interpretation in Canada and, as Iacobucci J. wrote in *Bell ExpressVu Limited Partnership v. Rex*, it “has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings.”¹³⁷ Even in the context of taxation, the principle applies, as Major J. pointed out in *Will-Kare Paving & Contracting Ltd. v. Canada*: “The modern approach to

need for caution in superintending the relationship between the external and internal legal order” [footnotes omitted]. See also R. Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 Commonwealth L. Bulletin 1268, at 1274-75.

¹³⁶ E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 87.

¹³⁷ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at 580 [emphasis added]. Iacobucci J. cited the following cases: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at 578; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at 40-41; *R. v. Gladue*, [1999] 1 S.C.R. 688, at 704; *R. v. Araujo*, [2000] 2 S.C.R. 992, at 1006-7; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at 74-75 [hereinafter *Sharpe*]; and *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at 101-2.

statutory interpretation has been applied by this Court to the interpretation of tax legislation.”¹³⁸

In *R. v. Ulybel Enterprises Ltd.*, Iacobucci J. further opined that the “famous passage from Driedger ‘best encapsulates’ our court’s preferred approach to statutory interpretation.”¹³⁹ Likewise, according to Justice Charles Gonthier in *Barrie Public Utilities v. Canadian Cable Television Assn.*: “The starting point for statutory interpretation in Canada is Driedger’s definitive formulation.”¹⁴⁰ The modern principle has recently been reformulated in *R. v. Jarvis*,¹⁴¹ where Iacobucci and Major JJ. paraphrased Driedger and wrote: “The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.”¹⁴²

Of course, this modern approach to the construction of legislation contrasts with the old restrictive “plain meaning rule,”¹⁴³ which was adopted at a time when it was seriously believed that “Parliament changes the law for the worse”¹⁴⁴ and that a statute was an “alien intruder in the house of the common law.”¹⁴⁵ The plain meaning rule is now generally considered obsolete in common law jurisdictions because courts realized that legislative language cannot be read in isolation:¹⁴⁶ “The most fundamental objection to the rule is that it is based on a false premise, namely that words have plain,

¹³⁸ *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915, at 934. Major J. cited the following two cases: 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at 810-11 and 832; and *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at 578.

¹³⁹ *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, at 883.

¹⁴⁰ *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, at para. 20.

¹⁴¹ *R. v. Jarvis*, [2002] 3 S.C.R. 757.

¹⁴² *Ibid.*, at para. 77.

¹⁴³ On the “plain meaning rule” (or “literal rule”) in general, see P.-A. Côté, *supra* note 13, at 357-86.

¹⁴⁴ F. Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882), at 85.

¹⁴⁵ H. Stone, “The Common Law in the United States” (1936) 50 *Harvard L. Rev.* 4, at 15.

¹⁴⁶ See, on this point, S. Beaulac, “Le *Code civil* commande-t-il une interprétation distincte?” (1999) 22 *Dalhousie L.J.* 236, at 251-52; and S. Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill L.J.* 287, at 310-12.

ordinary meanings apart from their context."¹⁴⁷ In England,¹⁴⁸ the House of Lords acknowledged this shift in favour of a purposive and contextual construction of legislation in *Pepperv. Hart*,¹⁴⁹ where Lord Griffiths said:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.¹⁵⁰

British author Francis Bennion very recently reiterated the danger of the plain meaning rule — what he called the “first glance approach”: “The informed [that is, modern] interpretation rule is to be applied no matter how plain the statutory words may seem at first glance.”¹⁵¹ Bennion went further and argued that, “[w]ithout exception, statutory words require careful assessment of themselves and their context if they are to be construed correctly.”¹⁵²

In Canada, L’Heureux-Dubé J. at the Supreme Court of Canada was one of the main proponents of a liberal approach to the interpretation of statutes. Already in *Hills v. Canada (Attorney General)*,¹⁵³ for which she wrote the majority decision in 1988, her views on the matter were well settled. Later in *2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool)*,¹⁵⁴ she wrote an impressive dissenting opinion in which she made an exhaustive historical and doctrinal

¹⁴⁷ M. Zander, *The Law-Making Process*, 4th ed. (London: Butterworths, 1994), at 121.

¹⁴⁸ See A. Lester, “English Judges as Law Makers” (1993) Public L. 269, at 272, who explains the old English approach thus: “Yet they [courts] decided that, to avoid ‘making laws,’ they were compelled to give effect to the ‘plain and unambiguous’ language of a statute, no matter that words are rarely plain or unambiguous in real life, and no matter how absurd might be the result of such a literal interpretation.”

¹⁴⁹ *Pepperv. Hart*, [1993] A.C. 593 [hereinafter *Pepper*].

¹⁵⁰ *Ibid.*, at 617.

¹⁵¹ F.A.R. Bennion, *Statutory Interpretation — A Code*, 4th ed. (London: Butterworths, 2002), at 500.

¹⁵² *Ibid.* [emphasis added].

¹⁵³ *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513.

¹⁵⁴ *2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919 [hereinafter *Régie des permis d’alcool*].

review of the methodology of statutory interpretation. Her conclusion captured the essence of the modern approach:

What Bennion calls the “informed interpretation” approach is called the “modern interpretation rule” by Sullivan and “pragmatic dynamism” by Eskridge. All these approaches reject the former “plain meaning” approach. In view of the many terms now being used to refer to these approaches, I will here use the term “modern approach” to designate a synthesis of the contextual approaches that reject the “plain meaning” approach. According to this “modern approach,” consideration must be given at the outset not only to the words themselves but also, *inter alia*, to the context, the statute’s other provisions, provisions of other statutes *in pari materia* and the legislative history in order to correctly identify the legislature’s objective.¹⁵⁵

She is obviously not alone anymore in openly holding that a proper interpretation and application of a statute must consider the context and purpose as well as the language of the enactment. One of the latest examples is found in *Harvard College v. Canada (Commissioner of Patents)*,¹⁵⁶ where Justice Michel Bastarache, for the majority, wrote: “This Court has on many occasions expressed the view that statutory interpretation cannot be based on the wording of the legislation alone.”¹⁵⁷

At the outset of the second edition of *Construction of Statutes*, Elmer Driedger forcefully expresses the view that in fact “[w]ords, when read *by themselves* in the abstract can hardly be said to have meanings.”¹⁵⁸ In the latest edition of *Construction of Statutes*, Ruth Sullivan points out that “Driedger’s modern principle is sometimes referred to as the *words-in-total-context approach*, a characterization that is apt.”¹⁵⁹ Developing on the idea that words need to be read in context to identify their meanings,¹⁶⁰ she writes:

¹⁵⁵ *Ibid.*, at 1002.

¹⁵⁶ *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45.

¹⁵⁷ *Ibid.*, at para. 154. Bastarache J. referred to the opinion of Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra* note 137, at 41. In addition, to the same effect, see the dissenting opinion by Bastarache and LeBel JJ. in *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, at 698, which reads: “[T]he interpretation of an Act cannot be based simply on its wording.”

¹⁵⁸ Driedger, *supra* note 136, at 3 [emphasis in original].

¹⁵⁹ Sullivan, *supra* note 15, at 259 [emphasis added].

¹⁶⁰ See also R. Sullivan, “Some Implications of Plain Language Drafting” (2001) 22 *Statute L. Rev.* 145, at 147-49. The author wrote: “Virtually everyone who studies language and communication agrees that, contrary to these assumptions, different readers bring different levels of competence and different contexts to their reading” (at 149) [footnotes omitted].

The meaning of a word depends on the context in which it is used. This basic principle of communication applies to all texts, including legislation. It has been repeatedly confirmed by linguists, linguistic philosophers, cognitive psychologists and others — by virtually anyone who studies communication through language. And it has long been recognized in law.¹⁶¹

A similar position, albeit more qualified, was taken by Pierre-André Côté in *Interpretation des lois*.¹⁶² Randal Graham, using Derrida's deconstruction,¹⁶³ opines likewise:

By far the most important of these [interpretative] tools is often referred to as "the context." In ascertaining the meaning of a word or a written passage, we appeal to the context to guide our interpretation.¹⁶⁴

In order to address, rationalize, and understand the national application of international law within the framework of statutory interpretation, treaties ought to be considered within this *modern approach* — that is, within the *words-in-total-context approach*. Ruth Sullivan, who now has a whole chapter on international law,¹⁶⁵ provides a list of contextual elements that includes, significantly, such norms:

Under Driedger's modern principle, the words to be interpreted must be looked at in their *total context*. This includes not only the Act as a whole and the statute book as a whole but also the legal context, consisting of case law, common law and *international law*. The primary significance

¹⁶¹ Sullivan, *supra* note 15, at 259. This proposition was again recently affirmed by Bastarache and Lebel JJ., dissenting, in *Macdonell v. Quebec (Commission d'accès à l'information)*, *supra* note 157, at 698: "The plain meaning of the words will not be of much value if the court considers it without regard to the context of the statutory provision and the purposes of the Act."

¹⁶² See Côté, *supra* note 13, at 355, where the author wrote: "Sans aller jusqu'à prétendre que les mots n'ont pas de sens en eux-mêmes, on doit admettre cependant que leur sens véritable dépend partiellement du contexte dans lequel ils sont employés" [footnotes omitted]. A similar somewhat qualified position was expressed by the American author W.N. Eskridge Jr., "The New Textualism" (1990) 37 U.C.L.A. L. Rev. 621, at 621: "The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context."

¹⁶³ The French author Jacques Derrida has developed his ideas on deconstruction in several books, including J. Derrida, *Positions* (Paris: Minuit, 1972); J. Derrida, *Marges de la philosophie* (Paris: Minuit, 1972); and J. Derrida, *De la grammatologie* (Paris: Minuit, 1967).

¹⁶⁴ R.N. Graham, *Statutory Interpretation — Theory and Practice* (Toronto: Emond Montgomery, 2001), at 62-63.

¹⁶⁵ See Sullivan, *supra* note 15, at 421-39.

of legal context is that it supplies a set of norms that affect interpretation at every stage. These norms influence the intuitive process by which ordinary meaning is established; they are also relied on in textual, purposive and consequential analysis. Whether or not they are acknowledged, these norms are part of the mindset that lawyers and judges unavoidably bring to interpretation.¹⁶⁶

This point is confirmed in the international legal literature where, for instance, Hugh Kindred writes that “where the context of the legislation includes a treaty of other international obligation, the statute should be interpreted in light of it.”¹⁶⁷ The last section of this article will develop this idea and suggest guidelines to assist in determining the interpretative value and weight of international law as a contextual element in the construction of Canadian domestic statutes.

INTERNATIONAL TREATY NORMS AS CONTEXTUAL ELEMENTS OF INTERPRETATION

The argument defended throughout this article is that, fundamentally, the national application of international law is a question pertaining to the construction of statutes. Indeed, the legislative interpretation framework reflects that, far from being binding in Canada, international treaty law can only be influential or persuasive within the domestic legal system. Now, informed by the treaty implementation practices and in light of the modern approach to statutory interpretation, the main contribution consists in proposing an analytical scheme of the persuasive force of international law, which is based on the degree of incorporation of treaty norms within the Canadian legal system. However, first, it is necessary to briefly consider the so-called presumption of conformity with international law and the correlative ambiguity requirement.

CONTEXT RATHER THAN PRESUMPTION AND AMBIGUITY

Given the recent developments in regard to the methodology of statutory interpretation in Canada, especially with the modern principle that recognizes the proper role of context and remembering that it is more appropriate to consider international law as

¹⁶⁶ *Ibid.*, at 262 [emphasis added]. See also J. Simard, “L’interprétation législative au Canada : la théorie à l’épreuve de la pratique” (2001) 35 *Rev. jur. Thémis* 549, at 583 *ff.*

¹⁶⁷ Kindred, *supra* note 3, at 271.

an element of persuasion rather than an all-or-nothing "binding" factor, the old way in which courts were able to resort to norms from the international legal order should be reformulated in a more contemporary fashion.¹⁶⁸ The relevant presumption of conformity — which is similar to those regarding the conformity with the constitution or fundamental legal principles¹⁶⁹ — is a rule of interpretation according to which domestic statutes ought to be read, whenever possible, consistently with international law.¹⁷⁰ British author Peter Maxwell gives an early formulation of this rule when he writes that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law."¹⁷¹ This

¹⁶⁸ This black-or-white approach to the domestic use of international law is illustrated by the decision of the Judicial Committee of the Privy Council in *Chung Chi Cheung v. The Queen*, [1939] A.C. 160, at 168, where Lord Atkin expressed the following view: "The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally determined by their tribunals." In Canada, see the reasons of Justice Andrew MacKay of the Federal Court in *José Periera E. Hijos, S.A. v. Canada (Attorney General)*, [1997] 2 F.C. 84, at 100 (F.C.T.D.), who wrote that "[i]n construing domestic law, whether statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law."

¹⁶⁹ See Côté, *supra* note 13, at 465: "L'interprète doit favoriser l'interprétation d'un texte qui permet de le concilier avec les textes qui énoncent des règles de niveau hiérarchique supérieur. On présume que le législateur n'entend pas déroger à ces règles, qu'il s'agisse de règles du droit international (1), de règles qui conditionnent la validité du texte (2) ou de règles énoncées dans certains textes de nature fondamentale (3)."

¹⁷⁰ See Sullivan, *supra* note 15, at 421: "Although international law is not binding on Canadian legislatures, it is presumed that the legislation enacted both federally and provincially is meant to comply with international law generally and with Canada's international law obligations in particular." In international legal literature, see also D.C. Vanek, "Is International Law Part of the Law of Canada?" (1960) 8 U. Toronto L.J. 251, at 259-60; Toope, *supra* note 8, at 538; and H.M. Kindred, *supra* note 3, at 269-70.

¹⁷¹ P.B. Maxwell, *On the Interpretation of Statutes* (London: Sweet and Maxwell, 1896), at 122. See also, in England, *Corocraft v. Pan American Airways*, [1968] 3 W.L.R. 1273, at 1281 (C.A.), where Lord Denning wrote that there is a "duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it." In international legal literature, see also H. Lauterpacht, "Is International Law a Part of the Law of England?" (1939) Transactions Grotius Society 51.

rule was enunciated clearly in Canada by Justice Louis-Philippe Pigeon in *Daniels v. White and The Queen*:

I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, *because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.*¹⁷²

Very recently, the Supreme Court of Canada again referred to this presumption and, indeed, relied on this excerpt in *Schreiberv. Canada (Attorney General)*.¹⁷³

When examined closely, this passage from Pigeon J.'s opinion provides the reason why the presumption of conformity with international law does not any longer correspond to the statutory interpretation approach favoured in Canada. Namely, the preliminary requirement of the utilization of international law through such a presumption, which is to find that the statutory provision is *ambiguous*.¹⁷⁴ This precondition was considered by Justice Willard Estey in *Schavernocho v. Foreign Claims Commission*,¹⁷⁵ where he explained:

If one could assert an ambiguity, either patent or latent, in the Regulations it might be that a court could find support for making reference to matters external to the Regulations in order to interpret its terms. Because, however, there is in my view no ambiguity arising from the above-quote excerpt from these Regulations, there is no authority and none was drawn to our attention in argument entitling a court to take recourse either to an underlying international agreement or to textbooks on international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the Regulations.¹⁷⁶

¹⁷² *Daniels v. White and The Queen*, [1968] S.C.R. 517, at 541 [emphasis added].

¹⁷³ *Schreiberv. Canada (Attorney General)*, [2002] 3 S.C.R. 269, at 293-94. See also, on the *Schreiber* case, S. Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 *Statute L. Rev.* 19.

¹⁷⁴ See also the decision of the Judicial Committee of the Privy Council in *Collo Dealings v. Inland Revenue Commissioners*, [1962] A.C. 1, at 19, where Viscount Simonds said: "My Lords, the language that I have used is taken from a passage of p. 148 of the 10th edition of 'Maxwell on the Interpretation of Statutes' which ends with the sentence: 'But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law.'"

¹⁷⁵ *Schavernocho v. Foreign Claims Commission*, [1982] 1 S.C.R. 1092 [hereinafter *Schavernocho*].

¹⁷⁶ *Ibid.*, at 1098. See also, to the same effect, the reasons by Chief Justice Boris Laskin in *Capital Cities*, *supra* note 69, at 173.

The main problem with such an ambiguity requirement is that it perpetuates the empty rhetoric of the plain meaning rule.¹⁷⁷ Another concern is how difficult it is to determine whether or not the legislation is ambiguous or unambiguous.¹⁷⁸ As Lord Oliver of Aylmerton pointed out in *Pepper*: “Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact.”¹⁷⁹

The truth of the matter is that, when judges hold that a statutory provision is clear or that it is ambiguous, they have in fact already construed the legislation.¹⁸⁰ L’Heureux-Dubé J., dissenting in *Régie des permis d’alcool*, considered this point and appositely observed that, “[i]n reality, the ‘plain meaning’ can be nothing but the result of an *implicit process* of legal interpretation.”¹⁸¹ Indeed, rather than being something *a priori*, legislative ambiguity is a conclusion — can really be only a conclusion — that is reached at the end of the process of interpretation. Ambiguity is in effect a determination that can be made only after a full assessment of the intention of Parliament, using canons and tools of statutory interpretation, including international law as a contextual element.

It is illogical and thus erroneous to require that legislation be ambiguous as a preliminary threshold test to the interpretation of legislation either in general or specifically with respect to the use of international law as an aid to the construction of statutes. This was the conclusion reached by Gonthier J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*,¹⁸² where he effectively narrowed down Estey J.’s statement in *Schaverno*¹⁸³ and wrote that “it is

¹⁷⁷ On this point, see S. Beaulac, “Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates” (2000) 63 Saskatchewan L. Rev. 581, at 602.

¹⁷⁸ See, generally, C.B. Nutting, “The Ambiguity of Unambiguous Statutes” (1940) 24 Minnesota L. Rev. 509.

¹⁷⁹ *Pepper*, *supra* note 149, at 620.

¹⁸⁰ See, on this general issue, Zander, *supra* note 147, at 121-27; W.N. Eskridge, *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994), at 38-41; N.J. Singer, *Statutes and Statutory Construction*, vol. 2A, 5th ed. (New York: Clak Boardman Callaghan, 1992), at 5-6; V. van de Kerchove, *L’interprétation en droit — Approche pluridisciplinaire* (Brussels: Facultés universitaires St-Louis, 1978); F.E. Horack Jr., “In the Name of Legislative Intention” (1932) 38 West Virginia L.Q. 119, at 121; and M. Radin, “Statutory Interpretation” (1930) 43 Harvard L. Rev. 863, at 869.

¹⁸¹ *Régie des permis d’alcool*, *supra* note 154, at 997 [emphasis in original].

¹⁸² *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 [hereinafter *National Corn Growers*].

¹⁸³ *Schaverno*, *supra* note 175, at 1098.

reasonable to make reference to an international agreement *at the very outset* of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation.¹⁸⁴ Ruth Sullivan also notes the problems with the reasoning behind the ambiguity requirement and agrees that no such preliminary condition is necessary before resorting to international law.¹⁸⁵

The new position that holds that domestic courts in Canada do not have to find an ambiguity or an obscurity in the statutory provision before construing it as having a regard to international law falls squarely within Driedger's modern principle of legislative interpretation. This words-in-total-context approach also commands that the old way to resort to international law, by invoking the presumption of conformity, be reformulated in terms of the purposive and contextual method of statutory interpretation. Indeed, international treaty law ought to be considered in all cases — not only when one artificially concludes that there is an ambiguity — as an *element of context* that, as Dickson J. wrote in *R. v. Zingre*, would allow for “a fair and liberal interpretation with a view to fulfilling Canada's international obligations.”¹⁸⁶

Ruth Sullivan accurately noticed that the recent trend at the Supreme Court of Canada — in decisions such as *Baker, Suresh, R. v. Sharpe*,¹⁸⁷ and *114957 Canada Ltée (Spraytech) v. Hudson (Town)*¹⁸⁸ — is an increased open “reliance on international law as legal context.”¹⁸⁹ In this regard, it is interesting to point out that in *Baker*¹⁹⁰ Justice L'Heureux-Dubé relied on an excerpt of the third edition of the *Construction of Statutes*, where Sullivan writes:

¹⁸⁴ *National Corn Growers*, *supra* note 182, at 1371 [emphasis added]. Similarly, see M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997), at 40, where the author writes: “So instead of asking if there is ambiguity which can be resolved with the ‘assistance’ of international law, on this approach the court should ask, having automatically considered the international law alongside the national law, whether the domestic law is unambiguously (in the sens of irrec- oncilably) in conflict with the international norms.”

¹⁸⁵ See Sullivan, *supra* note 15, at 437-38.

¹⁸⁶ *R. v. Zingre*, [1981] 2 S.C.R. 392, at 409-10.

¹⁸⁷ *Sharpe*, *supra* note 137.

¹⁸⁸ *114957 Canada Ltée (Spraytech) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [hereinafter *Spraytech*].

¹⁸⁹ Sullivan, *supra* note 15, at 426.

¹⁹⁰ *Baker*, *supra* note 2 at 861.

Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. *These constitute a part of the legal context in which legislation is enacted and read.* In so far as possible, therefore, interpretations that reflect these values and principles are preferred.¹⁹¹

Justice L'Heureux-Dubé thus endorsed Sullivan's view on the relevance of international law as a *contextual element of interpretation*. It is certainly meaningful that her ladyship did not refer to — and thus did not endorse — what Sullivan writes about the presumption of compliance, which is in the preceding two sentences.¹⁹² Therefore, an argument can be made that *Baker* stands as an authority for the proposition that the appropriate way to consider international law is now as an element of context and not through a presumption of conformity.¹⁹³

In *Rahaman v. Canada (Minister of Citizenship and Immigration)*,¹⁹⁴ Justice Kerry P. Evans of the Federal Court of Appeal referred to *Baker* and *Suresh* and opined that “[n]owadays, there is no doubt that, even when not incorporated by Act of Parliament into Canadian law, international norms are *part of the context* within which domestic statutes are to be interpreted.”¹⁹⁵ He further wrote, quite significantly, that, “[o]f course, the *weight* to be afforded to international norms that have not been incorporated by statute into Canadian law will depend on all the circumstances of the case.”¹⁹⁶ There is no reason why these remarks do not equally apply to international law that *has been* implemented within the Canadian domestic legal system. Given that such legal norms are authoritative and persuasive — and not binding — the national application of

¹⁹¹ Sullivan, *supra* note 12, at 330 [emphasis added].

¹⁹² This passage, at *ibid.*, reads: “First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing among possible interpretations, therefore, the court avoid interpretations that would put Canada in breach of any of its international obligations.”

¹⁹³ See S. Beaulac, “L’interprétation de la *Charte*: Reconsidération de l’approche téléologique et réévaluation du rôle du droit international,” in G.-A. Beaudoin and E. Mendes (eds.), *The Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: Carswell, 2004, forthcoming). This is an aspect of the *Baker* case that Jutta Brunnée and Stephen Toope also noticed, but which they used to argue that the majority should have resorted to the old approach of the presumption of conformity with international law. See Brunnée and Toope, *supra* note 9, at 42-43.

¹⁹⁴ *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537.

¹⁹⁵ *Ibid.*, at 558 [emphasis added].

¹⁹⁶ *Ibid.* [emphasis added].

international law should always be considered as a question of *weight*, as Evans J. put it.

ANALYTICAL SCHEME OF PERSUASIVE FORCE OF TREATY NORMS

Now that all the building blocks have been laid down, it is possible to put forward an analytical scheme to determine the persuasive force of international law in interpreting statutes. These issues had to be examined first, however, starting with the fundamental proposition that international law in our Westphalian system is not “binding” within a sovereign state such as Canada, then moving to the treaty implementation techniques that ought to inform the statutory interpretation framework, which is the most appropriate to use in order to address, rationalize, and understand the national application of international law. It was also seen that today’s legislative interpretation discourse endorses Driedger’s modern principle. Away from the plain meaning rule or any preliminary threshold of ambiguity, this approach advocates the construction of enactments in context — an element of which is, of course, international treaty law.

International Treaty Norms as an Element of Internal Context

The proposed analytical scheme of the persuasive force of treaty norms, as an element of the contextual interpretation of Canadian legislation, is based on their degree of incorporation within the domestic legal system. Simply put, the clearer it is that the parliamentary authority intended to give effect to international law through the transformation of the convention, the more weight a court should recognize and attribute to such norms in the process of ascertaining the meaning of the statutory provision.¹⁹⁷ There is obviously quite a spectrum of different levels of domestic incorporation of international treaties. Based on the two techniques of legislative implementation examined earlier in this article — incorporation by reference and harmonization¹⁹⁸ — the main categories of implementation are as follows:

¹⁹⁷ See, however, Brandon, *supra* note 67, at 443, who wrongly dissociated, on the one hand, the way in which the parliamentary authority implemented an international treaty law and, on the other, the intention of Parliament in regard to the transformation of such norms in the domestic legal system. She writes: “It is contended that the method of implementation is less important than are indications of an intention to implement.”

¹⁹⁸ See footnotes 97-106 and accompanying text.

- directly through reference or reproduction of treaty norms in statute;
- directly by scheduling treaty and intention to thus implement;
- indirectly through the adoption of a statute based on treaty; and
- indirectly by amending or repealing existing legislation.¹⁹⁹

In terms of contextual interpretation, the first two categories of incorporated treaty norms form part of the “internal-immediate-context” — they are *internal* in the sense that the statute incorporates them within itself, thus embodying and giving direct effect domestically to such international norms, and they are *immediate* in that they are so intrinsically intertwined with the legislation that to construe the domestic legal norms amounts to construing the international legal norms.²⁰⁰ This is why, in such situations, courts must use the “wording of the Convention and the rules of treaty interpretation,”²⁰¹ which are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties,²⁰² as the majority of the Supreme Court of Canada wrote in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*. To this extent, therefore, Bill Schabas is right to say: “Hence, the exercise is one of treaty

¹⁹⁹ These categories borrow, in part, from the following excerpt in Macdonald, *supra* note 96, at 311: “A treaty may be implemented by legislation in one of three ways: first, Parliament may translate the treaty into a number of statutes or amendments to existing statutes; second, it may enact a general law which uses the key terms of the treaty; finally, it may directly enact the treaty, with an appropriate preamble, into English law.”

²⁰⁰ See Sullivan, *supra* note 15, at 430, where she writes: “Although it becomes part of domestic legislation it retains its identity as an instrument of international law. It carries its international law baggage with it.”

²⁰¹ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at 1019-20, *per* Bastarache J. [hereinafter *Pushpanathan*]. See also *R. c. Parisien*, [1988] 1 S.C.R. 950, at 958; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, at 827; and *R. v. Palacio* (1984), 7 D.L.R. (4th) 112, at 120 (Ontario C.A.). In *Thomson v. Thomson*, *supra* note 102, at 577, La Forest J., for the majority, wrote that, except for *travaux préparatoire*: “By and large, international treaties are interpreted in a manner similar to statutes.” On this point, see also Kindred *et al.*, *supra* note 17, at 202.

²⁰² Vienna Convention, *supra* note 54. It is interesting that in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 713 *ff.*, La Forest J. appears to use the rules of treaty interpretation (in particular, those concerning *travaux préparatoires*), without mentioning the Vienna Convention in order to assist in interpreting the Immigration Act (*supra* note 100).

interpretation and not statutory interpretation,²⁰³ This type of international law context should have the most persuasive force.²⁰⁴

An illustration of the first category, which is where there is direct implementation through the reference or reproduction of treaty norms in the legislation, is in *Pushpanathan*,²⁰⁵ where section 2(1) of the Immigration Act²⁰⁶ incorporated by Reference Article 1F of the Convention Relating to the Status of Refugees.²⁰⁷ An example of the second category, where there is direct implementation because the treaty is reproduced in a schedule and there is an intention to thereby incorporate the conventional norms, is the situation in *Thomson v. Thomson*,²⁰⁸ where Manitoba's Child Custody Enforcement Act²⁰⁹ had the Hague Convention of the Civil Aspects of International Child Abduction²¹⁰ in a schedule and had an express provision (section 17) indicating a clear legislative intention to implement the corresponding international norms.

The last two categories of incorporated treaty norms form part of the "internal-extended-context" — they are also *internal* in the sense that they have direct effect on the interpretation of the statute but they are *extended* (not immediate) in that the parliamentary authority did not accept them as international legal norms but rather changed them into domestic legal norms through the process of transformation. This second group of incorporated treaty law, unlike the previous one, is really only domestic in nature and, although due regard should be given to its international filiation, such internal legislation must be interpreted according to the

²⁰³ Schabas, *supra* note 44, at 178. See also, interestingly, Sullivan, *supra* note 15, at 430-31: "In interpreting an incorporated provision, the court appropriately looks to international law materials and to interpretations of the incorporated provision by international courts or by courts in other jurisdictions."

²⁰⁴ Having said that, like any other interpretative argument, a contextual element such as international law can never be "determinative" on the construction of a statutory provision. Accordingly, the following statement by Brunnée and Toope, *supra* note 9, at 26, appears questionable: "When a treaty has been explicitly transformed into Canadian law, its provisions should be *determinative* in the interpretation of domestic legislation" [emphasis added].

²⁰⁵ *Pushpanathan*, *supra* note 201.

²⁰⁶ Immigration Act, *supra* note 100.

²⁰⁷ Convention Relating to the Status of Refugees, *supra* note 101.

²⁰⁸ *Thomson*, *supra* note 102.

²⁰⁹ Child Custody Enforcement Act, S.M. 1982, c. 27 (now R.S.M. 1987, c. C360).

²¹⁰ Hague Convention of the Civil Aspects of International Child Abduction, *supra* note 103.

principles of statutory interpretation.²¹¹ Ruth Sullivan writes that, for such implementing statutes, “the court still looks to international law materials and interpretations but it considers the domestic context as well and in particular *it relies on domestic rules and techniques of interpretation.*”²¹² This type of international law context, nevertheless, has substantial persuasive force.

An illustration of the third category, where there is indirect implementation through the adoption of legislation based on the intentional convention, is the situation in *W. (V.) v. S. (D.)*,²¹³ where Québec’s Act Respecting the Civil Aspects of International and Interprovincial Child Abduction²¹⁴ was based on the Hague Convention of the Civil Aspects of International Child Abduction²¹⁵ and, accordingly, did not integrate *per se* the treaty norms. An example of the fourth category, where there is indirect implementation because of the amendment or the repeal of existing legislation, is the situation in *Pfizer*,²¹⁶ where Part II of the World Trade Organization Agreement Implementation Act²¹⁷ amended and repealed several statutory provisions of federal legislation to bring them into line with Canada’s international obligations, but was deemed not to incorporate the WTO Agreement,²¹⁸ which was scheduled in the said implementing statute.²¹⁹

²¹¹ See *Schavernoch*, *supra* note 175, at 1098, where Estey J. wrote: “Here the regulations fall to be interpreted according to the maxims of interpretation applicable to Canadian law generally.” See also *Crown Zellerbach*, *supra* note 119, where the Supreme Court of Canada interpreted the federal statute at issue as a domestic piece of legislation, although it was indirectly implementing an international agreement. See also, at the Federal Court of Canada, *R. v. Seaboard Lumber Sales Co.*, [1994] 2 F.C. 647 (F.C.T.D.).

²¹² Sullivan, *supra* note 15, at 431 [emphasis added].

²¹³ *W. (V.) v. S. (D.)*, *supra* note 105.

²¹⁴ Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q., c. A-23.01.

²¹⁵ Hague Convention of the Civil Aspects of International Child Abduction, *supra* note 103.

²¹⁶ *Pfizer*, *supra* note 109.

²¹⁷ World Trade Organization Agreement Implementation Act, *supra* note 117.

²¹⁸ WTO Agreement, *supra* note 116.

²¹⁹ See also the following decision, in similar circumstances and to the same effect, by the Quebec Court of Appeal, *UL Canada Inc. v. Procureur du Québec*, 500-09-008256-992, 1 October 2003.

International Treaty Norms as an Element of External Context

International norms that do not meet the implementation requirement examined earlier²²⁰ are not, strictly speaking, part of Canadian law; but Pigeon J., dissenting in *Capital Cities Communications Inc. v. Canada (C.R.T.C.)*, was right in saying that it “is an over-simplification to say that treaties are of no legal effect unless implemented by legislation.”²²¹ Thus, although their potential influence on the construction of a statute is greatly reduced — especially in light of the separation of powers, federalist and democratic arguments — there are four other categories of international treaty norms that must be considered for the present purposes. They are:

- treaty norms that are unimplemented by statute;
- unimplemented treaty norms created after the adoption of a statute;
- unratified and even unsigned international treaties; and
- “soft-obligation” treaties (and perhaps other “soft-law” instruments).

In terms of contextual interpretation, all of these international norms form part of the “external context.” They are *external* in the sense suggested by Ruth Sullivan: “The external context of a provision is the setting in which the provision was enacted, its historical background, and the setting in which it operates from time to time.”²²² She notices that the Supreme Court of Canada has referred to these elements as social context, which “encompasses any facts that are judged to be relevant to the *conception* and *operation* of legislation, whether social, political, economic, cultural, historical or institutional.”²²³

The international norms of these four categories — and, arguably, international customs and general principles, although these are beyond the scope of the present discussion,²²⁴ — are relevant to the interpretation and application of statutes even though they

²²⁰ See footnotes 57-72 and 107-35 and accompanying text.

²²¹ *Capital Cities*, *supra* note 69, at 188.

²²² R. Sullivan, *supra* note 15, at 457.

²²³ *Ibid.* [emphasis added].

²²⁴ As stated at the outset of the present article, no position is taken with regard to the domestic role of international customary law nor, for that matter, of the general principles of international law.

are *not* part of the laws of Canada.²²⁵ These norms were privy to the original conception or are relevant to the contemporary operation of the enactment and, to borrow from the *Baker* case,²²⁶ the “values” they represent and enshrine ought to legitimately inform legislative interpretation. Therefore, unimplemented treaty norms, as well as unimplemented treaty norms created after the adoption of the statute, form part of the “external-immediate-context” — they are *immediate* in that, although external to the statute *per se*, the norms have been given some authority, through ratification, by an organ of government (that is, the executive branch) as the expression of an international consensus. An undeniable degree of persuasive force should thus be recognized and attributed to such international legal norms as a valuable element of context to the construction of statutes.

The first category of treaty norms that are unimplemented by legislation is of course the situation in the *Baker* case, where the majority, *per* L’Heureux-Dubé J., used the values associated with the notion of the “best interest of the child” in Article 3(1) of the Convention on the Rights of the Child,²²⁷ which had not been transformed through legislation in Canada, as a contextual element to interpret the discretionary power of an immigration officer granted pursuant to section 114(2) of the Immigration Act.²²⁸ The second category of unimplemented treaty norms created after the adoption of the legislation under scrutiny was also the situation in *Baker* because, to be precise about it, the Immigration Act²²⁹ was adopted in 1976 while the Convention on the Rights of the Child²³⁰ entered into force in 1990 and was actually ratified by Canada in 1992, thus post-dating the legislative provision at issue.

The last two categories of international norms form part of the “external-extended-context” — they are *extended* as well as external

²²⁵ See footnote 94 and accompanying text.

²²⁶ In *Baker*, *supra* note 2 at 861, L’Heureux-Dubé J. famously wrote: “I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions there have no direct application within Canadian law. Nevertheless, the *values* reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review” [emphasis added].

²²⁷ Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, Can. T.S. 1992 No. 3 (entered into force on 2 September 1990).

²²⁸ Immigration Act, *supra* note 100.

²²⁹ *Ibid.*

²³⁰ Convention on the Rights of the Child, *supra* note 227.

because they represent no more than the opinion of government representatives, or other actors on the international plane, with respect to legal norms relevant to the conception or operation of the Canadian statute. In *Re Canada Labour Code*,²³¹ Justice La Forest referred to an unratified treaty (the North Atlantic Treaty Status of Forces Agreement²³²) and wrote that “[it] has no legal effect in Canada, as it has not been ratified by domestic legislation. [*sic*] Inasmuch as it might influence the interpretation of the Act, a contrary interpretation is demanded by Article I of the Leased Bases Agreement.”²³³ Ruth Sullivan refers to this excerpt after explaining that “[t]he body of international conventions, including conventions to which Canada may not be a signatory, forms part of the legal context in which legislation *is drafted and operates*.”²³⁴

In regard to “soft-obligation” treaties,²³⁵ Jutta Brunnée and Stephen Toope agree that international instruments such as declarations, codes of conduct — and, presumably, unratified and unsigned treaties — have a place as secondary elements of contextual interpretation: “There is no reason why Canadian courts should not draw upon these types of norms,” they write, “so long as they do so in a manner that recognizes their non-binding [that is, less persuasive] quality.”²³⁶ An illustration of such external-extended-context is the situation in *Spraytech*,²³⁷ where L’Heureux-Dubé J. referred to the Bergen Ministerial Declaration on Sustainable Development in the ECE Region²³⁸ as a non-binding international instrument to which Canada is a signatory, as evidence of the

²³¹ *Re Canada Labour Code*, [1992] 2 S.C.R. 50.

²³² North Atlantic Treaty Status of Forces Agreement, Can. T.S. 1953 No. 13.

²³³ *Re Canada Labour Code*, *supra* note 231.

²³⁴ Sullivan, *supra* note 12, at 464 [emphasis added].

²³⁵ For a definition of “soft-law,” see C.M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) 38 *Int’l & Comp. L.Q.* 850, at 851: “Soft law instruments range from treaties, but which include only soft obligations (‘legal soft law’), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations (‘non-legal soft law’), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles” [footnotes omitted].

²³⁶ Brunnée and Toope, *supra* note 9, at 62.

²³⁷ *Spraytech*, *supra* note 188.

²³⁸ Bergen Ministerial Declaration on Sustainable Development in the ECE Region, 6 August 1990, Doc. A/CONF.151/PC/10, reprinted in (1990) 1 *Y.B. Int’l Environmental L.* 429.

so-called precautionary principle in international environmental law, which her ladyship used to confirm the interpretation given to a municipal by-law adopted pursuant to section 410(1) of the Quebec's Cities and Towns Act.²³⁹

CONCLUSION

To recall the hypothesis that is central to this article, it is argued that the national application of international law is, as far as Canadian judges and other domestic actors are concerned, an issue pertaining to statutory interpretation, which must thus be addressed, rationalized, and understood within this framework. In order to prepare the ground for the main proposition, the erroneous claim that international law "binds" Canada (that is, binds *within* Canada) had to be rebutted, having regard to the general tenets of our international law system. Then, after considering the practices followed by parliamentary authorities to implement international treaties, Driedger's modern principle was examined in detail, including the important role of context in ascertaining the meaning of legislation. Finally, a set of directives was put forward to assist in the determination of the persuasive force of the international law argument.

The proposed analytical scheme speaks within the discourse of statutory interpretation and considers the matter in which conventions were implemented in Canada and, accordingly, is based on the degree of incorporation of treaty norms within the domestic legal system. It follows that, all things being otherwise equal, the weight of the different types of international law contexts (grouping the eight categories of treaty norms identified earlier) can be ranked thus in a decreasing order of authority:

- internal-immediate-context;
- internal-extended-context;
- external-immediate-context; and
- external-extended-context.

That being said, the flexibility of any guidelines meant to help in the construction of statutes is crucial in order to allow the consideration of the particular circumstances of each enactment and of each interpretative situation. Therefore, the hierarchy of the persuasive force of international law as a contextual element suggested in this article is by no means absolute.

²³⁹ Cities and Towns Act, R.S.Q., c. C-19, as amended.

Sommaire

L'application du droit international en droit interne: la perspective de l'interprétation législative

Bien que l'application du droit international en droit interne ait suscité beaucoup d'intérêt depuis quelques années, le point de vue national dans le débat n'a pas été considéré adéquatement. L'auteur soutient que le recours au droit international est, pour le juge canadien et les autres intervenants nationaux, une question d'interprétation des lois qui doit être abordée, rationalisée et comprise dans cette optique. Tout d'abord, on rappelle la validité du principe selon lequel les tribunaux canadiens ne sont pas liés par les normes internationales, y compris celles issues de traité, et ce malgré certains prononcés judiciaires et doctrinaux qui laissent entendre le contraire. Le droit international ne peut être contraignant puisque notre modèle "westphalien" de relations internationales, régi par la structure juridique "vattélienne," postule l'existence d'un domaine international qui est distinct et séparé des sphères nationales. De là l'exigence de mettre en œuvre par voie législative les conventions internationales. Nos tribunaux interprètent et appliquent le droit canadien; le droit international peut les influencer dans la mesure où ce droit issu de traité fait partie du droit interne, mais il ne peut jamais les lier. La seconde partie, et c'est l'apport principal du texte, présente un modèle d'analyse de la force persuasive du droit international. À cette fin, il faut examiner la pratique en matière de mise en œuvre de traité et comment elle est liée à l'intention du parlement — indiquant l'impossibilité de l'incorporation passive. Il faut aussi tenir compte de la méthode moderne d'interprétation des lois de Driedger, qui favorise le recours au droit international comme élément contextuel dans tous les cas plutôt que comme présomption de conformité liée à l'exigence préliminaire, et artificielle, d'ambiguïté. En bout d'analyse, il est démontré que le poids de l'argument de droit international dépendra du degré d'incorporation des normes conventionnelles dans le système juridique canadien. À cet égard, il y aurait quatre types de contexte dans lesquels tomberaient les catégories de normes issues de traité. Dans l'ordre décroissant de leur autorité persuasive: (a) le contexte interne immédiat, (b) le contexte interne élargi, (c) le contexte externe immédiat et (d) le contexte externe élargi.

*Summary***National Application of International Law: The Statutory Interpretation Perspective**

In recent years, although the national application of international law has gathered much interest, the domestic point of view on the issue has not been adequately considered. The argument defended in this article is that the domestic use of international law is, as far as Canadian judges and other domestic actors are concerned, a question of statutory interpretation, which must be addressed, rationalized, and understood within this framework. First, the author refers to the principle according to which Canadian courts are not bound by international norms, including treaty norms, which is still valid even though some judicial and doctrinal statements seem to challenge it. International law cannot be binding upon national courts because the "Westphalian" model of international relations, regulated by the "Vattelien" legal structure, postulates the existence of an international plane that is distinct and separate from the internal spheres. Hence, the requirement that international conventions be implemented through the adoption of domestic legislation. Our courts interpret and apply Canadian law and, to the extent that international treaty law is part of domestic law, it may have an influence on them, but without ever binding them. The second part, and the main contribution of the article, consists of an analytical scheme of the persuasive force of international law. The practices of treaty implementation and how it relates to parliamentary intent — showing also that passive incorporation is impossible — as well as Driedger's modern approach to statutory interpretation, which favours recourse to international law as a contextual element in all cases over a presumption of conformity involving the preliminary and artificial requirement of ambiguity are discussed in the article. In the final analysis, it is shown that the weight of the international law argument shall be based on the degree of incorporation of treaty norms within the Canadian legal system. In this regard, there would be four types of context in which fall the categories of treaty norms. In decreasing order of persuasive authority: (1) internal-immediate context; (2) internal-extended context; (3) external-immediate context; and (4) external-extended context.