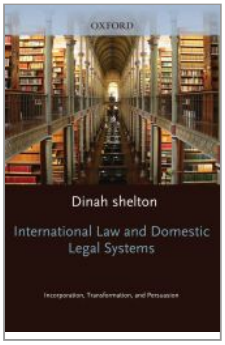

International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion
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Abstract and Keywords

With two exceptions, Canada's written Constitution is silent on international agreements and treaties. This is because Canada was a British Dominion rather than a sovereign state at the time of Canadian Confederation in 1867, and its foreign affairs were conducted on its behalf by the Imperial British government in the years immediately following Confederation. There are no explicit references to customary international law or the law of nations in Canada's written Constitution. However, section 11(g) of the Canadian Charter of Rights and Freedoms implicitly references customary international law when it refers to offences at ‘international law’. Further, the preamble to the Constitution Act 1867 provides that Canada shall have ‘a Constitution similar in principle to that of the United Kingdom’. This has generally been interpreted to mean that customary international law has a status in Canadian law similar to that which it enjoys in British law.

Keywords: Canadian law, customary international law, constitutional law, constitution, domestic law, British law, international agreements, treaties

1. Introduction

As a result of Canada's legal and constitutional heritage, its Constitution is ‘similar in principle to that of the United Kingdom’.[1] As such, the Canadian Constitution comprises both ‘written’ and ‘unwritten’ elements. Its written sources are found primarily in enactments of the British Imperial Parliament (the most important of which are the Constitution Act, 1867[2] and the Constitution Act, 1982),[3] Royal Proclamations and Letters Patent; and a number of enactments of the Canadian Parliament and the provincial legislatures.[4] The unwritten elements are found in common law constitutional principles propounded by the courts, which explain the written Constitution's necessarily implied elements;[5] the vestigial remains of the royal prerogative;[6] and justiciable yet legally unenforceable constitutional usages and conventions.[7] These unwritten or ‘common law’ aspects of Canada's Constitution are equally applicable throughout Canada, including Québec. This is so (p.117) notwithstanding Québec's predominant civil law heritage and system of private law, as ‘common law rules that are public in nature apply in the province’.[8]

1.1 Relevant Provisions of the National Constitution

With two exceptions, Canada's written Constitution is silent on international agreements and treaties. This is because Canada was a British Dominion rather than a sovereign state at the time of Canadian Confederation in 1867, and its foreign affairs were conducted on its behalf by the Imperial British government in the years immediately following Confederation.[9]

The first exception to this silence is section 132 of the Constitution Act 1867, which provides that:

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

This provision is of limited modern significance, since Canada acquired the right to negotiate international treaties on its own behalf in 1926[10] and attained sovereign statehood in or about 1931.[11] Canada does nevertheless remain bound by some treaty obligations previously entered into on its behalf by the Imperial Government, so this provision may continue to be relevant in the unlikely event that performance of such treaty obligations still requires domestic legislative or executive action.[12]

The second notable reference to international agreements or treaties in Canada's written Constitution is somewhat indirect. In accordance with the principle

nullem crimen sine lege, section 11(g) of the Canadian Charter of Rights and Freedoms[13] provides:

> Any person charged with an offence has the right…not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or *international law* or was criminal according to the general principles of law recognized by the community of nations.[14]

(p.118) While the reference to 'international law' in this provision is generic, it clearly encompasses international treaty law.[15]

The void created by the absence of references to international agreements or treaties in Canada's written Constitution has largely been filled by judicial development of the unwritten Constitution,[16] as will be seen below.

There are no explicit references to customary international law or the law of nations in Canada's written Constitution. However, section 11(g) of the Canadian Charter of Rights and Freedoms implicitly references customary international law when it refers to offences at 'international law'.[17] Further, the preamble to the Constitution Act 1867 provides that Canada shall have 'a Constitution similar in principle to that of the United Kingdom'. As will be explored below, this has generally been interpreted to mean that customary international law has a status in Canadian law similar to that which it enjoys in British law.

The only reference to general principles of law in Canada's written Constitution is found in section 11(g) of the Canadian Charter of Rights and Freedoms, which prohibits criminal convictions for acts that were not, inter alia, 'criminal according to the general principles of law recognized by the community of nations' at the time of their commission. This formulation was intended to reflect the wording used in the parallel protection found in the International Covenant on Civil and Political Rights.[18] Canada's unwritten Constitution also contains no rules specifically addressing the domestic legal status of general principles of international law. It has been suggested that there is no need for such rules, as general principles by definition originate in domestic legal systems.[19]

There are no express references in Canada's written Constitution to 'soft-law' sources of international law, such as the decisions of international tribunals or declarative resolutions of the United Nations General Assembly. The Canadian courts have, however, on occasion made reference to the significance and role of such sources in domestic law in a manner that may be considered to form part of Canada's unwritten Constitution. For example, with respect to the decisions of international tribunals, the Supreme Court of Canada has made the following observation regarding the weight to be attributed in domestic courts

to decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR):

> Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with (p.119) which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law.[20]

While the Court thus held that the decisions of these international tribunals were not binding, it did find that differences between those decisions and the Court's own prior jurisprudence 'warrant[ed] reconsideration' of the latter.[21]

Some members of the Supreme Court of Canada have expressed similar views with respect to the domestic legal relevance of the 'teachings of…publicists'.[22] In *R v Finta*,[23] La Forest J, writing for himself and two other members of the Court, observed as follows:

> [Learned writers] render valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But…in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be…than the enunciation of a rule or practice as universally approved or assented to.[24]

This 'persuasive but non-binding' approach is applied by Canadian courts not only to the material sources of international law enumerated in section 38(1)(d) of the ICJ Statute, but also to soft-law more generally. A recent illustration of this may be found in *Dell Computer Corp. v Union des consommateurs,* [25] where the majority stated that the UNCITRAL Model Law on International Commercial Arbitration[26] was 'a non-binding document that the United Nations General Assembly has recommended that states take into consideration' and that 'Canada has made no commitment to the international community to implement'.[27] Nevertheless, as the Québec legislation provided that its interpretation should take into consideration, where applicable, the Model Law, the majority concluded that 'international thinking' reflected in the Model Law was also a 'formal source' for interpreting the Québec legislation.[28]

Finally, rules of construction applicable to the Canadian Charter of Rights and Freedoms also call for consideration of the judgments of international tribunals and soft-law sources of international human rights law, a development that will be considered further in sections 4.3 and 4.4 below.

1.2 References to International Law in Legislation or Regulations

There are virtually no Canadian legislative or regulatory provisions that explicitly call for the application of international law generally within the Canadian legal (p.120) system. One narrow exception to this is the federal Interpretation Act, which provides that in every federal Act or regulation, the definition of the maritime zones of another state is 'determined in accordance with international law and the domestic laws of that other state'.[29] Another, similarly narrow exception is found in the Extradition Act,[30] which provides that extradition agreements or provisions thereof published in either the Canada Treaty Series or the Canada Gazette are to be judicially noticed by Canadian courts.[31]

Aside from this, however, there are many pieces of legislation that implement specific treaties or other international legal obligations within the Canadian legal system. Still other legislation merely refers to Canada's international legal obligations without necessarily engendering domestic legal effects in respect of those obligations.[32]

An example of simple transformation or implementation by reference in domestic legislation is the Foreign Missions and International Organizations Act,[33] which implements in Canada key provisions of the Vienna Convention on Diplomatic Relations 1961[34] and the Vienna Convention on Consular Relations 1963.[35] Other than a few provisions relating to interpretation and the establishment of certain administrative procedures necessary to give effect to the provisions of both conventions, the Act simply gives relevant provisions of those conventions (included as schedules to the Act) legal force in Canadian law.[36]

A different approach is taken in the Oceans Act,[37] which implements Canada's obligations as a party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[38] Rather than including UNCLOS as a schedule to the Oceans Act and conferring domestic legal effect upon its provisions, the Oceans Act in fact reproduces, in many instances verbatim, those provisions within the Act's own operative provisions. Thus, for example, the Act's definitions of Canada's territorial sea,[39] its contiguous zone,[40] its exclusive economic zone[41] and its continental shelf[42] borrow language directly from provisions of UNCLOS. This approach minimizes variations between UNCLOS and the Oceans Act. Where there are variations in the text, of course, precisely the opposite effect results, with attendant (p.121) potential for a degree of divergence between the meaning of the treaty and that of the legislation.[43]

Other laws implement treaties by paraphrasing or drawing inspiration from their text without relying upon their express terms. For example, the War Crimes and Crimes Against Humanity Act implements Canada's obligations under the Rome Statute of the International Criminal Court.[44] Pursuant to the Rome Statute's complementarity provisions,[45] the Act establishes Canadian criminal

jurisdiction over the 'core' international crimes of genocide, crimes against humanity and war crimes. Moreover, it defines these crimes for purposes of domestic criminal prosecutions. However, in doing so it does not limit itself to the provisions of the Rome Statute. Instead, the Act extends Canadian criminal jurisdiction over core international crimes not only on the basis of the territorial and nationality principles, as does the Rome Statute;[46] but also on the basis of the passive personality and quasi-universal principles.[47] Similarly, the definitions of genocide, crimes against humanity and war crimes adopted in the Act take the Rome Statute definitions as their starting point but go further in defining these crimes in terms of evolving customary or conventional international law.

In some cases, domestic treaty implementing legislation explicitly provides that interpretation of the implementing (and sometimes other) legislation is to be consistent with the international agreement thus implemented. For example, section 3 of the North American Free Trade Implementation Act provides:

> For greater certainty, this Act, any provision of an Act of Parliament enacted by Part II and any other federal law that implements a provision of the Agreement or fulfils an obligation of the Government of Canada under the Agreement shall be interpreted in a manner consistent with the Agreement.[48]

Indeed some domestic implementing legislation goes further by providing that the terms of an implemented treaty shall prevail over any conflicting domestic legislation, including the implementing legislation itself. For example, some Canadian provincial legislation implementing the 1980 Hague Convention on the Civil Aspects of International (p.122) Child Abduction[49] 'contain[s] the provision that, in the event of a conflict between the Convention and any other legislative scheme, the Convention prevails'.[50]

As final examples, a number of provincial or territorial human rights codes make preambular reference to certain sources of international human rights law. For example, the Ontario Human Rights Code provides in its preamble:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations.[51]

The Yukon Human Rights Act[52] goes somewhat further by spelling out, in its preamble, the consequences of Canada's international human rights obligations, and referring to such obligations in its first operative section.

1.3 Federalism and International Law

The constitutions of Canada's provinces are embedded in the written and unwritten Constitution of Canada itself.[53] There are no specific references to international law in the provincial constitutional aspects of Canada's written constitution. However, the provinces are affected by those aspects of Canada's unwritten Constitution that address matters relating to international law.

Canada's written Constitution is virtually silent with respect to federal authority over matters concerning international law. One arguable exception to this is found in the Letters Patent of 1947, by which all of the King's prerogative powers in respect of Canada were delegated to the Governor-General.[54] It is widely considered that this delegation comprised the foreign affairs power,[55] including the treaty-making power, in respect of Canada as a whole.[56] This position is contested by the province of Québec, which claims power to conclude international agreements in (p.123) areas assigned to exclusive provincial legislative jurisdiction under section 92 of the Constitution Act 1867.[57] In practice, however, the federal executive alone concludes international treaties.[58]

Mention should be made of the federal Department of Foreign Affairs and International Trade Act.[59] Section 10 of that Act gives the Minister of Foreign Affairs the power to conduct Canada's foreign affairs, including the power to conduct and manage international negotiations as they relate to Canada, coordinate Canada's international economic relations, and 'foster the development of international law and its application in Canada's external relations'.[60] Similarly, section 10(1) of the federal Extradition Act empowers the Minister of Foreign Affairs, with the agreement of the Minister of Justice, to 'enter into a specific agreement with a State or entity for the purpose of giving effect to a request for extradition in a particular case'.[61]

With respect to treaty performance (where this requires the enactment of implementing legislation), such legislation must be enacted by either Parliament, or the provincial legislatures, or both, depending on whether the subject-matter of the treaty falls within the legislative competence of Parliament or the provincial legislatures, respectively, as established in the Constitution Act 1867. This requirement is explored in greater detail in section 2.2 below.

2. Treaties and Other International Agreements

In Canada, the debate regarding the legally binding effect of treaties has been considered in the context of international human rights, particularly in the context of the Canadian Charter of Rights and Freedoms,[62] which is the legislative implementation of Canada's international human rights treaty commitments.[63] (p.124) In a dissent in *Re Public Service Employee Relations*

Act, Dickson CJ expressed a point of view that set the tone for resorting to international law in Canada:

> The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions…The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the *Charter*'s protection.' I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified…In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.[64]

In this statement, Dickson CJ draws a distinction between two categories of international legal instruments: (1) those that, while not necessarily binding upon Canada as a question of law, fit generally into the category of contemporary international human rights law, (2) and those that actually bind Canada as a matter of international law.[65] The first category includes treaties such as the European Convention on Human Rights and the American Convention on Human Rights; declarations and other inherently non-binding norms,[66] such as the Universal Declaration of Human Rights,[67] the Helsinki Final Act, and other documents of the Organization for Security and Co-operation in Europe, the Standard Minimum Rules for the Treatment of Prisoners, the Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, and the UN Declaration on the Rights of Indigenous Peoples. Such non-binding or 'soft-law' norms are said to be relevant and persuasive to the interpretation of the Charter because they are sources of comparative law, not international law proper.[68] Canadian courts have a long tradition of referring to comparative law sources. Where fundamental rights are concerned, there has been a particular affinity for the (p.125) case-law of the US courts with respect to that country's Bill of Rights, which predates the Canadian Charter.

The second category identified by the Chief Justice—instruments that are legally binding upon Canada—includes instruments such as the International Covenant on Civil and Political Rights, the International Convention on the

Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Rome Statute of the International Criminal Court. The provisions of these instruments are often similar to those of the Charter, and they have been ratified or acceded to by Canada. According to Dickson CJ, Canada is bound by international law to protect such rights within its borders. Interestingly, he did not specifically base his conclusion on the classic rule of interpretation by which domestic legislation is presumed to be consistent with international obligations. Rather, he wrote that 'general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation'.

Dickson CJ's interpretation of these two categories has been very influential. In a 1988 speech, former Justice of the Supreme Court of Canada Gérard La Forest stated of the Chief Justice's position in *Re Public Service Employee Relations Act*: 'Though speaking in dissent, his comments on the use of international law generally reflect what we all do.'[69] More recently, in 2000 another former Justice of Canada's highest court, Michel Bastarache, opined similarly: 'While Chief Justice Dickson rejected the implicit incorporation of international law doctrine in a dissenting judgment, his opinion reflects the present state of the law.'[70] While the famous 'relevant and persuasive' passage has been cited on numerous occasions in subsequent Canadian cases, the distinction suggested by the Chief Justice between binding and non-binding instruments has generally been ignored. Canadian judges rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect on Canada. Instead, they tend to consider *all sources* of international human rights law as 'relevant and persuasive'.

To be entirely accurate, there continues to be some authority for distinguishing between binding and non-binding instruments, but it is of little real significance. In the 2005 decision in *Mugesera*, for example, the Supreme Court of Canada spoke of 'the importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations'.[71] (p.126) The Court referred to the 1999 case of *Baker*,[72] which is seminal in many regards for the reception of international law in Canada. Justice L'Heureux-Dubé for the majority relied heavily on the Convention on the Rights of the Child, noting that it had been ratified by Canada and was thus binding upon it. But after acknowledging the fact of ratification, she conceded that: 'International treaties and conventions are not part of Canadian law unless they have been implemented by statute.' She proceeded with the observation that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review'.[73] Justice L'Heureux-Dubé then discussed two important instruments that are non-binding

by their very nature, the Universal Declaration of Human Rights and the Declaration on the Rights of the Child. She concluded as follows: 'The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights.'[74] Accordingly, the majority in *Baker* did not operate on any actual distinction between binding and non-binding sources of international human rights law.

2.2 Domestic Incorporation of Treaties

Unlike many countries in the world, Canada is not described as 'monist' because its legal system does not consider domestic law and international law as forming a coherent and holistic body of law. At least in respect to treaties,[75] Canada follows the 'dualist' logic of reception, which means that treaty obligations cannot be enforced by a domestic court unless and until they have been transformed by the legislative branch of government. In an official opinion dated April 2002, the Legal Bureau of the Department of Foreign Affairs of Canada wrote:

> It is the legislative implementation of treaties that affords Parliament its main role in the treaty process: if new legislation must be passed, or existing legislation amended, it is Parliament that must pass or amend the legislation according to usual parliamentary practices.[76]

On numerous occasions, Canadian courts have endorsed and used the dualist approach, stating unambiguously that the mere ratification or accession to a treaty does not in any way, shape, form, or alter the law enforceable within the country.[77] As (p.127) the Judicial Committee of the Privy Council stated in the famous *Labour Conventions* case:

> Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.[78]

Given Canada's dualist approach and federalist system, provinces must participate in the transformation of treaties in order to give effect to norms falling within their legislative authorities. Under the Constitution Act 1867, particularly sections 91 and 92, sovereign powers are divided up in Canada between the federal government and provincial governments.[79] To give a few examples, under section 91 the federal authority has jurisdiction over trade and

commerce, unemployment insurance, the postal service, military and naval defence, navigation and shipping, fisheries, currency and coinage, banking, weights and measures, bankruptcy and insolvency, copyrights, marriage and divorce, immigration, and criminal law. On the other hand, under section 92 of the Constitution Act 1867, the provincial authorities are competent over public lands, the management of hospitals, municipal institutions, local works and undertakings, the celebration of marriage, property and civil rights, as well as the administration of justice, penal offences, and under paragraph 16: 'Generally all matters of a merely local or private nature in the province.'

Since the Constitution did not explicitly define whether the national or provincial authority was competent to implement treaties, this issue was decided in 1937 by the Judicial Committee of the Privy Council in the *Labour Conventions* case.[80] This case held that the legislative authority to implement international treaties is not the exclusive competence of the central government of Canada. It is the subject-matters of these agreements that determine what legislative authority has competence to implement them in the domestic legal order, pursuant to sections 91 and 92 of the Constitution Act 1867. The legislative authority to implement international treaty norms in domestic law is thus shared between the two levels of government in Canada, federal and provincial. This better respects the federal character of the Canadian constitutional structure.

There are countless examples of legislative implementation of international treaties by provincial authorities in Canada. For example, the 1980 Hague Convention on the Civil Aspects of International Child was incorporated by means of provincial implementing statutes, as described in *Thomson v Thomson*:

> (p.128) The Uniform Law Conference agreed upon the text of a 'Uniform Act' to implement the *Hague Convention*. Four provinces (New Brunswick, Nova Scotia, Saskatchewan and Alberta) enacted legislation that paralleled the Uniform Act, including its provision that, in the event of a conflict between the *Convention* and any other enactment, the *Convention* prevailed: *International Child Abduction Act*, S.N.B. 1982, c. I-12.1; *Child Abduction Act*, S.N.S. 1982, c. 4; *The International Child Abduction Act*, S.S. 1986, c. I-10.1; and *International Child Abduction Act*, S.A. 1986, c. I-6.5.
>
> Quebec chose not to enact the *Convention* at all, but to legislate equivalent provisions: *An Act respecting the civil aspects of international and interprovincial child abduction*, S.Q. 1984, c. 12. The five remaining provinces (Manitoba, Ontario, British Columbia, Prince Edward Island and Newfoundland) adopted the *Convention* in a more general statute dealing with the civil aspects of child abduction: *The*

> *Child Custody Enforcement Act*, S.M. 1982, c. 27 (now R.S.M. 1987, c. C360); *Children's Law Reform Amendment Act, 1982*, S.O. 1982, c. 20; *Family Relations Amendment Act, 1982*, S.B.C. 1982, c. 8, as am. by S.B.C. 1985, c. 72, s. 20; *Custody Jurisdiction and Enforcement Act*, S.P.E.I. 1984, c. 17; and *The Children's Law Act*, S.N. 1988, c. 61. Of these five, Ontario, Prince Edward Island and Newfoundland's enactments all contain the provision that, in the event of a conflict between the *Convention* and any other legislative scheme, the *Convention* prevails. Only the British Columbia and Manitoba Acts do not contain such supremacy provisions.[81]

As seen in these passages, the same international convention, which needs the involvement of provinces for domestic incorporation, will not necessarily be implemented the same way throughout the country.[82]

One of Canada's most respected specialists in legislative drafting, Ruth Sullivan, has identified two techniques used by the competent authorities to incorporate treaties into domestic law: (1) incorporation by reference and (2) harmonization.[83] 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.[84] However, in *Re Act Respecting the Vancouver Island Railway,* the mere scheduling of an international treaty was deemed insufficient by itself to give domestic effect to the norms therein.[85] The second technique, harmonization, is '[w]hen a legislature…redrafts the law to be implemented in its own terms so as to adapt it to domestic law'.[86] This is no doubt the mode of treaty incorporation that is most commonly used and in many areas of the law, including criminal law.

(p.129) However, one must realize that the two techniques are not mutually exclusive. 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 Immigration and Refugee Protection Act[87] is such an example of hybrid legislation that both directly implements and harmonizes Canadian law in view of the Convention Relating to the Status of Refugees.

The deciding factor in knowing whether or not a treaty has been incorporated into domestic law is the 'intention of Parliament'.[88] As Justice Lemieux of the Federal Court of Canada in explained the *Pfizer* case, 'whether an agreement is legislated so as to become endowed with statutory force is a matter of discovering Parliament's intention'.[89] Thus, when the statute explicitly declares that a certain international convention has 'force of law in Canada',[90] the implementing requirement is likely fulfilled.[91] 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'.[92] A similar view was expressed by the Quebec Court of Appeal in *UL Canada Inc*.,[93] which stated: 'One must, using all the rules of statutory interpretation, determine the intention of the legislature. Did it intend to incorporate the Agreement into internal law?'[94] Accordingly, the old view that 'courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation'[95] appears obsolete nowadays.

Such an assessment of legislative intention led the Federal Court in *Pfizer* to hold that the whole treaty known as the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)[96] was not incorporated in Canada through the domestic legislation entitled 'World Trade Organization Agreement Implementation Act',[97] which even scheduled the relevant international documents. In *Pfizer,* Justice Lemieux held:

> When Parliament said, in section 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 (p.130) 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.[98]

In short, as in any case of 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 of the enactment under examination.[99]

There is a lagging issue when it comes to the implementation of treaty norms in Canada—whether or not relying on existing legislation is enough to determine actual incorporation of international law. This contention is often expressed in terms of 'passive incorporation' or 'incorporation by complacence'. Here is how defenders of such argument put it: 'Existing law often provides a sufficient basis to allow the legal advisers of the federal government to proceed with ratification of a treaty without the necessity of any new enactment.'[100] This view does not correspond to Canadian practice, and is not supported by any government statement or judicial authority. The argument can be attractive,

given claims by Canadian authorities in reports to international treaty bodies that Canada's human rights commitments have been met on the basis of prior conformity.[101] However, this position contradicts the ideals of separation of powers, federalism, and democracy, and is not currently the law.

Since Canada uses a dualist model, it does not address treaties in terms of self-executing or non-self-executing. Under a dualist approach, international and national legal systems are separate. This results in two fundamental legal principles, one from international law and one from constitutional law. The first then is that a sovereign state is not entitled to invoke its internal law (including its constitutional structure)[102] in order to justify a breach of its international obligations.[103] The (p.131) essential reason why domestic law cannot justify a failure to honour obligations vis-à-vis the international community is that these norms and duties belong to two distinct and separate legal systems.

The second core legal principle springing from the international/internal divide is in fact a set of rules concerning the administration of the relationship between the two systems. These rules determine how the two legal systems interact, including the way in which the norms from one may be used in the other. As Francis Jacobs explained, '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 governed by domestic constitutional law.'[104] This is fundamentally an application of the dualist logic.

In terms of judicial activities, the international/domestic dichotomy means that domestic courts apply their domestic law, while the International Court of Justice and other international tribunals apply international law. Put another way, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law. This normative division, however, does not mean that international judicial bodies cannot take into account domestic law. Conversely, domestic judges may resort to international law when it has become part of the laws of the land through reception rules.[105] While recent cases provide for more flexibility in using international law domestically,[106] the orthodoxy remains: 'International treaties and conventions are not part of Canadian law unless they have been implemented by statute.'[107]

2.3 Standing and Private Rights of Action

Canadian courts are entrusted with the interpretation and application of Canadian law, including treaty implementing statutes. The general rule is that private parties do not have direct contact with international norms, as a treaty cannot be invoked (p.132) and enforced in litigation between private parties. Canada's domestic law governs any domestic litigation involving domestic actors, be they private or public. The norms applied may be statutory or judge-made law, and can include the means by which international law is incorporated

into domestic law, such as treaty implementing legislation. Be it as it may, the legal rules that private parties invoke are domestic law. The same remarks apply for issues of standing and private rights of action.

The 2002 Supreme Court of Canada decision in *Suresh* [108] provides a relatively recent illustration of the situation. At issue in this case was a ministerial decision under immigration legislation that allows deportation to a country where a refugee faces serious risks of torture in exceptional cases of national security. Central to the issue was whether such deportation was contrary to the principles of fundamental justice protected by section 7 of the Canadian Charter of Rights and Freedoms. To determine the scope of protection against torture in Canada, the Court first referred to domestic law, and then continued its analysis under international law, stating: 'A complete understanding of the Act and the Charter requires consideration of the international perspective.'[109] Such an 'international perspective' involved considering (without deciding the issue, however) whether the international prohibition on torture was a peremptory norm of customary international law (*jus cogens*), as well as examining the provisions of three international conventions: the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention Relating to the Status of Refugees. It was clear for the Supreme Court of Canada that such treaty-based international norms were merely acting as persuasive authority in its interpretation and application of section 7 of the Charter. Even though the court found that international law prohibited any deportation to face torture, even in exceptional cases of national security, the court held that, under Canadian domestic law, 'in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1'.[110]

Accordingly, the legal norm against torture in Canada was held to be different from the one that exists in the international legal order. This indicates without a doubt that the international law argument was given some weight by the Court, but not a determinative weight, let alone a controlling one.

2.4 Treaty Interpretation

In Canada, there is no established practice for government authorities to provide an official interpretation for treaties. The judiciary does not defer to the political branches of government regarding the interpretation and application of Canadian law. However, several cases from the Supreme Court of Canada in the 1980s and 1990s seem to suggest that the international interpretation influences the domestic (p.133) interpretation. Since the 1990s the highest court has not referred to the interpretive provisions of the Vienna Convention on the Law of Treaties (Vienna Convention). There has been no need for the court to resort to international law in such contexts because of a recent convergence of

methodological approaches in respect to international treaties and domestic legislation.

It was at the Ontario Court of Appeal that, in the 1980s, the first explicit reference was made to the international interpretive methodology in the interpretation of legal norms incorporated by domestic legislation. At issue in *R v Palacios* [111] was Canada's Diplomatic and Consular Privileges and Immunities Act,[112] which implemented the Vienna Convention on Diplomatic Relations, giving it 'the force of law'[113] in Canada, including the grounds on which diplomatic immunity may be lost, such as when a diplomat leaves the country. When interpreting the expression 'leave the country' found in section 39(2) of the Convention, Blair JA of the Ontario Court of Appeal stated: 'The principles of public international law and not domestic law govern the interpretation of treaties.…These rules of interpretation apply even where, as in this case, a treaty has been incorporated in a statute.'[114]

At the Supreme Court of Canada, the first time international rules of interpretation were referred to was in *R v Parisien*,[115] which involved the construction of Canada's Extradition Act.[116] In his reasoning, La Forest J did not explicitly distinguish international interpretation methodology from that applicable in Canadian domestic law, but he did refer to the interpretive provisions of the Vienna Convention by name, stating that an extradition treaty 'must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law; see Art. 31 of the *Vienna Convention on the Law of Treaties*'.[117]

At the Supreme Court of Canada, there have been several other instances in the 1980s and 1990s where the Vienna Convention was invoked in the interpretation of implementing legislation.[118] The last one was the 1998 case of *Pushpanathan*, where Bastarache J for the majority, applied and quoted at length the Vienna Convention.[119]

It has been more than ten years since Canada's highest court referenced the interpretive rules of the Vienna Convention. There was no shortage of occasions to do so, with several cases involving implementing legislation that directly incorporated treaty obligations in Canada's domestic law, either by reproducing (p.134) the treaty or by scheduling it in a statute. Yet, despite numerous opportunities, there has been no reference whatsoever to the methodology of interpretation applicable on the international plane.[120] The author's hypothesis for this is that the Canadian legal system has evolved considerably in the last few decades, such that the domestic approach and international approach are largely similar. The traditional strict and literal interpretation of statutes has left the way to a much more liberal, purposive, and dynamic construction of the

Canadian Charter, other constitutional texts, ordinary statutes, and even implementing legislation.[121]

2.5 Reservations

Pursuant to the British-style parliamentary tradition, matters of international relations like the conclusion and ratification of treaties fall within the prerogatives of the Crown. In Canada, it is the executive branch of the federal government that exercises such prerogatives with respect to foreign affairs,[122] including the power to negotiate, sign and ratify international treaties. Neither the legislative branch of government nor the judiciary has any formal role to play at the stage of treaty formation,[123] which includes issues of reservations and their validity. Therefore, *ex ante*, a court cannot be involved in determining the scope or the legality of treaty reservations. It is unclear whether Canadian courts would decide the legality or effect of a reservation or declaration, as there is no judicial authority on this issue. This is not surprising given Canada's strict dualist approach to international law.

2.6 Non-binding Instruments as Persuasive Authority

The Supreme Court of Canada has required that the treaties they invoke, whether implemented or not into domestic law, be at least formally approved. In addition, the Supreme Court of Canada does not consider international law, whether a formally approved treaty or an instrument of 'soft-law', to be binding upon the Canadian courts, either in Charter interpretation or regular construction of ordinary law.[124]

(p.135) Two decisions by the Supreme Court of Canada, in the area of labour law, show how the line between treaties and other international instruments or documents is blurred in Canadian case-law.[125] In the 1999 case of *Delisle*,[126] the issue was whether the exclusion of members of the Royal Canadian Mounted Police from the definition of 'employee' in section 2(e) of the Public Service Staff Relations Act,[127] constituted an infringement of constitutionally protected freedom of association. The majority held that there was no violation because the statute did not affect their right to form an independent union and carry on labour activities outside the statutory regime. Dissenting Justices Cory and Iacobucci stated that the very purpose of the exclusion at hand was to ensure that these employees remain unassociated and thus vulnerable to management, which was sufficient in itself to constitute an infringement of their freedom of association.[128] In support of the basic right to form and join a labour union, the dissenting justices referred to many international instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Labour Organization's Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize, as well as the Concluding Document of the Madrid Meeting of the Conference on

Security and Co-operation in Europe.[129] The latter instrument is not an international convention, but the dissenting justices noted that 'All of these instruments protect the fundamental freedom of employees to associate together in pursuit of their common interests as employees.'[130] As such, they were all referred to in order to help interpret section 2(d) of the Canadian Charter.

A similar argument was presented later in the *Dunmore* case.[131] The case bore many similarities with *Delisle*: it concerned agricultural workers who were excluded from the Ontario Labour Relations Act 1996,[132] but without an express provision prohibiting them from associating. The court not only cited international conventions to which Canada was a party, but also gave considerable weight to ILO Convention No 11, even though it has not been ratified by Canada This demonstrates the Canadian practice to treat all sources of international law, as 'relevant and persuasive sources' in the interpretation and application of domestic law.

Using this 'relevant and persuasive' doctrine, Canadian courts do not draw a hard distinction between international instruments that are binding upon Canada at international law, and those that are not. They may all play a persuasive role in the judicial process of interpreting and applying domestic law. For example, Canada often references the European human rights regime, especially when interpreting the (p.136) Canadian Charter.[133] The courts have cited not only the European Convention on Human Rights, but also the case-law of the European Court of Human Rights.[134]

A recent example is the 2004 decision in *Canadian Foundation for Children, Youth and the Law*, the so-called 'spanking case'.[135] In this case, the Supreme Court of Canada examined a section of the Criminal Code that exempted parents and teachers from criminal sanctions for the use of corrective force on children or pupils that is 'reasonable under the circumstances'. In deciding whether this legislative norm was unconstitutional based on the 'void for vagueness' doctrine,[136] McLachlin CJ resorted to the interpretive guidance provided by the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as by the European Convention on Human Rights and its case-law.[137]

Canadian courts find the comments and observations of European jurists, whose training and outlook is not unlike their own, to be quite persuasive. According to La Forest J, writing extra-judicially:

> The Convention decisions are obviously not directly applicable to the Canadian context, reflecting as they do the compromises necessary for a multinational agreement in Post-war Europe. However, given that the Commission has had the opportunity to consider many of (p.137) the issues that are coming before our courts, the more frequent citation of

> these materials would assist us as we develop a Canadian approach to these common issues.[138]

Canada is surely not alone. The case-law of the European Court of Human Rights has had an impact on many domestic courts outside of Europe. For example, its landmark decision on the so-called 'death row phenomenon'[139] has been cited not only by the Supreme Court of Canada,[140] but also by the US Supreme Court,[141] the Supreme Court of Zimbabwe,[142] the South African Constitutional Court,[143] the High Court of Tanzania,[144] and the Judicial Committee of the Privy Council, sitting in review of the Jamaican Court of Appeal.[145]

It is not only in the area of human right law that one finds references to European legal experience. In the 2004 decision by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada*,[146] resort was made to the WIPE Copyrights Treaty when addressing interpretive issues dealing with Canada's Copyright Act.[147] In this case, Justice Binnie noted that 'Canada is a signatory but not yet a party to the *WIPE Copyrights Treaty*'.[148] He then proceeded to consider the situation in Europe, which is bound by the said treaty and where the European Commission has adopted, in 2000, a piece of legislation entitled 'Directive on Electronic Commerce'.[149]

3. Customary International Law

As observed above, Canada has a Constitution 'similar in principle to that of the United Kingdom'.[150] In the United Kingdom, it is well-settled that customary international law that does not conflict with legislation automatically forms part of the common law and, as such, has direct legal effect in British courts without the need for intervention or transformation by domestic law-making (p.138) processes.[151] Notwithstanding Canada's British constitutional heritage, the situation has been less clear in Canadian law until recently, largely because the courts have tended not to address the issue expressly.[152] Rather, Canadian courts have for many years appeared implicitly to espouse an adoptionist stance,[153] giving rise to the cautious conclusion that 'there is room for the view that the law on the relationship of customary international law to domestic law in Canada is the same as it is in England'.[154] More recently, some commentators have taken a more robust view of Canadian law's embrace of the doctrine of adoption.[155] Recent case-law tends to support the latter view, although the matter is still not clear of all doubt.

The leading early case, usually cited as probable authority for the adoptionist approach to customary international law in Canada, is the *Foreign Legations Reference*.[156] In that case, the Supreme Court of Canada was asked to give an advisory opinion on whether the Ontario Assessment Act[157] applied to property

owned by foreign states in the national capital region. Section 4 of the Act did not expressly address this issue but simply provided that 'All real property in Ontario…shall be liable to taxation.' Implicit in the question before the Court was the status of customary international law granting immunities to foreign states from local taxation. While Duff CJ appeared in his judgment to adopt the proposition that customary international law was presumptively part of the common law of Canada, and Justice Taschereau concurred in a separate opinion with the Chief Justice, the three remaining judges deciding the case were not explicit in their support for such an adoptionist position. As such, the adoptionist position did not unambiguously command a clear majority of the opinions in the case. Nevertheless, the overall tendency in the cases following the *Foreign Legations Case* has been to implicitly endorse the position articulated by Duff CJ.

(p.139) This is illustrated in the advisory opinion given by the Supreme Court of Canada in *Re Newfoundland Continental Shelf*. [158] In that case one of the principal issues was whether customary international law relating to the status of the continental shelf had progressed sufficiently by 1949, the date of Newfoundland's entry into Confederation, to have vested Newfoundland with sovereign rights over the continental shelf off its coasts. While the Court did not expressly address the nature of the relationship between customary international law on this issue and the domestic legal and constitutional questions before it, the careful review of customary international law carried out by the Court would appear to be an implicit acknowledgment of its direct legal relevance in Canadian law.

Similarly, in the *Québec Secession Reference*,[159] the Supreme Court considered at length the customary international law of self-determination of peoples in determining the legality of a potential unilateral declaration of independence by the National Assembly of Québec. It addressed objections to its jurisdiction to consider international law in this context by stating:

> In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. *International law has been invoked as a consideration and it must therefore be addressed*.[160]

While a somewhat cryptic and cursory statement on a complex and critical issue, this could be read as an endorsement of the direct legal effect or relevance of customary international law in construing the common law constitution of Canada.[161] There are many similar examples of such implicit adoption of customary international law in Canadian common law.[162]

(p.140) More recently, a number of lower Canadian courts have been more explicit in their support for the adoptionist approach to customary international law. For example, in litigation arising from the 1995 boarding and arrest by Canadian officials of the Spanish fishing trawler *Estai* in international waters (during the so-called 'turbot war'), the Federal Court of Canada considered 'well settled' the proposition that 'accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law'.[163] Similarly, in addressing a lawsuit brought by an Iranian expatriate against Iran for alleged torture, the Ontario Court of Appeal accepted that 'customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation'.[164]

A majority in the Supreme Court of Canada has also recently revisited the issue in *R v Hape*.[165] Interestingly, this case turned solely on interpretation of the Canadian Charter of Rights and Freedoms,[166] such that its discussion of the doctrine of adoption must likely be considered obiter dicta.[167] After reviewing the somewhat ambivalent adoptionist stance taken by the Canadian courts to date, LeBel J, writing for five members of the Court, concluded:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. *The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary*. Parliamentary sovereignty (p.141) dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[168]

While this appears to have been an attempt to clarify the direct domestic effect of customary international law through the doctrine of adoption,[169] this paragraph, and the majority's subsequent application of the 'doctrine of adoption' in *Hape*, gives rise to considerable uncertainties as to the true interpretation of that doctrine.[170] In particular, this and other passages from *Hape* could be read to endorse as many as five different understandings of the relationship between customary international law and Canadian common law, as follows:

- customary international law *is automatically part of* the common law of Canada in the absence of conflicting legislation;[171]
- customary international law *should be incorporated into* the common law of Canada in the absence of conflicting legislation;
- customary international law *may be incorporated into* the common law of Canada in the absence of conflicting legislation;[172]
- customary international law *may aid in the development of* the common law of Canada; or
- customary international law *may aid in the interpretation of* the common law of Canada.[173]

Hape therefore arguably formulates several mutually inconsistent versions of the doctrine of adoption, both monist and dualist in nature,[174] without stipulating which one prevails. Some clarification as to whether the majority's intention was indeed to endorse the first of these alternative formulations—the only one clearly consistent with the doctrine of adoption applied in English law[175]—is therefore necessary.

(p.142) To summarize, it can cautiously be concluded that, unless a statute is expressly and irreconcilably to the contrary effect, a rule of customary international law will be deemed to form part of the common law of Canada and to have direct domestic legal effect as such.[176] As a logical corollary, existing statutory law that does not expressly override inconsistent rules of customary international law will generally be interpreted by the courts in such a way as to conform to the latter.[177] In this way, it is probable that customary international law is readily received in Canadian domestic law via the common law while preserving the domestic legal system's ultimate ability, through its legislative branch, to control the content of domestic law through express override of a customary/common law rule.

3.1 Deference to the Executive or Legislature

There are a number of legislative provisions that provide for executive certification of matters of fact, such as the identity of a state or a head of government,[178] the existence of an extradition agreement,[179] or the status of a treaty.[180] Such certificates will generally be deemed by the courts to be conclusive proof of their contents.[181] There is, however, no general doctrine of judicial deference to the executive or legislative branches with respect to the existence or content of customary international law. Indeed any such doctrine would be inconsistent with the presumed common law status of customary international law[182] and the rule that judicial notice is to be taken of customary international law.[183]

However, courts generally defer to the legislative branch with respect to the content of domestic law, pursuant to the principle of legislative or parliamentary supremacy.[184] This is the basis of the limitation on the direct domestic effect of customary international law due to irreconcilable conflict with constitutionally valid legislation.[185] It also means that in the case of statutes addressing matters governed by customary international law, such as Canada's State Immunity Act,[186] courts will give effect to clear statutory language even if it contradicts the current state of customary international law.[187]

(p.143) Legislatures on occasion explicitly defer to the courts with respect to the existence or content of customary international law. For example, Canada's Crimes Against Humanity and War Crimes Act[188] defines the offences of genocide, crimes against humanity, and war crimes according to customary international law.[189] This is clearly a legislative invitation to the courts to determine and apply the relevant customary international law when applying the statutory definitions of genocide, crimes against humanity, and war crimes.

3.2 Judicial Notice of Customary International Law

While there are few clear and authoritative Canadian decisions on point, it is generally assumed by Canadian commentators and courts alike that judicial notice is taken of customary international law, in keeping with the position in English law.[190] The same position is generally considered to apply in Québec on the basis of legislation providing that 'judicial notice shall be taken of the law in force in Québec'.[191] The effect of this provision is generally taken to encompass customary international law.[192]

One of the few Canadian cases explicitly addressing judicial notice of customary international law is *The Ship* '*North*'.[193] The issue in that case was whether Canadian law enforcement authorities had exceeded their jurisdiction in arresting an American fishing vessel, beyond the (then-prevailing) three nautical mile limit of Canada's territorial sea, for illegal fishing in Canadian waters. At first instance, the Admiralty Court took judicial notice of customary international law's doctrine of hot pursuit onto the high seas in order to find jurisdiction. On appeal to the Supreme Court of Canada, two members of the Court explicitly held that 'the Admiralty Court…is bound to take notice of the law of nations' and that the right of hot pursuit under the law of nations 'was properly judicially taken notice of and acted upon by the learned judge'.[194] One other member of the Court relied upon the doctrine of hot pursuit in concurring reasons, albeit without explicitly addressing the judicial notice question; another simply concurred in the result without (p.144) giving reasons; while yet another dissented, finding that the doctrine of hot pursuit was not available due to a conflict with domestic legislation. From this mix of opinions, one can discern a predominating preference for taking judicial notice of customary international law.[195]

In many other cases, Canadian courts have simply taken judicial notice of customary international law without explicitly addressing the existence of a rule of law permitting them to do so.[196] While in some cases expert evidence has been led, and occasionally admitted, on the existence or content of customary international law, this has generally been treated as legal argument rather than evidence in the strict sense.[197]

3.3 Subject Areas of Customary International Law

As illustrated in the discussion preceding section 3.1 above, the primary subject areas or contexts in which customary international law has been invoked or applied by Canadian courts include the existence or scope of sovereign or diplomatic immunities,[198] the extent of offshore maritime zones,[199] self-determination and state succession,[200] international criminal law,[201] human rights,[202] environmental law,[203] and state jurisdiction.[204]

4. Hierarchy

Treaties do not formally have the force of law in Canada's domestic legal system unless legislatively implemented.[205] If legislatively implemented, treaty obligations (p.145) rank equally with other domestic legislation. However, the presumption of statutory conformity with Canada's international legal obligations may give slightly more weight to treaties because domestic legislation will, in so far as possible, be interpreted to conform to Canada's treaty obligations, rather than the other way around.[206] This indirect effect is limited, however, by the principle that clear legislative language will override irreconcilably inconsistent treaty provisions.[207]

As seen above, it is likely that customary international law has direct domestic effect in Canada as common law.[208] It is much less clear in Canadian law, however, whether customary international law overrides established common law precedent (as is the case in English law),[209] or vice versa. On the one hand, there is somewhat dated Supreme Court of Canada authority for the proposition that customary international law does not displace existing common law precedent.[210] On the other hand, there is more recent, if somewhat inconclusive, lower court and Supreme Court of Canada authority implying that binding common law precedent may yield to contrary rules of customary international law.[211] This is a matter that will require further clarification by the Canadian courts. In any case it is clear that customary international law, as common law, will yield to clearly inconsistent statutory language,[212] including any such language implementing treaty obligations. However, the courts will strain to avoid this result by seeking to interpret legislation in a manner consistent with the relevant rule of customary international law.[213]

4.1 Presumption of Conformity

The Canadian courts' approach to the effect of customary international law on Canadian common law has already been noted above in section 3. Other than this, perhaps the most significant development in the Canadian courts' stance vis-à-vis international law in recent years has been their development and entrenchment of an interpretive 'presumption of conformity' of Canadian legislation with Canada's (p.146) binding international legal obligations, whether found in treaty or customary international law.[214]

In one of its earliest clear articulations by a majority of the Supreme Court of Canada, in the 1990 decision in *National Corn Growers*,[215] this presumption was originally conceived as a means of reconciling Canada's treaty commitments and domestic legislation implementing them. The presumption was therefore originally premised on respect for legislative intent:

> In interpreting legislation *which has been enacted with a view towards implementing international obligations*, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.[216]

This original conception was repeated and applied in such cases as *Ward* (1993),[217] *Thomson v Thomson* (1994),[218] *Pushpanathan* (1998)[219] and *Ordon Estate v Grail* (1998).[220]

However, the presumption of conformity is not confined to the implementing legislation context. In particular, in the 1999 majority Supreme Court of Canada decision in *Baker*,[221] the seeds were sown for a radical extension of the scope of the presumption. In *Baker*, the majority found that the 'values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review', and described the Convention on the Rights of the Child as an 'aid in interpreting domestic law'—even though it remained formally unimplemented in Canadian legislation.[222]

A majority of the Supreme Court revisited and arguably extended the *Baker* approach in 2001 in *Spraytech*.[223] *Spraytech* required interpretation of provincial and municipal legislation to ensure that the latter came within the grant of delegated legislative authority provided in the former. Recalling the majority ruling in *Baker,* the *Spraytech* majority suggested that international environmental law's 'precautionary principle' may be customary international law.[224] It also noted that its interpretation of the by-law in issue 'respected,' and its interpretation of the enabling provincial legislation was 'consistent' with, that principle.[225] Again, the majority used very cautious language: the precautionary principle was described merely as 'context'; and no presumption

of conformity of domestic legislation with that arguable principle of international law was asserted. Rather, conformity was merely noted to exist, almost as a fortuitous coincidence. But the *Spraytech* majority's invocation of *Baker* seemed at (p.147) least to suggest that the permissible use of international law to interpret domestic legislation was not limited to treaty law, but could also extend to customary international law—perhaps even if not clearly established as such.

The Court's subsequent decisions decisively went much further, clearly overtaking *Baker* and *Spraytech,* and dramatically extending the role of the presumption of conformity well beyond its *National Corn Grower* roots. *Schreiber* (2002)[226] offered a first inkling of such an extension.[227] In *Schreiber*, the Court was invited by one of the interveners to apply international law when construing the State Immunity Act.[228] The Court demurred, on the ground that the domestic legislation was clearer and more detailed than international law and that nothing was therefore to be gained from considering the latter.[229] However, in doing so the Court also endorsed a much earlier dictum of Justice Pigeon, writing for himself in the 1968 case of *Daniels v White*:[230] '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… [although] if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.'[231] The majority in *Schreiber* characterized this dictum as the rule governing 'when international law is appropriately used to interpret domestic legislation'.[232] Remarkably, it did so without tying such a presumption to the interpretation of domestic *implementing* legislation. However, it also did not address how such an extension of the presumption of conformity could be reconciled with the requirement of legislative implementation of treaty obligations before they can have domestic legal effect.[233] Nevertheless, following *Schreiber* the Supreme Court of Canada has relied upon this much broader presumption of conformity in numerous cases and contexts.

For example, in *Canadian Foundation for Children* (2004),[234] the majority referred without qualification to the presumption that '[s]tatutes should be interpreted to comply with Canada's international obligations'.[235] It accordingly applied a number of Canada's international treaty obligations, most unimplemented, in order to construe section 43 of the Criminal Code[236] in a way that avoided (p.148) unconstitutionality on the basis of vagueness. In *Mugesera* (2005),[237] the Court was called upon to interpret the elements of the Criminal Code offence of genocide.[238] In doing so, the Court underlined '[t]he importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations'.[239]

In *GreCon Dimter* (2005),[240] the Court had to determine which of two apparently inconsistent provisions of the Civil Code of Québec[241] should prevail in determining whether the Québec courts had jurisdiction over an action brought by a Québec importer against a German manufacturer. Noting that Canada (and thus Québec) is bound by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[242] and that the 'legislature has incorporated the principles of the *New York Convention*…into Quebec law by enacting the substance of the Convention',[243] the Court found that the '*New York Convention* is therefore a formal source for interpreting the domestic law provisions'.[244] However, the Court went further still in describing the way in which this formal source was to be applied. The Court wrote: 'The interpretation of the provisions in issue…*must necessarily be harmonized* with the international commitments of Canada and Quebec.'[245]

National Corn Growers articulated a rebuttable presumption of conformity of implementing legislation with international treaty obligations, one that courts 'should…strive' to apply 'where the text of the domestic law lends itself to it'.[246] Subsequent articulations of the presumption of conformity, which asserted that courts 'should' strive to interpret domestic legislation in conformity with Canada's international legal obligations, also implied its rebuttable nature.[247] The language quoted from *GreCon Dimter* above, by contrast, appears on its face to make such conformity mandatory and arguably gives the treaty controlling effect. The Court tied this rule to the 'presumption that the legislature is deemed not to intend to legislate in a manner that cannot be reconciled with the state's international obligations',[248] but did not explain why such a 'presumption' entails a restatement of the *National Corn Growers* rule in such unqualified, compulsory terms.

(p.149) While both the majority and dissenting judgments in the subsequent *Dell Computer* (2007) case[249] relied on *GreCon Dimter*'s conclusion that the New York Convention was a formal source for the interpretation of domestic law, neither addressed the seemingly mandatory conformity rule enunciated by the Court in *GreCon Dimter* or its apparent departure from prior articulations of the presumption.

Clarification on this point may however be gleaned from *Hape* (2007),[250] where a majority of the Court affirmed, albeit in obiter, the nature and scope of the presumption of conformity:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.…The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.…The

> presumption applies equally to customary international law and treaty obligations.[251]

Again, here the presumption is stated without limiting its application to implementing legislation or to treaty obligations that have been implemented domestically. However, the rebuttable nature of the presumption is once again underscored, as is its application to both Canada's obligations under customary international law and treaties.

Thus, the Supreme Court of Canada has expanded the scope of the presumption of statutory conformity well beyond its origins as a device for reconciling Canada's treaty obligations and legislation implementing those obligations domestically. Rather, the presumption now clearly requires Canadian courts to interpret all domestic legislation, whether or not it purports to implement treaty obligations, in a manner consistent with all of Canada's international legal obligations, whether or not they take the form of treaty obligations. However, the presumption is rebuttable where the terms of the domestic legislation cannot, through interpretive ingenuity, be reconciled with the international legal obligation.[252]

One particularly notable application of the presumption of statutory conformity with international law arises in the context of interpreting Québec's Charter of Human Rights and Freedoms.[253] This statute, the counterpart to other Canadian provinces' human rights codes, has repeatedly been interpreted by Québec's *Tribunal des droits de la personne* in light of the presumption of conformity with Canada's international human rights obligations.[254]

(p.150) The Canadian courts have also articulated a number of interpretive presumptions designed to reconcile, to various degrees, interpretation of the Canadian Charter of Rights and Freedoms[255] (part of Canada's written Constitution) with Canada's international legal obligations. These presumptions are described in greater detail in section 4.4 below.

4.2 Jus Cogens

There has been limited recognition of the doctrine of *jus cogens* norms in Canadian case-law. Moreover, even where a rule of international law has been judicially recognized as having a *jus cogens* character, little if any domestic legal or practical significance has flowed from that characterization in itself.[256]

For example, in *Suresh,* [257] the Supreme Court of Canada addressed the issue of whether deportation to a risk of torture, on national security grounds, was consistent with the Canadian Charter of Rights and Freedoms. In considering the role that international law should play in answering this question,[258] the Court considered the nature of *jus cogens* norms in general[259] and whether the prohibition of torture in particular had acquired the status of such a peremptory

norm in international law.[260] The Court's somewhat non-committal conclusion on this issue was that 'the prohibition of torture at international law…is considered by many academics to be an emerging, if not established peremptory norm, [which] suggests that it cannot be easily derogated from'.[261] However, the Court disclaimed any need to definitively resolve the issue, as 'this Court is not being asked to pronounce on the status of the prohibition on torture in international law'.[262] Given that the central task before the Court was interpretation of the Canadian Charter of Rights and Freedoms, this dictum appears to suggest that the peremptory character of a rule of international law is irrelevant to that exercise. This seems to be confirmed elsewhere in the judgment, where the Court appeared to accord the same interpretive weight to international law generally and *jus cogens* norms in particular.[263]

Another example of the apparently inconsequential recognition of the *jus cogens* concept by the Supreme Court of Canada is found in *Schreiber.* [264] One of the interveners in the case had argued that the Court's interpretation of Canada's State Immunity Act should take account of the fact that 'the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law which prevails over the doctrine of sovereign (p.151) immunity'.[265] The Court dismissed this submission on the basis that no such peremptory norm had been established.[266] However, the Court went further and rejected the relevance of 'international legal principles' generally in interpreting the State Immunity Act, given the clear terms of the latter and Parliament's authority to enact legislation contrary to international law.[267] This may suggest that, even if the peremptory norm asserted by the intervener had been established, it would have had no greater relevance than an ordinary rule of international law.

4.3 Constitutional Interpretation

When Canada's Constitution was 'patriated' from the United Kingdom in 1982,[268] it was also fundamentally amended by, inter alia, the inclusion of a constitutionally entrenched 'bill of rights' known as the Canadian Charter of Rights and Freedoms.[269] While it is widely accepted that the Charter does not, at least formally, implement any of Canada's international legal obligations,[270] the Canadian courts have liberally taken account of international human rights obligations when construing the fundamental guarantees set out in the *Charter.* [271] This is a relatively long-standing practice stretching back to the 1989 majority judgment of the Supreme Court of Canada in *Slaight Communications Inc. v Davidson,* [272] where it was held that 'the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified'. This rule is sometimes described as the 'minimum content presumption', meaning that the Charter should generally be interpreted to provide protections

no less generous than those found in Canada's international human rights treaty obligations.[273]

However, subsequent case-law has displayed a surprising degree of variability in the role international human rights law plays in the interpretation of the Charter (as well as the range of international legal sources more generally that may be called upon for this purpose, as will be seen in section 4.4 below). *Suresh* [274] in particular signalled a retreat from *Slaight Communications*' minimum content presumption. In (p.152) *Suresh,* the Court accepted that deportation to torture is categorically prohibited by the International Covenant on Civil and Political Rights[275] and the Convention Against Torture,[276] to both of which Canada is a party.[277] Yet it also found that 'in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by section 7 of the Charter or under section 1.'[278] This either signals abandonment of the minimum content presumption, or underscores the significance of Dickson CJ's use of the qualification 'generally' in first setting it out.[279] More recently, however, in the collective bargaining/freedom of association context, the Court has reiterated the minimum content presumption *without* such a qualification.[280] Yet in another judgment released the day before, a majority of the Court relied upon Canada's customary international legal obligations—significantly, not of a human rights character—to *restrict* the potential scope of application of the Charter and, hence, of the protections it extends.[281] The reasons for this variability of approach are not clear; nor is there a clearly discernable trend in the Court's approach to the issue. On one hand, the *Hape* approach would apply a rigid presumption of conformity of the *Charter* with Canada's international legal obligations, whether of a human rights character or not. On the other hand, *Health Services* (which post-dates *Hape* by a day) appears to favour a robust, *Slaight*-type minimum content presumption with specific reference to Canada's international human rights obligations. And in still another reading, both *Hape* and *Health Services* appear also to endorse *Suresh*'s highly discretionary contextual approach, in which international law and other sources merely 'may inform' Charter interpretation.[282] Clarification of which of these various approaches should prevail must therefore await future cases.

(p.153) 4.4 Hierarchy within International Law

As described in section 4.3 above, the Supreme Court of Canada has on occasion appeared to prescribe a somewhat elevated relevance, in interpreting the Canadian Charter of Rights and Freedoms, for Canada's international human rights obligations, as distinct from Canada's other international legal obligations. Unfortunately, however, it has not done so in a clear or consistent manner, with the result that it remains unclear whether international human rights law has any higher status in Canadian law than other areas of international law.

In particular, the majority of the Supreme Court of Canada in *Slaight Communications* (1989) asserted a minimum content presumption only in respect of Canada's international human rights obligations.[283] While the Court subsequently, in *Burns* (2001), broadened the range of international law that may be used in interpreting the Charter beyond Canada's international human rights obligations, it nevertheless appeared to attribute differential weight to different categories of international law: whereas Canada's international human rights obligations 'must' be 'relevant and persuasive', international law generally was merely 'of use'.[284] *Suresh* (2002), however, appeared to eschew this differential approach, holding in effect that interpretation of the *Charter* is 'informed' no less by international law in general than it is by international human rights law in particular.[285] This non-differential approach appears subsequently to have been endorsed in the articulation, in *Hape* (2007), of a uniform presumption of *Charter* conformity with all of Canada's international legal obligations, whether of a human rights character or not.[286] However, in an apparent return to the approach in *Burns*, the majority in *Health Services* (2007) appeared to apply the *Suresh* 'may inform' approach to international law generally, whereas the *Slaight Communications*' minimum content presumption was applied to international human rights law in particular.[287] Yet the subsequent, apparent approval of *Hape*'s presumption of conformity in *Khadr* (2008),[288] coupled with the latter's application of the *Suresh* 'may inform' approach to Canada's international human rights obligations,[289] fails to confirm, and indeed would appear to undermine, the differential value apparently attributed by *Health Services* to Canada's international legal obligations generally and those of a human rights character particularly.

5. Jurisdiction

5.1 International Crimes and Criminal Jurisdiction

As a common law based country, Canada generally follows the territorial principle for criminal jurisdiction.[290] Section 6(2) of the Canadian Criminal Code confirms this approach to state jurisdiction when it says that: 'Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged…of an offence committed outside Canada.' The nationality (or personality) principle applies to provide criminal jurisdiction to Canadian courts in but a few instances, when particularly serious crimes are committed abroad by Canadian citizens.[291] The so-called passive personality jurisdictional basis also finds some rare applications in the Criminal Code.[292]

In terms of the universal jurisdiction principle, it is through the participation in the International Criminal Court regime that Canada has provided for this basis of state jurisdiction. Let us first recall that the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002, calls upon member states to prosecute in their domestic criminal justice system perpetrators of

genocide, crimes against humanity and war crimes.[293] Like many countries in the world, Canada has responded by enacting provisions giving domestic courts universal jurisdiction, as part of the implementing legislation giving effect to the Rome Statute, namely the Crimes Against Humanity and War Crimes Act.[294] Section 8 of this federal statute reads:

> 8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
>
> (a) at the time the offence is alleged to have been committed,
> (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
> (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
> (iii) the victim of the alleged offence was a Canadian citizen, or
> (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
>
> (b) after the time the offence is alleged to have been committed, the person is present in Canada.

(p.155) In addition to the nationality basis and the passive personality basis of jurisdiction, this statutory provision provides for the universal principle to justify the exercise of Canada's domestic jurisdiction over genocide, war crimes and crimes against humanity, providing of course that the accused is physically present in the country.

Finally, note also that Canada has extended its national jurisdiction on the basis of the universal principle in regard to a number of other offences under the Criminal Code, including hijacking,[295] hostage-taking,[296] terrorist acts[297] and piracy.[298]

5.2 Civil Jurisdiction

The modern trend in Canada is not to draw a distinction between the rules pertaining to criminal jurisdiction and those relating the civil actions brought in a domestic court.[299] The general basis for jurisdiction is territorial, with other bases such as the nationality or the passive personality of the party seldom being invoked.[300] It follows that territoriality plays a heavy role on issues of state jurisdiction and, in Canada, the applicable test is that of the *real and substantial link*. This is how Justice La Forest of the Supreme Court of Canada explained the doctrine in the *Libman* case:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well-known in public and private international law.[301]

The 2004 decision of the Ontario Court of Appeal in *Bouzari* [302] addressed the question of whether the 'real and substantial link' standard would justify extending jurisdiction over someone not in Canadian territory. According to *Bouzari,* the principal elements worthy of consideration in assessing this issue are: (1) the reprehensible character of the alleged injurious acts; (2) the fact that the alleged acts were perpetrated or condoned by the *locus delicti* state, hence dismissing itself as a possible forum for the case; (3) the fundamental idea of access to justice,[303] which is linked to the rule of law[304] and justifies a broad interpretation of the real and substantial link test for state jurisdiction.

6. Non-binding International Norms

6.1 Declarations and Other Non-binding Instruments

Let us first recall here what was discussed above about the 'relevant and persuasive' role of international law in the interpretation and application of domestic law. Particularly important is the absence of a meaningful distinction between binding and non-binding international law (sections 2.1 and 2.2) or between instruments to which Canada is party and those inapplicable to it (section 2.8). There is no doubt that declarative texts emanating from the United Nations or other international organizations are not seen by Canadian courts as compelling or controlling for domestic legal issues. On a sliding scale of persuasive authority, such instruments of soft-law should be considered at the lower end; much less than implemented treaty norms, less than unimplemented treaty norms, somewhat less also than treaties to which Canada is not a party and a little less (or pretty much the same) than other soft-law. But, pursuant to the 'relevant and persuasive' approach to the use of international law, the Cartesian reasoning just employed is unlikely to be verifiable.

6.2 International Jurisprudence

The closest case on this issue is the Ontario Court of Appeal decision is *Ahani*.[305] Both *Ahani* and *Suresh* [306] were considered at the same time by the Supreme Court of Canada, and the decisions were handed down in tandem in January 2002, shortly after the terrorist attacks of September 2001 in the United States. Unlike the latter case, the petitioner Ahani was not granted a new deportation hearing and, having exhausted all domestic remedies, went to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant of Civil and Political Rights, which had not been

implemented in Canadian law. The Human Rights Committee called upon Canada to stay the deportation until the full consideration of Ahani's case, a request that was refused by Canada. The second Canadian judicial proceeding, which went as far as the Ontario Court of Appeal (the Supreme Court of Canada denied leave to appeal), asked for an injunction to suspend the deportation order on the basis of the Human Rights Committee interim measure of protection, and thus 'preserve an effective remedy in international law.'[307] The injunction was not granted.[308]

The majority rejected Anahi's position because it 'would convert a non-binding request in a Protocol [ie interim measure], which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice'.[309] Concerning the nature of the international interim measure of protection from the Human Rights Committee, the court stated that 'the Committee's final views and its interim (p.157) measures requests are not binding or enforceable in international law'. Therefore, Canada 'reserved the right to enforce its own laws before the Committee gave its views',[310] and thus there was no violation of the Optional Protocol because the petitioner 'has no right to remain in Canada until the Committee gives its views'.[311]

What is blatantly absent in the reasoning is a reference to the landmark decision of the International Court of Justice on these issues of interim or provisional measures, namely the *LaGrand* case[312] which, unlike the *Avena* case, was rendered prior to *Ahani*. Based on Article 41 of the Statute of the International Court of Justice, it was held in *LaGrand* that the ICJ has 'the basic function of judicial settlement of international disputes by binding decisions', which creates a need 'to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved'.[313] Hence,

> the power to indicate provisional measures entails that such measures should be binding, inasmuch, as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.[314]

To our knowledge there is no case where a domestic court in Canada has been called upon to apply or enforce something that emanates from a non-judicial treaty body.

Notes:

* Professor Beaulac is the author of sections 2, 5 and 6 of this chapter.

** Professor Currie is the author of sections 1, 3 and 4 of this chapter.

([1]) Constitution Act 1867 (UK) (30 & 31 Vict) c 3, reprinted in RSC 1985 App II No 5, preamble.

([2]) Ibid.

([3]) Constitution Act 1982, being Sch B to the Canada Act 1982 (UK) 1982 c 11.

([4]) See the non-exhaustive enumeration of written sources of the Canadian Constitution set out in the Constitution Act 1982, ibid, s 52(2) and the Schedule thereto. See also the constitutional and 'quasi-constitutional' documents referred to in P.W. Hogg, *Constitutional Law of Canada* (5th edn, Supp (looseleaf), Scarborough, Ont: Thomson Carswell, 2007) s 1.5 n 32, s 1.6.

([5]) See *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455, 462–3; *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 752; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, [92]–[93] and [104] (*Judges Reference*); *Reference re Secession of Québec* [1998] 2 SCR 217, 276 (*Québec Secession Reference*); *Ocean Port Hotel v British Columbia* [2001] 2 SCR 781; *Babcock v Canada* [2002] 3 SCR 3, [55]; *British Columbia v Imperial Tobacco* [2005] 2 SCR 473, [65].

([6]) The royal prerogative is a residual source of executive power, once exercised by the King or Queen, but now much limited in its scope and conventionally exercised, in Canada, by either the federal or provincial cabinets. See, eg, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London: Macmillan, 1964) 424; Hogg (n 4) s 1.9.

([7]) See *Reference Re Amendment of the Constitution of Canada* [1981] 1 SCR 753, 876–84; Hogg (n 4) s 1.10.

([8]) *Prud'homme v Prud'homme* [2002] 4 SCR 663, [46].

([9]) See Hogg (n 4) s 11.2.

([10]) See ibid, s 11.5(a). See also IC Rand, 'Some Aspects of Canadian Constitutionalism' (1960) 38 Can Bar Rev 135, 138.

([11]) Statute of Westminster 1931 (UK) 22 Geo V c 4, reprinted in RSC 1985 App II No 27. See *Reference re Ownership of Offshore Mineral Rights (British Columbia)* [1967] SCR 792, 816 (*Offshore Mineral Rights (BC)*).

([12]) For example, Canada is bound by Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague (adopted 18 October 1907, entered

into force for Canada 26 January 1910) UKTS 9 (1910), Cd 5030, as a result of Great Britain's ratification of the Convention on 27 November 1909.

([13]) Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act 1982 (n 3).

([14]) Ibid s 11(g) (emphasis added).

([15]) See *R v Finta* [1994] 1 SCR 701 (La Forest J dissenting on another point).

([16]) See generally Gib van Ert, *Using International Law in Canadian Courts* (2nd edn, Toronto: Irwin Law, 2008) 74–5.

([17]) See generally *Finta* (n 15) (La Forest J dissenting on another point).

([18]) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 28 March 1979) 999 UNTS 171 (ICCPR) Article 15(2). See Mark Freeman and Gib van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) 182.

([19]) See van Ert (n 16) 280; Freeman and van Ert (n 18) 182. See also Jutta Brunnée and Stephen J. Toope, 'A Hesitant Embrace: The Application of International Law by Canadian Courts' (2002) 40 Can YB Int'l L 3, 12.

([20]) *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, [126] (*Mugesera*).

([21]) Ibid.

([22]) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) Can TS 1945 No 7 Article 38(1)(d) (ICJ Statute).

([23]) *Finta* (n 15).

([24]) Ibid 761–2 (La Forest J dissenting on another point).

([25]) *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801 (*Dell Computer*).

([26]) UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) UN Doc A/40/17 (1985) Ann I (Model Law).

([27]) *Dell Computer* (n 25) [46].

([28]) Ibid [46]–[47].

([29]) Interpretation Act RSC 1985 c I-21 ss 2(1), 35(1).

([30]) Extradition Act SC 1999 c 18.

([31]) Ibid, s 8(3).

([32]) See generally van Ert (n 16) 238–9.

([33]) Foreign Missions and International Organizations Act SC 1991 c 41.

([34]) Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

([35]) Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

([36]) Foreign Missions and International Organizations Act (n 33), s 3.

([37]) Oceans Act SC 1996 c 31.

([38]) United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

([39]) Compare Oceans Act (n 37), s 4 with UNCLOS (n 38), Articles 3–4.

([40]) Compare Oceans Act (n 37), ss 10–11 with UNCLOS (n 38), Article 33.

([41]) Compare Oceans Act (n 37), ss 13–14 with UNCLOS (n 38), Articles 55–7.

([42]) Compare Oceans Act (n 37), ss 17–18 with UNCLOS (n 38), Articles 76–7.

([43]) For example, Canada chooses, in the Oceans Act, to rely upon a system of geographical coordinates of points joined by geodesics in order to give effect to UNCLOS's provisions relating to the use of straight baselines for purposes of establishing the boundaries of a coastal state's maritime zones: see Oceans Act (n 37), ss 5, 13, 17, 25, and UNCLOS (n 38), Article 7.

([44]) Crimes and Crimes Against Humanity Act SC 2000 c 24 (CAHWCA); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

([45]) The Rome Statute provides that the Court may only exercise jurisdiction over the core crimes where national legal systems fail or are unable genuinely to do so, clearly making the Court's jurisdiction secondary or ‘complementary’ to that of national criminal systems. Ibid, Article 17.

([46]) Ibid, Article 12(2).

([47]) CAHWCA (n 44), s 8. ‘Quasi-universal’ jurisdiction refers to the exercise of jurisdiction over crimes having no territorial or national links to Canada other than the presence of the accused in Canadian territory at the time such jurisdiction is exercised. This ‘presence requirement’ belies classification of such jurisdiction as genuinely ‘universal’ jurisdiction: see *Case Concerning the*

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 5, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [41], [45].

([48]) North American Free Trade Implementation Act, SC 1993 c 44, s 3.

([49]) Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980), Hague XXVIII, [1983] Can TS no 35.

([50]) *Thomson v Thomson* [1994] 3 SCR 551 (La Forest J for the majority).

([51]) Human Rights Code RSO 1990 c H-19 preamble.

([52]) Human Rights Act RSY 2002 c 116.

([53]) For a description of the complex web of sources of Canada's provincial constitutions, see Hogg (n 4), ss 4.5, 4.7.

([54]) Letters Patent Constituting the Office of Governor General of Canada RSC 1985 App II No 31. While not listed among the instruments comprising Canada's written Constitution in the s 52(2) schedule to the Constitution Act, 1982 (n 3), the fundamental importance of the Letters Patent to the exercise of federal executive authority in Canada surely elevates them to constitutional status. The powers delegated in the Letters Patent are today exercised, as a matter of constitutional convention, on the advice of the federal cabinet: see Hogg (n 4), s 11.2.

([55]) Hogg (n 4), s 11.2.

([56]) See *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act* [1936] SCR 461, 488–9 (Duff CJ writing for himself and Kerwin and Davis JJ) (*Labour Conventions Reference (SCC)*); *Thomson* (n 50) [112]–[113] (L'Heureux-Dubé J, McLachlin J concurring); Hon P. Martin, Secretary of State for External Affairs, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) 11–33; G.L. Morris, 'The Treaty-Making Power: A Canadian Dilemma" (1967) 45 Can Bar Rev 478, 484.

([57]) See eg Ministère des Relations internationales, *Quebec's International Policy: Working in Concert* (Québec: Gouvernement du Québec, 2006); An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State SQ 2000 c 46, s 7; An Act Respecting the Ministère des Relations Internationales RSQ c M-25.1, ss 19–22.4. See also C Emanuelli, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne* (2nd edn, Montréal : Wilson and Lafleur, 2004) 92; J.-Y. Morin, 'La personnalité internationale du

Québec‘(1984) 1 RQDI 163; J.-Y. Morin, ‘Le Québec et le pouvoir de conclure des accords internationaux‘(1966) 1 Études Jur Can 136; A.-M. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) 78–94.

([58]) Hogg (n 4), ss 11.2, 11.6; A.E. Gotlieb, *Canadian Treaty Making* (Toronto: Butterworths, 1968) 4–6. The provinces of course retain the ability to enter into various reciprocal arrangements with foreign jurisdictions: see eg *Ontario (Attorney General) v Scott* [1956] SCR 137 (inter-jurisdictional agreement on the reciprocal enforcement of judgments). However, these agreements do not amount to treaties at international law unless they have been negotiated and ratified at the provinces’ behest by the federal government.

([59]) Department of Foreign Affairs and International Trade Act RSC 1985 c E-22.

([60]) Ibid, s 10.

([61]) Extradition Act (n 30), s 10(1).

([62]) Canadian Charter of Rights and Freedoms (n 13).

([63]) M. Cohen and A.F. Bayefsky, ‘The Canadian Charter of Rights and Freedoms and International Law’ (1983) 61 Can Bar Rev 265.

([64]) *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 348–50.

([65]) This part draws from W.A. Schabas and S. Beaulac, *International Human Rights and Canadian Law—Legal Commitment, Implementation and the Charter* (3rd edn, Toronto: Thomson Carswell, 2007) 84–90.

([66]) On non-binding norms, in general, see: C. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 Int'l & Comp LQ 850.

([67]) It has been argued that at least some of the norms contained in the Universal Declaration represent codified provisions of customary human rights law: R.B. Bilder, ‘The Status of International Human Rights Law: An Overview’ (1978) Int'l L & Pr 1, 8; J. Humphrey, ‘The Canadian Charter of Rights and Freedoms and International Law‘(1985–1986) 50 Sask L Rev 13; J. Humphrey, ‘The Universal Declaration of Human Rights: Its History, Impact and Judicial Character’ in B.G. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff, 1984).

([68]) See K. Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 NYUJ Int'l L & Pol 501.

([69]) G.V. La Forest, 'The Use of International and Foreign Material in the Supreme Court of Canada' in *Proceedings, XVIIth Annual Conference* (Ottawa: Canadian Council on International Law, 1988) 230, 232.

([70]) M. Bastarache, 'The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts' in R. Johnson and J.P. McEvoy (eds), *Gérard v La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project, 2000) 433, 434.

([71]) *Mugesera* (n 20) [82].

([72]) *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 (*Baker*).

([73]) Ibid [69].

([74]) Ibid [71].

([75]) This is said to contrast, in Canada, with the reception of customary international law. However, see S. Beaulac, 'Customary International Law in Domestic Courts: Imbroglio, Lord Denning, *Stare Decisis*' in C.P.M. Waters (ed.), *British and Canadian Perspectives on International Law* (Leiden and Boston: Martinus Nijhoff, 2006) 379.

([76]) C. Swords (ed.), 'Canadian Ratification Practice' (2002) 40 Can YB Int'l L 491.

([77]) *Arrow River & Tributaries Slide & Boom Co v Pigeon Timber Co* [1932] SCR 495; *Francis v R* [1956] SCR 618; *Capital Cities Communications Inc v Canada (Radio-Television & Telecommunications Commission)* [1978] 2 SCR 141; *Baker* (n 72).

([78]) *Canada (A-G) v Ontario (A-G)* [1937] AC 326, 347–8 (*Labour Conventions*).

([79]) This part borrows from S. Beaulac, 'The Canadian Federal Constitutional Framework and the Implementation of the Kyoto Protocol' (2005) 5 Revue juridique polynésienne (hors série) 125.

([80]) *Labour Conventions* (n 78).

([81]) *Thomson* (n 50) 601–2.

([82]) This situation, of course, would run contrary to the spirit of article 29 of the Vienna Convention on the Law of Treaties, on the territorial scope of treaties, which reads: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire

territory.' For more on this aspect, see S. Beaulac, 'National Application of International Law: The Statutory Interpretation Perspective' (2003) 41 Can YB Int'l L 225, 243.

([83]) R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th edn, Markham and Vancouver: Butterworths, 2002) 430.

([84]) For example, the International Organizations Act (n 33) directly incorporates the applicable provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

([85]) *Re Act Respecting the Vancouver Island Railway* [1994] 2 SCR 41.

([86]) Sullivan (n 83) 434.

([87]) Immigration and Refugee Protection Act SC 2001 c 27.

([88]) Generally, on the concept of 'legislative intent,' see S. Beaulac, *Handbook on Statutory Interpretation—General Methodology, Canadian Charter and International Law* (Markham: LexisNexis, 2008).

([89]) *Pfizer Inc v Canada* [1999] 4 FC 441 (FCTD) 458.

([90]) For instance, see s 3 of the United Nations Foreign Arbitral Awards Convention Act RSC 1985 c 16 2nd Supp; and s 3(1) of the Foreign Missions and International Organizations Act (n 33).

([91]) Such clear intention to implement, however, is not necessarily conclusive as to the actual transformation of treaty norms domestically—see *Antonsen v Canada (A-G)* [1995] 2 FC 272 (FCTD) 305–6.

([92]) See *Re Act Respecting the Vancouver Island Railway* (n 85) 110. See also *Cree Regional Authority v Canada (Federal Administrator)* [1991] 3 FC (FCA) 546–7, 551–2.

([93]) *UL Canada Inc v Quebec (A-G)* [2003] RJQ 2729, 234 DLR (4th) 398, aff'd [2005] 1 SCR 10.

([94]) Ibid [78].

([95]) *MacDonald v Vapor Canada Ltd* [1977] 2 SCR 134, 171 (Laskin CJ).

([96]) Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994) 1867 UNTS 3.

([97]) World Trade Organization Agreement Implementation Act SC 1994 c 47.

([98]) *Pfizer Inc v Canada* (n 89) 460.

([99]) See also *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401; and *R v Hydro-Quebec* [1997] 3 SCR 213.

([100]) A. de Mestral and E. Fox-Decent, 'Rethinking the Relationship Between International and Domestic Law' (2008) 53 McGill LJ 573, 621. See, also of the McGill school on these issues: van Ert (n 16); and Brunnée and Toope (n 19).

([101]) 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: 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*, UN CCPROR, 1995, UN Doc CCPR/C/103/Add.5.

([102]) See R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, London: Longman, 1992) 254.

([103]) 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 s 27 of the Vienna Convention on the Law of Treaties. See also P. Daillier and A. Pellet (eds), *Nguyen Quoc Dinh —Droit international public* (5th edn, Paris: LGDJ, 1994) 272.

([104]) F.G. Jacobs, 'Introduction' in F.G. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987) xxiii, xxiv. This represents the traditional position, which is challenged by the 'internationalist conception' of the relation between international law and domestic law, advocated by some authors in the United States, according to which, 'the incorporation and status of international law in the US legal system should be determined, at least to some extent, by international law itself'. C.A. Bradley, 'Breard, Our Dualist Constitution and the Internationalist Conception' (1999) 51 Stanford L Rev 529, 531.

([105]) If an authority was needed, the clearest judicial pronouncement in Canadian case-law may be found in the *Reference re Secession of Quebec* (n 5) 235, where, in rejecting the argument that it had no jurisdiction to look at international law, the Supreme Court of Canada wrote this: '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.' The Court cited the following case-law in support: *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia* (n 11); and *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86. See also S. Beaulac, 'On the Saying that International Law Binds Canadian Courts' (2003) 29(3) CCIL Bulletin 1.

([106]) See S. Beaulac, 'Recent Developments on the Role of International Law in Canadian Statutory Interpretation' (2004) 25 Statute L Rev 19; and A.W. La Forest, 'Domestic Application of International Law in Charter Cases: Are We There Yet?' (2004) 37 UBCL Rev 157.

([107]) *Baker* (n 72) 861.

([108]) *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (*Suresh*).

([109]) Ibid.

([110]) Ibid [78].

([111]) *R v Palacios* (1984) 7 DLR (4th) 112.

([112]) Diplomatic and Consular Privileges and Immunities Act SC 1976–1977 c 31.

([113]) *Palacios* (n 111) 116.

([114]) Ibid 120–1.

([115]) *R v Parisien* [1988] 1 SCR 950.

([116]) Extradition Act RSC 1970 c E-21.

([117]) *Parisien* (n 115) 958.

([118]) These cases include: *Canada (A-G) v Ward* [1993] 2 SCR 689, 713; *Thomson* (n 50); and *Crown Forest Industries Ltd v Canada* [1995] 2 SCR 802, 827. Note that in the case of *Ward*, rules of treaty interpretation were used without explicit reference to the Vienna Convention.

([119]) *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

([120]) See eg *Mugesera* (n 20); *GreCon Dimter inc v JR Normand inc* [2005] 2 SCR 401 (*GreCon Dimter*); *Dell Computer* (n 25). See also Sullivan (n 83) 430–1: '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.'

([121]) For more details, see S. Beaulac and P.-A. Côté, 'Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 Revue juridique Thémis 131.

([122]) See A.-M. Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada* (Paris: LGDJ, 1971) 102.

([123]) However, in January 2008, the federal government announced that all treaties will be tabled in the House of Commons of the Parliament of Canada prior to ratification for a period of 21 days. It must be noted that this new policy is very much a courtesy on the part of the executive branch of government, which continues to have sole authority to decide whether, after the involvement of Parliament, to bind Canada to an international convention by means of ratification or otherwise.

([124]) S. Beaulac, 'Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international' (2004) 5 Revue juridique Thémis 359.

([125]) This part draws from Schabas and Beaulac (n 65) 320–3.

([126]) *Delisle v Canada (Deputy A-G)* [1999] 2 SCR 989 (*Delisle*).

([127]) RSC 1985 c P-35.

([128]) *Delisle* (n 126) [107].

([129]) Ibid [71].

([130]) Ibid.

([131]) *Dunmore v Ontario (A-G)* [2001] 3 SCR 1016.

([132]) Labour Relations Act 1995 SO 1995 c 1 Sch A s 3(b).

([133]) Especially in the early years of *Charter* interpretation. See, for example: *R v Oakes* (1983) 145 DLR (3d) 123, aff'd [1986] 1 SCR 103l; *R v King* [1984] 4 WWR 531; *Rowland v R* (1984) 10 DLR (4th) 724; *Lazarenko v Law Society (Alberta)* [1984] 4 DLR (4th) 389; *Borowski v Canada (A-G)* [1984] 4 DLR (4th) 112; *Reference re Education Act (Ontario)* [1984] 10 DLR (4th) 491; *R v Morgentaler* [1984] 12 DLR (4th) 502, aff'd (1984) 14 CRR 107; *R v Punch* [1985] 22 CCC (3d) 289; *Association des détaillants en alimentation du Québec v Ferme Carnaval Inc* [1986] RJQ 2513; *Black v Law Society of Alberta* [1986] 27 DLR (4th) 527, aff'd [1989] 1 SCR 591; *Ford v Quebec (A-G)* [1988] 2 SCR 712; *Borowski v Canada (A-G)* [1987] 39 DLR (4th) 731, aff'd [1989] 1 SCR 342; *R v Schmidt* [1987] 1 SCR 500;*R v Morgentaler* [1986] 22 DLR (4th) 641, rev'd [1988] 1 SCR 30; *Cotroni v Centre de Prévention de Montréal* [1989] 1 SCR 1469; *Tremblay v Daigle* [1989] 2 SCR 530; *R c Pearson* [1990] RJQ 2438, rev'd [1992] 3 SCR 665; *Lippé v Charest* [1990] RJQ 2200, rev'd [1991] 2 SCR 114; *R v Keegstra* [1990] 3 SCR 697; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892; *Lavigne v OPSEU* [1991] 2 SCR 211; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779; *Québec (Commission des droits de la personne) v Immeubles Ni/Dia Inc* [1992] RJQ 2977; *Commission des droits de la personne du Québec v Commission scolaire Deux-Montagnes* [1993] RJQ 1297.

([134]) Just at the Supreme Court of Canada, see: *R v Mills* [1986] 1 SCR 863; *R v Rahey* [1987] 1 SCR 588; *BCGEU v British Columbia (A-G)* [1988] 2 SCR 214; *Ford v Quebec (A-G)*, ibid; *Andrews v Law Society (British Columbia)* [1989] 1 SCR 143; *Irwin Toy Ltd v Quebec (A-G)* [1989] 1 SCR 927; *R v Conway* [1989] 1 SCR 1659; *Edmonton Journal v Alberta (A-G)* [1989] 2 SCR 1326; *R v Keegstra*, ibid; *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139; *R v Lippé*, ibid; *Lavigne v OPSEU*, ibid; *Kindler v Canada*, ibid; *Reference re Ng Extradition (Canada)* [1991] 2 SCR 858; *R v Butler* [1992] 1 SCR 452; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606; *R v Potvin*, [1993] 2 SCR 880; *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835; *Thomson Newspapers Co v Canada (A-G)* [1998] 1 SCR 877; *R v Lucas* [1998] 1 SCR 439; *United States v Burns* [2001] 1 SCR 283 (*Burns*); *R v Advance Cutting & Coring Ltd* [2001] 3 SCR 209; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

([135]) *Canadian Foundation for Children, Youth and the Law v Canada (A-G)* [2004] 1 SCR 76 (*Foundation for Children*).

([136]) On the void for vagueness doctrine in Canada, see S. Beaulac, 'Les bases constitutionnelles de la théorie de l'imprécision: partie d'une précaire dynamique globale de la Charte' (1995) 55 Revue du Barreau 257.

([137]) *Foundation for Children* (n 135) [33]–[34]. The European Court of Human Rights decision referred to was *A v United Kingdom* (App No 25599/94) 23 September 1998, Reports 1998-VI.

([138]) GV La Forest (n 69) 241.

([139]) *Soering v United Kingdom and Germany*, 7 July 1989, series A, vol 161, 11 EHRR 439.

([140]) *Kindler v Canada* (n 133).

([141]) *Lackey v Texas* 115 SCt 1421, 63 LW 3705, 131 LEd2d 304 (1995).

([142]) *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* et al (1993) 1 ZLR 242 (S), 4 SA 239), 14 Human Rights Law Journal 323 (ZSC).

([143]) *S v Makwanyane* 1995 (3) SA 391, (1995) 16 Human Rights Law Journal 154.

([144]) *Republic v Mbushuu* [1994] 2 LRC 335.

([145]) *Pratt v Jamaica (A-G)*, [1994] 2 AC 1, 14 Human Rights Law Journal 338, 33 ILM 364 (Jamaica; PC).

([146]) *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427.

([147]) Copyright Act RSC 1985, c C-42.

([148]) *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* (n 146) [65].

([149]) *Directive 2000/31/EC of the Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* [2000] OJL 178/1.

([150]) Constitution Act 1867 (UK) (n 1) preamble.

([151]) See, for example, *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (Eng CA). In this judgment, Lord Denning traces the origins of this rule to the early eighteenth century and provides a succinct overview of the relevant precedents: ibid 553. See also *Buvot v Barbuit* (1737) 25 ER 777 (Ch); *Heathfield v Chilton* (1767) 4 Burrow 2015 (Lord Mansfield); S. Fatima, *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005) 403–6; and I. Brownlie, *Principles of Public International Law* (7th edn, Oxford: Oxford University Press, 2008) 41–4.

([152]) See generally J.H. Currie, *Public International Law* (2nd edn, Toronto: Irwin Law, 2008) 226–331.

([153]) The term 'incorporationist' is more common in British practice whereas 'adoptionist' tends to be used in Canadian practice. On the vagaries of the terminology used in this area of the law, see van Ert (n 16) 3–5.

([154]) R. St J. Macdonald, 'The Relationship between International Law and Domestic Law in Canada' in R. St J. Macdonald, G.L. Morris and D.M. Johnston (eds), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88, 111. See also Brunnée and Toope (n 19) 42–51, reviewing the ambiguous and sometimes conflicting Canadian case-law and tentatively concluding that 'the best view appears to be that customary law can operate directly within the Canadian legal system'.

([155]) See in particular the excellent analyses of the law in this area by van Ert (n 16) 182–27; and F Larocque and M Kreuser, 'L'incorporation de la coutume internationale en common law canadienne' [2007] 45 Can YB Int'l L 173.

([156]) *Reference Re Powers of Ottawa (City) and Rockcliffe Park* [1943] SCR 208 (*Foreign Legations Case*).

([157]) Assessment Act RSO 1937 c 272 (now RSO 1990 c A-31).

([158]) *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86 (*Newfoundland Continental Shelf*).

([159]) *Québec Secession Reference* (n 5).

([160]) Ibid 276 (emphasis added).

([161]) But see S.J. Toope, 'Case Comment on the *Québec Secession Reference*' (1999) 93 AJIL 519, 523–5, referring to the Court's 'complete disregard for customary law'; and Brunnée and Toope (n 19) 45, arguing that the Court 'failed completely to engage with the customary law on self-determination', suggesting that 'a dualist position may implicitly have been adopted'. With respect, this seems an overly pessimistic reading. While the Court did fail to advert to customary international law as such, it did indicate that 'the principle [of self-determination] has acquired a status beyond 'convention' and is considered a general principle of international law' (see [114]). Moreover, the Court did in fact refer to several elements of non-conventional state practice and *opinio juris* (admittedly, without labelling them as such), suggesting that, at least in substance, it was applying customary international law. Certainly, the Court failed to take account of some recent, mainly European, state practice in this area, but that speaks to the quality of the Court's analysis of customary international law rather than to rejection of its applicability in principle.

([162]) See for example *Saint John v Fraser-Brace Overseas Corp* [1958] SCR 263, 268–9 (Rand J) (*Saint John*) (again dealing with the effect of the customary international law of state immunities from municipal taxation); *Pushpanathan* (n 119) 1029–35 (referring to the customary international legal meaning attributed to the words 'contrary to the principles of the United Nations' in interpreting legislation implementing treaty obligations relating to refugee status). See also *The Ship 'North'* v *The King* (1906) 37 SCR 385, 394 (Davies J) (*The Ship 'North'*); *Reference as to Whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts* [1943] SCR 483, 502 (Kerwin J) (*Re US Armed Forces*); *Finta* (n 15); *Baker* (n 72); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Ville)* [2001] 2 SCR 241, [30]–[32] (*Spraytech*); *Suresh* (n 108) [61]–[65]; *Schreiber v Canada (Attorney General* [2002] 3 SCR 269 [48]–[50] (LeBel J) (*Schreiber*). But see *Gouvernement de la République démocratique du Congo v Venne* [1971] SCR 997 (*Congo v Venne*). It should be noted that while the Court relied extensively on customary international law in *Mugesera* (n 20), it did so in the context of statutory interpretation, and (at least in considering the definition of 'crimes against humanity') in light of the express incorporation of customary international law in s 7(3.76) of the Canadian Criminal Code RSC 1985 c C-46. Accordingly, the question of the relationship between customary international law and Canadian common law did not arise in that case.

([163]) *Jose Pereira E Hijos SA v Canada (Attorney General)* [1997] 2 FC 84 [20] (TD) (*Jose Pereira*).

([164]) *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 [65] (CA), leave to appeal ref'd [2005] 1 SCR vi (*Bouzari*). See also *Mack v Canada (Attorney General)* (2002) 60 OR (3d) 737 [32] (CA), leave to appeal ref'd [2003] 1 SCR xiii.

([165]) *R v Hape* [2007] 2 SCR 292 (*Hape*). The accused had been convicted of money laundering based in part on evidence gathered abroad by Canadian police officers working co-operatively with local police. The principal issue in the case was whether the *Charter*'s s 8 protection against unreasonable search and seizure extended to the offshore activities of Canadian law enforcement officials. Relying in part on customary international legal principles of territorial sovereignty, non-intervention and extraterritorial jurisdiction, the majority concluded it did not: *Hape*, ibid [55]–[56], [85] (LeBel J).

([166]) *Canadian Charter of Rights and Freedoms* (n 13).

([167]) See discussion of this point in JH Currie, 'Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law' [2007] 45 Can YB Int'l L 55, 85–6, n 136.

([168]) *Hape* (n 165) [39] (emphasis added).

([169]) See R Sullivan, *Sullivan on the Construction of Statutes* (5th edn, Markham Ont: Butterworths, 2008) 558 n 82; Larocque and Kreuser (n 155).

([170]) See discussion in Currie (n 167) 63–6.

([171]) See also *Hape* (n 165) [56], where the majority refers to the principle of 'the direct application of international custom'.

([172]) See also ibid [46], holding that principles of customary international law 'may be adopted into the common law of Canada in the absence of conflicting legislation;' and [36], where the English position is paraphrased thus: 'Prohibitive rules of international law may be incorporated directly into domestic law through the common law…. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules.'

([173]) See also ibid [70], where the majority refers to the 'context and interpretive assistance set out in the foregoing discussion'.

([174]) On the distinction between monist and dualist models for the reception of international law in domestic law, see van Ert (n 16) 3–5; Currie (n 167) 220–4. See also G Fitzmaurice, 'The General Principles of International Law:

Considered from the Standpoint of the Rule of Law' (1957-II) 92 Rec des Cours 5, 68–85; and J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 Brit YB Int'l L 66.

([175]) See authorities collected (n 151).

([176]) See van Ert (n 16) 194–208; Currie (n 167) 226–35; Larocque and Kreuser (n 155) 220–1.

([177]) See van Ert (n 16) 131–2; Sullivan (n 169) 538–9, 548–9; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd edn, Scarborough: Carswell, 2000) 367–8; *Hape* (n 165) [53]–[54]; *Jose Pereira E Hijos S.A.* (n 163) [20].

([178]) State Immunity Act RSC 1985 c S-18, s 14(1).

([179]) Extradition Act (n 30), s 10(3).

([180]) See eg *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v Château-Gai Wines Ltd* [1975] SCR 190, 199; *Ganis v Canada (Minister of Justice)* (2006) 216 CCC (3d) 337 [23]–[26] (BCCA); *Château-Gai Wines Ltd v Attorney General of Canada* [1970] Ex CR 366, 382–4.

([181]) *Ganis* (n 180) [23].

([182]) See further section 3 above.

([183]) See further section 3.2 below.

([184]) See *Hape* (n 165) [39], [53], [68]; Macdonald (n 154) 119; Hogg (n 4) [12.2]; Sullivan (n 169) 431; and R Sullivan, *Statutory Interpretation* (Concord Ont: Irwin Law, 1997) 34.

([185]) See further above, section 3.

([186]) State Immunity Act (n 178).

([187]) See *Schreiber* (n 162) [50]–[51]; *Bouzari* (n 164) [66]–[67].

([188]) CAHWCA (n 44).

([189]) Ibid, ss 4(3), 6(3)-(4). See also *Mugesera* (n 20) [133ff], interpreting the offence of crimes against humanity formerly defined with reference to customary international law in Canada's Criminal Code (n 162) s 7(3.76).

([190]) See eg Macdonald (n 154) 112–13; van Ert (n 16) 42–56, 62–6; A Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) 138–9. For critical commentary on the appropriateness of such an approach, and suggestions for reform, see Knop (n 68) 525; A Warner La Forest, 'Evidence and International

and Comparative Law' in O.E. Fitzgerald (ed.), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 367, 384; G van Ert, 'The Admissibility of International Legal Evidence'(2005) 84 Can B Rev 31, 44–6. The leading English decisions supporting judicial notice of customary international law include *Triquet v Bath* (1764) 97 ER 936, 938 (KB); *Buvot v Barbuit* (n 151); *Re Piracy Jure Gentium* [1934] AC 586, 588 (JCPC); *The Christina* [1938] AC 485, 497 (HL); *Chung Chi Cheung v The King* [1939] AC 160, 168 (JCPC); *Trendtex* (n 151) 569 (Stephenson LJ).

([191]) Civil Code of Québec SQ 1991 c 64, s 2807.

([192]) See Emanuelli (n 57) 73.

([193]) *The Ship* '*North*' (n 162).

([194]) Ibid 394 (Davies J, MacLennan J concurring).

([195]) See also *Re US Armed Forces* (n 162) 524 (Rand J); *Finta* (n 15) 773–4 (La Forest J dissenting on another point).

([196]) See eg *Foreign Legations Case* (n 156); *Saint John* (n 162); *Offshore Mineral Rights (BC)* (n 11); *Newfoundland Continental Shelf* (n 158); *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401 (*Crown Zellerbach*); *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 (*Slaight Communications*); *Ordon Estate v Grail* [1998] 3 SCR 437; *Québec Secession Reference* (n 5); *Baker* (n 72);*United States v Burns* [2001] 1 SCR 283 (*Burns*); *Spraytech* (n 162); *Suresh* (n 108); *R v Malmo-Levine; R v Caine* [2003] 3 SCR 571; *Mugesera* (n 20); *GreCon Dimter* (n 120); *Hape* (n 165); *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391, 2007 SCC 27 (*Health Services*).

([197]) See for example *Québec Secession Reference* (n 5); *Re Bill C-7 Respecting the Criminal Justice System* (2003) 228 DLR (4th) 63 (Qué CA); *Bouzari* (n 164). But see *Romania v Cheng* (1997) 158 NSR (2d) 13 (SC) aff'd (1997) 162 NSR (2d) 395 (CA). See also generally van Ert (n 16) 50–4, 69; A Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Academic, 2000).

([198]) See eg *Foreign Legations Case* (n 156); *Re US Armed Forces* (n 162); *Saint John* (n 162); *Congo v Venne* (n 162); *Schreiber* (n 162); *Bouzari* (n 164).

([199]) See eg *The Ship North* (n 162); *Re Newfoundland Continental Shelf* (n 158); *Jose Pereira* (n 163).

([200]) See eg *Québec Secession Reference* (n 5).

([201]) See eg *Finta* (n 15); *Mugesera* (n 20).

([202]) See eg *Pushpanathan* (n 119); *Baker* (n 72); *Suresh* (n 108); *Mack* (n 164); *Bouzari* (n 164).

([203]) See eg *Spraytech* (n 162).

([204]) See eg *The Ship North* (n 162); *Re US Armed Forces* (n 162); *Jose Pereira* (n 163); *Hape* (n 165).

([205]) See further sections 2.6, 2.6 above.

([206]) See further section 4.1 below.

([207]) *Hape* (n 165) [53]. See also van Ert (n 16) 131–2; Sullivan (n 169) 548–9; Côté (n 177) 367–8; H.M. Kindred, 'The Use and Abuse of International Legal Sources by Canadians Courts' in Fitzgerald (n 190) 5, 8–9.

([208]) See section 3 above.

([209]) See *Trendtex* (n 151) 553; Fatima (n 151) 403–36; and Brownlie (n 151) 41–4.

([210]) See *Re US Armed Forces* (n 162) 490 (Duff CJ for the majority). This decision may be considered dated as it was based upon the precedent of the Judicial Committee of the Privy Council in *Chung Chi Cheung v The King* (n 190) 168 (Lord Atkin), which has since been superseded in English law by *Trendtex* (n 151). See generally discussion in van Ert (n 16) 184–94, 208–13. See also Macdonald (n 154) 102–5.

([211]) See eg *Gouvernement de la République démocratique du Congo v Venne* [1969] BR 818(Qué CA), reversed on other grounds by the Supreme Court of Canada (n 162); *Re Canada Labour Code* [1992] 2 SCR 50, 73–4 (La Forest J for the majority); *Hape* (n 165) [36], [39]. See discussion in van Ert (n 16) 211–12, 216–18.

([212]) See *Hape* (n 165) [39], [53], [68]; Macdonald (n 154) 119; Hogg (n 4) [12.2]; Sullivan (n 169) 431; Sullivan (n 184) 34.

([213]) See van Ert (n 16)131–2; Sullivan (n 169) 538–9, 548–9; Côté (n 177) 367–8; *Hape* (n 165) [53]–[54]; *Jose Pereira E Hijos S.A.* (n 163) [20].

([214]) See generally van Ert (n 16) 130–81; Currie (n 167) 248–59; J.H. Currie, 'International Law in the Jurisprudence of the McLachlin Court' in D. Wright and A. Dodek (eds), *The McLachlin Court's First Decade: Reflections on the Past and Projections for the Future* (Toronto: Irwin Law, 2011) 391.

([215]) *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324 (*National Corn Growers*) (Gonthier J for the majority).

([216]) Ibid 1371 (emphasis added).

([217]) *Ward* (n 118).

([218]) *Thomson* (n 50).

([219]) *Pushpanathan* (n 119) 1029–35.

([220]) *Ordon Estate* (n 196) [137] (Iacobucci and Major JJ).

([221]) *Baker* (n 72).

([222]) Ibid [70].

([223]) *Spraytech* (n 162).

([224]) Ibid [32].

([225]) Ibid [30]–[31].

([226]) *Schreiber* (n 162).

([227]) It is arguable that the judgment of Dickson J, writing for the Court in *Zingre v The Queen* [1981] 2 SCR 392, 406–7, 409–10, had already implicitly applied a presumption of conformity to the interpretation of non-implementing legislation. However, the language used in the judgment could also support the view that its use of the relevant treaty as an interpretive aid was confined to the particular facts of the case and that no general principle was being adumbrated by the Court; and it has not been cited by the Court as support for the presumption of conformity in the non-implementation context until very recently. See eg *Hape* (n 165) [54].

([228]) State Immunity Act (n 178).

([229]) *Schreiber* (n 162) [51].

([230]) *Daniels v White and The Queen* [1968] SCR 517.

([231]) Ibid 541 (Pigeon J concurring).

([232]) *Schreiber* (n 162) [50].

([233]) See further section 2.3 above.

([234]) *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 (*Canadian Foundation for Children*).

([235]) Ibid [31] (McLachlin CJ for the majority).

([236]) Criminal Code (n 162).

([237]) *Mugesera* (n 20).

([238]) Criminal Code (n 162), s 318(1).

([239]) Ibid.

([240]) *GreCon Dimter* (n 120).

([241]) Civil Code of Québec (n 191) Articles 3139, 3148(2).

([242]) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) 330 UNTS 3, [1986] Can TS No 43 (*New York Convention*); see *GreCon Dimter* (n 120) [40].

([243]) *GreCon Dimter* (n 120) [41].

([244]) Ibid. See also *Dell Computer* (n 25) [38]–[41], [44]–[47] and [73]–[75] (DesChamps J); and [175] (Bastarache and LeBel JJ dissenting).

([245]) *GreCon Dimter* (n 120) [39] (emphasis added).

([246]) *National Corn Growers* (n 215) 1371.

([247]) See eg *Canadian Foundation for Children* (n 234) [31] (McLachlin CJ): 'Statutes *should* be construed to comply with Canada's international obligations' [emphasis added].

([248]) *GreCon Dimter* (n 120) [39], citing Côté (n 177) 367.

([249]) See *Dell Computer* (n 25) [38]–[41], [44]–[47] and [73]–[75] (DesChamps J); and [175] (Bastarache and LeBel JJ dissenting).

([250]) *Hape* (n 165).

([251]) Ibid [53]–[54].

([252]) Ibid [53]. See also van Ert (n 16) 131–2; Sullivan (n 169) 548–9; Côté (n 177) 367–8.

([253]) Charter of Human Rights and Freedoms RSQ c C-12.

([254]) See eg *Dufour v Centre hospitalier St-Joseph de la Malbaie* [1992] RJQ 825 (TDPQ); *Québec (Commission des droits de la personne) v Immeubles Ni-Dia Inc* [1992] RJQ 2977 (TDPQ); *Kafé et Commission des droits de la personne du Québec v Commission scolaire Deux-Montagnes* [1993] RJQ 1297

(TDPQ); *Roy et Commission des droits de la personne et des droits de la jeunesse du Québec v Maksteel Québec Inc* [1997] RJQ 2891 (TDPQ); *ML et Commission des droits de la personne du Québec v Maison des jeunes* [1998] JTDPQ No 31 (TDPQ).

([255]) Canadian Charter of Rights and Freedoms (n 13).

([256]) See generally van Ert (n 16) 223–7.

([257]) *Suresh* (n 108).

([258]) See further, on the use of international law in interpreting the Canadian Charter of Rights and Freedoms, section 4.3 below.

([259]) *Suresh* (n 108) [61].

([260]) Ibid [62]–[65].

([261]) Ibid [65].

([262]) Ibid.

([263]) Ibid [46]: *Charter* interpretation 'is informed…by international law, including *jus cogens*'. See also ibid [60].

([264]) *Schreiber* (n 162).

([265]) Ibid [48].

([266]) Ibid [49]; see also [17].

([267]) Ibid [50]–[51].

([268]) 'Patriation' refers to the final surrender of the formal power to amend Canada's Constitution by the United Kingdom Parliament to the Canadian Parliament and legislatures, in accordance with amending formulae set out in the Constitution Act 1982 (n 3), ss 38–49.

([269]) Canadian Charter of Rights and Freedoms (n 13).

([270]) See eg *Ahani v Canada (Attorney General)* (2002) 58 OR (3d) 107 [31] (CA) (*Ahani*); Schabas and Beaulac (n 65) 59–67; Hogg (n 4) [36.9(c)]. But see van Ert (n 16) 333–5. For criticism of the *Ahani* decision, see J Harrington, 'Punting Terrorists, Assassins and Other Undesirables' (2003) 48 McGill LJ 55.

([271]) See generally Schabas and Beaulac (n 65).

([272]) *Slaight Communications* (n 196).

([273]) See WS Tarnopolsky, 'A Comparison between the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*' (1982–83) 8 Queen's LJ 211; Hogg (n 4) [33.8(c)], [36.9(c)]; Schabas and Beaulac (n 65) 61; Currie (n 167) 259; van Ert (n 16) 344. See also J. Claydon, 'International Human Rights Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*' (1982) 4 SCLR 287. But see the cautionary note sounded with respect to such a 'minimum content' presumption by I. Weiser, 'Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation' (1998) 27 Can Council Int'l L Proc 132, 138–9.

([274]) *Suresh* (n 108).

([275]) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976; Article 41 entered into force 28 March 1979) 999 UNTS 171 (ICCPR).

([276]) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

([277]) *Suresh* (n 108) [66]–[75].

([278]) Ibid [78].

([279]) *Public Service Employee Relations Act Reference* (n 64).

([280]) *Health Services* (n 196) [70]: '…[T]he *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.' See also ibid [79]: '…s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection [as international conventions to which Canada is a party].' Note, however, the somewhat non-committal language used by the Court in describing Canada's international legal obligations as an 'interpretive tool' that 'can assist' courts in interpreting the *Charter*: ibid [69].

([281]) *Hape* (n 165) [56] (LeBel J for the majority): 'In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.' The majority relied in part on the customary international legal principles of territorial sovereignty and non-intervention in reaching its conclusion that 'extraterritorial application of the *Charter* is impossible': ibid [55]–[56], [85]. See also *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30 [10], [66]–[67], *semble* relying on Canada's treaty obligations to bolster the government's s 1 justification of a prima facie infringement of s 2(b) *Charter* rights. These cases of course

illustrate that allowing interpretation of the *Charter* to be influenced by Canada's international legal obligations can be a double-edged sword. On the dangers of allowing international law to act as a limit on the protections afforded by the *Charter*, see *R v Cook* [1998] 2 SCR 597 [148] (Bastarache J).

([282]) See *Hape* (n 165) [55]; *Health Services* (n 196) [20], [69]; *Canada (Justice) v Khadr* 2008 SCC 28 [29].

([283]) *Slaight Communications* (n 196) 1056–7.

([284]) *Burns* (n 196) [79]–[80].

([285]) See *Suresh* (n 108) [46], where the Court accords the same interpretive weight to international law generally, 'sources' of international human rights law in particular, and even *jus cogens* norms. See also [60]. For comment, see Brunnée and Toope (n 19) 49–50.

([286]) *Hape* (n 165) [56].

([287]) *Health Services* (n 196): contrast [70] ('the *Charter should be presumed* to provide at least as great a level of protection as is found in the *international human rights documents* that Canada has ratified') with [20] ('*international law…may inform* the interpretation of *Charter* guarantees') [emphasis added].

([288]) *Khadr* (n 282) [18].

([289]) Ibid [29].

([290]) On issues of state jurisdiction, see *Hape* (n 165).

([291]) Criminal Code (n 162) s 7(3)(c), for certain crimes against internationally protected persons, and s 46(3), for acts of treason.

([292]) Criminal Code (n 162) s 7(3)(d), for crimes against Canadian diplomats abroad, s 7(3.1)(e), for hostage-taking of Canadian citizens abroad, s 7(3.7)(d), for acts of torture against Canadian citizens abroad, and ss 7(3.72)(e), 7(3.73)(g), and 7(3.75)(a) for terrorist acts against Canadian citizens abroad.

([293]) Rome Statute of the International Criminal Court (n 44) Article 86.

([294]) CAHWCA (n 44).

([295]) Criminal Code (n 162), s 7(2).

([296]) Ibid, s 7(3.1)(f).

([297]) Ibid, ss 7(3.72)(d), 7(3.73)(d).

([298]) Ibid, s 74(2).

([299]) Currie (n 167) 333–4.

([300]) See generally Swords (n 76) 494–5.

([301]) *R v Libman* [1985] 2 SCR 178, [74]. The modern academics referred to are S.A. Williams and J.-G. Castel, *Canadian Criminal Law, International and Transnational Aspects* (Toronto: Butterworths, 1981); and L. Hall, ''Territorial' Jurisdiction and the Criminal Law'[1972] Crim L Rev 276.

([302]) *Bouzari v Iran* [2004] 243 DLR (4th) 406, confirming [2002] OJ No 1624, 114 ACWS (3d) 57; leave to appeal to the SCC denied [2005] 1 SCR vi.

([303]) On a possible human right of access to justice, see F. Francioni et al (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (Milan: Giuffrè, 2008); and F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford: OUP 2007).

([304]) On the rule of law and its international law ramifications, see S. Beaulac, 'The Rule of Law in International Law Today' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 197.

([305]) *Ahani* (n 270).

([306]) *Suresh* (n 108).

([307]) *Ahani* (n 270) [29].

([308]) See generally Harrington (n 270).

([309]) *Ahani* (n 270) [33].

([310]) Ibid [42].

([311]) Ibid.

([312]) *LaGrand case (Germany v United States of America)* (2001) 40 ILM 1069.

([313]) Ibid [102].

([314]) Ibid.