CANADA –
THINKING OUTSIDE THE DUALIST BOX? SURELY NOT YET!

by Stéphane Beaulac*

INTRODUCTION

Pursuant to the Anglo-Saxon parliamentary system of governance and following the common law tradition inherited from Great Britain, Canada's public law is founded *inter alia* on two fundamental constitutional principles: the supremacy (or sovereignty) of Parliament and the rule of law. Moreover, from a domestic perspective, issues revolving around the national use of international law continue to be apprehended and framed *as per* the Westphalian paradigm.[1] Simply put, the matrix within which state affairs take place and according to which international law is understood postulate the existence of a "divide"[2] – the dualist reasoning box[3] – according to which the international legal plane is deemed distinct and separate from the national legal realms[4].

In this context, the very premise of the *ipso facto* supremacy of international law[5], when it comes to see its relationship with domestic law, is contestable ontologically as just reflecting the dominant international viewpoint.[6] The *Treatment of Polish Nationals case*[7], as well as the *Vienna Convention on the Law of Treaties*[8] (article 27) and *State*

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[1] See Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000) 2 *J. History Int'l L.* 148.
[2] This draws from Janne Nijman & André Nollkaemper, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).
[3] See Stéphane Beaulac, "Thinking Outside the 'Westphalian Box': Dualism, Legal Interpretation and the Contextual Argument", in C.C. Eriksen & M. Emberland (eds.), The New International Law – An Anthology (Leiden: Brill Publishers, 2010), 17.
[4] See Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *New York U. J. Int'l L. & Pol.* 501.
[5] See Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008).
[66] See Curtis A. Bradley, "Breard, Our Dualist Constitution and the Internationalist Conception" (1999) 51 *Stanford L. Rev.* 529.
[7] [1931] P.C.I.J., Series A/B, No. 44, p. 23.

Responsibility Draft Articles[9] (articles 3 and 32), reflect this international take on normative supremacy between the two legal spheres or (to put it more in line with a Kelsenian monist epistemology[10]) within the so-called global legal world[11].

From a domestic point of view,[12] relying on dualism as a meta heuristic tools for the international-national interface, the principles of the supremacy of Parliament and the rule of law keep the authority over applicable normativity within the sovereignty of national states. Hence, if there is a conflict between international and domestic law, the latter will prevail within the national legal sphere.[13] In a sense, just like international law claims and posits supremacy on the international plane, fundamental constitutional principles in Anglo-Saxon public law call for maintaining the supremacy of domestic law. The chSupra note apter first addresses (section I), these fundamental principles at play regarding interlegality in Canada.

Of course, these principles do not prevent international law from having a role, sometime a material one, at the domestic level when interpreting and applying national normativity.[14] On the contrary. In Canada, since the 1999 decision in the *Baker case*,[15] the definite trend is for much greater use of international law by our courts and tribunals. A summary of the two main techniques used by the judiciary, within the methodology of legal interpretation, will be discussed (section II). They are the interpretative argument of context and the presumption of conformity with international law (our "Charming Betsy"

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[8] Adopted on 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), Can. T.S. 1980 No. 37 (entered into force on 27 January 1980).
[9] UN General Assembly, *Draft Articles on the Responsibility of States for internationally wrongful acts*, Resolution 56/83, 12 December 2001, Annex.
[10] See Hans Kelsen, *Théorie pure du droit*, 2nd ed. (Paris, Dalloz, 1962), trans. Charles Eisenmann.
[11] See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).
[12] See Stéphane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective", (2003) 41 *Canadian YB Int'l L.* 225.
[13] See, generally, Stéphane Beaulac & Frédéric Bérard, *Précis d'interprétation législative*, 2nd ed. (Montreal: LexisNexis, 2014).
[14] See Stéphane Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 *Statute L. Rev.* 19.
[15] *Baker v. Canada (Minister of citizenship and Immigration)*, [1999] 2 S.C.R. 817.

rule).[16] They are often resorted to by our national courts not only to resort to international law, but also to reconcile the two sets of normativity, instead of having one trumping the other.

However, in case of normative incompatibility – whether constitutional domestic rules are involved or not – national law will take precedent over international law, be it customary or treaty based.[17] Three court cases from the last fifteen years shall be used (section III) to substantiate the hypothesis that, from a domestic perspective, national law remains supreme in Canada. They are the Ontario Court of Appeal decision in the *Ahani case*[18] and the Supreme Court of Canada decision in the *Suresh case*[19], both rendered in 2002, as well as the recent decision from our highest court in the 2014 *Kazemi case*[20]. As far as operationalization of international law, by it by means of interpretative context or through the presumption of conformity, these cases will show that, when push comes to shove, these techniques preserve the supremacy of domestic law over international law.[21]

I. CANADA'S FUNDAMENTAL PRINCIPLES AT PLAY

As one of its former Dominions,[22] Canada has a direct constitutional and legal lineage with Great Britain. Its first founding document, the *Constitution Act, 1867*[23] – formally called *British North American Act* – makes it explicit that its Constitution is to be "similar in principle to that of the United Kingdom"[24]. As such, the Constitution of Canada includes both "written" and "unwritten" elements, the latter referring to judge-

[16] See Stéphane Beaulac, "La problématique de l'interlégalité et la méthodologe juridique – Examples canadiens d'opérationnalisation du droit international", in J.-Y. Chérot *et al.* (eds.), *Le droit entre autonomie et ouverture – Mélanges en l'honneur de Jean-Louis Bergel* (Brussels : Bruylant, 2013), 5.
[17] See Stéphane Beaulac, "Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004) 38 *Revue juridique Thémis* 359.
[18] *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107.
[19] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.
[20] *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 S.C.R. 176.
[21] See Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois", in S. Beaulac & J.-F. Gaudreault-DesBiens (eds.), *JurisClasseur Québec – Droit constitutionnel*, looseleaf updated 2015 (Montreal: LexisNexis, 2011), fasc. 23.
[22] See, generally, Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 2005).
[23] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
[24] *Ibid.*, preamble.

made-law constitutional principles developed by courts, also known as just constitutional common law,[25] which must not be confused with so-called "constitutional conventions" unenforceable by law (e.g. function and power of the prime minister). Two of the most important constitutional principles in the country, including as regards the domestic use of international law, are the supremacy of Parliament – or the sovereignty of Parliament – and the rule of law (in French, *principe de la primauté du droit*).

Although their ramifications are much broader in scope,[26] these two constitutional principles are certainly concerned, first and foremost, with the "legality" of the system of governance and of actual exercise of public powers.[27] Hence the idea that the legislative branch, namely Parliament – also the principal source of democratic legitimacy, under a Westminster model – is deemed the supreme authority in the State structure[28]. Legality also means, of course, to be ruled by law, be it duly passed by Parliament (then properly interpreted and applied) or developed by the judiciary *as per* the common law tradition[29]. The transplant of the rule of law template on the international plane captures[30], at the very least, such formalistic features of legality[31] – the binding nature of law, the requirement to comply with international law – themselves also pertinent to the whole interlegality problematics and the challenges or contestations of the domestic use by courts (and other legal actors) of non-national normativity.[32]

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[25] See, generally, Maxime St-Hilaire & Laurence Bich-Carrière, "La constitution juridique et politique du Canada : notions, sources et principes", in S. Beaulac & J.-F. Gaudreault-DesBiens (eds.), *JurisClasseur Québec – Droit constitutionnel*, looseleaf updated 2015 (Montreal: LexisNexis, 2011), fasc. 1.

[26] See, generally, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. loose-leaf updated 2016 (Scarborough: Thomson Carswell, 2007).

[27] On the principle of legality, within the formal conception of the rule of law, see Brian Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

[28] See Michael Gordon, *Parliamentary Sovereignty in the UK Constitution – Process, Politics and Democracy* (Oxford & Portland: Hart Publishing, 2015); and Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge: Cambridge University Press, 2010).

[29] See Trevor R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge L.J.* 111.

[30] See, generally, Jeremy Waldron, "The Rule of International Law" (2006) 30 *Harvard J. L. & Pub. Pol.* 15.

[31] See Stéphane Beaulac, "The Rule of Law in International Law Today", in G. Palombelle & N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009), 197.

[32] See Machiko Kanetake & André Nollkaemper (eds.), *The Rule of Law at the National and International Levels – Contestations and Deference* (Oxford: Oxford University Press, 2016).

The final fundamental constitutional principle relevant here, also "unwritten" as it is judge-made-law, concerns the well-known dualist theory of interlegality, or what I like to call the heuristic tools of dualism.[33] From an international perspective, it is important as well to view these issues in light of the Westphalian model of international relations,[34] at the centre of which is the *idée-force* of sovereignty.[35] As Neil Walker noted, the legal by-products of this social construct are constitutional law and international law,[36] which indeed correspond to the exercise of internal sovereignty (Jean Bodin's[37]) and external sovereignty (Emer de Vattel's[38]), respectively. As a result,[39] the dominant view in the common law world continues to assume that the Westphalian model, articulated around the Vattelian legal structure of independent states, involves an international plane that is distinct and separate from the internal realms.[40] While he argued that the paradigm might be changing, Sir Geoffrey Palmer provided the following useful image: "[I]nternational law and municipal law have been seen as two separate circles that never intersect."[41]

Most interestingly, there is a recent forceful of example of this enduring scheme of analysis in Anglo-Saxon legal reasoning, as regards the relation between international and national spheres, coming out of the political and judicial sage involving Brexit, that is

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[33] See Giorgio Gaja, "Dualism – A Review", in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007), 52.

[34] See Stéphane Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth" (2004) 8 *Australian Journal of Legal History* 181; Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000) 2 *Journal of the History of International Law* 148.

[35] See Stephen D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2004) 25 *Michigan J. Int'l L.* 1075, at 1077, who accurately summarises the modern situation with respect to sovereignty, in spite of the numerous revisionist claims over the years, with the following catchy phrase: "Sovereignty is now the only game in town."

[36] See Neil Walker, "Late Sovereignty in the European Union," in N. Walker (ed.), *Sovereignty in Transition* (London: Hart Publishing, 2003), 3.

[37] See Stéphane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 *Melbourne J. Int'l L.* 1; Stéphane Beaulac, "Le pouvoir sémiologique du mot 'souveraineté' dans l'œuvre de Bodin" (2003) 16 *Int'l J. Semiotics L.* 45.

[38] See Stéphane Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 *Journal of the History of International Law* 237.

[39] *Contra*, see Philip Allott, "The Emerging Universal Legal System," in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007), 63.

[40] See, generally, Stéphane Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004).

[41] Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria U. Wellington L. Rev.* 27, at 59.

the intention of the United Kingdom to leave the European Union following a referendum in June 2016. A legal challenge (the main one, because another proceeding was taken in Northern Ireland[42]) was brought against the government of Theresa May on the basis that the executive branch, the Crown, could not alone trigger British withdrawal from the EU pursuant to its prerogative powers; instead, according to general constitutional principles – parliamentary supremacy, rule of law, dualism – Parliament had to be involved in the process because Brexit would alter the domestic law of the UK and affect a variety of rights acquired domestically under the EU Treaty. In giving right to the petition, the High Court of Justice, at first instance, was very thorough and articulated in its decision – *inter alia*, using the epistemological divide, based on dualism at the meta-level – holding that the Crown's prerogative power operates only on the international legal plane, not at the domestic level.[43] Relying on a line of cases,[44] the unanimous bench of three judges wrote the following: "By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law."[45] On the precise point at issue, the court added this: "It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights"[46]. Thus dualism is alive and very well in Great Britain, indeed in most common law jurisdictions[47].

As for the dualist and monist tools – at the micro-level – they help to rationalise how one legal system interacts, how it treats the other legal system, including the way in which the normativity emanating from one may be taken into account or utilised in the other.[48] From the perspective of sovereign states, the rules on the status of international law within national jurisdiction are domestic rules, often considered important enough to be part of constitutional law.[49] As Francis Jacobs explained, "the effect of international

[42] *Re McCord's Application*, [2016] NIQB 85.
[43] *R (Miller) v. Secretary of State for Exiting the European Union*, [2016] EWHC 2768.
[44] In fact, mainly relying on *J.H. Rayner (Mincing Lane Ltd v. Department of Trade and Industry* [1990] 2 AC 418.
[45] *R (Miller) v. Secretary of State for Exiting the European Union*, *supra* note 43, para. 32.
[46] *Ibid.*
[47] See, generally, David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement – A Comparative Study* (Cambridge: Cambridge University Press, 2009).
[48] See René Provost, "Judging in Splendid Isolation" (2008) 56 *American J. Comp. L.* 125.
[49] See Christopher Greenwood, "International Law in National Courts: Discussion," in J. Crawford & M. Young (eds.), *The Function of Law in the International Community: An Anniversary Symposium –*

law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law".[50] "Indeed", in further wrote, "international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances".[51] This understanding of the legal world, of how the national and the international interact, is what I call the application of the dualist logic at the meta-level.[52] Mattias Kumm has suggested something similar when he wrote: "The very idea that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist."[53] Of course, this view is completely at odd with the international take on interlegality – *Polish National case*, article 27 *Vienna Convention*, articles 3 & 32 *Draft Articles* – as it was highlighted in the introduction.

Thus today like before, as in most other common law jurisdictions, it is assumed in Canada that it is if, and only to the extent that, national legal rules of reception allow international law to be part of domestic law – and that it has indeed become part of that domestic law, be it through a monist logic or my means of a dualist reasoning requiring implementing legislation – that international norms may have an direct legal effect on the interpretation and application of domestic law by domestic courts. Strictly speaking then, international law *qua* international law cannot be binding on national judges,[54] whose judicial authority is constitutionally entrusted by and for a sovereign state. Put another way, such a normativity cannot apply *per se* within domestic systems because courts are concerned with and competent over national, not international law.[55] What norms from the international legal order can do, and indeed ought to do whenever appropriate, is to

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Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law (Cambridge, 2008), available at http://www.lcil.cam.ac.uk?25th_anniversary?book.php

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

[51] *Ibid.*

[52] See Stéphane Beaulac, "Lost in Transition? – Domestic Courts, International Law and Rule of Law '*À la Carte*'", in E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (eds.), *International Law in Domestic Courts – Rule of Law Reform in Post-Conflict States* (Antwerp: Intersentia, 2012), 17

[53] Mattias Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement," in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), 256, at 258.

[54] See Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002) 16 *Supreme Ct. L. Rev. (2nd)* 23, at 62.

[55] See the classic: Gerald. Fitzmaurice, "The General Principles of International Law: Considered from the Standpoint of the Rule of Law" (1957) 92 *Hague Recueil* 1, at 70-80.

influence the domestic interpretation and application of the law of the land. International law would indeed act as persuasive authority, that is to say, as material and information, "regarded as relevant to the decision which has to be made by the judge, but [as it were] not binding on the judge under the hierarchical rules of the national system determining authoritative sources".[56]

In Canada, resort to international law by domestic courts has often been discussed in the context of international human rights, particularly as regards the *Canadian Charter of Rights and Freedoms*.[57] In a dissenting set of reasons in *Re Public Service Employee Relations Act*, Chief Justice Dickson expressed a point of view that set the tone in 1987 for the use of 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.[58]

The Chief Justice's position has been very influential and, indeed, would capture the general understanding of interlegality in the country. In a speech just a year after this case, in 1988, former Justice of the Supreme Court of Canada Gérard La Forest, speaking extra-judicially, pointed out that Dickson C.J.'s opinion 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".[59] In 2000, another former Justice of Canada's highest

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[56] Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights" (2000) 20 *Oxford J. Leg. St.* 499, at 502-503.

[57] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK) 1982, c 11 [RSC 1985, app II, no 44, s 52].

[58] *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 348-350 [emphasis added].

[59] Gérard 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.

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".[60] The famous "relevant and persuasive sources of interpretation" passage has been cited on numerous occasions in subsequent Canadian cases,[61] again recently in the *Health Services and Support case*,[62], where the Supreme Court of Canada wrote that the country's "international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the [Canadian] Charter".[63]

The main advantage of such an approach, of course, it to leaving plenty of margin of appreciation for the judiciary as to the persuasive force to be given to the international law argument, that is the very weight of such non-national normativity, when interpreting and applying domestic law.[64]

II. LEGAL INTERPRETATIVE TECHNIQUES TO USE INTERNATIONAL LAW DOMESTICALLY

Accordingly, to determine the legal status of international normativity within the domestic legal systems of a sovereign state, one must look inward at the constitutional rules of reception. In the United States, for instance, unimplemented treaties have no direct effect generally, in spite of the so-called "supremacy clause" in the American constitution,[65] because of a presumption against self-executing treaties developed by

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[60] Michel 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 & JP McEvoy (eds), *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 433, 434.

[61] For an extensive review of these cases, see William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law – Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Thomson Carswell, 2007).

[62] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391.

[63] *Ibid.*, para. 78 [emphasis added].

[64] Stéphane Beaulac, " 'Texture ouverte', droit international et interprétation de la Charte canadienne", in E. Mendes & S. Beaulac (eds.), *Canadian Charter of Rights and Freedoms / Charte canadienne des droits et libertés*, 5th ed. (Toronto: LexisNexis, 2013), 191.

[65] Article VI, clause 2, of the *Constitution of the United States of America* provides that "all Treaties made, or which shall be made, under the authority of the United States" shall be part of the supreme law of the land.

caselaw.[66] In Canada, recent caselaw allows more flexibility in using international law domestically,[67] as we will see, but the general approach remains: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute".[68] With regard to customary law, no implementation is required, as the monist logic considers that these norms automatically apply domestically prevails.[69] In the latter situation, the rules of reception call for direct domestic effect.[70]

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Over time, Canadian courts have developed more than one technique, through the methodology of legal interpretation – as "relevant and persuasive sources"[71] – to put into operation international normativity. Simply put, it may be done using the international law argument of contextual interpretation and/or it may be accomplished by means of the presumption of conformity with international law. Each is examined in turn.

- Operationalisation technique no. 1: contextual international law argument[72]

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[66] The authority for distinguishing between self-executing and non-self-executing treaties is the case of *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). On the presumption against self-executing treaties, see *Goldstar, S.A.* v. *United States*, 967 F.2d 965 (4th Cir. 1992); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Sei Fuji* v. *State*, 242 P.2d 617 (Cal. 1952). See also *Restatement (Third) of the Foreign Relations Law of the United States*, section 111.

[67] See Anne W. La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 *U. British Columbia L. Rev.* 157.

[68] *Baker v. Canada (Minister of Citizenship and Immigration), supra* note 15, at 861. See also the classic statement by the Judicial Committee of the Privy Council in the *Labour Conventions* case, *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, at 347, *per* Lord Atkin: "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".

[69] In Canada, this issue if now finally settled, with the decision of the Supreme Court in *R.* v. *Hape*, [2007] 2 S.C.R. 292. See also, in other common law jurisdictions, Treasa Dunworth, "The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?" (2004) 15 *Public L. Rev.* 36; Gerald L. Neuman, "Sense and Nonsense about Customary International Law: A Response to Bradley and Goldsmith" (1997) 66 *Fordham L. Rev.* 371; Louis Henkin, "International Law as Law in the United States" (1984) 82 *Michigan L. Rev.* 1555.

[70] See Stéphane 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: Martinus Nijhoff, 2006), 379

[71] See above, *Re Public Service Employee Relations Act*, *supra* note 58 and accompanying text.

[72] This part draws from Stéphane Beaulac, "International Law and Statutory Interpretation: Up with Context, Down with Presumption", in O.E. Fitzgerald *et al.* (eds.), *The Globalized Rule of Law – Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006), 331.

In the last 25 years, the most significant development on these issues here is the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.[73] At stake was whether the order to deport a woman with Canadian-born dependent children should be judicially reviewed. She had asked for an exemption based on humanitarian and compassionate considerations, under section 114(2) of the *Immigration Act*.[74] In order to determine the scope of this legal norm, L'Heureux-Dubé J. for the majority of the Court considered Canada's international obligations. Central to her analysis was the 1989 *Convention on the Rights of the Child*,[75] and its notion of the "best interests of the child",[76] because the interests of the applicant's children required to have her continue providing for them, hence a humanitarian and compassionate reason for the exemption invoked.

The problem was that Canada has ratified this international treaty, but has yet – even now, more than 15 years after this case – to implement it within its domestic legal system. According to the dualist logic, there would be no direct legal effect possible and courts should not resort to such non-implemented conventional norms to help interpret and apply domestic legal rules like the one found in section 114(2) of the *Immigration Act*. This is where L'Heureux-Dubé J. made a groundbreaking statement in the *Baker* case, as regards the international / national normative interaction:

> I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

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[73] *Supra* note 15.
[74] *Immigration Act*, R.S.C. 1985, c. I-2; now replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[75] *Convention on the Rights of the Child*, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.
[76] *Ibid.*, article 3.

> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.[77]

As a result, Justice L'Heureux-Dubé for the majority of the Supreme Court of Canada did consider the values and principles underlying the international legal norm of the best interests of the child, pursuant to the *Convention of the Rights of the Child*, even though this treaty remains unimplemented in the country's domestic law. It contributed, along with other international soft-law instruments – *Universal Declaration of Human Rights*,[78] *Declaration of the Rights of the Child*[79] – give an expansive read of the law. In fact, the reason why the *Baker* decision has been considered so important on these issues is straightforward: Justice L'Heureux-Dubé, by saying that both implemented and non implemented treaties may be used in interpreting domestic statutes, quite clearly opened the door wider to international normativity.

In terms of interpretative technique, the majority opinion in the *Baker case*[80] is an instance where international law was used through the contextual argument of statutory interpretation. After holding that the values underlying unimplemented treaty norms are nevertheless relevant, L'Heureux-Dubé J. quoted from legal publicist, in particular on the contextual international law argument:

> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 33:
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> > [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These

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[77] *Baker*, *supra* note 15, at para. 69-70 [emphasis addded].
[78] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3rd Sess., UN GAOR, Supp. No. 13, UN Doc. A/810, (1948) 71.
[79] *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), 14th Sess., UN GAOR, Supp. No. 16, UN Doc. A/4354, (1959) 19, 20.
[80] *Supra* note 15.

> constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added (by L'Heureux-Dubé J.).]
>
> The important role of international human rights law as an aid in interpreting domestic law as also been emphasized in other common law countries.[81]

Thus the majority of the Supreme Court of Canada in *Baker* reproduced and endorsed what Ruth Sullivan wrote about international legal norms being part of the context of adoption and of application of domestic legislation and how these contextual elements should be considered "relevant and persuasive" by courts when appropriate.

- Operationalisation technique no 2: the presumption of conformity with international law

This technique is known in the United States as the "Charming Betsy"[82] rule of interpretation, to the effect that judges ought to construe national law to be in line with international law.[83] Canada inherited this canon of interpretation from Great Britain,[84] about which Peter Maxwell wrote the following: "[E]very statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law".[85] Lord Diplock explicated thus:

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[81] *Ibid.*, at para.70.
[82] From the case *Murray v. The Charming Betsy*, 6 U.S. 64 (1804).
[83] See, generally, Gerald L. Neuman, "International Law as a Resource in Constitutional Interpretation" (2006) 30 *Harvard J. L. & Pub. Pol.* 177; and Curtis A. Bradley, "The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretative Role of International Law" (1998) 86 *Georgetown L.J.* 479.
[84] See Charles-Emmanuel Côté, "La réception du droit international en droit canadien" (2010) 52 *Supreme Court L. Rev. (2d)* 483, at 533: the presumption of conformity is "solidement ancré en droit anglais et c'est tout naturellement qu'il a pu être appliqué aussi par les tribunaux canadiens".
[85] Peter B. Maxwell, *On the Interpretation of Statutes* (London: Sweet & Maxwell, 1896), at 173. See also Hersh Lauterpacht, "Is International Law a Part of the Law of England?" (1930) *Transactions Grotius Society* 51.

> [T]here is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.[86]

Another major case on this in Great Britain was the House of Lord decision in the 2002 case of *R. v. Lyons*[87], which was recently endorsed by the High Court of Justice in the Brexit legal challenge, *R (Miller) v. Secretary of State for Exiting the European Union*[88].

In Canada, the presumption of conformity with international law is not limited to domestic written law and thus applies to both statutory law and to judge-made-law, in regard to both conventional international law and customary international law.[89] The interpretative rule was reiterated by the Supreme Court of Canada in the 1998 case of *Ordon Estate v. Grail*:

> Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations.[90]

The 2007 case of *R. v. Hape*[91] saw the Supreme Court of Canada rely heavily on international law by means of the presumption of conformity. At issue was whether or not an investigation conducted abroad with the involvement of Canadian federal police was subject to Canadian law and, more broadly, in what circumstances the *Canadian*

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[86] *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116 (C.A.).
[87] [2002] UKHL 447; [2003] AC 976, para. 27-28.
[88] *Supra* note 43, para. 33.
[89] See Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 130 *ff.*
[90] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. See also *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, as well as William A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 *Canadian Bar Rev.* 174
[91] *R. v. Hape*, *supra* note 66.

Charter of Rights and Freedoms could have an extra-territorial application and guarantee procedural rights to a person accused of a criminal offence. The text said nothing explicit about the jurisdictional scope of the *Charter*, which called for considerable reliance on the international law rules of state jurisdiction in the judgment,[92] the Court endorsing the distinction between the different types of jurisdiction at international law (prescriptive, executive, adjudicative) and how consent by the foreign country is essential for a possible extra-territorial application of Canadian law.

In order to justify such substantive recourse to international normativity, LeBel J. for the majority of the Court spent a good part of his reasons for judgment to dwell upon the logics of interaction between legal spheres. This gave the Supreme Court of Canada the opportunity to finally confirm that international customary law has automatic direct effect domestically, an issue left lingering for some time in Canada.[93] Most interesting were LeBel J.'s remarks under the heading "Conformity with international law as an interpretive principle of domestic law", where he concluded thus: "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".[94] Thus in interpreting and applying the law, to help determine the exceptional circumstances where the *Canadian Charter* applies extra-territorially, international normativity was used extensively, namely the customary legal rules of territorial sovereignty and non-intervention, as well as the concept known as the comity of nations.[95]

These "relevant and persuasive" elements from the international legal order were resorted to by LeBel J. for the majority of the Court in order to shed light onto the debate about the extra-territorial application of the *Charter*. The legal interpretation technique

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[92] See, generally, John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 *Canadian Yearbook of International Law* 55.

[93] *R. v. Hape*, *supra* note 66, at para. 35-39. See also Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 *University of New Brunswick Law Journal* 11.

[94] *Ibid.*, at para. 56 [emphasis added].

[95] See, generally, Steve G. Coughlan, Robert J. Currie, Hugh M. Kindred & Teresa Scassa, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 *Canadian J. L. & Tech.* 29.

by which international law was operationalised in *Hape* was not the contextual argument of interpretation, but rather the presumption of legislative intents, Canada's "Charming Betsy" rule, the presumption of conformity with international law. There are numerous cases in the last decades using this interpretative technique[96]. In fact, the recent case of *B010 v. Canada (Citizenship and Immigration)*[97], in 2015, seems to suggest that it has become the preferred technique for resorting to domestic law in the country; the Court noted also the following: "This interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world".[98]

On this note, it is now appropriate to move to the last section, which highlights the challenges and/or contestations of the domestic use of international law, bringing us back to the fundamental constitutional principles at play in Canada when dealing with issues of interlegality.

III. Assuring the Supremacy of Domestic Law: Some Examples from Canada

Going back to the hypothesis at the heart of this chapter, a domestic perspective on the problematics of international law used by courts (and other actors) continues to show, quite clearly, that national law remains supreme in Canada. Although the *Baker case*[99], as we highlighted, has confirmed the trend in the country for greater resort – both in quantitative and qualitative terms – of international normativity, there are unmistakable indications that domestic decision-makers are still the gatekeepers, indeed have the final word as regards interlegality. There are three ways which the courts have used to, in the end, shut out international law from their consideration, when interpreting and applying domestic law. The first method concerns the very divide, based on dualism, between the international and national legal spheres. The other two are incidental to the methodology of legal interpretation, just discussed, and the operationalisation technique: the weighing

[96] See, for instance, *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, at para. 39; *United States of America v. Anekwu*, [2009] 3 S.C.R. 3, at para. 25; *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, at para. 34; *Thibodeau v. Air Canada*, [2014] 3 S.C.R. 340, at para. 113.
[97] [2015] 3 S.C.R. 704.
[98] *Ibid.*, para. 48. The Court referred to the work by André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), chapter 7.
[99] *Supra* note 15.

down of the international argument of contextual interpretation and, finally, ambiguity as a preliminary condition to resorting to the presumption of conformity with international law, and even the very presumptive-type of reasoning in the latter case. The following discussion addresses each of these three challenges in turn, with the help of three cases (and a few others) decided by Canadian courts.

- Dualism can remain determinative: the *Ahani case*[100]

In the initial national judicial proceeding, which reached the Supreme Court of Canada[101], the *Ahani case* was considered along with the *Suresh case*[102], the decisions in which were rendered on 11 January 2002. Unlike Suresh, the petitioner Ahani was not given a new deportation hearing and, having thus exhausted all domestic remedies, he sought relief with the UN Human Rights Committee under the *Optional Protocol to the International Covenant of Civil and Political Rights*[103]. The international treaty body then asked Canada to suspend deportation until the full consideration of Ahani's situation, a request which was refused by the federal government. Thus a second judicial proceeding was launched, reaching the Ontario Court of Appeal (the leave to appeal to the Supreme Court of Canada was denied[104]), seeking an injunction to hold off his deportation order. Although the substantive issue was *refoulement*, not capital punishment (and although the international legal instruments were not the same, of course), the dynamic at play in this Canadian case is reminiscent of the famous American judgment in *Medellín v. Texas*[105], where the United States Supreme Court refused to carry out the International Court of Justice's judgment in the *Avena case*[106] (including interim measure), in fact holding that such decisions were not binding at the domestic level.

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[100] *Supra* note 18.
[101] *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72.
[102] *Supra* note 19.
[103] Adopted 16 December 1966, 999 U.N. T.S. 171, Can. T.S. 1976 no. 47 (entered into force 23 March 1976).
[104] S.C.C. File No. 29058., S.C.C. Bulletin, 2002, p. 781, 16 May 2002.
[105] 552 U.S. 491 (2008), 128 S. Ct. 1346; 170 L. Ed. 2d 190.
[106] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12.

Ultimately in *Ahani*[107], the majority of two justices of the Ontario Court of Appeal decided against the petitioner. As regards interlegality, at issue was whether the *Optional Protocol*[108] was part of Canadian law which, via the principles of fundamental justice in section 7 of the *Canadian Charter of Rights and Freedoms*, would also mean enforcing the interim order to delay deportation until the views from the Human Rights Committee were communicated. Although regretted by many,[109] the fact is that there is no legislation in Canada implementing international human rights instruments and, specifically, nothing provides for direct legal effect to the *Optional Protocol*[110]. Like at the Ontario Superior Court of Justice[111], the Court of Appeal – as a matter of fact, majority and dissent agreed on this point – held that the interim order had no direct legal effect within the Canadian domestic legal system.

More specifically, Justice Laskin (Charron J.A. with him), for the majority, wrote: "Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation."[112] Quite clearly, he added: "Absent implementing legislation, neither has any legal effect in Canada."[113] "It would lead to an "untenable result," Laskin J.A. further wrote, to "convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice"[114]. In a similar fashion, although he would have allow the petitioner to stay in Canada, dissenting Justice Rosenberg indeed agreed with the federal government, and thus the majority of the Court of Appeal, that the divide of interlegality was a determining factor in this case[115].

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[107] *Ahani v. Canada (Attorney General)*, *supra* note 18.
[108] Adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[109] See, for instance, William W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 *Canadian Bar Rev.* 174, 193-195.
[110] See Hugh M. Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts," in S.G. Coughlan & D. Russell (eds.), *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Éditions Thémis, 2002), 263, at 265.
[111] *R. v. Ahani* (2002), 90 CRR (2d) 292.
[112] *Ahani v. Canada (Attorney General)*, *supra* note 18, para. 31.
[113] *Ibid.*
[114] *Ibid.*, para. 33.
[115] *Ibid.*, para. 73.

Of course, as expected, this court decision put Canada at odd with its obligations on the international plane. It was more than two years after Ahani was deported to Iran by Canadian authorities, on 10 June 2002, that the Human Rights Committee's views were delivered, on 15 June 2004[116]. It opined that Canada had not respected Articles 9 and 13 (along with Article 7) of the *International Covenant on Civil and Political Rights*: before his removal, Ahani was not provided with a proper judicial review, including appropriate procedural safeguards. The Committee also addressed the fact that his refoulement took place before the communication could be properly considered and with disregard to the observations the treaty body was to provide. This was deemed to run against Canada's obligations under the *Optional Protocol*.[117]

Coming back to the Court of Appeal judgment in the *Ahani case*, it was a strict application, plain and simple, of the dualist logic. In the end, the international-national divide which saw the Ontario appellate court enforce the decision made under Canadian law – the Supreme Court of Canada judgment[118] – disregarding the interim order issued by an international instance. Audrey Macklin summed it up thus: "Because the Supreme Court of Canada provides the final word on Canadian law, international treaty bodies [like the Human Rights Committee] that advise states party of the scope of international norm, do not challenge the Supreme Court of Canada's interpretative monopoly"[119]. In a way, then, *Ahani* could be dubbed Canada's *Medellín v. Texas*[120], although of course the reasons for judgment given by the Court of Appeal are substantially different than in the American case. Clearly though, dualism is at the heart of both decisions, as a means to bar, to challenge the direct legal effect and, *a fortiori*, the supremacy of international normativity and/or international (quasi) adjudication.

- International contextual argument can be weak: the *Suresh case*[121]

[116] *Ahani v. Canada. Communication No. 1051/2002*. UN Doc. CCPR/C/80/D/1051/2002.
[117] See also the comment by Gerald Heckman, "Ahani v. Canada" (2005) 99 *American J. Int'l L.* 669.
[118] The January 2002 jugement in *Ahani*, *supra* note 101.
[119] Audrey Macklin, "Mr. Suresh and the Evin Twin" (2002) 20 *Refuge* 15, at 18.
[120] *Supra* note 104.
[121] *Supra* note 18.

It was mentioned already that, along with the first *Ahani* proceeding,[122] the *Suresh case* was decided by the Supreme Court of Canada in 2002, ordering a reconsideration of his petition by the Minister in view of the required procedural safeguards.[123] At issue in *Suresh* was also a ministerial decision under immigration legislation allowing 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 under 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 section 12 of the *Charter* and its caselaw on cruel and unusual treatment or punishment[124], including the *Burn case*[125]. The Court then continued its analysis under the heading "The International Perspective", dwelling on the relevance of international normativity:

> We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice. However, that does not end the inquiry.[126]

It added the following: "A complete understanding of the Act and the *Charter* requires consideration of the international perspective".[127]

Such an "international perspective" involved considering (without deciding the issue though) whether the international prohibition on torture was a peremptory norm of customary international law (that is, *jus cogens*), as well as examining the provisions of three international treaties, the *International Covenant on Civil and Political Rights*[128], the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[129] and the *Convention Relating to the Status of Refugees*[130]. However, it was

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[122] *Supra* note 101.
[123] For a comment on this case, see Stéphane Beaulac, "The *Suresh* Case and Unimplemented Treaty Norms" (2002) 15 *Quebec J. Int'l L.* 221
[124] *Kindler v. Canada*, [1991] 2 S.C.R. 779; and *R. v. Schmidt*, [1987] 1 S.C.R. 500.
[125] *United States v. Burns*, [2001] 1 S.C.R. 283.
[126] *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19, at para.59.
[127] *Ibid.*
[128] *Supra* note 103.
[129] Adopted 10 December 1984, 1465 U.N. T.S. 85, Can. T.S. 1987 no. 36 (entry into force 26 June 1987).
[130] Adopted on 28 July 1951, 189 U.N. T.S. 136, Can. T.S. 1969 no. 6 (entry into force 22 April 1965).

clear for the Supreme Court of Canada that such conventional international normativity was acting as "relevant and persuasive sources"[131] in the interpretation and application of section 7 of the *Canadian Charter*. Witness the following passage of the judgment:

> International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.[132]

Toward the end of this part of its reasons in the *Suresh case*, the Court held that international law prohibited any deportation to face torture, even in exceptional cases of national security.[133] The Court explained that in interpreting section 7 of the *Charter* in its entire context, the total prohibition of deportation to face torture is the international legal norm that "best informs the content of the principles of fundamental justice".[134] To be clear, this particular norm acted on the interpretation and application of Canadian law as persuasive authority, but nothing decisive it seems. The actual outcome of the case, the conclusion the Court reached supports this feature of the *Suresh* decision. Indeed, it was held that, in spite of the total prohibition *as per* the rule of international law, when it comes to 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".[135]

Accordingly, the legal norm against torture in this country was said to be different from the one identified in the international legal order, the Canadian one is less stringent. This seems to indicate, without a doubt, that the international law argument of contextual

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[131] See above, *Re Public Service Employee Relations Act*, *supra* note 58 and accompanying text.
[132] *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19, at para. 60 [emphasis added].
[133] This part draws from Stéphane Beaulac & John H. Currie, "Canada", in D. Shelton (ed.), *International Law and Domestic Legal System – Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011), 116.
[134] *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19, at para. 75.
[135] *Ibid.*, at para. 78.

interpretation was considered, was even given some weight (in all likeliness), but in the end this interpretative technique was weighted down and was not a determining factor[136]. Context, as an interpretative tool, is often attributed little persuasive force – sometimes none – in interpreting and applying domestic legal rules[137]. Clearly, this is exactly what the Supreme Court of Canada did in the *Suresh case*, thus illustrating another situation in which there are impediments and/or challenges to resorting to international normativity domestically. Even more to the point, this judgment is proof in itself of an implied, yet blatant contestation of supremacy (in any way, shape or form) of international law over domestic law[138].

- Cutting short the presumption of conformity with international law: the *Kazemi case*[139]

This time, before discussing the leading case, some further background is needed to study this feature of the presumption of conformity with international law, namely the preliminary requirement of legislative ambiguity[140]. Indeed, in the process of construing statutes – a precondition that exists for all presumptions of intent, pursuant to the general methodology of interpretation[141] – there must be a prior finding by the court that the text of the legislative provision at issue is ambiguous, or is otherwise problematic to interpret by reason of vagueness, generality or redundancy.[142] Short of meeting this precondition, the presumption of conformity with international law cannot be invoked as an argument of interpretation. Here is how Pigeon J., at the Supreme Court of Canada, highlighted this aspect of the international interpretative presumption in *Daniels v. White*[143]:

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[136] See Stéphane Beaulac, "Le droit international comme élément contextual en interpretation des lois" (2004) 6 *Revue canadienne de droit international* 1.
[137] See Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *Revue juridique Thémis* 131.
[138] See Stéphane Beaulac, "On the Saying that 'international Law Binds Canadian Courts'" (2003) 29 *CCIL Bulletin* 1.
[139] *Supra* note 20.
[140] For a critical analysis of such a preliminary requirement to presumptions of intent, see Stéphane Beaulac "Les dommages collatéraux de la Charte canadienne en interpretation législative" (2007) 48 *Cahiers de droit* 751.
[141] See, generally, Pierre-André Côté, coll. Stéphane Beaulac & Mathieu Devinat, *Interprétation des lois*, 4th ed. (Montreal: Éditions Thémis, 2009), at 509 *ff.*
[142] On the different problems found in statutes, see R. Dickerson, "The Diseases of Legislative Language" (1964) 1 *Harvard Journal on Legislation* 5.
[143] *Daniels v. White and The Queen*, [1968] S.C.R. 517, at 541.

> I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.[144]

The Supreme Court of Canada in the case of *Schreiber v. Canada (Attorney General)*[145], Justice LeBel referred to *Daniels v. White* and (literally) underlined the last sentence of this passage, on how the presumption of conformity with international law "is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law".[146] Again recently, in *Németh v. Canada (Justice)*[147], a unanimous Court relied on Lebel J.'s opinion in *Schreiber* (itself based on Pigeon J.'s comments in *Daniels v. White*) and held that there was no need to use international law because the legislative text was clear and not ambiguous.[148]

For some scholars,[149] it is intuitively sensible to argue such normativity through a presumption of intent, in favour of conformity with Canada's international obligations, as it would make the commitment to interlegality stronger and, in seems as first blush, make the argument more convincing. However, I have argued that, contrariwise, a presumption of intent is actually a weaker technique to resort to international normativity because of this preliminary requirement of ambiguity. In other words, the possible influence coming from the international plane, as "relevant and persuasive sources" to assist in interpreting and applying domestic law is, in each and every case, at risk of being shout down because

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[144] *Ibid.*, at 541.
[145] [2002] 3 S.C.R. 269.
[146] Quote from *Daniels v. White* found in *Schreiber*, *ibid.*, at para. 50; sentence underlined by LeBel J.
[147] [2010] 3 S.C.R. 281.
[148] *Ibid.*, para. 56.
[149] See, for instance, Gib van Ert, *supra* note 5; Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53 *McGill L.J.* 573; and Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 *Canadian YB Int'l L.* 3.

of the ambiguity precondition of this presumptions of intent[150]. As we saw, it has indeed happened on a regular basis in recent Canadian cases that, following such a preliminary conclusion that the legislation was not problematic, the court just rejected, without much consideration, the international law argument. Obviously, ambiguity requirement is an efficient way to side-track, to deny a domestic role for international law in this country.

Now the *Kazemi case*[151], in a sense, is even worse because the Supreme Court of Canada actually diminished and discredited the value of a presumptive-type of reasoning involved in Canada's "Charming Betsy" rule of construction. At issue in this case was the federal statute domestically codifying the rules in the field, the *State Immunity Act*[152], and more specifically whether this legislation should be interpreted expansively, to read in a new exception for torture. This Canadian case is similar, although the qualification of the crimes was different, to the line of court decisions in Italy – *Ferrini case*[153], *Milde case*[154] – which led to 2012 judgment of the International Court of Justice in a dispute between Germany and Italy[155], *Jurisdictional Immunity of the State*[156]. Canada also had a previous case, in 2004, raising the same issue of an implied exception to state immunity for torture – *Bouzari v. Iran*[157]. – The *Kazemi case*, ten years later in 2014, was the first opportunity for our highest court consider these difficult questions, requiring a balancing between traditional international legal rules and modern commitments to human rights protection.

In a split decision, the Supreme Court of Canada rejected the claimant's argument and reaffirmed the prevailing understanding that the domestic legislation was, in effect, a

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[150] See Stéphane Beaulac, "Le droit international et l'interprétation législative: oui au contexte, non à la présomption", in O.E. Fitzgerald *et al.* (eds.), *Règle de droit et mondialisation: rapports entre le droit international et le droit interne* (Cowansville: Yvon Blais, 2006), 413.
[151] *Supra* note 20.
[152] R.S.C. 1985, c. S-18.
[153] *Ferrini v. Repubblica federale di Germania*, Court of Cassation no. 5044, 11 March 2004, in [2004] 87 *Rivista di diritto internazionale* 539; English translation in 128 I.L.R. 659
[154] *Milde v. Repubblica federale di Germania*, Court of Cassation no. 1072, 21 October 2009, [2009] 92 Rivista di diritto internazionale 618.
[155] For an analysis of these cases, including parallels with the situation in Canada, see Riccardo Pavoni & Stéphane Beaulac, "L'immunité des États et le *jus cogens* en droit international: étude croisée Italie / Canada" (2009) 43 *Revue juridique Thémis* 491.
[156] *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99.
[157] *Bouzari v. Iran* (2004) 243 D.L.R. (4th) 406 (Ont. C.A.).

complete code on the national law of state immunity: it sets out the rules applicable in the country and, more on point, it provides an exhaustive list of exceptions to jurisdictional immunity. Focussing on interlegality and what was written on the role of international normativity in regard to Canada's *State Immunity Act* (a.k.a. "*SIA*"), the relevant passage in *Kazemi* reads as follows:

> The current state of international law regarding redress for victims of torture does not alter the *SIA*, or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, "*'Texture ouverte', droit international et interprétation de la Charte canadienne*", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), at pp. 231-35). Indeed, the presumption that legislation will conform to international law remains just that – merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute under consideration (*Hape*, at paras. 53-54). In the present case, the *SIA* lists the exceptions to state immunity exhaustively. Canada's domestic legal order, as Parliament has framed it, prevails.[158]

So here you have it all. Not only are these reasons based, quite clearly, on dualism at the meta-level and the interlegality divide. Not only did the majority of the Court laid out the rejection of the international law argument using the vocabulary of ambiguity as a preliminary condition to resorting to the presumption of conformity. But most damaging, in a way, is the suggestion that the latter technique to rely on international normativity as persuasive authority in interpretation was "merely a presumption", noting more, which can be set aside with clear legislative intent. Thus when push comes to shove, in terms of interlegality in Canada, there is no doubt that the will of the sovereign Parliament should and will prevail, even over international human rights obligations[159].

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[158] *Kazemi (Succession) v. Iran*, *supra* note 20, para. 60 [emphasis added].
[159] See also Stéphane Beaulac, "L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international" (2005) *Supreme Court L. Rev. (2d)* 1.

The argument based on a presumption of intent gives, in fact, the false impression, even the illusion of strong commitment vis-à-vis international legal role domestically. In the end, however, this rhetoric may play lip-service to a greater role for such non-national normativity. To sum it up in terms of ways to challenge to the utilisation, even more so to the claim of supremacy of international law, they are twofold: (i) legislative ambiguity as a precondition to resorting to this technique and (ii) the "mere" presumptive nature of this international interpretative argument.

CONCLUSION

To recapitulate, we saw that three fundamental constitutional principles are at play in Canada when addressing the problematics of interlegality and the reality of resorting to international normativity at the domestic level. These principles prove most relevant also in considering the obstacles and contestations to the very role of international law and the claim for its supremacy. They are: the supremacy (or sovereignty) of Parliament, the rule of law and, of course, the epistemology of dualism, at the meta-level. The trend in this country, especially since the *Baker case*[160], is for greater influence for both conventional and customary international law, as "relevant and persuasive sources"[161], to assist in the interpretation and application of domestic law. This operationalisation is conducted with the help of two interpretative techniques, within the methodology of legal construction, namely the argument of international context and the presumption of conformity with international law. Finally, centering on the general theme for this book, we saw the three major ways in which the use and, even more so, the supremacy of international law is challenged by Canadian courts: the international-national divide, the weak appreciation of the international context, and finally the two hurdles to overcome for the presumption of intent to apply (presumptive reasoning, ambiguity precondition).

As a last concluding remark, let me step back and look at the forest of the global world, with a view to suggesting that, perhaps, the doubts and resistance of modern-day

[160] *Supra* note 15.
[161] See *Re Public Service Employee Relations Act*, *supra* note 58 and accompanying text.

interlegality have a more transcendental, yet straightforward reason. My brief explanation brings us back, first, to the idea and ideal of the "international rule of law"[162], that states as the principal legal subjects on the international plane ought to be ruled by law, which means taking normativity seriously, all the way to ultimate compliance with their legal obligations[163]. Intuitively, and in line with the spirit of *pacta sunt servanda* – along with *Polish National case*, article 27 *Vienna Convention*, articles 3 & 32 *Draft Articles*, seen in the introduction – the international rule of law as compliance, at a minimum, would call upon states to make sure that, when needed, the domestic implementation of their international obligations is realised fully and, in times, is effected with the appropriate collaboration of the judiciary and other decision-makers.

What is missing from this picture, it seems, are values other than the rule of law's, which are nevertheless crucial in liberal democracies. These would include, *inter alia*: (a) democratic legitimacy of normativity, (b) subsidiarity and people's self-determination, as well as (c) legal pluralism and validation of diversity in governance.[164] These important modern values give justifications, even if they are not explicitly voiced in the process of interlegality, for domestic courts and other legal actors to find ways to, legitimately, keep "*un droit de regard*" on where, when and how international law is applied domestically. This way, as important as compliance is in a rule of law system, including internationally, it would not be deemed the only game in town. Be it inside or outside legal reasoning, let me suggest that good governance – indeed, a government of the people, by the people, for the people; *dixit* US Constitution – requires sensitivity to transcendental values other than the (all important) ones behind the rule of law.

[162] See Stéphane Beaulac, "An Inquiry into the International Rule of Law" (2007) *EUI Working Papers*, MWP 2007/3.
[163] See Simon Chesterman, "An International Rule of Law" (2008) 56 *American J. Comp. L.* 331.
[164] For a similar suggestion, see the excellent final chapter in a collective book, just published in April 2016, by Machiko Kanetake & André Nollkaemper, "The International Rule of Law in the Cycle of Contestations and Deference", in M. Kanetake & A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels – Contestations and Deference* (Oxford: Hart Publishing, 2016), 445.