

2 Thinking Outside the “Westphalian Box”: Dualism, Legal Interpretation and the Contextual Argument

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Abstract

The matrix within which the states operate and international affairs are conducted continues to be based on the Westphalian model, with its external-internal dichotomy. Consequently, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law. It is if and to the extent that national legal rules of reception allow international law to be part of national law that the latter may have an impact domestically. This dualist logic is challenged by globalisation and inter/supra/transnational governance. Question: What are the changes required in the methodology of interpretation and application of law that would allow judges to better contribute to the actualisation of such normative inter-permeability? The paper argues that only a slight adjustment in the methodology of interpretation and application of law is needed for domestic courts to better engage international law. Indeed, a reinforced argument of contextual interpretation constitutes the appropriate means to operationalise a systematic role for international law in domestic judicial decision-making.

Keywords

international law; constitutional law; international law in domestic courts; Westphalian model; dualism; legal interpretation

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1. Introduction

Contrasting with the grandiloquent analysis found in recent literature on the subject, Karen Knop summed up the problematics at hand with this catchy phrase: “domestic law is ‘here’ and international law is ‘there’”.¹ In terms of normative interaction, there exists indeed a pertinacious dichotomy between international law and domestic law. Simply put, the international realm continues to be viewed as distinct and separate from the national spheres.² Another Canadian legal scholar, John Currie, captured this structural divide with the following definition: “Public international law is not so much an area or topic of the law as it is an entire legal system that is conceptually distinct from the national legal systems that regulate daily life within states.”³

This picture of the international / national interaction is generally considered as representing the practice in most common law jurisdictions from the Anglo-Saxon liberal constitutional tradition, like Canada and the United States of America. As with many other legal issues, however, there are attempts to challenge the long accepted paradigm through scholarship describing, for the benefit of human consciousness,⁴ the prospective in terms of the actual; in other words, authors using “is” when they really mean “ought to”.⁵ In the Canadian context, a good example is Stephen Toope, who writes that the metaphor of national sovereignty is being abandoned in favour of transnationalism: “[I]n this in-between time, international law is both ‘foreign’ and ‘part of us’”.⁶ In another paper, Toope discards the international / national dichotomy and contends that “international law is both outside and in”.⁷ Since “international law is partly *our* law”, he further writes, the “process of relating international law to domestic law is not a translation of norms from outside”.⁸ There are, one would agree, many instances of wishful “is” in these remarks.⁹

1 K. Knop, ‘Here and There: International Law in Domestic Courts’, 32 *New York University Journal of International Law and Policy* (2000) p. 504.

2 S. Beaulac, ‘National Application of International Law: The Statutory Interpretation Perspective’, 41 *Canadian Yearbook of International Law* (2003) p. 234.

3 J. Currie, *Public International Law*, 2nd ed. (Irwin Law, Toronto, 2008) p. 1.

4 The Hegelian idea of “consciousness” associated to an ensemble of human beings was suggested by G. Butler, ‘Sovereignty and the League of Nations’, 1 *British Yearbook of International Law* (1920–1921) p. 42.

5 On this technique, see P. Allott, *The Health of Nations* (CUP, Cambridge, 2002), ch. 1. This is linked to the later Wittgensteinian argument that language not only represents reality, but constitutes an activity happening within reality, that it is indeed a participant in human consciousness; see L. Wittgenstein, *Philosophical Investigations* (Basil Blackwell, Oxford, 1958).

6 S. J. Toope, ‘The Uses of Metaphor: International Law and the Supreme Court of Canada’, 80 *Canadian Bar Review* (2001) p. 540.

7 S. J. Toope, ‘Inside and Out: The Stories of International Law and Domestic Law’, 50 *University of New Brunswick Law Journal* (2001) p. 11.

8 *Ibid.*, p. 18.

9 Interestingly, another Canadian internationalist and human rights advocate, John Humphrey, once observed that “human rights lawyers are notoriously wishful thinkers”; see J. P.

In the United States, Curtis Bradley has shown that the position defended by similarly-minded American members of the international legal academy, favouring a greater domestic role for international law, is largely out of touch with the reality of domestic legal practice.¹⁰ Using the case of *Breard v. Greene*,¹¹ Bradley contrasts the legal publicists’ “internationalist conception” with the dualist type of reasoning that US government actors and courts of justice still favour in dealing with international legal issues.¹² Likewise, many Canadian members of the international legal academy – Hugh Kindred,¹³ Jutta Brunnée,¹⁴ René Provost,¹⁵ Joanna Harrington¹⁶ – seem to give insufficient weight to domestic practice of government officials and judges and, like Toope essentially, advocate an unrealistic degree of authority for international law domestically.¹⁷

This paper avoids these pitfalls by aiming pretty low with the proposition it puts forward and, more importantly, by making sure that the suggested incremental change can be reconciled relatively well with current practice. The hypothesis is that a greater engagement of international law calls for national judges to think outside the box, that is, outside the “Westphalian box”, all the while continuing to work within the dualist legal framework of sovereignty. It is argued that only a slight adjustment in the methodology of interpretation and application of law is needed for domestic courts to better

Humphrey, ‘Foreword’, in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (University of Virginia Press, Charlottesville, 1973) p. vii.

- 10 C. A. Bradley, ‘Breard, Our Dualist Constitution and the Internationalist Conception’, 51 *Stanford Law Review* (1999).
- 11 118 S. Ct. 1352 (U.S.S.C. 1998), affirming *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1997), and *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994).
- 12 In that case, the United States Supreme Court refused to consider itself bound by the decision of the International Court of Justice providing for a provisional order to stay the execution of a murder convict, which was based on a *prima facie* violation of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, 24 April 1963, 596 U.N.T.S. 261.
- 13 H. M. Kindred, ‘The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principles Approach’, in O. E. Fitzgerald *et al.* (eds.), *The Globalized Rule of Law – Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) p. 5.
- 14 J. Brunnée and S. J. Toope, ‘A Hesitant Embrace: The Application of International Law by Canadian Courts’, 40 *Canadian Yearbook of International Law* (2002).
- 15 R. Provost, ‘Judging in Splendid Isolation’, 56 *American Journal of Comparative Law* (2008).
- 16 J. Harrington, ‘Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection’, 48 *McGill Law Journal* (2003).
- 17 Quite surprisingly, the exaggerated enthusiasm from the international legal academy has been picked up without much nuance or qualification by international commentators from the Department of Justice of Canada. See, for example, O. E. Fitzgerald, ‘Implementation of International Humanitarian and Related Law in Canada’, in Fitzgerald *et al.*, *supra* note 13, p. 625; E. Eid and H. Hamboyan, ‘Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical’, in *Legitimacy and Accountability in International Law* (C.C.I.L., Ottawa, 2005) p. 175.

engage international law. A reinforced argument of contextual interpretation constitutes the appropriate means to operationalise a systematic role for international law in domestic judicial decision-making. Part 2 recalls the Westphalian model and the dualist logic, and Part 3 examines the methodology of interpretation in general (3.1) and the international law argument of contextual interpretation in particular (3.2).

2. Westphalia and Dualism

As far as judges in most common law jurisdictions are concerned, the matrix within which states operate and international affairs are conducted continues to be based on the Westphalian model of international relations,¹⁸ at the centre of which is the *idée-force* of sovereignty.¹⁹ The legal by-products of this social construct are twofold: constitutional law and international law,²⁰ which correspond to the exercise of internal sovereignty (that of Jean Bodin)²¹ and external sovereignty (that of Emer de Vattel).²² The traditional stance, therefore, has constantly held that the Westphalian model of international relations, which is governed by the Vattelian legal structure, involves an international realm that is distinct and separate from the internal realms.²³ Geoffrey Palmer, while arguing that the situation is changing, provides the following adequate illustration: “[I]nternational law and municipal law have been seen as two separate circles that never intersect.”²⁴ To borrow from the lexicon of economics, the international plane is a *non-intersecting set* that has no inherent contact or knows no overlap with the other non-intersecting sets representing the domestic spheres of sovereign states.

The distinctiveness and separateness of the international / national realities explain two fundamental legal principles, one from international law and one from constitu-

18 Of course, Westphalia is an *aetiological myth* (i.e. a myth of origin), created by international society to explain the whens, wheres and hows of its becoming and its being. This acknowledgement, however, does not diminish in any way the most extraordinary semiotic effects of Westphalia on the consciousness of international society. See S. Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’, 8 *Australian Journal of Legal History* (2004); S. Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, 2 *Journal of the History of International Law* (2000).

19 See S. D. Krasner, ‘The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law’, 25 *Michigan Journal of International Law* (2004) p. 1077, who wrote: “Sovereignty is now the only game in town.”

20 See N. Walker, ‘Late Sovereignty in the European Union’, in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing, London, 2003) p. 3.

21 See S. Beaulac, ‘The Social Power of Bodin’s “Sovereignty” and International Law’, 4 *Melbourne Journal of International Law* (2003).

22 See S. Beaulac, ‘Emer de Vattel and the Externalization of Sovereignty’, 5 *Journal of the History of International Law* (2003).

23 See, generally, S. Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Martinus Nijhoff, Leiden, 2004).

24 G. Palmer, ‘Human Rights and the New Zealand Government’s Treaty Obligations’, 29 *Victoria University in Wellington Law Review* (1999) p. 59.

tional law. The first then is that a sovereign state is not entitled to invoke its internal law – which includes its constitutional structure²⁵ – in order to justify a breach of its international obligations.²⁶ Essentially, the 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, in fact a set of rules, concerns the administration of the relationship between the two systems.²⁷ To borrow from the lexicon of computer science this time, such a feature may be referred to as the *interface* between the two distinct and separate legal realities.

These rules determine, as a matter of law, how one legal system interacts with, 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. Accordingly, the rules on the status of international law within the jurisdiction of a sovereign state are domestic rules, usually deemed important enough to be part of constitutional law. As Francis Jacobs explained:

[T]he 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. It is true that domestic law may, under certain conditions, require or permit the application of treaties which are binding on the State, even if they have not been specifically incorporated into domestic law. But this application of treaties “as such” is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law. *Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances. It does not modify the fundamental principle that the application of treaties by domestic courts is governed by domestic law.*²⁸

This is, fundamentally, an application of the dualist logic. Mattias Kumm is right to point out that “[t]he very idea that the national constitution is decisive for generating

25 See R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th ed., vol. 1 (Longman, London, 1992) p. 254.

26 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 Article 27 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

27 See, generally, I. Seidl-Hohenveldern, ‘Transformation or Adoption of International Law into Municipal Law’, 12 *International and Comparative Law Quarterly* (1963).

28 F.G. Jacobs, ‘Introduction’, in F. G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (Sweet and Maxwell, London, 1987) p. xxiv (emphasis added). 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 U.S. legal system should be determined, at least to some extent, by international law itself”; Bradley, *supra* note 10, at 531.

the doctrines that structure the relationship between national and international law is dualist”.²⁹

In terms of judicial activities, the international / domestic dichotomy means that domestic courts and tribunals of sovereign states apply their domestic law, while the International Court of Justice and other international courts and tribunals apply international law. Put another way, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law. But this normative division does not mean that international judicial bodies cannot take into account domestic law, which is in fact an explicit source of international law under Article 38(1) of the Statute of the International Court of Justice,³⁰ or that domestic case-law does not influence their decisions as a secondary source of international law or as evidence of international customs.³¹ Conversely, no authority needs to be cited for the proposition that domestic judges may resort to international law when it has also become part of the laws of the land.³²

Such a mutual influence, however, does not modify the basic situation that the international judiciary applies the legal norms of its realm and that national judiciaries apply the legal norms of their realms. The international reality is distinct and separate from the internal reality and, therefore, the actualisation of international law through judicial decision-making is distinct and separate from the actualisation of domestic law through judicial decision-making. Thus, it is still assumed in North America 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 in effect become part of that domestic law, such as through implementing legislation – that international norms may have an impact on the interpretation and application of domestic law by domestic courts.³³ Strictly speaking, therefore, international law *qua* international law cannot be binding on national

29 M. Kumm, ‘Democratic Constitutionalism Encounters International Law: Terms of Engagement’, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2007) p. 258.

30 Statute of the International Court of Justice, 26 June 1945, U.N.T.S. 961, Article 38(1), enunciates the sources of international law, including in sub-paragraph (c) the so-called “general principles of law recognized by civilized nations”, which are drawn from the legal traditions of domestic jurisdictions.

31 Sub-paragraph (d) of Article 38(1) of the Statute of the International Court of Justice provides that judicial decisions – which was interpreted to include those of domestic courts – are a subsidiary source of international law.

32 If an authority was needed, the clearest judicial pronouncement in Canadian jurisprudence may be found in the *Reference re Secession of Quebec*, 2 S.C.R. 217 (1998) p. 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.” See also S. Beaulac, ‘On the Saying that International Law Binds Canadian Courts’, 29:3 *Canadian Council on International Law Bulletin* (2003).

33 See Beaulac, *supra* note 2.

judges,³⁴ whose judicial authority is constitutionally entrusted by and for a sovereign state. Put another way, international normativity cannot apply *per se* within domestic systems because courts are concerned with and competent over national not international law.³⁵ What norms from the international legal order can do, and indeed ought to do whenever appropriate, is to influence the interpretation and application of the laws of the land.³⁶ They should act as *persuasive authority*, that is, as material and information that is “regarded as relevant to the decision which has to be made by the judge, but [...] not binding on the judge under the hierarchical rules of the national system determining authoritative sources”.³⁷

This conception of the relation between international law and domestic law, in particular the judicial application of legal norms, is essentially dualist. Indeed, the two systems are not, in any real sense, part of an integrated legal order, one that falls within a monist logic. Rather, according to the still dominant understanding of the legal world, “different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system”.³⁸ It follows that to determine the legal status of international normativity within the domestic legal systems of sovereign states, one must be looking inwardly at the constitutional rules of reception. In the United States, for instance, unimplemented treaties have no direct effect generally, in spite of the *supremacy clause* in the American Constitution,³⁹ because of a presumption against self-executing treaties developed by case-law.⁴⁰ In Canada, while recent cases

34 See L. LeBel and G. Chao, ‘The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law’, 16 *Supreme Court Law Review (2nd)* (2002) p. 62.

35 See G. Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’, 92 *Hague Recueil* (1957) pp. 70–80.

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

37 C. McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’, 20 *Oxford Journal of Legal Studies* 499 (2000) pp. 502–503. Such a terminology is reminiscent of the “relevant and persuasive” doctrine, concerning the role of international law in the interpretation of the Canadian Charter of Rights and Freedoms, in Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, suggested by C. J. Dickson in *Reference re Public Service Employee Relations Act (Alberta)*, 1 S.C.R. 313 (1987), p. 349. On the role of international law in Canadian Charter interpretation, see S. Beaulac, ‘L’interprétation de la Charte: reconsidération de l’approche téléologique et réévaluation du rôle du droit international’, 27 *Supreme Court Law Review (2nd)* (2005).

38 Kumm, *supra* note 29, p. 257.

39 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.

40 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.

provide for more flexibility in using international law domestically,⁴¹ the orthodoxy remains: “International treaties and conventions are not part of Canadian law unless they have been implemented by statute.”⁴² As regards customary international law, most publicists opine that no express implementation is required.⁴³ In this case, the dualist rules of reception call for direct application.⁴⁴

3. Legal Interpretation and the Contextual Argument

At the risk of being accused of using clichés, one cannot but acknowledge that the challenges of globalisation and inter/ supra / transnational governance are calling the whole Westphalian model into question. This new reality requires a reengineered structure of public authorities with legal frameworks recognising the multifarious influences of norms. Thus one question is this: What are the changes required in the methodology of interpretation and application of law that would allow judges to better contribute to the actualisation of such normative inter-permeability? The following discussion starts with judicial interpretation in general (3.1) and then moves to the contextual argument more particularly (3.2).

3.1. Methodology of Legal Interpretation

A review of the general methodology of interpretation is certainly in order to highlight the discretionary way in which domestic courts resort to international legal norms. It may be trite, but let us recall first that the function of the judiciary, indeed no less than its constitutional mission in a British-style parliamentary liberal democracy, is the in-

1952). See also Restatement (Third) of the Foreign Relations Law of the United States, section 111.

41 See S. Beaulac, ‘Recent Developments on the Role of International Law in Canadian Statutory Interpretation’, 25 *Statute Law Review* (2004); A.W. La Forest, ‘Domestic Application of International Law in Charter Cases: Are We There Yet?’, 37 *University of British Columbia Law Review* (2004).

42 *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817 (1999) (hereinafter *Baker*) at 861. See 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*, A.C. 326 (1937), p. 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.”

43 In Canada, this issue is now finally settled, with the decision of the Supreme Court in *R. v. Hape*, 2 S.C.R. 292 (2007). See also, in other common law jurisdictions, T. Dunworth, ‘The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?’, 15 *Public Law Review* (2004); G. L. Neuman, ‘Sense and Nonsense About Customary International Law: A Response to Bradley and Goldsmith’, 66 *Fordham Law Review* (1997); L. Henkin, ‘International Law as Law in the United States’, 82 *Michigan Law Review* (1984).

44 See S. Beaulac, ‘Customary International Law in Domestic Courts: Imbroglia, Lord Denning, *Stare Decisis*’, in C. P. M. Waters (ed.), *British and Canadian Perspectives on International Law* (Martinus Nijhoff, Leiden, 2006) p. 379.

terpretation and application of domestic law with a view to settling disputes over which it has jurisdiction, be it territorial, personal or universal jurisdiction. With respect to legal norms based on legislation, the Parliament deliberates on and adopts them, and the courts interpret and apply them.⁴⁵ In this process of statutory interpretation, at the centre of which is the structural notion of parliamentary intention, courts have available several methods of interpretation.⁴⁶ They include textual interpretation, teleological interpretation, historical interpretation, as well as general maxims of interpretation based on logics and several types of arguments of legislative context, be it internal or external (from the use of parliamentary debates to the use of legal norms from the international order), and the pragmatic (or consequentialist) arguments like *ab absurdo* or the presumptions of legislative intent.

The point here is not to enumerate an exhaustive list of interpretative methods. Rather, it is to emphasise on how these arguments, in what may be called the “judges’ toolbox of construction”, are all available to assist in ascertaining the intention of the constituent (e.g. Parliament), but none is obligatory or constraining. By definition, in fact, arguments of interpretation are just that, *arguments*, which may or may not be used by a court, the mission of which is to interpret and apply legal norms, like those found in legislation. Instead, all of these interpretative *conventions* – which are sometimes (regrettably) referred to as “rule”, although there is no normative element into them – exist to guide and to justify the outcome of the process of construction.⁴⁷ Courts will give the persuasive force to each of the different interpretative arguments deemed relevant in a case based on a series of factors, one of which being the general policy consideration of justice.⁴⁸ No one canon of interpretation will “have to” be considered and will “have to” be given a certain weight (let alone a determinative weight) by a court.⁴⁹ Put another way, it would be most awkward to have a litigant argue in front of a judge that he or she “must” adopt the textual argument or the teleological argument or the historical argument in his or her interpretation, or that he or she “must” assign a certain weight to one or many of the different methods of interpretation. The same applies for the international law argument, which may or may not be used by a court in a particular instance, which may or may not be given much weight by a court depending on the

45 See, generally, E. Freund, ‘Interpretation of Statutes’, 65 *University of Pennsylvania Law Review* (1917).

46 See, generally, S. Beaulac, *Handbook on Statutory Interpretation – General Methodology, Canadian Charter and International Law* (LexisNexis, Markham, 2008).

47 On the dual function, heuristic and justificatory, of the methods of legal interpretation, see S. Beaulac and P.-A. Côté, ‘Driedger’s “Modern Principle” at the Supreme Court of Canada: Interpretation, Justification, Legitimization’, 40 *Revue juridique Thémis* (2006).

48 See R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, Markham, 2008) p. 3.

49 See the classic piece by M. Radin, ‘Statutory Interpretation’, 43 *Harvard Law Review* (1929–1930) p. 881.

circumstances. This is the true nature of statutory interpretation and, to a large extent, of legal interpretation in general.⁵⁰

3.2. Contextual Argument of Interpretation and International Law

As an argument of interpretation, therefore, the legal norms of the international legal order are traditionally used in a *soft way*, to borrow from Mattias Kumm, that is to say, “by providing a *discretionary point of reference for deliberative engagement*”⁵¹ Kumm provides examples from the United States of such a way to resort to international law, including the youth capital punishment case of *Roper v. Simmons*⁵² and the affirmative action programmes case of *Grutter v. Bollinger*,⁵³ to which one could add the sodomy criminal legislation case of *Lawrence v. Texas*.⁵⁴ Unlike its southern neighbour, where resort to foreign and international law remains quite controversial,⁵⁵ Canada has adopted such a discretionary way to utilise extra-national legal norms in constitutional interpretation for many years now.⁵⁶

A recent example is the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*,⁵⁷ where the Supreme Court of Canada held that it was useful to refer to international law in interpreting the scope of the “principles of fundamental justice” in Section 7 of the Canadian Charter of Rights and Freedoms.⁵⁸ Under the heading “The International Perspective”, the Court writes: “A complete understanding of the Act and the Charter requires consideration of the international perspective.”⁵⁹ This international

50 See, generally, J. Wróblewski, ‘L’interprétation en droit: théorie et idéologie’, 17 *Archives de Philosophie du droit* (1972); O. W. Holmes, ‘The Theory of Legal Interpretation’, 12 *Harvard Law Review* (1898–1899).

51 Kumm, *supra* note 29, p. 278 (emphasis in original).

52 *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

53 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

54 *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003).

55 Perhaps no legal doctrinal text better demonstrates the deep division among the members of the United States Supreme Court on these issues than the piece in I-CON summarising the conversation between two Justices that occurred at an event organised by the U.S. Association of Constitutional Law and held at the Washington College of Law, American University – ‘The Relevance of Foreign Legal Material in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer’, 5 *International Journal of Constitutional Law* (2005).

56 Some of the clearest cases on this practice at the Supreme Court of Canada include: *Slaight Communications Inc. v. Davidson*, 1 S.C.R. 1038 (1989); *R. v. Keegstra*, 3 S.C.R. 697 (1990).

57 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 1 S.C.R. 3 (2002) (hereinafter *Suresh*). See also S. Beaulac, ‘The *Suresh* Case and Unimplemented Treaty Norms’, 15 *Quebec Journal of International Law* (2002).

58 *Supra* note 37. Section 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

59 *Suresh*, *supra* note 57, pp. 37–38.

perspective involved invoking (without deciding the issue) that the international prohibition on torture was a peremptory norm of customary law (that is, *jus cogens*),⁶⁰ as well as taking into consideration three international conventions: (i) the International Covenant on Civil and Political Rights,⁶¹ (ii) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶² and (iii) the Convention Relating to the Status of Refugees.⁶³ At the end of the day, however, the Supreme Court did not feel bound in any way to the international perspective as it concluded that the Canadian domestic norm was different than the international legal norm under Section 7 of the Canadian Charter, the former providing for an absolute prohibition to deport if there is a risk of torture while the latter was interpreted to be a quasi-absolute prohibition that accepts the validity of the national security exception provided for in the Canadian legislation in extreme circumstances.

The *Suresh* case confirms the trend that began with *Baker v. Canada (Minister of Citizenship and Immigration)*⁶⁴ towards resorting to international law through the argument of contextual interpretation, be it in constitutional interpretation or in legal interpretation in general.⁶⁵ Interpreting Section 7 of the Charter in its entire context, therefore, the Supreme Court of Canada in *Suresh* identified the international legal norms that “best [inform] the content of the principles of fundamental justice”.⁶⁶ Other statements in the decision show that international law was utilised as a contextual argument of construction: “The Canadian and international perspectives in turn inform our constitutional norms;”⁶⁷ “Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests.”⁶⁸ Accordingly, in ascertaining the intention of the normative constituent (in a constitution or a statute) for the purpose of legal interpretation, a court may choose to resort to international law as an element of context. A court does not “have to” do it though, no more than it “must” take into account any other argument of interpretation, be it also contextual, be it textual, teleological or else. The discretion involved in resorting to international law in domestic

60 This notion is defined in Article 53 of the Vienna Convention on the Law of Treaties, *supra* note 26.

61 999 U.N.T.S. 171 (1976).

62 23 I.L.M. 1027 (1984), minor changes in 24 I.L.M. 535.

63 189 U.N.T.S. 150 (1951).

64 *Baker*, *supra* note 42. Other cases at the Supreme Court of Canada confirm this trend: *United States v. Burns*, 1 S.C.R. 283 (2001); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2 S.C.R. 241 (2001). See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 1 S.C.R. 76 (2005); *R. v. Hape*, *supra* note 43.

65 The present author provides a review of this trend in S. Beaulac, ‘International Treaty Norms and Driedger’s “Modern Principle” of Statutory Interpretation’, in *Legitimacy and Accountability in International Law* (C.C.I.L., Ottawa, 2005) p. 144.

66 *Suresh*, *supra* note 57, p. 45.

67 *Ibid.*

68 *Ibid.*

decision-making constitutes the most important challenge to the inter-permeability of norms between the international and the national legal systems.

Now, to recap: Given that the Westphalian model of international relations continues to be the accepted paradigm – the “Westphalian box” that remains – and that, therefore, the constitutional mandate of domestic courts is to interpret and apply the law of the land to settle disputes over which they have jurisdiction, what are the changes in the methodology of judicial decision-making needed to circumscribe and steer the inherent discretion in using the international law argument in domestic cases, with a view to promoting recourse to such extra-national normativity? In fact, only a slight adjustment in the contextual method of interpretation is required to get a better, more systematic, involvement of international legal norms in domestic courts. Again, pertinent is Mattias Kumm’s work, showing that international human rights law (and, surely, international law at large) can be connected to constitutional interpretation (and, surely, to legal interpretation at large) in a *strong way*, or at least in a “stronger” way, one that is less weak than the purely discretionary recourse to international law.⁶⁹ He introduces the idea of the *rules of engagement*⁷⁰ for international normativity, which “characteristically take the form of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort.”⁷¹

69 Kumm, *supra* note 29, pp. 279–281. In fact, he refers to two situations where international human rights can be used in constitutional interpretation in a stronger way. First is the case where the text of a constitutional, itself, requires domestic courts to resort to international normativity, such as in South Africa. The other situation is recourse by means of a “rebuttable *presumption* that domestic constitutional rights are to be interpreted in a way that does not conflict with international law” (p. 280) (emphasis in original).

70 *Ibid.*, p. 292. Kumm distinguishes this stronger way to resort to international law from the discretionary weaker way referring to methods of interpretation. He writes: “The idea of a ‘discourse between courts’ too is a response to this shift. It captures the reasoned form that engagement with international law frequently takes. But it too falls short conceptually. It is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them” (*ibid.*). On the latter point, about the dialogue or discourse among courts and judges through international or transnational networks, see the following literature: M. Toufayan, ‘Identity, Effectiveness and “Newness” in Transjudicialism’s Coming of Age’, 31 *Michigan Journal of International Law* (2009); V. C. Jackson, ‘Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse’, 65 *Montana Law Review* (2004); A.-M. Slaughter, ‘A Global Community of Courts’, 44 *Harvard International Law Journal* (2003); C. McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’, 20 *Oxford Journal of Legal Studies* (2000); C. L’Heureux-Dubé, ‘The Importance of Dialogue: Globalization and the International Impact on the Rehnquist Court’, 34 *Tulsa Law Journal* (1998); A.-M. Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review* (1994).

71 Kumm, *supra* note 29. To illustrate this point, he utilises an example from Germany, the case of *Görgülü v. Germany*, (2004) 2 Bv.R. 1481/04, where the Constitutional Court confirmed the role of international normativity in these terms: “[T]he Convention provision as interpreted by the ECHR must be taken into account in making a decision; the court must at least duly consider it” (para. 62).

The suggestion seems to be that the fact that there are legal norms from the international order changes, as it were, the regular dynamic involved in the normal process of interpretation and application of domestic law. Even though the loyalty of courts continues to reside within the internal realm of a sovereign state’s constitutional law, the existence of international normativity on the subject-matter in a case ought to force domestic adjudicators to give it due consideration.⁷² Put another way, recourse to international law ceases to be fully discretionary and, in a sense, begins to be seen as obligatory. Without putting into question the dualist legal framework within which the international and the national orders interact, the proposed adjustment requires a re-assessment of the inherent authority of the international law argument in the process of legal interpretation. This is, essentially, the suggested thought, albeit a modest one, outside the “Westphalian box” that remains.

Keeping the present debate rooted in domestic legal practice, the contextual argument of interpretation constitutes the most appropriate means to operationalise a systematic role for international law in domestic courts.⁷³ The concept of context in legal interpretation is sufficiently flexible to allow a range of authority to different arguments.⁷⁴ Some elements of legislative context, for instance, are fully optional and are generally given little persuasive force, such as the preamble of a statute.⁷⁵ Other elements of context in legal interpretation are *de facto* almost obligatory where they are argued in a case, such as parliamentary debates (legislative history) in statutory interpretation.⁷⁶ Accordingly, an augmented role for international law in domestic legal interpretation would see the international law argument of context be given a (quasi) automatic con-

72 To help theorise this kind of new loyalty of domestic judicial actors *vis-à-vis* the international legal order, it may be useful to recall George Scelle’s doctrine of “*dédoublement fonctionnel*”, usually translated as “role splitting” – see G. Scelle, ‘Le phénomène juridique du *dédoublement fonctionnel*’, in W. Schätzel and H.-J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation, Festschrift für Hans Wehberg zu seinem* (Klostermann, Cologne, 1956) p. 324; G. Scelle, ‘Règles générales du droit de la paix’, 46 *Hague Recueil* (1933) p. 356. Essentially, if a judge feels that he or she is not only a participant in the realisation and actualisation of domestic normativity, but also of international normativity, there is more of a legitimate claim to resorting to the latter in all cases of interpretation and application of domestic law. See also A. Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law’, 1 *European Journal of International Law* (1990) pp. 228–229.

73 See S. 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* (Irwin Law, Toronto, 2006) p. 331.

74 On context in legal interpretation, in general, see P.-A. Côté, S. Beaulac and M. Devinat, *Interprétation des lois*, 4th ed. (Thémis, Montreal, 2009).

75 See A.-F. Bisson, ‘La Disposition préliminaire du Code civil du Québec’, 44 *McGill Law Journal* (1990); A.-F. Bisson, ‘Préambule et déclaration de motifs ou d’objets’, 40 *Revue du Barreau* (1980).

76 See S. Beaulac, ‘Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?’, 43 *McGill Law Journal* (1998); S. Beaulac, ‘Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates’, 63 *Saskatchewan Law Review* (2000).

sideration when it is shown to be relevant. The weight given to the international law contextual argument would then vary depending on a series of factors. As regards international treaty law in a jurisdiction like Canada that requires implementation, one main factor would be the degree of domestic incorporation, from explicit transformation by means of implementing legislation to indirect incorporation by merely referring to the underlying international legal values.⁷⁷

A case at the Supreme Court of Canada in 2005 illustrates this possibility of engaging international law through the international law contextual argument of legal interpretation in a more systematic fashion. The decision in *Mugesera v. Canada (Minister of Citizenship and Immigration)*⁷⁸ concerned the interpretation of the provisions of the Canadian Criminal Code⁷⁹ on the crimes of incitement to murder, genocide and hatred and the crimes against humanity. First, with respect to genocide, the Court writes: “Genocide is a crime originating in international law. International is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide.”⁸⁰ Later, it further notes: “The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada’s treaty obligations was emphasized in [*Baker*]⁸¹”,⁸² which is a case involving general legal interpretation where international law was considered as an element of context. In the second part of the case, on the crimes against humanity, the Court is even bolder as to the necessity to resort to international normativity, including the way in which it was developed by international case-law, in interpreting the relevant provisions of domestic legislation:

Though the decisions of the [International Criminal Tribunal for the former Yugoslavia] and the [International Criminal Tribunal for Rwanda] are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law

77 See Beaulac, *supra* note 2, where the present author proposes an analytical scheme of the persuasive force of international treaty norms based on their degree of incorporation within Canada’s domestic legal system – “Simply put, the clearer it is that the parliamentary authority intended to give effect to international law through the transformation of the convention, the more weight a court should recognize and attribute to such norms in the process of ascertaining the meaning of the statutory provision” (p. 260). In the end, it was suggested that there are four categories of context in which treaty norms fall; in a decreasing order of persuasive authority, they are: (i) internal-immediate context, (ii) internal-extended context, (iii) external-immediate context, (iv) external-extended context.

78 *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 100 (2005) (hereinafter *Mugesera*).

79 Criminal Code, R.S.C. 1985, c. C-45 (hereinafter Criminal Code) s. 27 (1)(a.1)(ii), (a.3(ii) (on incitement to murder, genocide and hatred) and s. 7 (3.76), (3.77) (on crimes against humanity).

80 *Mugesera*, *supra* note 78, para. 82 (emphasis added).

81 *Baker*, *supra* note 42.

82 *Mugesera*, *supra* note 78, para. 82.

with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions.⁸³

It is noteworthy that the Criminal Code provisions defining crimes against humanity explicitly incorporate the applicable international legal norms,⁸⁴ making it somewhat easier for the Supreme Court of Canada to engage international normativity in such a direct and forceful fashion.

4. Conclusion

As a concluding remark, it should be emphasised again that the proposal presented is modest indeed, the gist of it amounting to a slight adjustment in the methodology of interpretation and application of domestic law, with a view to promoting a greater role for international law. A good part of the paper was spent showing how the process of domestic judicial decision-making remains based on the Westphalian model and the dualist legal framework, which means that courts are concerned with and competent over national law, not international law. The soft way to resort to international legal norms through the argument of contextual interpretation proves inadequate because it is fully discretionary. However, just a minor realignment of authority with respect to this element of legal context would allow for a systematic use of international law, one that engages extra-national normativity in a stronger way.

This is essentially to say that a mere incremental change to legal interpretation is all that is needed to make, at the end of the day, a world of difference on the domestic role of international law. Any more ambitious proposal, I am afraid, would bring the debate too much outside the current domestic legal practice of courts and government actors and, accordingly, would be doomed to convince nobody but a handful of like-minded avant-gardist academics.

83 *Ibid.*, para. 126.

84 Section 7(3.76) of the Canadian Criminal Code, *supra* note 79, reads: “For the purposes of this section, [...] ‘crime against humanity’ means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, *constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations*” (emphasis added).