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On the Saying that "International Law Binds Canadian Courts"

by Stéphane Beaulac[*]

In recent years, the issue of the national application of international law has caused much ink to flow in Canada. It seems that a large part of the polemic among academics resolves around whether or not "international law" is *binding*. The traditional stance that international law is *not* binding was most clearly stated by the Supreme Court in *Ordon Estate v. Grail*.[1] Applying the presumption of conformity, Iacobucci and Major JJ. wrote: "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."[2] In an article co-authored with Gloria Chao, Justice LeBel reminded us that "international law is generally non-binding or without effective control mechanisms."[3]

However, this traditional position has recently been challenged, presumably following the groundbreaking decision in *Baker v. Canada (Minister of Citizenship and Immigration)*.[4] In the 2002 case of *Suresh v. Canada (Minister of Citizenship and Immigration)*,[5] for instance, the Supreme Court seems to suggest that international is "binding" if implemented ——"International treaty norms are *not*, strictly speaking, *binding* in Canada *unless* they have been incorporated into Canadian law by enactment."[6] Similarly, Rosenberg J. of the Ontario Court of Appeal referred to "the established principle that international conventions are *not binding* in Canada *unless* they have been specifically incorporated into Canadian law."[7]

Karen Knop, for her part, has suggested that the relevance of international law "is not based on bindingness," which means that "the status of international and

*(See **International Law Binds Canadian Courts** on page 4)*

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[1] [1998] 3 S.C.R. 437.
[2] *Id.*, at 526. [emphasis added]
[3] L. LeBel & G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 Supreme Court L. Rev. (2nd) 23, at 62.
[4] [1999] 2 S.C.R. 817.
[5] [2002] 1 S.C.R. 3.
[6] *Id.*, at para. 60. [emphasis added]
[7] *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107, at para. 73. [emphasis added]
[8] K. Knop, "Here and There: International Law in Domestic Courts" (2000), 32 New York U. J. Int'l L. & Pol. 501, at 520. [emphasis added]

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On the Saying that "International Law Binds Canadian Courts"

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foreign law becomes similar, both being *external sources of law*."[8] In fact, Knop challenged the binding / non-binding distinction — what she called the "on / off switches for the domestic application of international law"[9] — and suggested an alternative approach, that she argued springs from the *Baker* case, "where the authority of international law is persuasive rather than binding."[10] This proposition seemed to "rub"[11] the wrong way some international legal scholars, one of them being Stephen Toope.

Toope has argued that "the dichotomy that Knop sets up between a traditional focus on international law as 'binding' on domestic courts, and international law as 'persuasive authority' is, I think, a false dichotomy."[12] Instead, he opined that "international law can be both"[13] binding and persuasive because "international law is both 'foreign' and 'part of us.'"[14] Toope further argued that "international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law,' because international law is partly *our* law."[15]

Whether or not one is in agreement with Knop's comparative law metaphor as regards all international law rules, it is still accurate to hold that, strictly speaking, international law does not bind Canada, or any sovereign states for that matter. The fundamental reason behind this lack of obligatory legal force relates to the so-called Westphalian model of international relations, which very much remains at the centre of the present state system and hence the present international law system.

Tenets of the international law system

The matrix in which international affairs are conducted and in which international law operates is based on the Westphalian model of international relations, at the centre of which is the *idée-force* of sovereignty.[16] As Richard Falk explained, it is "by way of the Peace of Westphalia that ended the Thirty Years' War, that the modern system of states was formally established as the *dominant world order framework*."[17] Similarly, Mark Janis wrote: "Sovereignty, as a concept, formed the cornerstone of the edifice of international relations that 1648 raised up. Sovereignty was the crucial element in the peace treaties of Westphalia."[18]

The international reality consists of a community of sovereign states (or nations) which are independent from one another and have their own wills and finalities as corporate-like representatives of the peoples living on their territories. The 18th century author Emer de Vattel proposed an international legal framework to regulate the relations between states in his masterpiece *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*.[19] His seminal contribution is a scheme in which sovereign states are the sole actors on the international plane and thus the only subjects of international law; it is also based on the formal equality of states and on a notion of national independence that involves non-interference in the domestic affairs of other states.[20] This is very much indeed the basic theory still underlying modern international law.

Accordingly, 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 realm. John Currie explained thus: "Public international law is not so much

[9] *Id.*, at 515.
[10] *Id.*, at 535.
[11] "Rub" is indeed the word Toope himself used in describing the effect that Knop's paper had on him — see S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001), 80 Canadian Bar Rev. 534, at 535.
[12] *Id.*, at 536.
[13] *Ibid.*
[14] *Id.*, at 540.
[15] S.J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U. New Brunswick L.J. 11, at 18. [emphasis added]

[16] See, generally, S. Beaulac, "The Westphalian Legal Orthodoxy — Myth or Reality?" (2000), 2 J. History Int'l L. 148.
[17] R.A. Falk, Law in an Emerging Global Village: A Post-Westphalian Perspective (Ardsley, U.S.: Transnational Publishers, 1998), at 4. [emphasis added]
[18] M.S. Janis, "Sovereignty and International Law: Hobbes and Grotius," in R.St.J. Macdonald (ed.)," Essays in Honour of Wang Tieya (Dordrecht: Martinus Nijhoff, 1994), 391, at 393. [emphasis added]
[19] E. de Vattel, Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains, 2 vols. (London: n.b., 1758).
[20] See, generally, S. Beaulac, "Emer de Vattel and the Externalisation of Sovereignty" (2003), 5 J. History Int'l L. (forthcoming).

an area or topic of the law as it is "*an entire legal system, quite distinct from the national legal systems* that regulate daily life within states."[21] As far as the relation between international law and domestic law is concerned, there is no direct connection because the two systems are distinct and separate—"public international law exists outside and independent of national legal systems."[22] Thus quite appositely, Karen Knop schematically wrote that "domestic law is 'here' and international law is 'there.'"[23]

Domestic courts and international law

Each of these two distinct and separate realms of the international and the internal of course has its own judiciary. At the international level, the *Charter of the United Nations*, at article 92, provides that: "The International Court of Justice shall be the principal judicial organ or the United Nations." At the national level, to take Canada as an example, there exists a whole judicial structure of domestic courts and tribunals, both provincial and federal, at the pinnacle of which is the Supreme Court of Canada.

The more important point here is that both sets of courts have their own sets of legal norms, that is, the International Court of Justice and other international courts and tribunals apply international law, and the Supreme Court and other Canadian courts and tribunals (or any domestic courts of sovereign states for that matter) apply their domestic law.[24] It does not mean, however, that international judicial instances cannot take into consideration 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*, or that domestic case law does not influence their decisions as a secondary source of international law and even as evidence of international customs.

Although it is not an aspect usually dwelled upon in judicial decisions, the Supreme Court had such an opportunity to consider its role vis-à-vis the international legal system in the *Reference re Secession of Quebec*.[25] The *amicus curiae* Yves Le Boutillier argued that the Court had no jurisdiction to answer questions of "'pure' international law."[26] The response, significant for the present purposes, was that the "Court would not, in providing an advisory opinion in the context of a reference, be purporting to 'act as' or substitute itself for an international tribunal."[27] Thus, as Justice Louis LeBel and Gloria Chao observed, "the key limits to the [Supreme] Court's use [of these norms] is that it has never seen itself as a final arbiter of international law."[28]

In the *Reference re Secession of Quebec*, an argument was also made that the Court had no jurisdiction to "look at international law"[29] to decide the questions at issue. "This concern is groundless," was the reply. "In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system."[30] Therefore, treaty norms of the distinct and separate international legal system may have an effect within the Canadian domestic legal system. It is important to acknowledge, however, that such a legal effect will not at all be automatic or obligatory. Indeed, as Bill Schabas pointed out, Canadian courts may use "international law to the extent that it is also part of the 'Laws of Canada.'"[31]

Put another way, domestic courts interpret and apply domestic law, and it is to the extent that the constitutional and other domestic legal rules allow international law to be part of domestic law (and that it has in effect become part of that domestic law) that international norms may have an impact on the interpretation and application of domestic law by domestic courts. In that sense, international law can never "bind" a sovereign state like Canada, or more accurately, international law can never be "binding" in or within the domestic legal system because domestic courts have jurisdiction over national law, not international law. What international law can do, and indeed should do as much as possible, is to "influence" the interpretation and application of domestic law, the degree of which will depend on the extent that international law "is also part of the 'Laws of Canada.'"[32]

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[21] J. Currie, Public International Law (Toronto: Irwin Law, 2001), at 1. [emphasis added]
[22] *Ibid.*
[23] K. Knop, supra, note 8.
[24] For the sake of completeness, it must be added that, of course, Canadian private international law can dictate that foreign domestic law will apply to a particular situation. This does not change the basic proposition, however, because Canadian courts fundamentally resort, even in such cases, to Canadian domestic law in the first instance.
[25] [1998] 2 S.C.R. 217.
[26] *Id.*, at 234.
[27] *Ibid.*
[28] L. LeBel & G. Chao, supra, note 4, at 59.
[29] *Supra*, note 26, at 235.
[30] *Ibid.*
[31] W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000), 79 Canadian Bar Rev. 174, at 176.
[32] *Ibid.*

The "influence" of international law on the interpretation and application of Canadian law can also be put in terms of the determination of the "persuasive force" of international law or the evaluation of the "weight" of the international law argument. This approach to the domestic use of international law is not an endorsement of the proposition put forward by Karen Knop based on the transgovernmental model and the comparative law methodology. It shares, however, the belief that international law, by definition, cannot "bind" the courts of sovereign states. ◅

Case Comment

UPS v. Canada

On November 22, 2002, the Arbitral Tribunal* constituted under NAFTA Chapter 11 to consider the complaint of United Parcel Service of America Inc. (UPS) against Canada (and its monopoly, Canada Post Corporation) released its award on jurisdiction (http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf). The results are mixed. Some of Canada's challenges to jurisdiction were successful; the rest were either held to be moot, were dismissed, or were joined to the merits. In dismissing some of UPS's claims, the Tribunal noted that Article 1116 of NAFTA only conferred jurisdiction with respect to violations of investors' rights as set out in Section A of Chapter 11. UPS had argued that the reference in Article 1116(1)(b) to Article 1502(3)(a) opened up the whole Agreement to potential investor claims. The Tribunal further held that it was bound by the Free Trade Commission's July 31, 2001 Interpretation that stated:

The concepts of "fair and equitable treatment" and "full protection and security" [set out in Article 1105(1)] do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

The Tribunal observed that regulating anticompetitive behaviour was not required under customary international law.

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The views of the author are his alone. ◅

*The Tribunal consists of Dean Ronald A. Cass, L. Yves Fortier and Justice Kenneth Keith (President).

Commentaire d'arrêt

Sylvie Gravelle Prize

The Sylvie Gravel Prize was established in 1986 in recognition of Sylvie Gravelle's contribution to the Canadian Council on International Law. The annual prize of $200 is awarded to a graduate student in law at the University of Ottawa for the best Masters thesis or Memorial in public or private international law.

This year's prize was awarded to Sophie Lefrançois, whose Memorial is entitled "Le droit au retour des réfugiés palestiniens en Israël".

Past recipients include : Parimal Kasbekar (1985-86), Grace Ntieyong Akpan (1988-89), Steven MacDonald (1989-90), Grégoire Bisson ((1990-91), Gang Wu (1991-92), Abhimanyu Jalan (1992-93), Satinder Cheema (1993-94), Oxana Selska (1994-95), Normand Bonin (1995-96), Ausma Khan (1996-97), Philippe Lortie (1996-97), Stéphane Jean (1997-98), Julie Boulanger et Frédérique Couette (1998-99), Jean-Paul Gakwerere (2000-2001). ◅

Prix Sylvie Gravelle

Le prix Sylvie Gravelle fut établi en 1986 en mémoire de Sylvie Gravelle pour sa contribution au Conseil canadien de droit international. Ce prix annuel de 200 $ est accordé à une étudiante ou à un étudiant aux études supérieures de l'Université d'Ottawa pour le meilleur mémoire ou la meilleure thèse de maîtrise en droit, en français ou en anglais, en droit international, public ou privé.

Cette année, le prix Sylvie Gravelle fut accordé à Mlle Sophie Lefrançois. Sa mémoire portait sur « Le droit au retour des réfugiés palestiniens en Israël ».

Les anciens gagnants du prix inclus : Parimal Kasbekar (1985-86), Grace Ntieyong Akpan (1988-89), Steven MacDonald (1989-90), Grégoire Bisson ((1990-91), Gang Wu (1991-92), Abhimanyu Jalan (1992-93), Satinder Cheema (1993-94), Oxana Selska (1994-95), Normand Bonin (1995-96), Ausma Khan (1996-97), Philippe Lortie (1996-97), Stéphane Jean (1997-98), Julie Boulanger et Frédérique Couette (1998-99), Jean-Paul Gakwerere (2000-2001). ◅