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4

Conforming Legal Interpretation Based on International Law: The Use of Unwritten Principles, the Example of Equality of Arms

STÉPHANE BEAULAC*

I. Preliminary Matters

The initial challenge in addressing these issues, of course, concerns the terminology used, which would oppose *unwritten* principles (presumably vague and uncertain), on the one hand, to *written* rules (deemed clear and precise), on the other. Setting up the problem as such, resorting to a simple binary reasoning, if not a simplistic dichotomy (be it genuine, exaggerated or false) brings to mind the classic Wittgensteinian insight,[1] that the limits of one's language are, indeed, the limits of one's world.[2] Dwelling on the same theme in his book *Eunomia*, University of Cambridge Professor Philip Allott once wrote that, '[o]ur words make our worlds', and that in fact, '[t]o choose our words is to choose a world'.[3]

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[1] Naturally, writing this chapter in Austria, at the University of Graz, it was quite fitting to start with a reference to one of its most celebrated contemporary philosophers, also an alumni of the University of Cambridge, like me.

[2] The quote from the original book: 'Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt' – see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* [reprinted with a few corrections] (New York, Harcourt, 1933) s 5(6).

[3] Philip Allott, *Eunomia – New Order for a New World* (Oxford, Oxford University Press, 1990) 6.

Short of dispensing with them,[4] let me suggest at the outset that it might be appropriate, perhaps more useful to see principles, along with rules,[5] on a spectrum, that is to say on a sort of continuum.[6] Thus beyond the written-unwritten dichotomy, (i) these norms could be sometimes expressly and directly linked to the language of the normative instrument (such as a constitution or an international treaty); (ii) while in many other instances they would be connected more or less remotely to the letter of the law; and finally, (iii) on rare occasions, while they would be deemed fundamental in a material sense,[7] there could be no textual support at all for them in the constitution or in conventional law.

For our purposes, it is mainly the third category of situations that is of interest, what author Mark Walters referred to as *freestanding* principles,[8] with no textual anchoring to a constitutional or international document. Also relevant here are the situations in the second category, what author Charles Black called *structural* principles,[9] but only those where the inference is tenuous, merely deriving from the spirit of the constitutional or conventional instrument.[10] Accordingly, for the sake of clarity – and in spite of various terminology in legal literature (eg underlying, implied, hidden, invisible, extra-textual[11]) – the expression

[4] Interestingly, there are arguments highlighting the illusion (even uselessness) of legal principles. See Larry Alexander, 'Legal Objectivity and the Illusion of Legal Principles' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 115.

[5] For the present purposes, it is unnecessary to distinguish between rules and principles, which classic formulation (though there are others) comes from Ronald Dworkin's work. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977); and Ronald Dworkin, *Law's Empire* (London, Fontana, 1986).

[6] This conceptualisation was well summarised, recently, by my University of Montreal colleague Han-Ru Zhou, 'Legal Principles, Constitutional Principles, and Judicial Review' (2019) 67 *American Journal of Comparative Law* 889.

[7] On material constitution, as opposed to formal constitution, see Julian Arato, 'Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations' (2012) 10 *New York University International Journal of Constitutional Law* 627.

[8] Mark D Walters, 'The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91. See also, in general, Lawrence H Tribe, *The Invisible Constitution* (Oxford, Oxford University Press, 2008); and David A Strauss, *The Living Constitution* (Oxford, Oxford University Press, 2010).

[9] Charles L Black Jr, *Structure and Relationship in Constitutional Law* (Baton Rouge, Louisiana State University Press, 1969). See also, in general, Thomas C Grey, 'Do We Have an Unwritten Constitution?' (1975) 27 *Stanford Law Review* 703; and Jack M Balkin, *Living Originalism* (Cambridge, Harvard University Press, 2011). In the Canadian context, for instance, one author has recently enumerated the numerous foundations of unwritten constitutional principles: '[T]heir source [is found] in "the general object and purpose of the Constitution", the preambles of the *Constitution Act, 1867* and *1982*, the operative provisions of the Constitution, the Constitution's architecture, the United Kingdom's and Canada's constitutional history, the common law, practice, and logic' [footnotes omitted]. See Vanessa A MacDonnel, 'Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making' (2019) 65 *McGill Law Journal* 175, 179.

[10] Using the terminology of '*principes non-écrits*' (ie unwritten principles), French theorist Jean Boulanger had early on linked them to the *spirit* underlying the letter of the law. See Jean Boulanger, 'Principes généraux du droit et droit positif' in *Le droit privé français au milieu du XXe siècle: Études offertes à Georges Ripert*, vol 1 (Paris, Pichon and Durand-Auzias, 1950) 51, 67.

[11] See Rosalind Dixon and Adrienne Stone, 'The Invisible Constitution in Comparative Perspective' in Dixon and Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge, Cambridge University Press, 2018) 3.

unwritten principles shall be employed as encompassing freestanding principles, as well as (tenuously) structural principles, at the end of the sliding scale, with no, or almost no connection with constitutional or international texts.[12]

Another important preliminary point, with a view to providing focus in this chapter, is the relationship between international normativity and (constitutional) domestic law,[13] what I like to call *interlegality*.[14] Professor André Nollkaemper of the University of Amsterdam, who has written extensively on the subject,[15] has aptly suggested that beyond the theories known as monism and dualism, the national use of international law calls upon diversity of approaches to overcome and bridge the 'divide' between these two spheres.[16] I have myself suggested that, at least in the Anglo-Saxon tradition, the prevalent understanding continues to see, a priori, the international and the national legal realities as separate and distinct, forming non-intersecting sets,[17] the relationships of which are guided by a web of practices that are specific to every state.[18]

As I have written elsewhere,[19] it remains true in most, if not in all common law countries – Canada, Australia, UK, etc – that it is if, and actually only to the extent that national rules of reception allow international law to be part of domestic law, be it through a monist or dualist-type of reasoning, that international norms may have a direct legal effect in regard to domestic law. It follows that international law per se does not, in fact cannot be binding on domestic judges, who form part of the national judiciary and, indeed, are mandated by the Constitution to interpret and apply the law of the land (not international law).[20] In short, be it conventional

[12] On the different types of gaps and silences in constitutional texts, see Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *New York University International Journal of Constitutional Law* 922.

[13] See eg Dinah Shelton (ed), *International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (Oxford, Oxford University Press, 2011); and David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge, Cambridge University Press, 2009).

[14] See Stéphane Beaulac, 'Constitutional Interpretation: On Issues of Ontology and of Interlegality' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford, Oxford University Press, 2017) 867; and Stéphane Beaulac, 'Interlégalité et réception du droit international en droit interne canadien et québécois' in Stéphane Beaulac and Jean-François Gaudreault-DesBiens (eds), *JurisClasseur Québec (coll. Droit public), Droit constitutionnel* (Montreal, LexisNexis Canada, 2022) ch 23.

[15] For instance, see André Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford, Oxford University Press, 2018).

[16] See the introduction of the collective book: Janne Jijman and André Nollkaemper (eds), *New Perspective on the Divide between National and International Law* (Oxford, Oxford University Press, 2007).

[17] University of Toronto Professor Karen Knop notoriously explained that, 'domestic law is "here" and international is "there"'; see 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policy* 501, 504.

[18] See Stéphane Beaulac, 'National Application of International Law: The Statutory Interpretation Perspective' (2003) 41 *Canadian Yearbook of International Law* 225. See also Charles-Emmanuel Côté, 'La réception du droit international en droit canadien' (2010) 52 *Supreme Court Law Review (2d)* 483.

[19] See Stéphane Beaulac, 'L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international' (2005) 27 *Supreme Court Law Review (2d)* 1, 34–35.

[20] See Stéphane Beaulac, 'La mise en œuvre judiciaire des obligations internationales du Canada en matière de droits humains – Obstacles et embûches' in Oonagh E Fitzgerald, Valerie Hughes and Mark Jewett (eds), *Reflections on Canada's Past, Present and Future in International Law* (Waterloo, Centre for International Governance Innovation, 2018) 31.

or customary, international law cannot but be merely persuasive,[21] not binding, within the domestic legal order of a state.[22]

A third and last groundwork matter relevant to this chapter relates to the canon of interpretation – the very theme of the present collective book – namely *conforming legal interpretation*, and it concerns methodology, essentially. When considering this type of construction, be it in general or for specific applications, it is useful to distinguish between two things: the source of the normativity of reference (constitution, treaty), on the one hand, and the actual law (ordinary, domestic) to be interpreted in conformity with these fundamentals, on the other hand. Put another way, when one interprets 'in conformity with', there are two groups of norms at play, those deemed the reference point, the reference normativity, which will have an impact on the interpretation of the other set of normativity, which is the one actually applicable in a situation, ie positive law.

Hence, both the presumption of constitutionality and the presumption of conformity with international law necessarily rely on a comparison of two elements: the constitution or an international law source (treaty, customs) is first considered; then, sequentially, the ordinary domestic law ('presumed' to be in line with it) is construed accordingly, unless it is not possible. The main point here is that conforming legal interpretation, as it were,[23] acts at both these steps of the analysis, ie initially, on the construction of the constitution or the international treaty, and ultimately, on the interpretation of the normative content of the positive law at issue, presumably complying with such fundamentals.

This chapter focuses on the presumption of conformity with international law,[24] which I now turn to.

[21] As one author succinctly explained, *persuasive authority* is a source, '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'; see Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 40 *Oxford Journal of Legal Studies* 499, 502–503.

[22] This is the approach adopted by the Supreme Court of Canada in a recent case, *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, where in a 5-4 split decision, the majority realigned the analysis of interlegality issues and corrected a trend in case law, as of late then, that allowed for an exaggerated role for international law. Referring to my writings on statutory interpretation and interlegality (paras 3 and 22), the majority of the Court wrote (para 22): 'While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation'. See also Stéphane Beaulac, 'Arrêtons de dire que les tribunaux au Canada sont "liés" par le droit international' (2004) 38 *Revue juridique Thémis* 359.

[23] On this, see Danielle Pinard, 'Le principe d'interprétation issu de la présomption de constitutionnalité et la *Charte canadienne des droits et libertés*' (2004) 35 *McGill Law Journal* 305, 313–14.

[24] Some of the material used in this paper draws from Stéphane Beaulac, '"L'égalité des armes" – une phrase bénie? – en droit processuel au Québec: Le rôle du droit international' (2022) 52 *Revue générale de droit* 269.

II. Conforming Legal Interpretation Based on International Law

Although the rationales[25] underlying conforming legal interpretation may vary depending on whether one resorts to constitutional law or international law, we just saw that the same interpretative technique is at play. The idea is relatively simple and can be put thus: when judges consider legal rules, like a provision of domestic legislation (but it could also be judge-made-law, just the same), they should opt for an interpretation that allows it to be in line, to comply with the normativity of reference based either on constitutional law or on international law.[26] Put another way, faced with two possible meanings when reading the applicable domestic law, one that would be in breach of constitutional law or international obligations, and another that would be compliant with them, the latter ought to be favoured as much as possible.[27]

The presumption of conformity with international law, as I have explained elsewhere,[28] is basically one of the two techniques, within the methodology of legal interpretation, for a national judge to operationalise such norms in domestic law. The other one, to mention it without going in any detail,[29] is based on contextual interpretation.[30] It allows us to take into account norms based on

[25] On the rationales (legal certainty, legal coherence) for CCI, see Paul Daly, 'Canada. Legal Coherence versus Legal Certainty' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation – Comparative Perspectives Volume 1: National Reports* (Oxford, Hart Publishing, 2023) s I. On the international plane, I shall come back to these rationales in my concluding remarks.

[26] See eg Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th edn (Toronto, Carswell, 2011), ss 1398–1401. For a critical view of these presumptions, see Thomas A Cromwell, Siena Anstis and Thomas Touchie, 'Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation' (2017) 95 *Canadian Bar Review* 297.

[27] For classic expositions of the presumption of constitutionality, in the USA, see Véase Note, 'Supreme Court Interpretation of Statutes to Avoid Constitutional Decision' (1953) 53 *Columbia Law Review* 633, 642ff; and in Canada, see François Chevrette and Herbert Marx, *Droit constitutionnel* (Montreal, Presses de l'Université de Montréal, 1981) 310ff. For more contemporary analysis of the situation in the US, see Fred Schauer's chapter in volume 1 of the present collective work: Frederick Schauer, 'United States: Constitutional Avoidance as Constitutional Conformation' in Klatt (n 25).

[28] See Stéphane Beaulac, 'International Law and Statutory Interpretation: Up with Context, Down with Presumption' in Oonagh E Fitzgerald et al (eds), *The Globalized Rule of Law – Relationships between International and Domestic Law* (Toronto, Irwin Law, 2006) 331.

[29] For more detail, see Stéphane Beaulac, 'Thinking Outside the "Westphalian Box": Dualism, Legal Interpretation and the Contextual Argument' in Christoffer C Eriksen and Marius Emberland (eds), *The New International Law – An Anthology* (Leiden, Brill Publishers, 2010) 17; and Stéphane Beaulac, 'Le droit international comme élément contextuel en interpretation des lois' (2004) 6 *Canadian International Lawyer* 1.

[30] In an important decision of the Supreme Court of Canada, *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, the contextual argument of interpretation was used in order to make it possible to resort to *unimplemented* treaty norms, in spite of the dualist logic requiring the incorporation for conventions to have legal effects domestically. For the majority of seven judges (two wrote a concurring opinion), Justice L'Heureux-Dubé relied (para 70) on the author Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd edn (Toronto, Butterworth, 1994) 330, who wrote: '[T]he legislature

international treaty or on customary law – the two core formal sources pursuant to section 38(1) of the Statute of the International Court of Justice – as elements of legislative context, which may be relied upon with a view to ascertaining the normative substance of the domestic legal rule.[31]

Concentrating on the other operationalisation technique – what is known in the USA as the 'Charming Betsy Rule'[32] – the presumption of conformity with international law was originally developed in Great Britain, of course.[33] Author Peter Maxwell: '[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'.[34] A classic exposition of the canon was offered by Diplock LJ (later Lord Diplock):

> [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.[35]

Another major case applying this technique of conforming legal interpretation in Great Britain was *R. v Lyons*[36] in 2002, a House of Lord decision which, in turn, was resorted to by the High Court of Justice in the Brexit legal challenge, the 2016 *Miller* case.[37]

Recently, the United Kingdom Supreme Court relied on the presumption of conformity with international law in the *Reference on Scottish Referendum*,[38] a judgment handed down in November 2022. In addressing the international law arguments based on self-determination and the right of secession – which saw the

is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read'.

[31] In a recent case, handed down on 15 July 2022, the Supreme Court of Canada reiterated how context may be used as gateway for international law – see *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, para 45: 'The modern approach to statutory interpretation requires interpreting the statute's text in its "entire context". The statute's context includes any relevant international obligations'. See also Stéphane Beaulac, 'International Law Gateway to Domestic Law: Hart's "Open Texture", Legal Language and the Canadian Charter' (2012) 46 *Revue juridique Thémis* 443.

[32] From the case *Murray v The Charming Betsy*, 6 U.S. 64 (1804).

[33] See Gerald L Neuman, 'International Law as a Resource in Constitutional Interpretation' (2006) 30 *Harvard Journal of Law and Public Policy* 177.

[34] Peter B Maxwell, *On the Interpretation of Statutes* (London, Sweet and Maxwell, 1896) 173. See also on this, the celebrated international legal scholar Hersch Lauterpacht, 'Is International Law a Part of the Law of England?' (1930) *Transactions Grotius Society* 51.

[35] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143.

[36] *R. v Lyons* [2002] UKHL 44, [2003] AC 976, paras 27–28. See also *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] AC 471, para 122.

[37] *R. (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, para 33; judgment upheld by the Supreme Court of the United Kingdom in a final judgment, [2017] UKSC 5, 24 January 2017.

[38] *Reference by Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.

UK top Court cite at length the Supreme Court of Canada's reasons in the 1998 Reference on Quebec Secession[39] – the issue was addressed as follows:

> The strong presumption in favour of interpreting our domestic law in a way which does not place the United Kingdom in breach of its obligations in international law is well established. […] If there is ambiguity in a statutory provision operating in a field where the United Kingdom is bound by a treaty obligation, the presumption of conformity with international law will apply to the interpretation of that statutory provision […]. This presumption of compatibility extends to international treaty obligations whether or not they have been implemented into domestic law within the United Kingdom […]. However, the presumption will only be a permissible aid to interpretation if the statutory provision is not clear on its face […].[40]

Beside Great Britain,[41] Canada provides other examples of how to resort to conforming legal interpretation based on international law. The Supreme Court of Canada explained the presumptive reasoning as follows in 1998: 'In choosing among possible interpretation of a statute, the court should avoid interpretations that would put Canada in breach of such obligations'.[42] In the 2007 *Hape* case, the main reasons for judgment by LeBel J provided insights that are worth citing in full:

> The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. […] [T]he presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.[43]

Thus, in Canada, like in the UK, not only binding international law like treaty obligations as such, but 'values and principles of customary and conventional international law' may trigger, just the same, conforming legal interpretation.[44]

[39] *Reference re Secession of Quebec* [1998] 2 SCR 217; the UK Supreme Court referred to paras 138 and 154 of the Canadian decision, quoting them in full (see para 88 of the UK judgment, ibid).

[40] *Reference on Scottish Referendum* (n 38) para 87 [references omitted].

[41] For more British references, see Shaheed Fatima, 'The Domestic Application of International Law in British Courts' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford, Oxford University Press, 2019) 485.

[42] *Ordon Estate v Grail* [1998] 3 SCR 437, para 137 [reference omitted].

[43] *R. v Hape* [2007] 2 SCR 292, para 53 [underlines added] [references omitted].

[44] To be complete, in the Canadian context, with regard to the interpretation of the *Canadian Charter*, a recent 5-4 split decision saw the majority make a surprising nuance – see *Québec inc.* (n 22) paras 32–35. In a somewhat unclear fashion, Brown and Rowe JJ suggest that the presumption of conformity may be triggered, in providing support and confirmation in *Canadian Charter* interpretation, but only with regard to international law that is 'binding' on the country (as opposed to non-binding international law, I suppose). It remains to be seen whether this novel position will be followed in subsequent cases, which is doubtful.

A further point made by LeBel J in the *Hape* decision – which was also highlighted by the UK Supreme Court in the *Reference on Scottish Referendum*[45] – is, of course, that the presumption of conformity is rebuttable: 'Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation'.[46] This is uncontroversial in case law and was further explicated as follows by Canada's top Court:

> 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.[47]

Interestingly, a last quote from the Supreme Court of Canada, from a 2015 case, suggests that there is indeed universality in conforming legal interpretation: 'This interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world'.[48]

To recap, before proceeding with a case study, the principal point to highlight as regards the presumption of conformity with international law, considering it through the lens (or epistemology) of Anglo-Saxon interlegality analysis, is this: although the weight given may vary depending on the circumstances, there seems to be no objection to the use of unwritten principles coming from the international legal order as an aid to the construction of domestic law (including constitutional law) by means of conforming legal interpretation. On the contrary, in light of the UK's and Canada's experiences, no matter the source of law and, more importantly, no matter the actual nature or type of normativity – be it specific treaty and customary obligations or unwritten principles with no (or almost no) connection with these formal sources – the interpretative canon favouring compatibility between the international and the national legal realities shall be employed, whenever possible and appropriate.

III. Case Study: The Unwritten Procedural Principle of Equality of Arms

Be that as it may, the verification of the hypothesis according to which conforming legal interpretation based on international law allows domestic judges to rely on an

[45] See *Reference by Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* (n 38).

[46] *Hape* (n 43) para 53.

[47] *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCR 704, para 60 [underlines added] [case law reference omitted]. See also *Society of Composers* (n 31) para 48.

[48] *B010 v Canada (Citizenship and Immigration)* [2015] 3 SCR 704, para 48 [reference omitted].

'unwritten principle' of this legal order is certainly not an easy task to undertake. The main reason why involves, arguably, the very sources of international law, the two core ones being international treaties and customary rules.[49] For the sake of brevity, let us agree that customary international rules being already unwritten – *as per* state practice and *opinio juris*[50] – it is in relation to treaties that issues of unwritten principles arise.

Indeed, unlike customs, conventional international law provides for written rules that have been laid down in treaty documents, the conclusion of which is governed by the Vienna Convention on the Law of Treaties.[51] The definition in section 2(a) is explicit in that regard: '"[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation'.[52] Hence, when it comes to unwritten principles from the international legal order in the following discussion, they shall be considered in connection to written rules of conventional law, a formal source under section 38(1)(a) of the Statute of the International Court of Justice.

The question then becomes whether and, if so, how these fundamental principles found in international conventional law – be them freestanding or (tenuously) connected with the treaty, in spirit only[53] – may be relied upon by a domestic judge in a case. Put another way, are there examples where the canon of conforming legal interpretation was used to give effect at the national level to unwritten international principles deemed fundamental pursuant to a conventional regime? A prime illustration, as it were, seems to come from international human rights law, with the important principle of procedural law known as 'equality of arms'.

A. Equality of Arms as an Unwritten Principle Based on International Law

The expression 'equality of arms' finds an equivalent in many other European languages: '*[É]galité des armes*' or '*égalité des moyens*' in French, '*uguaglianza delle armi*' in Italian, '*Waffengleichheit*' in German, to name a few. It reflects that the

[49] On the sources of international law, in general, see Stéphane Beaulac and Miriam Cohen, *Précis de droit international public – Théorie, sources, interlégalité, sujets*, 3rd edn (Montreal, LexisNexis Canada, 2021) 81ff.

[50] See the classic formulation of the two constituting elements of international custom, a formal source of international law pursuant to s 38(1)(b) of the Statute of the International Court of Justice, from the case, *North Sea Continental Shelf*, Judgment, ICJ Reports 1969 3, 33, para 77: '[T]wo conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.'

[51] See, in particular, arts 6 to 17 of the Vienna Convention 1969.

[52] [Underlines added].

[53] See section I of this chapter, on preliminary matters.

principle exists in many jurisdictions, be it in penal, civil or administrative procedures, predominantly in Continental Europe.

To identify the origins of equality or arms, one needs to look at the European level, especially at international human rights law. Although the European Commission was the first one to refer to the principle in the 1959 *Szwabowicz* case,[54] the initial classic articulation is credited to the European Court of Human Rights, in the *Delcourt* case: '[A] trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage',[55] the Strasbourg court wrote in 1970.

These statements cut across other important values underlying procedural schemes, be they in criminal or civil law. For example, in addition to fair trial, there would be the idea of adversarial hearing, the right to be heard, as well as values relating to impartial decisions, to making a full answer and defence, and to fairness in the debates. In the Anglo-Saxon tradition, one could add the ideas of due process and of level playing field: one has to make sure, not that each party has the same chances to win the case on the merits, but rather that the rules of the game are not such that a participant is put at a disadvantage during the procedure. At a higher level, equality of arms contributes to serving justice and, as importantly, to assuring that there appears to be justice rendered.

Having said that, to put it in terms relevant to our discussion on unwritten principles, it is crucial to highlight that the actual terminology of *equality of arms* is nowhere to be found in the binding international law instruments. Instead, it constitutes a typical freestanding principle, or at least one with a remote (ie tenuous) connection with the text of the human rights law instruments. One of them, surely enjoying cardinal authority, is the Universal Declaration of Human Rights,[56] which provides at Article 10:

> **10.** Everyone is entitled <u>in full equality</u> to a fair and public hearing by an independent and impartial tribunal, in the termination of his rights and obligations and of any criminal charge against him. [underlines added]

It is noteworthy that, although the word 'equality' is found expressly, the expression 'in full equality' is somewhat remotely linked to the principle of equality of arms. No doubt, it could be deemed structural to Article 10, though indeed instrumental to the *spirit* of the right to a fair and public hearing.

[54] *Szwabowicz v Sweden* (application no. 434/58), ECommHR, 30 June 1959, Annuaire II para 535 (quote found in French only): 'Le droit à un procès équitable implique que toute partie à une action civile et *a fortiori* à une action pénale doit avoir une possibilité raisonnable d'exposer sa cause au tribunal dans des conditions qui ne le désavantagent pas d'une manière appréciable par rapport à la partie adverse'.

[55] *Delcourt v Belgium* (application no. 2689/65), ECtHR, 17 January 1970, (1970) Series A no. 11, para 34.

[56] On the domestic role of the Universal Declaration of Human Rights, in general, see William A Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law – Legal Commitment, Implementation and the Charter*, 3rd edn (Toronto, Thomson Carswell, 2007).

It is mainly on the basis of the European Convention on Human Rights that the unwritten principle of equality of arms has been articulated internationally. Albeit not in explicit terms either, it is deemed linked to the text of Article 6(1), which reads:

> **6(1).** In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]
>
> [The second part of the provision relates to *in camera* procedures, not relevant for our purposes]

Applicable to both civil and criminal procedures,[57] equality of arms and Article 6(1) was utilised by the European Court of Human Rights in numerous cases,[58] some of which will be examined in a moment.

Also relevant, from the universal regime of human rights protection, is the International Covenant on Civil and Political Rights. Similar to the provision found in the European regional instrument, Article 14(1) of the 1966 Covenant is written in vague and broad terms, none of which, however, explicitly provide for equality of arms. Only the first two sentences, materially significant, are to be cited here:

> **14(1).** All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. […]

Similar to the European Convention, the Covenant provides for hard law which, under the rules of the Vienna Convention,[59] is binding in international law. Accordingly, it may also be used domestically, and with much persuasive force, including by means of the conforming legal interpretation canon.

More explicit than Article 14(1) of the Covenant, as regards equality of arms, is the soft law instrument derived from it, namely General Comment no. 32.[60] Adopted in 2007 by the UN Human Rights Committee, it dwells upon the different universal procedural rights and refers to our principle by name, at sections 8 and 13:

> **8.** The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14(1), those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination. [underlines added]
>
> […]

[57] See *Feldbrugge v The Netherlands* (application no. 8562/79), ECtHR, 26 May 1986, Series A no. 99.

[58] See European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)*, available at rm.coe.int/1680700aaf. In particular, see the section on equality of arms 90ff.

[59] See Vienna Convention on the Law of Treaty, art 26, codifying the principle of *pacta sunt servanda*.

[60] United Nations, Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, U.N. Doc. N.U. CCPR/C/GC/32 (23 August 2007).

> **13.** The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision. The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined. [underlines added] [footnotes omitted]

This being so, such an express reference to equality of arms could hardly mean that the principle becomes more than unwritten. Indeed, the General Comment provides for soft law, not hard law, and given that the present analysis is rooted in positivism, as well as the formal sources under section 38(1) of the Statute of the International Court of Justice, equality of arms remains very much an unwritten principle, no doubt. Besides, for our purposes, it is generally true that the presumption of conformity with international law is not triggered when dealing with soft law instruments, but only when resorting to treaty obligations (or to customary international law) that are binding on states.[61]

To be complete, the last conventional instrument to be included in our review comes from the European Union regime, dealing with economic and political integration.[62] Since 2009, the EU enjoys the benefits of a formal protection of human rights for situations falling under the jurisdiction of the Court of Justice of the European Union, in Luxembourg. In Article 47 of the Charter of Fundamental Rights of the European Union,[63] one can read:

> **47.** Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. […]

These first two paragraphs of Article 47, one will notice, are formulated very similarly to Article 6(1) of the European Convention on Human Rights; it is worth noting as well that, between the Strasbourg and the Luxembourg courts, there can

[61] See, on this point, John H Currie, *Public International Law*, 2nd edn (Toronto, Irwin Law, 2008) 262.

[62] See eg Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials*, 7th edn (Oxford, Oxford University Press, 2020).

[63] The instrument was proclaimed on 7 December 2000, but without direct legal effect, and only later entered into force as binding for the EU Member States, with the adoption of the Treaty of the European Union (or Treaty of Lisbon) on 1 December 2009 – Official Journal of the European Union, C 326.

sometimes be conflicts of jurisdictions.[64] More to the point, without providing for it expressly, the EU Charter of Fundamental Rights is also deemed to include the procedural principle of equality of arms, an unwritten principle developed in case law, the study of which we now turn to.

The European Court of Human Rights and the EU Court of Justice – interpreting the European Convention on Human Rights and the EU Charter of Fundamental Rights, respectively – have articulated the unwritten principle of equality on the basis of their international conventional instruments. Examining how the said principle may apply to criminal, civil and administrative matters, the discussion will focus on three cases.

First, the *Gryaznov*[65] case in 2012 concerned a Russian national who argued, referring to the right to a fair and public hearing in Article 6(1) of the European Convention, that the Russian Federation's Penal Code and Code of Civil Procedure violated the principle of equality of arms. The legislative provisions allowed for judicial audience without the accused present and, as a result, prevented him from making a full answer and defence in the proceedings. The First Section of the Court agreed and ordered compensation for the applicant, holding that domestic courts and tribunals in Russia needed to make sure that an accused was present during the proceedings in order for him to give his version of the facts, including here to testify on his personal experience of the alleged ill-treatments.

Other elements were considered in violation of Article 6(1) of the European Convention, namely the failure to serve documents on the applicant and the refusal to call a witness. All these procedural shortcomings, the Strasbourg court held, concern not only the right to a fair and public hearing, but also the adversarial principle and, most relevant for our purposes, the unwritten principle of equality of arms. Here are some short excerpts of the decision:

> 45. Article 6 of the Convention does not guarantee a right to personal presence before a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 §1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights [case law reference omitted].
>
> […]

[64] For comparisons of case law, see Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Cambridge, Intersentia, 2011); and in criminal context, Sabine Gless and Jeannine Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?' (2013) 1 *Bergen Journal of Criminal Law and Criminal Justice* 36. On issues of conflict between the Strasbourg and the Luxembourg courts, see Mattias Kumm, 'The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262; and Matthias Klatt, 'Balancing Competences: How Institutional Cosmopolitanism can Manage Jurisdictional Conflicts' (2015) 4 *Global Constitutionalism* 195.

[65] *Gryaznov v Russia* (application no. 19673/03), ECtHR, 12 June 2012.

> 51. In these circumstances, the Court finds that the principle of equality of arms was breached, owing to the domestic courts' refusal to secure the applicant's attendance at the hearing.
>
> […]
>
> 53. The Court reiterates that the principle of adversarial proceedings and equality of arms, which is one of the elements of the broader concept of fair hearing, requires that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent [case law references omitted].
>
> […]
>
> 57. Article 6 of the Convention does not explicitly guarantee the right to have witnesses called or other evidence admitted by a court in civil proceedings. Nevertheless, any restriction imposed on the right of a party to civil proceedings to call witnesses and to adduce other evidence in support of his case must be consistent with the requirements of a fair trial within the meaning of paragraph 1 of that Article, including the principle of equality of arms. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent [case law reference omitted].
>
> [underlines added]

Also in 2012, this time the EU Court of Justice examined such procedural issues in a case requiring a preliminary ruling on the interpretation of some conventional and regulatory provisions relating to competition law, and whether it was valid under Article 47 of the EU Charter. It concerned proceedings alleging anti-trust practices by companies in the business of elevators and escalators, brought before national courts of an EU member. The European Commission was to participate in the proceedings, which was challenged on the ground that it would play to the disadvantage of the defendant companies, given the situation of this EU organ in a previous case, where it adjudicated on the allegations. Beside the principle that no one should be a judge in their own cause (ie *nemo judex in sua causa*), the defendants argued judicial independence and equality of arms.

In the *Europese Gemeenschap*[66] case then, the Grand Chamber of the EU Court of Justice dwelled upon this unwritten principle, although in the end the arguments based on Article 47 of the EU Charter were insufficient. The Court did agree, however, that equality arms requires that there be a certain parity among the parties involved in judicial proceedings under a legal scheme of the European Union. The following passages of the judgment are on point, as they highlight the unwritten nature of this principle:

> 71. The principle of equality of arms, which is a corollary of the very concept of a fair hearing [case law reference omitted], implies that each party must be afforded a

[66] *Europese Gemeenschap v Otis NV et al.*, 6 November 2012, no. C-199/11.

> reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.
>
> 72. As the Advocate General has observed […], the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Conversely, the harm which a lack of balance will be likely to cause must, as a rule, be proved by the person who has suffered it.
>
> [underlines added]

A third illustration of how equality of arms constitutes an unwritten principle connected in spirit to conventional international human rights law comes again from the European Court of Human Rights in the 2017 *Regner*[67] case. The applicant was challenging the validity of an administrative procedure that led to ending his position at the Department of National Defense in the Czech Republic, on the basis of some alleged malfeasances. The problem was that the proceedings allowed for confidential evidence to be kept from the accused, information that was however made available for the tribunal to consider. In a 10-7 split decision, the motion was dismissed, the majority of justices holding that the restrictions on the European Convention rights, 'were offset in such a manner that the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant's right to a fair trial'.[68]

Many procedural rights were invoked and argued pursuant to Article 6(1) of the European Convention, including in regard to the unwritten principle of equality of arms, which was said to derive from the fundamental right to a fair hearing:

> 146. The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a 'fair hearing' within the meaning of Article 6 §1 of the Convention. They require a 'fair balance' between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents [case law reference omitted].
>
> [underlines added]

This excerpt from the main opinion of the Court, that is to say 7 of the 17 judges of the Grand Chamber, is not the only one relevant for our purposes. Indeed, a separate opinion by Justice Georigios Serghides (dissenting in part) includes very material passages on equality of arms. His analysis recalled the origins and the content of the right to a fair hearing and, relevant to the point in question, dwelled upon the numerous ramifications of this unwritten principle, as it applies to criminal, civil and administrative matters. He wrote the following: 'The right to a fair hearing incorporates a number of aspects of the due process of law, the

[67] *Regner v Czech Republic* (application no. 35289/11), ECtHR, 19 September 2017.
[68] ibid 38, para 161.

most fundamental of which are: (a) access to court, (b) equality of arms (*égalité des armes*), (c) adversarial proceedings, and (d) a reasoned judgment'.[69]

To recap, what comes out of this short review of the three main cases from the European regimes of international human rights law is how equality of arms was articulated around the idea of fair hearing, which is a right expressly provided for in conventional texts. The principle is said to be derived from the provisions of these treaties, extrapolated from the specific human rights. As such, equality of arms provides a good example of an unwritten principle of conventional international law, which now will be examined insofar as it may be used domestically.

B. Conforming Legal Interpretation and Equality of Arms in Domestic Law

With a view to verifying the hypothesis that conforming legal interpretation allows for recourse to unwritten principles based on international law and after fleshing out equality of arms as a top example of such a principle remotely connected to conventional human rights law, the next step is to examine the situation at the domestic level. Of course, there are many national jurisdictions, especially in Europe, that would provide interesting case studies on substantial issues of the right to a fair hearing and equality of arms. However, to make sure that, in methodological terms, the discussion brings out the dimension of interlegality and, more specifically, the judicial reasoning based on the presumption of conformity with international law, the choice was made to stay away from the somewhat hybrid (*sui generis*) legal reality in Europe, involving regional regimes of human rights.

A case study from a state that is viewed as traditional on these issues of interlegality, at least from an Anglo-Saxon common law legal tradition,[70] would seem more appropriate. Accordingly, Canada – which I happen to know best[71] – and, in particular, the provincial jurisdiction of Quebec, shall be examined below. The purpose, to put it most clearly, is to see how equality of arms, as an unwritten principle based on international law, has been used domestically in the interpretation and application of the province's procedural law, a word on which is now necessary.

Briefly, the law of civil procedure (criminal procedure is complex in Canada, with dual competence of the Federal and provincial legislatures,[72] and need not be addressed for the present purposes[73]) within the jurisdiction of Quebec is governed

[69] ibid 53, para 15 [underlines added].

[70] See Stéphane Beaulac and John H Currie, 'Canada' in Shelton (n 13) 116.

[71] See Stéphane Beaulac, 'Canada' in Fulvio M Palombino (ed), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge, Cambridge University Press, 2018) 21.

[72] See eg Marie-Eve Sylvestre, 'Droit criminel, droit pénal et droits individuels' in Beaulac and Gaudreault-DesBiens (n 14) ch 14.

[73] As regards the principle of equality of arms in the context of international criminal law, see Elise Groulx, '"Equality of arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System' (2010 – special issue) *Quebec Journal of International Law* 21.

by the Code of Civil Procedure, which was, incidentally, completely revamped in 2018.[74] Under the heading 'Guiding principles of procedure', section 17 of the Code provides as follows:

> **17.** The court cannot rule on an application, or take a measure on its own initiative, which affects the rights of a party unless the party has been heard or duly called.
>
> In any contentious matter, the court, even on its own initiative, must uphold the adversarial principle and see that it is adhered to until the judgment and during execution of the judgment. It cannot base its decision on grounds the parties have not had the opportunity to debate.

As important (if not more) a quasi-constitutional instrument in the province imposes some minimum requirements in terms of procedural law. The Quebec Charter of Human Rights and Freedoms, specifically section 23(1), reads as follows:

> **23.** Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> [underlines added]

Of course, the first striking thing upon reading section 23 is how the wording employed in this domestic law is similar to that of Article 10 of the Universal Declaration of Human Rights, which we saw before.[75] This feature was highlighted, among other things, in case law on the principle of equality of arms under the Quebec Charter, which we now turn to.

There are only a handful of cases from the province of Quebec that have invoked equality of arms as a principle of procedural law. One of them, in 2017, comes from Frédéric Bachand J (now at the Court of Appeal), who wrote the following in a Superior Court judgment: '[T]he [contractual] clause does not sit well with the general principle of equality of arms, which is a key component of natural justice and which finds expression in the first paragraph of section 23 of the Charter of Human Rights and Freedom.'[76] There are even fewer instances where a Quebec court resorted to international law to shed light on it. The two cases examined below were chosen because they show how, indeed, it was by means of a reasoning rooted in conforming legal interpretation that this unwritten principle based on international law was used domestically.

[74] See eg Catherine Piché, 'Le 'dialogue' des parties et la vérité plurielle comme nouveau paradigme de la procédure civile québécoise' (2017) 62 *McGill Law Journal* 901.

[75] See Schabas and Beaulac (n 56) and accompanying text.

[76] *Banque de Nouvelle-Écosse v Davidovit*, 2018 QCCS 5097, para 38 [underlines added] [references omitted]. Note that this first instance decision was overturned on appeal – see 2021 QCCA 551 – which included a rebuke of the argument based on equality of arms (para 25): 'The so-called "inequality of arms" infringement of the spirit of the right to a fair trial protected by section 23 of the *Charter* is simply without merit. […] Section 23 essentially refers to procedural rights, such as the right to be heard' [footnotes omitted].

The first one, from the Quebec Court of Appeal in 2015, concerned the special legislative scheme enacted to facilitate law suits against tobacco companies,[77] including as regards evidence and limitation periods. It was thus argued in *Imperial Tobacco*[78] that these new rules were unfair and, more to the point, violated equality of arms as between parties in a proceeding. In that context, the quasi-constitutional section 23 of the Quebec Charter was considered:

> [53] And what of the expression '*en pleine égalité*' (full and equal) in section 23?
>
> [54] The appellants maintain that, because of the objectives of the *Quebec Charter* and the rules governing the internal consistency of statutes, the expression '*en pleine égalité*' (full and equal) must be interpreted to include the principle of equality of arms, an interpretation that is in their view reinforced by the external case law cited, particularly that of the European Court of Human Rights […].

In the end, the argument under section 23 of the Quebec Charter and the idea of equality of arms did not make a difference in this case, as the Court of Appeal concluded that the special rules for evidence and limitation periods could validly apply in law suits against tobacco companies. Having said that, as far as this unwritten principle is concerned, its origins in conventional law and the many references to such international normativity by the Quebec domestic courts are the most important features of the case, for our purposes. In her reasons for judgment, Justice Geneviève Marcotte further wrote thus:

> [56] It is true that the legislative history of the *Quebec Charter* reveals that it was enacted to harmonize Quebec with the international obligations set out in the 1948 *Universal Declaration of Human Rights* and the 1966 *International Covenant on Civil and Political Rights*, and that some of its expressions or concepts reiterate those of the [European] *Convention for the Protection of Human Rights and Fundamental Freedoms*. While these international instruments may prove useful when interpreting *Quebec Charter* provisions given the similarity between section 23 of the *Quebec Charter* and Article 10 of the *Universal Declaration of Human Rights*, international instruments and foreign law do not, however, support the interpretation of section 23 of the *Quebec Charte*r proposed by the appellants, which moreover diverges from that developed in Quebec case law.
>
> [underlines added] [footnotes omitted]

'Harmonising' Quebec law, as the Court of Appeal wrote, with international obligations based on conventional law, including the unwritten principle of equality of law, this is no doubt a variation in language of the canon of conforming legal interpretation. Put another way, by means of a reasoning founded on an interpretative presumption, Marcotte J tried to read section 23 of the Quebec Charter, inasmuch as possible, in a way compatible with the relevant conventional documents – the Universal Declaration and the International Covenant – with which (remotely or

[77] See *Tobacco-related Damages and Health Care Costs Recovery Act*, C.Q.L.R. c. R-2.2.0.0.1.

[78] *Imperial Tobacco Canada Ltd. v Quebec (Attorney General)*, 2015 QCCA 1554, which upheld the first instance judgment by the Superior Court, see 2014 QCCS 842.

in spirit, at least) the unwritten principle of equality of arms is linked, as articulated in the case law of international courts.

The second judgment in Quebec, itself referring at length to the Court of Appeal reasons in *Imperial Tobacco*, is the Superior Court decision in the *Sanimax*[79] case, handed down in 2019. Decided after the reform of the Quebec Code of Civil Procedure, in 2018, one interesting thing Judge Lukasz Granosik does in his judgment is to make the connection between the guiding principles of procedure (sections 17ff of the Code) and section 23 of the Quebec Charter, explaining how important it is to interpret and to apply the former in light of the latter quasi-constitutional provision.[80] He then formulated the issue thus: 'Accordingly, the analysis must centre on the expression "*balance*", "*fairness in debates*" and "*full and equal*" [hearing] in the context of the present file'.[81]

In terms of international law, after referring to passages from the *Imperial Tobacco* case and connecting them with equality of arms in section 23 of the Quebec Charter, Judge Granosik referred to and quoted from the 2012 *Europese Gemeenschap* case, which was examined before.[82] He understood from the EU Court of Justice decision that equality of arms in a judicial proceeding 'constitutes a fundamental principle, which is included in the notion of fair trial and assures a balance between the parties'.[83] The Judge then relied on excerpts from legal writings (ie *doctrin*e) before reaching his conclusion, which in the end read down the extraordinary powers given to city inspectors under the enabling legislation at issue.

A more expansive construction of the public powers was rejected by the Court because it would be, 'at odds with the principles of "*fairness in debates*" and the "*balance*" between the parties in court, which in turn require that "*equality of arms*" be respected'.[84] Clearly then, among the principles deemed material here, equality of arms was front and centre. More significant for our discussion, pursuant to both the Quebec Civil Code of Procedure (section 17ff) and the Quebec Charter (section 23), the domestic interpretation given to equality of arms was compatible with this unwritten principle of conventional law, as articulated by international case law (cf European Court of Human Rights, EU Court of Justice).

In sum, the canon of legal interpretation known as the presumption of conformity with international law – though maybe not in name, but surely the essence of it – was

[79] *Ville de Montréal v Sanimax Lom inc.*, 2019 QCCS 303 [no English translation is provided by the Court].

[80] ibid, paras 20–21.

[81] ibid, para 22, my translation. Translation of the French: 'Il s'agit donc d'analyser ce que signifient les expressions *"équilibre"*, *"débat loyal"* et *"en pleine égalité"* dans le contexte du présent dossier'.

[82] See *Europese Gemeenschap v Otis NV et al.* (n 66) and accompanying text.

[83] *Sanimax* (n 79) para 25 [foonote omitted]. Translation of the French: '[C]onstitue un principe fondamental, compris dans la notion de procès équitable et assurant l'équilibre entre les parties' [footnote omitted].

[84] ibid, para 28 [foonote omitted]. Translation of the French: '[E]n porte-à-faux avec les principes du *"débat loyal"* et de l'*"équilibre"* des parties devant un tribunal, lesquels exigent le respect de *"l'égalité des armes"*' [footnote omitted].

at play in the two Quebec judgments that resorted to the procedural principle of equality of arms. It will be interesting to see how later domestic case law will continue building upon this jurisprudence and, more importantly, how conforming legal interpretation is likely to continue to be the means by which this unwritten legal principle based on international law helps interpret and apply Quebec's procedural law.

IV. Concluding Remarks

In a celebrated paper in 2004, titled 'The Unwritten Constitution and the Rule of Law',[85] legal theorist David Dyzenhaus engaged with Antonin Scalia[86] and argued that the late Justice of the US Supreme Court and his textualism/originalism were directed at resisting common law value-laden types of interpretation when ascertaining the content of written law, both statutory text and (even more so) constitutional documents.[87] Interestingly, such concerns are behind Scalia J's objections to both the idea of a living constitution and the domestic use of foreign and international law, including by means of what they call in the USA the 'Charming Betsy Rule',[88] the presumption of conformity with international law.

Dyzenhaus expressed the view that, 'the terrain of the unwritten constitution', that is of constitutional (and international) values, is 'important to the theme of the legitimacy of these modes of interpretation'.[89] Showing much realism, the Canadian author made the following suggestion: 'If interpretation of constitutional values [and international ones] were an activity which judges could not avoid, then it might seem that what they are doing when they interpret is also legitimate'.[90] Giving a warning not to confuse necessity with legitimacy, however, he rooted the justification to resorting to unwritten principles with the meta-principle of the rule of law: '[J]udges must – <u>if they are to be faithful to their duty to uphold the rule of law</u> – interpret

[85] David Dyzenhaus, 'The Unwritten Constitution and the Rule of Law' in Grant Huscroft and Ian Brodie (eds), *Constitutionalism in the Charter Era* (Toronto, LexisNexis, 2004) 383.

[86] See Antonin Scalia, *A Matter of Interpretation: Federal Court and the Law* (Princeton, Princeton University Press, 1997); and Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849. For a criticism of Scalia J's take on originalism, see Randy E Barnett, 'Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism' (2006) 75 *University of Cincinnati Law Review* 7.

[87] On originalism in general, among the vast literature on the subject, see the following particularly interesting texts: Jack N Rakove, *Original Meanings – Politics and Ideas in the Making of the Constitution* (New York, Vintage, 1997); Laurence B Solum, 'Originalist Methodology' (2017) 84 *University of Chicago Law Review* 269; and Randy E Barnett and Evan D. Bernick, 'The Letter and the Spirit: A Unified Theory of Originalism' (2018) 107 *Georgetown Law Journal* 1.

[88] See, on the American version of this type of interpretation, Curtis A Bradley, 'The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law' (1998) 86 *Georgetown Law Journal* 479.

[89] Dyzenhaus (n 85) 383.

[90] ibid.

the positive law of a [domestic] legal order in light of their understanding of unwritten constitutional values [and international ones]'.[91]

On the international plane, especially when dealing with conventional law – be it directly or with a remote connection, such as unwritten principles (as we saw) – the rule of law is very much intertwined with *pacta sunt servanda*, codified in the Vienna Convention of the Law of Treaties.[92] Acting similarly to the basic notions of consent and constituent power in constitutional and international legal theory,[93] the idea that a 'treaty in force is binding upon the parties to it', which means that these obligations 'must be performed by them in good faith',[94] is at the heart of the whole international legal structure founded on the positivist theory of voluntarism,[95] in the so-called Westphalian system of international relations,[96] which undoubtedly remains the dominant epistemology to help apprehend and rationalise this normative order.[97]

The rule of law[98] in its international version, which has been dwelled upon extensively in scholarship as of late,[99] has an important dimension relating to

[91] ibid 384 [underlines added]. See also, on the same theme of values in constitutional interpretation, Mark C Power and Darius Bossé, 'Une tentative de clarification de la présomption de respect des valeurs de la *Charte canadienne des droits et libertés*' (2014) 55 *Cahiers de droit* 775.

[92] See art 26 of the Vienna Convention 1969.

[93] For some reference works on this topic, from an American perspective: see Bruce Ackerman, *We the People – Foundations* (Cambridge, Harvard University Press, 1991); from a European perspective: Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism – Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007); from an international perspective: Mattias Kumm, 'Constituent Power, Cosmopolitan Constitutionalism, and Post-positivist Law' (2016) 14 *International Journal of Constitutional Law* 697; Thomas Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press, 1990); and from a post-conflict transitional perspective: Simon Chesterman, *You, The People – The United Nations, Transitional Administration, and State-Building* (Oxford, Oxford University Press, 2004). See also, in broader philosophical terms, Alan S Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (New York, Greenwood Press, 1988); and Randy E Barnett, 'Constitutional Legitimacy' (2003) 103 *Columbia Law Review* 111.

[94] Of course, one recognises the very wording of art 26 of the Vienna Convention 1969.

[95] See Mónica Garcia-Salmones Rovira, *The Project of Positivism in International Law* (Oxford, Oxford University Press, 2013); and Oriol Casanovas, *Unity and Pluralism in Public International Law* (The Hague, Martinus Nijhoff, 2001) 6–11.

[96] See 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, Martinus Nijhoff, 2004). See also Richard Joyce, 'Westphalia: Event, Memory, Myth' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events – The Force of International Law* (New York, Routledge, 2011) 55, especially at 57 and 64–67.

[97] See Patrick Daillier, Mathias Forteau and Alain Pellet, *Njuyen Quoc Dinh – Droit international public*, 8th edn (Paris, Librairie générale de droit et de jurisprudence, 2009) 111ff.

[98] For some classic works on the rule of law, see Lord Tom Bingham, *The Rule of Law* (London, Allen Lane, 2010); Brian Z Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge, Cambridge University Press, 2004); Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; and, for recent literature going against the grain of its virtues, see Csaba Varga, 'Rule of Law, Contesting and Contested' (2021) 1 *Central European Journal of Comparative Law* 245.

[99] See Stéphane Beaulac, 'The Rule of Law in International Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Oxford, Hart Publishing, 2009) 197. See also Arthur Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15; Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law' (2011) 22 *European Journal of International Law* 315; Kenneth J Keith, 'The International Rule of Law' (2015)

interlegality, that is to say the domestic use of international law.[100] In 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', Mattias Kumm wrote that, '[t]here is something intuitively attractive about the idea that the international rule of law requires national courts to enforce international law,' which would explain, 'why the international rule of law exerts such a strong moral pull in many quarters'.[101] Of course, he spent the bulk of the paper testing and challenging this view and, in the end, highlighted the limitations of the internationalist understanding of the rule of law.[102]

Where does that leave us when considering the canon of conforming legal interpretation based on international law? How is this presumptive reasoning favouring compatibility between the domestic and the international justified when relying on unwritten principles from the latter legal order, be them freestanding or remotely (even tenuously) connected to conventional law, be it at least in spirit? Does it bring the process of interpretation and application of national law closer to the values dear to the rule of law, in its traditional domestic version,[103] such as the ideas of legality, equal application of the law, as well as independent judicial decision-making? What about the international rule of law – with *pacta sunt servanda*, but also other underlying values of this legal order, as evidenced by state practice[104] – is it better or worse with an approach that favours conforming legal interpretation at the domestic level using unwritten principles based on international law?

28 *Leiden Journal of International Law* 403; Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 *International and Comparative Law Quarterly* 277; and Kostiantyn Gorobets, 'The International Rule of Law and the Idea of Normative Authority' (2020) 12 *Hague Journal on the Rule of Law* 227.

[100] See André Nollkaemper, *National Courts and the International Rule of Law* (Oxford, Oxford University Press, 2012); André Nollkaemper, Edda Kristjánsdóttir and Cedric Ryngaert (eds), *International Law in Domestic Courts – Rule of Law Reform in Post-Conflict States* (Antwerp, Intersentia, 2012); and Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels – Contestations and Deference* (Oxford, Hart Publishing, 2016).

[101] Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 *Virginia Journal of International Law* 19, 21.

[102] In his conclusion, ibid 32, Kumm wrote: 'This discussion of the international rule of law has yielded two propositions. First, there are morally attractive features about the idea of the international rule of law that provide *prima facie* support for the claim that courts have a role to play in the enforcement of international law, even absent specific endorsement from the political branches. Second, beyond furthering the international rule of law, there are countervailing considerations [reciprocity and flexibility concerns] that may limit the role of national courts as enforcers of international law'.

[103] For the archetype articulation of the principle of the rule of law, in the Anglo-Saxon legal tradition, of course see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1885) 188ff. For similar formulations, or at least which overlap substantially with Dicey's, see also Friedrich Hayek, *The Road to Serfdom* (London, Routledge, 1944) 54ff; Lon Fuller, *The Morality of Law*, 2nd edn (New Haven, Yale University Press, 1969) 38ff; John Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 270ff; and Joseph Raz, *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (Oxford, Clarendon Press, 1994) 373ff.

[104] See Noora Arajärvi, 'The Core Requirements of International Rule of Law in the Practice of States' (2021) 13 *Hague Journal on the Rule of Law* 173, who, based on an empirical study of the statements of governments at the UN, identified three such values as minimum requirements for the international rule of law, namely: (i) non-arbitrariness, (ii) consistency, and (iii) predictability.

All of these questions, which are more rooted in legal theory than anything this chapter (that ended up being quite applied, even empirical indeed) actually accomplished, will have to wait for another day, especially given that I am already treading dangerously close to the word limit for contributions to this collective book. To be continued, then.