



Comments on the Integration of International Law into the Canadian Legal System

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1. Background

Canada's rules for reception of international law into the domestic legal order must be understood within the context of Canada's unique constitutional structure as a federal parliamentary democracy and a federal and bilingual state.

The dramatic rise in the number of international treaties and supranational adjudicative bodies over the past two decades has been paralleled within Canada by an expanding interest in the interplay between our domestic law and international law. International law is increasingly cited in Supreme Court of Canada litigation and considered by judges in our domestic courts in their decision-making process. The growing presence and influence of international law in Canadian domestic law has occurred in the face of a recognized tension between "the democratic principle underlying the internal legal order and the search for conformity or consistency with a developing and uncertain external legal order."¹ The Supreme Court has attempted to ease this tension through the use of reception rules that affirm both respect for self-government and respect for conformity with international law.²

Our approach to the domestic use of international law has also had to mediate the tensions between a constitutional structure that includes: an executive branch that concludes treaties and a legislative branch that implements them; a federal treaty-making power and an implementing role that is shared between the federal and provincial legislative bodies; and nine common law provinces and one province that uses civil law. The balancing act is necessarily delicate.

In an article on this topic with I co-wrote Gloria Chao, we adopted a musical metaphor to explain the competing views of internalization of international law in Canada. "Fugue" refers to a type of music from the Baroque period in which "one or two themes are repeated or imitated by successively entering and interweaving repetitive elements."³ "Fusion," in contrast, is "a merging of diverse, distinct, or sepa-

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¹ The Honourable Justice Louis LeBel and Gloria Chao, "The Rise of international law in Canadian constitutional litigation: fugue or fusion? Recent developments and challenges in internalizing international law" (2002), 16 S.C.L.R. (2d) 23 at 24.

² On the implications of these two competing principles, see Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 5-11.

³ LeBel & Chao, *supra* note 1 at 24-25.

rate elements into a unified whole” or “the combination of different styles . . . to form a new style.”⁴ These musical metaphors describe two different approaches to the internalization of international law principles. Under a “fugue” approach, the domestic and the international legal orders operate separately and independently, unless international law is formally incorporated to ensure interweaving of the two. Fusion denotes an approach whereby international law informs and becomes part of the domestic legal order, and the two systems are merged into a unified whole. Canadian reception rules support, in varying degrees, both of these approaches.

Gibran van Ert has described two competing principles of the Canadian reception system: the principle of respect for international law and the principle of respect for self-government. The principle of respect for international law recognizes the obligatoriness of international law and supports treating it as part of Canadian law because Canada is a member of the international community. In contrast, the principle of self-government at times views international law as a coercive, undemocratic external force and seeks to ensure that our reception rules provide authority to dissent from international norms.⁵ Our rules of reception are based on a commitment to both principles, demonstrating a careful balance between the competing objectives wherein international law is given wide application, but self-government ultimately has the last word.⁶

In Canada, different rules apply to the reception of international law depending on the source of the legal principle being received. Canada’s reception system is a combination of adoptionist and transformationist approaches.⁷ The reception of customary international law is adoptionist. Rules of international custom are treated as part of the law and Canada which may be directly and immediately applied by domestic courts through the common law, without the need for legislative or executive action.⁸ In contrast, reception of conventional international law in Canada is transformationist. A treaty to which Canada is a party must be implemented by legislation or executive act in order to become part of the domestic law of Canada and therefore enforceable in court.⁹ I will elaborate on these two reception systems through the course of these comments.

I will first review the Canadian approach to the integration of Canada’s international treaty obligations into our domestic legal order. I will discuss both the challenges to domestic incorporation of conventional international law, and some of the judicial solutions to facilitating its integration. I will then discuss the influence of pub-

⁴ *Ibid.* at 25.

⁵ van Ert, *supra* note 2 at 7-12.

⁶ *Ibid.*, at 11

⁷ See Hugh M. Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery Publications Ltd., 2006) at 186. See also LeBel & Chao, *supra* note 1 at 35, using the terminology of “monism” and “dualism.”

⁸ van Ert, *supra* note 2 at 50.

⁹ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002) at 430.

lic international law in Canadian domestic law beyond formal integration issues. This influence can occur in one of three ways: the integration of customary international law and norms of *jus cogens* into the common law; the use of international law values and unimplemented treaties in the interpretation and development of our internal law; and the use of international law comparatively.

2. How international treaty obligations are integrated into Canadian law
 - a. General principles relating to treaty implementation in Canada

To begin, I will discuss the traditional rule that the reception of international treaty law is transformationist in Canada. The transformationist approach to conventional international law has been justified by Canada's constitutional structure and our deep roots in the British legal system.

In England, the treaty-making power was a Royal Prerogative. Formally, Canada's head of state is Her Majesty the Queen. The Queen holds certain executive powers that are derived from a collection of common law rights and powers which remain from a time when the reigning monarch held absolute authority. These rights and privileges are known as the Royal Prerogative. Any prerogative rights of the Crown in England are transferred to the Crown in right of Canada—formally, to the Governor General who is the Queen's representative in Canada. In practice, however, the prerogative powers are exercised by the federal executive.¹⁰

The text of the Canadian constitution is silent on the question of where treaty-making power lies. However, there are indications that at the time of confederation in 1867, the assumption was that the treaty-making power would remain a part of the prerogative powers governing the conduct of external affairs.¹¹ The preamble to the *Constitution Act, 1867*¹² establishes that Canada was to have "a Constitution similar in Principle to that of the United Kingdom." In addition, s. 132 provides that the Canadian Parliament and Government "shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

It is now generally settled that treaty-making power is derived from the Royal Prerogative and lies solely in the hands of the federal executive.¹³ As such, no Par-

¹⁰ Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process*, 4th ed. (Toronto: McGraw-Hill Ryerson Limited, 1987) at 179-80.

¹¹ Canada, Department of External Affairs, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) at 13.

¹² 30 & 31 Vict. c. 3 (U.K.).

¹³ There remains some debate as to whether the provinces have treaty-making powers. The *Vienna Convention on the Law of Treaties*, (1969) 1155 U.N.T.S. 331, does not address the power of members of a federal union to make treaties and some Canadian provinces, most notably Quebec, have maintained that they have the capacity to enter into treaties in their areas of exclusive jurisdiction and have entered into various forms of international agreements. See Kindred, *supra* note 7 at 202-205.

liamentary approval or involvement is necessary for Canada to ratify a treaty. However, the executive branch has no power to enact domestic legislation. Domestic law-making authority rests exclusively with the legislative branch of government. Consequently, treaties to which Canada is a party are not self-executing. A transformation system is necessary because of the peculiarity of our constitutional structure that the executive is competent to conclude treaties but has no authority to make domestic law. To preserve the separation of powers between the executive and the legislature, as John Currie explains, Canadian “treaty practice has two distinct elements or stages: treaty conclusion and treaty implementation, each of which falls under the jurisdiction of distinct branches of government—respectively, the executive and the law-making branches.”¹⁴ International treaties, even those that bind Canada at an international law, have no direct legal effect in the Canadian domestic legal system until and unless they are transformed into the domestic legal order through implementing legislation or another domestic law-making process.

I note briefly that while the vast majority of treaties require implementation through legislation, some do not. For example, defence pacts and peace treaties do not require domestic implementing legislation because they do not affect internal law. They merely create obligations on the federal government in its conduct of Canada’s international relations.¹⁵ Other treaty provisions may require only administrative enforcement by government officials or administrative tribunals, which can be done without changing Canada’s domestic law.¹⁶ These treaties are still “transformed” but it is achieved through executive act rather than legislation.

b. Problematic aspects of treaty implementation in Canada

Although constitutionally necessary, the discontinuity created by the division of treaty-concluding and treaty-implementing powers between the executive and legislative branches can give rise to difficulties. For one, the legislative branch has no obligation to implement a treaty concluded by the executive branch. From the moment the Canadian executive ratifies or accedes to a treaty, Canada is bound to its terms. If compliance with the treaty requires a change in Canada’s domestic legal order and the legislature fails to implement the treaty, Canada can be found in breach of its international obligations.

A further layer of complexity is added through the division of powers between the federal government and the provinces of Canada. While the federal executive has authority to ratify treaties in all subject areas, it is now well settled that the power to enact implementing legislation must follow the division of powers established in the Canadian constitution. If the federal executive concludes a treaty relating to a subject matter of exclusive provincial legislative competence, the provincial legislature alone has authority to enact it into domestic law. This was affirmed in a landmark

¹⁴ John H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 207.

¹⁵ Kindred, *supra* note 7 at 206.

¹⁶ *Ibid.*

1937 decision known as the *Labour Conventions Case*.¹⁷ That decision held as follows:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. . . . If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statutes. . . . Parliament, no doubt . . . has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. . . .

For the purposes of . . . the distribution of legislative powers between [Canada] and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.¹⁸

Because of Canada's parliamentary form of democracy, the federal legislative branch normally controls the federal executive. The Prime Minister, who exercises executive functions, is a member of Parliament and the head of the party with the most seats in the House of Commons. Consequently, as long as there is a majority government, there should in theory rarely be much difficulty in Parliament enacting implementing legislation for treaties concluded within its area of exclusive jurisdiction. However, the same cannot be said of the provinces who might have had little or no consultation prior to the federal executive's formal acceptance of the treaty obligations. In the absence of a federal state clause in the relevant treaty, Canada will be held responsible for a province's failure to implement a treaty in its area of exclusive jurisdiction.

Finally, the discontinuity between treaty-making and treaty-implementing authority in Canada causes difficulty for our domestic courts when a binding treaty remains unimplemented or incompletely implemented, or when there is debate as to whether or how it has or has not been implemented. Canadian law allows for various methods of implementation. One method is to incorporate the text of the treaty into the statute, either in whole or in part.¹⁹ Another method is to incorporate the substance of the treaty, but not its exact words, into the Canadian statute.²⁰ Additionally, the Crown will often find it unnecessary to create new legislation because the substance of the treaty is already part of Canadian legislator of the common law.²¹ These latter methods are commonly used and prompt the observation from Canadian international law expert Professor Stephen Troop that: "it is not routine Canadian practice

¹⁷ [1937] A.C. 326; [1937] 1 D.L.R. 673 (J.C.P.C.).

¹⁸ *Ibid.* at 678-79, 681-82.

¹⁹ Kindred, *supra* note 7 at 207.

²⁰ *Ibid.*

²¹ *Ibid.*

either to specifically incorporate treaties into legislation, or to enact the treaty itself, *holus bolus*.²² Moreover, implementing legislation need not refer to the treaty it implements.²³ When methods other than express implementing legislation are adopted, the question frequently arises in Canadian litigation of whether or not a treaty has in fact become formally a part of the domestic legal system.

The need to transform international conventions thus gives rise to a number of challenging constitutional considerations to which Canadian courts have had to respond from within the framework of our federal parliamentary democracy. Article 27 of the *Vienna Convention on the Law of Treaties* confirms that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁴ An unimplemented treaty to which Canada is a party is still legally binding on Canada at an international level, but because of our constitutional system, the courts cannot directly apply the convention absent implementing legislation or measures. However, as I will discuss, the modern Canadian approach is that unimplemented treaties may inform domestic law values and assist in statutory interpretation. Some might even say that this reliance on international law to interpret national law and to shape its values amounts to a more diffuse and incremental system of reception of international law.

c. Resolving problems with treaty implementation

In recent years, our courts have taken a more flexible approach to the division of powers in the Canadian constitution, which has provided the federal government with a broader scope for treaty implementation. In addition to the specific heads of power enumerated for Parliament and the provinces in sections 91 and 92, the *Constitution Act, 1867* grants Parliament a residual authority “to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” The 1988 case *R. v. Crown Zellerbach Canada Ltd.*,²⁵ involved a constitutional challenge to a federal statute implementing Canada’s obligations under the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*.²⁶ The defendant was charged under the federal legislation with dumping woodwaste into waters within the province of British Columbia. The defendant argued that the statute was unconstitutional since jurisdiction over

²² Stephen J. Toope, “Keynote address: Canada and international law” in Canadian Council on International Law, *The Impact of International Law on the Practice of Law in Canada* (The Hague: Kluwer Law International, 1999) at 35.

²³ In *MacDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, Laskin C.J.C. held that implementation must be manifest, not inferred. He wrote, at 171: “The courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation.” That position has been significantly softened in recent years: see van Ert, *supra* note 2 at 184-85.

²⁴ *Supra* note 13.

²⁵ [1988] 1 S.C.R. 401.

²⁶ Can. T.S. 1979/36.

the internal waters of a province lies with the province and not Parliament. The Supreme Court of Canada held that the statute was a valid exercise of Parliament's authority under the "peace, order and good government" clause of the constitution. The majority's reasons developed the "national concern doctrine." Under that doctrine, the subject matter of legislation lies within Parliament's authority under the "peace, order and good government" clause if it has a singleness, distinctiveness and indivisibility and there is a provincial inability to regulate the intra-provincial aspects. The majority explained that "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole."²⁷ It can be said, then, that where the subject matter of a treaty satisfies the test under the "national concern doctrine," the treaty may be implemented by Parliament through the "peace, order and good government" clause of the constitution.

Our legal system has also attempted to overcome implementation difficulties through statutory interpretation methods. For many years, Canadian courts have applied a presumption of conformity with international law when interpreting domestic legislation. The presumption is an established rule of statutory interpretation stipulating that the courts will presume the legislature does not intend to legislate contrary to Canada's international law obligations or international law generally.²⁸ The presumption directs courts to avoid, where possible, constructions of domestic law that would result in nonconformity with Canada's international commitments unless the wording of the statute clearly allows no other interpretation. The presumption is cited often in court decisions. For example, in a 1968 decision of the Supreme Court of Canada, Justice Pigeon wrote:

[T]his is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.²⁹

It has been said that the presumption is not so much one of legislative intent but rather a rule of judicial policy in that the court will attempt to avoid, through its decisions, bringing the state into violation of its international law obligations unless left with no other choice.³⁰ Thus, it is not a factual inquiry of searching for true legislative intent. Legislative intent to comply with international obligations is presumed as a

²⁷ *Crown Zellerbach*, *supra* note 25 at 436.

²⁸ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham and Vancouver: Butterworths Canada Ltd., 2002) at 421.

²⁹ *Daniels v. White and The Queen*, [1968] S.C.R. 517 at 541. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 31; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 at para. 50; *Orden Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137.

³⁰ See Gibran van Ert, "What is reception law?" in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 85 at 89.

matter of law based on prevailing norms of domestic law.³¹

The presumption is equally applicable to customary and treaty obligations, both implemented and unimplemented. Thus, while ratification of a convention does not change Canada's internal law, the presumption can give the act of ratifying a treaty some legal consequence even if the treaty has not been implemented. Ultimately, however, the presumption of international legality remains rebuttable. The constitutional principle of parliamentary sovereignty means that Parliament or a provincial legislature may legislate, within its sphere of jurisdiction, contrary to international law. For that reason, the courts must give effect to a statute that demonstrates the legislature's clear intent to contravene an international obligation.³²

The practice of looking to the underlying treaty for assistance in interpreting implementing legislation has been affirmed in recent years by the Supreme Court of Canada. Regardless of the precise mechanism of implementation, implementing legislation, where possible, is to be construed in conformity with the corresponding treaty obligations.³³ In the *National Corn Growers* case, the Supreme Court majority stated:

[I]n circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed, where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.³⁴

In that case, the Court confirmed that recourse to the treaty is not limited to situations where the provision of the domestic legislation is ambiguous on its face. Rather, the underlying international agreement may be referred to at the outset of the inquiry to determine if there is any ambiguity in the statute.³⁵

When looking to an underlying treaty to interpret the provisions of implementing legislation, the question that presents itself is "how should the treaty be interpreted?" Should the courts apply domestic rules of statutory interpretation or international rules of treaty interpretation? The approach in Canada has been the latter. In the 1998 case *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*³⁶ the Supreme Court of Canada had to interpret the meaning of the expression "acts contrary to the purposes and principles of the United Nations." That phrase can be

³¹ John Mark Keyes & Ruth Sullivan, "A legislative perspective on the interaction of international and domestic law" in Oonagh E. Fitzgerald, ed. *The Globalized Rule of Law*, *supra* note 30, 277 at 284.

³² See *Daniels v. White and The Queen*, *supra* note 29 at 167-68, per Pigeon J.

³³ Currie, *supra* note 14 at 218.

³⁴ [1990] 2 S.C.R. 1324 at 1371.

³⁵ *Ibid.*

³⁶ [1998] 1 S.C.R. 982.

found in Article 1F(c) of the *Refugee Convention*³⁷ as one of the categories of persons who may be excluded from the definition of “refugee.” The *Refugee Convention* had been implemented in Canada through incorporation by reference in the *Immigration Act*.³⁸ Mr. Pushpanathan, a refugee claimant in Canada, had been convicted of conspiracy to traffic in a narcotic and was sentenced to eight years in prison. The issue was whether such an offence constitutes an act “contrary to the purposes and principles of the United Nations.” The Court explained:

Since the purpose of the Act incorporating Article 1F(c) is to implement the underlying *Convention*, the Court must adopt an interpretation consistent with Canada’s obligations under the *Convention*. The wording of the *Convention* and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law.³⁹

The Court relied on the rules of interpretation articulated in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, which the Court had applied in previous cases. It is now settled that the rules of treaty interpretation are to be used when interpreting the provisions and requirements of a treaty underlying domestic legislation

The foregoing discussion demonstrates that the reception rules for domestic application of Canada’s international treaty obligations attempt to mediate a number of conflicting concerns and interests. Treaty implementation follows the division of powers, but we have adopted a more flexible approach to the federal government’s jurisdiction over peace, order and good government. Further, we now accept it as appropriate to look to treaties for assistance in interpreting domestic implementing legislation, even where that legislation does not explicitly refer to the underlying treaty. These developments allow Canadian law and reception rules to evolve with the realities of a changing world. This evolution is also evident in the consideration of public international law in the Canadian legal order outside of formal integration issues.

3. Influence of public international law on national law outside of formal integration issues

I have discussed at length the integration of Canada’s treaty obligations and the domestic legal order. The interplay between international and internal law in Canada has several dimensions beyond issues of formal integration of binding treaty obligations. I will now turn to three of those dimensions, namely the integration of customary international law, the impact of unimplemented conventions, and the use of comparative law.

³⁷ *Convention relating to the Status of Refugees*, Can. T.S. 1969/6, U.N.T.S. 189/137.

³⁸ R.S.C. 1985, c. I-2 (now replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27).

³⁹ *Pushpanathan*, *supra* note 36 at para. 51.

a. Integration of customary international law and jus cogens into the common law

I mentioned earlier that reception of customary international law in Canada generally follows an adoptionist model. Through the common law, courts apply rules of international custom directly without the need for any domestic legislative action. The adoptionist approach has deep roots in English common law, dating back to the eighteenth century,⁴⁰ and was accepted in Canada by Chief Justice Duff in the 1942 decision in *Re Foreign Legations*.⁴¹ The doctrine provides that the courts may not only decide cases in conformity with international law, but also may adopt international customs as rules of common law upon which their decisions are based.⁴²

The justification for the automatic incorporation of customary international law is that international custom, as “the law of nations,” is binding on Canada and is the law of Canada. However, in order to safeguard the constitutional principle of parliamentary supremacy, international custom may be applied directly by the courts through common law only if no valid legislation clearly conflicts with the customary rule. In the case of *R. v. Gordon*, a petitioner was charged with unlawfully entering and fishing in Canadian waters within the fishing zone but outside of Canada’s territorial sea. The petitioner argued that Parliament was without jurisdiction to pass legislation that conflicts with the customary international law principle of freedom of the High Seas. A British Columbia court held: “even if the law of Canada contravenes ‘customary international law,’ if Parliament, as here, has acted unambiguously, the courts of this country are bound to apply the domestic law.”⁴³

The doctrine of adoption is well accepted in British common law, particularly since the decision of Lord Denning in *Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria*.⁴⁴ The situation is not as clear in Canada. In recent years, Canadian courts have not always taken an adoptionist approach when they have had opportunity to do so. There is no constitutional obligation on courts in Canada to adopt any rules of customary international law in their decisions. Nonetheless, the doctrine has never been rejected and most commentators agree that the relationship between customary international law and domestic law is the same in Canada as it is in England.⁴⁵ In a recent decision the Ontario Court of Appeal affirmed that: “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly

⁴⁰ See, for example, *Buvot v. Barbut* (1737) Cas. T. Talb. 281, 25 E.R. 777; *Triquet v. Bath* (1764) 3 Burr. 1478, 97 E.R. 936.

⁴¹ [1943] S.C.R. 209.

⁴² van Ert, *supra* note 2 at 137.

⁴³ (1980), 19 B.C.L.R. 289 (S.C.) at 292, *aff'd* (1980), 117 D.L.R. (3d) 307 (B.C.C.A.).

⁴⁴ [1977] 1 Q.B. 529 (C.A.).

⁴⁵ See, for example, van Ert, *supra* note 2 at 142-50; Ronald St. J. Macdonald, “The relationship between international law and domestic law in Canada,” in Ronald St. J. Macdonald, Gerald L. Morris & Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88.

ousted by contrary legislation.”⁴⁶

The doctrine of adoption raises some interesting questions. A look at past cases reveals that not all customs may be internalized through the common law. Direct incorporation of customary international law through common law applies only to mandatory, prohibitive rules; permissive customs must be implemented through legislation to become part of domestic law.⁴⁷ Where international custom provides a permissive rule, it does not necessarily follow that a Canadian court will assume that Canadian law contains rules to the full extent of the international custom.⁴⁸ This exception to the general rule of adoption explains decisions holding that the common law rule that the realm ends at the low water mark cannot be expanded by incorporation of the three-mile limit recognized under customary international law.⁴⁹

The distinction between mandatory and permissive customs was recognized by Justice La Forest of the Supreme Court of Canada in the 1994 case *R. v. Finta*. That case raised the issue of whether Canada had jurisdiction to prosecute war criminals without statutory authority. Justice La Forest stated:

It is not self-evident that these crimes could be prosecuted in Canada in the absence of legislation. On the analogy of other international authority in this area, it is certainly arguable that the international norm regarding universality of jurisdiction is permissive only . . . and the language of s. 11(g) of the [*Canadian Charter of Rights and Freedoms*] also appears to be framed in permissive terms. Thus it is by no means clear that prosecution could automatically be pursued for these crimes before the courts of the various states, especially Canada where, barring express exception, crimes must comply with the requirement that they were committed within Canadian territory.⁵⁰

Legislation would be required for Canada to assume jurisdiction where international law does not require it, but merely permits it.

In addition, there is the question of which rule takes precedence when customary international law conflicts with a settled common law rule. Conflict can arise because of a change in international custom, because of an expansion of customary international law into areas formerly reserved for domestic law, or because of an erroneous development in the common law such that the conflict arises *per incuriam*.⁵¹ The quandary has yet to be resolved in Canada, although the answer is quite clear in England. In *Trendtex*, Lord Denning declared unequivocally:

International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50

⁴⁶ *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 at para. 65.

⁴⁷ *van Ert*, *supra* note 2 at 160. See also *R. v. Finta*, [1994] 1 S.C.R. 701, per LaForest J.

⁴⁸ See Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (London and New York: Addison Wesley Longman Limited, 1996) at 57.

⁴⁹ See *van Ert*, *supra* note XX at 161 discussing *Gavin v. The Queen* (1956), 115 C.C.C. 315 (P.E.I.S.C.); *Re Dominion Coal Co. Ltd. and County of Cape Breton*, *Re Nova Scotia Steel & Coal Co. Ltd. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593 (N.S.S.C.).

⁵⁰ *Finta*, *supra* note 47 at 734.

⁵¹ *van Ert*, *supra* note 2 at 152.

or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it.⁵²

While some commentators argue that *Trendtex* would be helpful in developing Canadian theory on this topic, it has yet to be explicitly adopted in any Canadian court.

Customary international law has appeared in recent decisions from the Supreme Court of Canada, particularly those dealing with humanitarian law and international criminal law. The recent case *Mugesera v. Canada (Minister of Citizenship and Immigration)*⁵³ required the Court to consider the interplay between Canadian domestic criminal law and international criminal law, particularly in regard to the prosecution of perpetrators of international crimes.

Mr. Mugesera and his family were granted permanent residency status in Canada in 1993, as refugees from Rwanda. Two years later, the Minister of Citizenship and Immigration became aware of allegations that Mr. Mugesera had delivered a speech in Rwanda which allegedly constituted an incitement to murder, hatred and genocide, and a crime against humanity. The Minister started deportation proceedings against Mr. Mugesera under the *Immigration Act*⁵⁴ on the basis that before being granted permanent residency he had committed an act that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of ten years or more. Among the issues before the Court were whether the speech satisfied the elements of the offence of advocating or promoting genocide, and the elements of the offence of a crime against humanity, as defined in the *Criminal Code of Canada*.

In its analysis on the offence of advocating or promoting genocide, the Court identified the treaty basis of Canada's obligations to prevent and punish genocide, but also acknowledged that the legal principles underlying the *Genocide Convention*⁵⁵ are considered to be part of customary international law. The Court emphasized the importance of interpreting domestic law in a manner consistent with customary international law.⁵⁶ Customary international law—particularly as applied and interpreted by the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia—provided the substantive basis for the elements of the offence of advocating or promoting genocide under the *Criminal Code*.

Similarly, customary international law was central to the Court's discussion of the elements of the offence of a crime against humanity. The relevant *Criminal Code* provision defined a "crime against humanity" to include any "inhumane act or omission that is committed against any civilian population or any identifiable group of

⁵² *Trendtex*, *supra* note 44 at 554.

⁵³ [2005] 2 S.C.R. 100.

⁵⁴ *Supra* note 38.

⁵⁵ *Convention on the Prevention and Punishment of the Crime of Genocide*, Can. T.S. 1949/27.

⁵⁶ *Mugesera*, *supra* note 53 at para. 126.

persons . . . that . . . constitutes a contravention of customary international law.”⁵⁷ Customary international law was therefore directly relevant to the proper interpretation of that section. Again, the Court referred to and relied on customary international law. The Court explained that under customary international law, the enumerated acts will become crimes against humanity if they are committed as part of a “widespread or systemic attack directed against any civilian population or any identifiable group.” Since this requirement is dictated by customary international law, the Court again found it appropriate to consider the jurisprudence of the ICTY and the ICTR in determining whether Mr. Mugesera’s speech constituted a crime against humanity under our domestic criminal legislation.

Although the Court did not directly refer to the doctrine of adoption in its decision in *Mugesera*, the elements of the offences of genocide and crimes against humanity under customary international law were directly relevant to the necessary elements of those offences under domestic criminal law in Canada. It is clear that even where the courts do not expressly rely on adoption of customary international law, it is open to them to apply rules of customary international law in domestic adjudication where there is no legislation to the contrary.

Related to the adoption of customary international law is the issue of reception of peremptory norms, or *jus cogens*. Classical international law theory drew no hierarchy of sources or rules of law, at least as between international custom and treaties. However, a higher order of customary rules known as *jus cogens* which carry special legal force and consequences has emerged. According to the *Vienna Convention on the Law of Treaties*, a peremptory norm is a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁵⁸ Once a particular norm achieves the legal status of *jus cogens*, the Latin expression *obligatio erga omnes* describes the legal implications arising from that characterization. Although the international legal order is founded on the principles of sovereign equality and consent, insofar as peremptory norms are concerned, consent is no longer the driving principle. Norms of *jus cogens* have a superordinate force in that they bind all states and no state may consent to their derogation. If ordinary rules of customary international law are directly incorporated through the doctrine of adoption, *a fortiori* peremptory norms must be applied directly through the common law.⁵⁹ A norm of *jus cogens* demands obedience from all levels of government including the judiciary. Although few Canadian cases have concerned the application of *jus cogens* norms, the Supreme Court of Canada has been open to arguments based on peremptory norms when they have arisen.⁶⁰

The leading Supreme Court decision involving *jus cogens* norms is *Suresh v.*

⁵⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 7(3.76).

⁵⁸ Art. 53.

⁵⁹ *van Ert*, *supra* note 2 at 165.

⁶⁰ *Kindred*, *supra* note 7 at 244.

Canada (Minister of Citizenship and Immigration).⁶¹ Mr. Suresh, a Sri Lankan citizen, entered Canada in 1990 and was recognized as a *Convention* refugee in 1991. Recognition as a *Convention* refugee carries several legal consequences. Notably, the government may not “*refoule*” a *Convention* refugee to a country where his or her life or freedom would be threatened by reasons of race, religion, nationality, membership in a particular social group or political opinion. In 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration started deportation proceedings against Mr. Suresh on security grounds. It was alleged that Mr. Suresh was a member of an organization engaged in terrorist activity in Sri Lanka.

The Court was required to determine the constitutionality of the provisions of the *Immigration Act* governing the conditions for deportation. In particular, the Court had to decide whether the provisions of the Act permitting Canada to deport a refugee to a country in which he faces a substantial risk of torture violates s. 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* guarantees to everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The case was argued under the *Charter* and therefore the Court’s decision focused on what the *Charter* requires, rather than on a strict international law analysis. It was therefore unnecessary for the Court to expressly refer to any obligation to adjudicate cases in conformity with norms of *jus cogens*. Nonetheless, in determining whether s. 7 of the *Charter* would be violated if Mr. Suresh were deported to face torture, the Court considered the status of the prohibition on torture under international law.

The Court began by affirming that the inquiry into the principles of fundamental justice under s. 7 of the *Charter* is informed not only by Canadian experience and jurisprudence, but also by international law including customary norms and *jus cogens*.⁶² As part of its discussion of the international perspective on torture, the Court considered the argument that an absolute prohibition on torture is a peremptory norm. The decision recognized the difficulty in pinpointing when a norm achieves the elevated status of *jus cogens*, but cited three compelling indicia that the prohibition on torture has become a peremptory norm. First, a large number of multilateral treaties expressly prohibit torture; second, no state has ever legalized torture or admitted to its deliberate practice; and third, various international authorities claim the prohibition on torture is an established peremptory norm.⁶³ Although the Court was not required to pronounce on the status of the prohibition on torture under international law, the indicia suggesting that it had become peremptory norm which cannot be easily derogated from informed the content of the principles of fundamental justice under s. 7 of the *Charter*.

⁶¹ [2002] 1 S.C.R. 3.

⁶² *Ibid.* at para. 46.

⁶³ *Ibid.* at paras. 62-64.

b. Using values of public international law (*i.e.* unimplemented conventions) in interpreting and developing national law

The second broad area in which public international law has influenced Canadian domestic law outside of formal integration of treaty obligations is through the use of values of international law to interpret and develop domestic law. In recent years, Canadian jurisprudence has evolved from regarding international law through a strict binary lens of bindingness/non-bindingness to a more nuanced perspective of international law.⁶⁴ While it is clear that Canadian courts must apply international obligations that have been implemented in domestic legislation, unimplemented treaties also have an impact on the interpretation and development of internal law.

Under the modern approach to statutory interpretation in Canada, “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁶⁵ In appropriate cases, the context of a statute may require consideration of Canada’s international law obligations. The values underlying an unimplemented treaty may assist the courts in determining the proper construction of a statute or the scope of a delegated discretionary power, and the content and scope of rights under the *Charter*.

Knop explains the traditional model of international law in domestic courts as asking whether the state has international legal obligations—customary or conventional—that are binding on the domestic law.⁶⁶ According to this model, whatever the particular mode of reception (adoption or transformation), the focus is on “the hard-wiring of international law into domestic law, the existence of vertical connections that require the courts of a state to enforce that state’s international legal obligations.”⁶⁷ This approach has led to a set of binary choices—under our traditional reception rules, the binding/non-binding distinction corresponds to an all-or-nothing application of international legal rules, and the rules of interpretation specify whether a rule must be treated like ordinary domestic law or whether account must be taken of its meaning in international law.⁶⁸ Jurisprudential developments from the Supreme Court of Canada in recent years have qualified this traditional view and sparked the observation that “the engagement of Canadian judges with international law is not necessarily explained or exhausted, let alone justified, by the binding/non-binding distinction.”⁶⁹ Rather than an all-or-nothing approach, our law now recognizes that international law values can affect our understanding of our domestic law, even

⁶⁴ See Karen Knop, “Here and there: International law in domestic courts” (2000) 32 N.Y.U. J. Int’l L. & Pol. 501.

⁶⁵ Ruth Sullivan, *supra* note 28 at 1, approved in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21.

⁶⁶ Knop, *supra* note 64 at 515.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 518.

whether those values are not derived from international law obligations that are directly applicable in our courts.

A landmark decision on the impact of unimplemented treaties in domestic law came from the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.⁷⁰ Ms. Baker, a Jamaican citizen, entered Canada as a visitor in 1981 and remained. She never received permanent resident status, but supported herself illegally as a domestic worker. She had four Canadian-born children. In 1992, Ms. Baker was ordered deported after it was determined that she had overstayed her visitor's visa and had been working illegally. The general rule under Canadian law is that one must apply for permanent residency from outside the country. Ms. Baker applied for an exemption from the general rule on the basis of humanitarian and compassionate grounds. She had been diagnosed with mental illness and was concerned about the availability of medical treatment in Jamaica as well as the effect her deportation might have on her children. Her application was denied by an Immigration Officer and the Supreme Court of Canada was required to review that decision.

In the appeal, Ms. Baker argued that the Immigration Officer had improperly exercised his discretion in denying her application on the basis of humanitarian and compassionate grounds. Part of her argument was based on the effect of the *Convention on the Rights of the Child* (CRC)⁷¹ in Canadian domestic law, in particular its recognition of the importance of children's rights and the best interests of children. The CRC has not yet been transformed into Canadian law through implementing legislation. The Supreme Court majority acknowledged the traditional rule that international conventions are not part of Canadian law unless they have been implemented and that the provisions of the CRC have no direct application in Canadian courts. Nonetheless, the majority referred to the contextual approach to statutory interpretation in Canada and declared that international human rights law has an important role as an aid in interpreting domestic law.⁷²

The decision in *Baker* confirmed that Canada's international obligations and the values they represent should be considered by our courts to inform the context of our domestic law and the scope of statutory discretions. Knop explains that both parties in *Baker* formulated their arguments according to the traditional notion of binding law.⁷³ However, the majority's use of the CRC did not fit the traditional, strict approach. Rather, Canada's international obligations were viewed as a persuasive source of the social values that are important to our country. The Court did not look for a rule of statutory interpretation requiring that the domestic legislation be construed in a manner consistent with the CRC. Instead, the CRC was "part of a less deterministic approach to the interpretation of the Act."⁷⁴

⁷⁰ [1999] 2 S.C.R. 817.

⁷¹ Can. T.S. 1992/3.

⁷² *Baker*, *supra* note 70 at para. 70.

⁷³ Knop, *supra* note 64 at 510.

⁷⁴ *Ibid.* at 512.

Following *Baker*, the Supreme Court of Canada took a similar approach to international law values in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*.⁷⁵ The Court was required to rule on the validity of a municipal by-law restricting the use of pesticides. The majority cited the observation from *Baker* that international law may help inform the contextual approach to statutory interpretation. The majority upheld the by-law, relying among other grounds on the “precautionary principle” for which there may be “currently sufficient state practice to allow a good argument that [it] is a principle of customary international law.”⁷⁶

The impact of unimplemented treaties and international law values has been even more striking in cases involving the content and scope of rights and freedoms under the *Charter*. As I explained in an earlier paper on this topic, co-written with Gloria Chao, “the *Charter* may be seen as a conduit or vehicle for international law to be used in the domestic legal order.”⁷⁷ Early in our *Charter* jurisprudence it was established that international law is relevant to the interpretation of rights and freedoms. In the 1985 *Motor Vehicle Reference*⁷⁸ decision, Justice Lamer explained that international law can provide insight into the scope and content of the “principles of fundamental justice” under s. 7 of the *Charter*. The more recent decision in *Suresh*, which I discussed earlier, confirmed that when analysing legislation for constitutionality, the inquiry into s. 7 and the “principles of fundamental justice” will be informed by Canada’s international obligations, even if not explicitly implemented by domestic legislation.

The impact of international law on *Charter* interpretation goes beyond the “principles of fundamental justice.” It also encompasses the scope and content of the rights guaranteed by the *Charter* and what can constitute pressing and substantial objectives justifying limitations on those rights. In *Slaight Communications Inc. v. Davidson*,⁷⁹ Chief Justice Dickson repeated his comment from his dissenting reasons in an earlier judgment in the *Public Service Employee Relations Act Reference*⁸⁰ that:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the *Charter*’s protection.” I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

He then added:

Canada’s international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the

⁷⁵ [2001] 2 S.C.R. 241.

⁷⁶ *Ibid.* at para. 32.

⁷⁷ LeBel & Chao, *supra* note 1 at 59.

⁷⁸ [1985] 2 S.C.R. 486.

⁷⁹ [1989] 1 S.C.R. 1038.

⁸⁰ [1987] 1 S.C.R. 313.

interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.⁸¹

It is against this jurisprudential backdrop that our Court, on numerous occasions, has looked to the values of international law and Canada's unimplemented treaty obligations for guidance in determining the scope and content of our constitutionally guaranteed rights and freedoms.⁸²

c. International law as comparative law

A third way in which international law may be used in the Canadian domestic legal order is as comparative law. Comparative law includes consideration of the decisions of other (non-Canadian) national courts, the decisions of supranational tribunals, foreign domestic laws and instruments of public international law. However, there is an important distinction between comparative law and public international law proper. By using international law comparatively, the court is not making a final determination on the state of international law. Rather, as Gloria Chao and I noted, Canadian courts may use comparisons with other jurisdictions to assess where Canadian law stands against those jurisdictions. The use of foreign and international law in this way does not *control* domestic law, but can inspire or inform the development of domestic law.⁸³

It is becoming more and more common for courts around the world to consider the reasoning and judgments of other courts, both national and supranational, in resolving common issues. This is so especially in the field of human rights. Various explanations have been given as to why comparative law has become so prevalent in judicial adjudication, particularly between countries with similar legal systems and traditions. For one, increased globalization has allowed judges from different countries to come together and share views and ideas in what has been described as "transjudicial communication."⁸⁴ This has been facilitated through advances in technology and increased personal contact between judges from different parts of the world. As never before, the same issues are facing courts throughout the world, particularly in human rights, criminal law and environmental protection. I would suggest that this is due also, in large part, to increased telecommunication across the globe. A third factor is the spread of an international, universal concept of human rights through the twentieth century. As international instruments establish universal standards, domestic courts look to international law for guidance in interpreting their own internal human rights guarantees.

While those factors have contributed to the expansion of comparative law, the

⁸¹ *Slaight Communications*, *supra* note 79 at 1056.

⁸² See, for example, *Suresh*, *supra* note 61; *United States v. Burns*, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

⁸³ LeBel & Chao, *supra* note 1 at 59.

⁸⁴ See Anne-Marie Slaughter, "A Typology of transjudicial communication" (1994) 29 U. Rich. L. Rev. 99.

nature of the comparative exercise has changed. At one time, certain courts were looked to by other countries unquestioningly as authorities to be followed because of their greater experience in certain subject matters. We looked to U.K. law in this manner in Canada's early years as an independent nation, and to U.S. law in the early years of the *Charter*, while, it is fair to say, the House of Lords and the U.S. Supreme Court looked at Canadian law far less often. That is no longer the case. In the words of my former Supreme Court colleague, Justice L'Heureux-Dubé:

[A]s courts look *all* over the world for sources of authority, the procession of international influence has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers." Reception is turning to dialogue.

This dialogue should be welcomed.

Much has been written in the academic literature about the purpose and propriety of the use of comparative law. Karen Knop explains that perhaps the greatest value of comparative law is the exercise of holding a mirror up to ourselves; its importance is not the reliance on international law but rather "international law's ability to provoke this critical self-reflection."⁸⁵ The benefit therefore attaches regardless of whether international law is adopted or even accepted as relevant.⁸⁶ Justice L'Heureux-Dubé shared this view in a 1998 article. She wrote:

I do believe that considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same. Foreign comparison broadens the perspectives for decision-making, and leads to consideration of the solutions of others who have considered the problem in a world facing increasingly similar issues.⁸⁷

However, she also cautioned that the solutions and reasoning of other nations must not be automatically imported without adequate consideration of their application in a Canadian context. Even when foreign reasoning is rejected, by considering and articulating why that approach is inappropriate, our courts can arrive at better decisions.⁸⁸

It has been suggested that comparative law makes use of foreign jurisprudence horizontally, rather than vertically, in the sense that the decisions of other jurisdictions have persuasive but not binding authority.⁸⁹ Comparison can serve as inspira-

⁸⁵ Knop, *supra* note 64 at 531.

⁸⁶ *Ibid.*

⁸⁷ "The Importance of dialogue: Globalization and the international impact of the Rehnquist court" (1998) 34 *Tulsa L.J.* 15 at 39.

⁸⁸ *Ibid.* at 26-27.

⁸⁹ See Bijon Roy, "An Empirical survey of foreign jurisprudence and international instruments in

tion for new solutions, as reassurance of the legitimacy of a particular path, or as a source of rhetorical persuasiveness or authority.⁹⁰ But, while Canadian courts look to foreign law, they do not always follow it. Consideration of foreign reasoning does not require abandoning domestic doctrine and our courts will only depart from prior Canadian doctrine if such a departure is demonstrably warranted.⁹¹

Comparative law is particularly relevant in our *Charter* interpretations. Foreign law and reasoning can assist Canadian courts in determining the scope and content of our rights and freedoms. Moreover, in determining what limits on rights can be demonstrably justified in a free and democratic society, we look at the experience and practices of other free and democratic societies.⁹² The role of our courts in considering foreign jurisprudence in domestic constitutional adjudication was expressed by Jamie Cameron as “not to find ready-made answers to difficult questions, but to enlighten themselves as to the nature of rights review, and to deepen their understanding of the doctrinal opinions open to them in interpreting the *Charter*.”⁹³ The Supreme Court demonstrated the same caution in *Lavigne v. Ontario Public Service Employees Union*, a case which dealt with the constitutional guarantee of freedom of association wherein Justice Wilson wrote:

[T]his Court must exercise caution in adopting any decision, however compelling, of a foreign jurisdiction. This Court has consistently stated that even although it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it generated. The uniqueness of the *Canadian Charter of Rights and Freedoms* flows not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition.⁹⁴

In the early years of the *Charter*, Canadian scholars frequently compared and contrasted it with the U.S. Bill of Rights and our courts often considered U.S. jurisprudence in deciding *Charter* cases. With little experience of our own in those early days, our decisions benefited greatly from consideration of American solutions to the same problems raised in our courts. Nevertheless, on some issues, our courts have taken vastly different approaches. While we look to foreign reasoning, we have not hesitated to go our own way where Canadian law has required such an approach.

These explanations of comparative law are evidenced in a number of Supreme Court decisions. I will discuss two.

Charter litigation” (2004) 62 U. T. Fac. L. Rev. 99. The concept of binding authority has been defined as material that “is regarded as relevant to the decision which has to be made by the judge, but is not binding on the judge under the hierarchical rules of the national system determining authoritative sources.” See H. Patrick Glenn, “Persuasive authority” (1987) 32 McGill L.J. 261.

⁹⁰ See Roy, *supra* note 89 at 109-10.

⁹¹ *Ibid.* at 114.

⁹² L’Heureux-Dubé, *supra* note 87 at 19.

⁹³ “The *Motor Vehicle Reference* and the relevance of American doctrine in *Charter* adjudication” in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1986) 69 at 70.

⁹⁴ [1991] 2 S.C.R. 211 at 256-57.

Earlier in this address I spoke of the Court’s decision in *Mugesera*.⁹⁵ *Mugesera* is a recent example of our Court’s consideration of the decisions rendered by supranational tribunals. This is particularly appropriate where the issue before our Court relates to a subject area in which the tribunal has particular expertise. Recall that in *Mugesera* the Supreme Court faced the issue of determining the elements of two offences under our domestic criminal code which originate in international criminal law: incitement to genocide and a crime against humanity.

The decisions of the ICTY and the ICTR, though not formally binding on our Court, played a significant role in our analysis. We adopted the ICTR’s approach in *Prosecutor v. Akayesu*⁹⁶ that a charge of incitement to genocide⁹⁷ does not require proof that genocide has occurred. We further adopted the *actus reus* and *mens rea* requirements from *Akayesu*—the act of incitement must be both direct and public, and the accused must have intended to prompt or provoke another person to commit genocide. Having given due consideration to the reasoning of the ICTR, we benefited from the experience and expertise of that tribunal and found it appropriate to incorporate those elements into the Canadian criminal law requirements for “advocating or promoting genocide.”

Similarly, the reasons of the ICTY and the ICTR were directly relevant to our consideration of the elements of a crime against humanity. Our *Criminal Code* provision defining a “crime against humanity” expressly incorporates principles of customary international law. In an earlier decision, our Court had suggested that a discriminatory intent was required for all crimes against humanity.⁹⁸ That decision was rendered in 1994, prior to the vast and persuasive body of jurisprudence from the ICTY and the ICTR dealing with the sources, evolution and application of customary international law. Our Court expressly noted that the expertise of those tribunals and their authority in respect of customary international law suggest that their reasoning should not be disregarded lightly.⁹⁹ We accepted the ICTY’s conclusion that the *mens rea* requirement for persecution as a crime against humanity is that the accused must have intended to commit the persecutory acts with discriminatory intent.¹⁰⁰ But, following the ICTY and the ICTR, we held the requirement of discriminatory intent applies only to persecution, not to other forms of crimes against humanity.¹⁰¹ In view of the particular expertise of the ICTR and the ICTY, and the authority in international criminal law with which they are vested, we found it appropriate to follow their guidance and depart from our own precedent. We reasoned:

In the face of certain unspeakable tragedies, the community of nations must provide a unified response. Crimes against humanity fall within this category.

⁹⁵ *Mugesera*, *supra* note 53.

⁹⁶ Case No. ICTR 96-4-T (Trial Chamber).

⁹⁷ Considered to be the parallel of s. 318(1) of the *Criminal Code*, “advocating genocide.”

⁹⁸ See *Finta*, *supra* note 47 at 813.

⁹⁹ *Mugesera*, *supra* note 53 at para. 126.

¹⁰⁰ See *Prosecutor v. Tadic*, 124 I.L.R. 61 (1999) (Appeals Chamber).

¹⁰¹ *Mugesera*, *supra* note 53 at paras. 142-43.

The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less.¹⁰²

Mugesera demonstrates how comparative law, properly considered, and the dialogue it promotes, can assist domestic courts in developing internal law and promote harmonized justice.

The Supreme Court of Canada's 2001 decision in *United States v. Burns*¹⁰³ also provides a strong example of how comparative law can enrich our understanding of Canadian values and develop Canadian law. That case involved two Canadian citizens who were sought by the U.S. on an extradition request to face triple aggravated murder charges in the State of Washington. If convicted in Washington, they would face either the death penalty or life in prison without the possibility of parole. Mr. Burns and Mr. Rafay, the two accused, challenged extradition from Canada on several grounds. The key issue on appeal was whether extradition without assurances that the death penalty would not be imposed in the event of a conviction would violate their right under s. 7 of the *Charter* to "life, liberty and security of the person" and "not to be deprived thereof except in accordance with principles of fundamental justice." Ten years earlier, in the case *Canada (Attorney General) v. Kindler*,¹⁰⁴ the Supreme Court of Canada held that extradition without such assurances would not constitute a violation of s. 7.

Our Court reiterated that s. 7 involves a "balancing process" in which "the global context must be kept squarely in mind."¹⁰⁵ The "global context" was central to our consideration of the Canadian constitutional and legal requirements. Again, although the views and approaches of international and foreign law did not bind our Court, they were relevant to interpreting the scope and content of our *Charter* rights. We noted both Canada's multilateral efforts to change extradition arrangements where sought persons face the death penalty and its international advocacy for the abolition of the death penalty. We then considered numerous international instruments that provide for assurances in extradition arrangements and abolition of the death penalty, including the *European Convention on Extradition*,¹⁰⁶ the *U.N. Model Treaty on Extradition* and the U.N. Commission on Human Rights Resolutions 1999/61 and 2000/6, supported by Canada.

The decision canvassed various important multilateral initiatives within the international community denouncing the death penalty since the Supreme Court's last decision on assurances. Further, we considered state practice around the world since 1991, which increasingly favours abolition of the death penalty. This survey of the international landscape led was helpful in testing Canadian values against those

¹⁰² *Ibid.* at para. 178.

¹⁰³ *Burns*, *supra* note 81.

¹⁰⁴ [1991] 2 S.C.R. 779.

¹⁰⁵ *Burns*, *supra* note 81 at para. 64, quoting *Kindler*, *supra* note 103 at 833.

¹⁰⁶ Eur. T.S. No. 24, signed December 13, 1957.

of comparable jurisdictions and led to the conclusion that “in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped.”¹⁰⁷ I emphasize that the Supreme Court was not bound by these international instruments or foreign law; rather, comparativism assisted the Court in understanding and assessing *Canadian* views and values by allowing us to hold up a mirror and assess our legal and social order against that of other nations. In the result, the Court determined that its earlier precedent no longer accorded with the values of our constitution and should be overturned. The Court concluded:

International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada’s principles advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.¹⁰⁸

4. Conclusion

These comments hope to provide with some insight into the Canadian perspective on the integration of public international law and domestic law. Our approach to the internalization of international law has undergone changes in recent years, particularly since the inception of the *Canadian Charter of Rights and Freedoms*. We still respect and affirm the tradition rule that international treaty obligations must be transformed into domestic law before they can be directly applied by the courts. However, international law can influence domestic adjudication in more nuanced ways, including common law’s ability to draw on customary international law; the use of international law values to inform our understanding of domestic legislation, delegation powers and constitutional rights; and exercises in comparativism.

Interest in the interplay between the two legal orders will no doubt continue in the near future in Canada as certain questions remain unresolved, waiting for the appropriate case. The expansion of transjudicial communication and the cross-pollination of ideas that occurs amongst judges, jurists and lawyers around the world indicates that we in Canada are not alone in grappling with new issues relating to the impact of international law in the domestic sphere. The discourse, both lively and enriching, will in my view only lead to a broadening of global justice as we move into the future.

Ottawa, Canada, October 30, 2006

¹⁰⁷ *Burns, supra* note 81 at para. 84

¹⁰⁸ *Ibid.* at para. 128.