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THE RISE OF INTERNATIONAL LAW IN CANADIAN CONSTITUTIONAL LITIGATION: FUGUE OR FUSION? RECENT DEVELOPMENTS AND CHALLENGES IN INTERNALIZING INTERNATIONAL LAW

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I. INTRODUCTION

1. Purpose

As the programme guide indicates, the topic of our discussion is “The Rise of International Law in Canadian Constitutional Litigation.” Over the last decade, there have been tremendous developments in international law, including the proliferation of conventional law as well as the establishment of a number of international criminal and trade law fora. This growth has reverberated through domestic law as

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in the past decade, a number of key constitutional law cases have applied principles of international law; such cases have touched on a wide range of topics, including international trade obligations,¹ war crimes or crimes against humanity,² possibility of unilateral secession of a province,³ extradition leading to possible death penalty,⁴ and deportation of refugees to face possible torture.⁵

¹ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

² *R. v. Finta*, [1994] 1 S.C.R. 701.

³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁴ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Ng, Re*, [1991] 2 S.C.R. 858; and *United States v. Burns*, [2001] 1 S.C.R. 283.

⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 18 Imm. L.R. (3d) 1.

The high profile nature of these cases has provoked much debate regarding the Supreme Court of Canada's interpretation or application of international law. At the heart of the debate is the 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. Some feel the Court has given undue weight to principles of international law, others believe the Court should expand on and develop a more principled approach to its use of international law in deciding domestic cases. The purpose of this discussion is to examine a few of the Court's key decisions on the topic, highlighting the tension between the two approaches to using international law in constitutional law cases.

2. Purview

As you may well appreciate, this topic is of boundless potential scope; therefore, we have taken the liberty of appending the subtitle "Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" to the title and limiting ourselves to looking primarily at decisions of the Supreme Court of Canada released in the last decade.

Music enthusiasts may already be aware that the question in the subtitle refers to two different styles of music from two different eras. "Fugue" is the term for the type of Baroque period music where one or two themes are repeated or imitated by successively entering and interweaving repetitive elements.⁶ "Fusion" is defined as a merging of diverse, distinct, or separate elements into a unified whole and is used in contemporary music to denote the

⁶ "Fugue" is defined by *Essentials of Music* online (<http://www.essentialsofmusic.com>.) Date accessed: 20 March 2002) as follows:

Polyphonic form popular in the Baroque era in which one or more themes are developed by imitative counterpoint. Example: Bach, *Chromatic Fantasy and Fugue in D minor*, Fugue

A fugue is a complex composition in which the theme (called the subject) is developed by imitative counterpoint. In this example, the first imitation of the subject is heard overlapping the initial idea.

The source *Merriam-Webster Online* (<http://www.m-w.com/home.htm>. Date of search: 20 March 2002) defines "fugue" as follows:

Etymology: probably from Italian *fuga* flight, fugue, from Latin, flight, from *fugere*

Date: 1597

1 a : a musical composition in which one or two themes are repeated or imitated by successively entering voices and contrapuntally developed in a continuous interweaving of the voice parts **b** : something that resembles a fugue especially in interweaving repetitive elements

2 : a disturbed state of consciousness in which the one affected seems to perform acts in full awareness but upon recovery cannot recollect the deeds

combination of different styles, most commonly, jazz and rock, to form a new style.⁷ A fugue is the metaphor for one approach to the internalization of international law principles: where international law is a separate order from the domestic legal order and must be formally incorporated in order to ensure an intersection or interweaving of the two orders of law. Fusion is the metaphor for another internalization approach: whereby international law informs and becomes an important part of the domestic legal order, especially in constitutional law cases, in such a manner that although two legal orders are combined, the resulting decision merges elements of each order into a unified whole.

This discussion examines some of the recent cases heard by the Court on the topic and attempts to identify which of the two metaphors best describes the current approach taken by the Court in the internalization of international law. It is divided into the following parts.

Part I sets out the definition and sources of international law and the uncertainties associated with those sources of law.

Part II examines the application of international law to the Canadian legal order. This is the main part of our discussion and is divided into two parts. First, we inquire into the difficulties of internalizing principles and rules of international law into the domestic legal order, highlighting the increased complexities of doing so in the constitutional law context. Secondly, we discuss the rise of international law in Canadian constitutional litigation, paying particular attention to four recent cases decided by the Court: the *Finta*, *Baker*,⁸ *Burns* and *Suresh* cases and noting the various approaches to the use of international law by the Court.

And finally, Part III makes a few suggestions that, hopefully, might assist the constitutional litigator in setting out the relevance of any international law arguments raised before the Court. The thesis underlying this discussion is that awareness of the pitfalls and misconceptions of the use of international law in

⁷ "Fusion" is defined by *Essentials of Music* online (<http://www.essentialsofmusic.com>. Date accessed: 20 March 2002) as follows:

Style that combines jazz improvisation with amplified instruments of rock.

The source *Merriam-Webster Online* (<http://www.m-w.com/home.htm>. Date of search: 20 March 2002) defines "fusion" as follows:

Etymology: Latin *fusion-*, *fusio*, from *fundere*

Date: 1555

- 1 : the act or process of liquefying or rendering plastic by heat
- 2 : a union by or as if by melting: as **a** : a merging of diverse, distinct, or separate elements into a unified whole **b** : a political partnership : COALITION **c** : popular music combining different styles (as jazz and rock)
- 3 : the union of atomic nuclei to form heavier nuclei resulting in the release of enormous quantities of energy when certain light elements unite

⁸ *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.

constitutional litigation may assist the litigator in attaining a better understanding of its relationship with internal Canadian law. Before we move on to the discussion, a word of caution appears necessary: these comments do not represent the position of the Supreme Court of Canada, but reflect only our own views and concerns.

II. DEFINITION OF INTERNATIONAL LAW

1. Historical and Modern Definitions

It is almost trite to say so, but a good part of the debate associated with the Court's use of international law in constitutional cases lies in the difficulty of defining public international law. The notion of public international law has developed and evolved over a number of centuries.

From the time of the Middle Ages,⁹ a state-based system of rules formed the key component of international law.¹⁰ The term began to expand at the end of the Middle Ages, whereby international organizations, and even individuals may be subjects of rights conferred and obligations imposed by international law.¹¹ However, the essence of the state-based definition was still found in the 1625 seminal work of Dutch jurist Hugo Grotius, *De Jure Belli ac Pacis, Libri iii*.¹² Considered the father of international law, Grotius presented his general conception of international law, explaining how the sovereign power could only be limited by natural law and/or agreements between sovereign states.¹³ Given the importance of Grotius' work, it is not surprising that modern standard definitions tend to focus on the relations of nations with each other,¹⁴ placing less emphasis on the rights of individuals under international law.

⁹ Although the Chinese, Indian, Greek, and Roman cultures evidenced some notions of international relations and rules prior to the Middle Ages, these were applied primarily on a regional basis and pre-dated the existence of the modern state. See Emanuelli, *Droit international public* (1998), at 16-17; Dinh, *Droit international public* (6e éd., 1999), at 42-46; and Carreau, *Droit international* (7e éd., 2001), at 9-14.

¹⁰ Dinh, *id.*, at 42-49.

¹¹ Jennings & Watts, eds., *Oppenheim's International Law* (9th ed., 1992), vol. I, at 4.

¹² Grotius, *The rights of war and peace: in three books wherein are explained the law of nature and nations and the principal points relating to government*, trans. J. Barbeyac (1738). See also Emanuelli, *supra*, note 9, at 19-20; Nussbaum, *A Concise History of the Law of Nations* (1950); and Hamilton, *Hugo Grotius: the father of the modern science of international law* (1986, c. 1917).

¹³ Dinh, *supra*, note 9, at 55-56.

¹⁴ See Emanuelli, *supra*, note 9, who writes at 1, para. 1:

Common to both historical and modern definitions is the sharp distinction between domestic and international law: the latter lacks the constitutional mechanism to concretize the law. As Ian Brownlie observes:

In the context of international relations the use of the term “formal source” is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law. Decisions of the International Court, unanimously supported resolutions of the General Assembly of the United Nations concerning matters of law, and important multilateral treaties concerned to codify or develop rules of international law, are all lacking the quality to bind states generally in the same way that Acts of Parliament bind the people...¹⁵ [Emphasis added.]

Instead, the primary basis of international law is that the “general consent of states creates rules of general application. The definition of custom in international law is essentially a statement of this principle...”¹⁶

2. Key Sources

The key sources of international law that are indicia of such general consent are found in a number of materials. Paragraph 1 of Article 38 of the *Statute of the International Court of Justice*,¹⁷ which sets out the functions of the International Court of Justice, is generally regarded as a complete statement of the sources of international law:¹⁸

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

Le droit international public peut se définir comme l'ensemble des normes juridiques qui régissent les rapports entre les membres (États, organisations intergouvernementales) de la communauté internationale.

See also Brun & Tremblay, *Droit constitutionnel* (3e éd., 1997), at 3; Combacau Sur, *Droit international public* (5e éd., 2001), at 2, where they write:

S. 1 Les relations interétatiques et leur droit - Le premier type de relations internationales est celui qui soulève le moins de difficultés quant à son identification et à celle du droit qui lui est applicable.

See further Carreau, *supra*, note 9, at 19-20, where the author describes the structure of the classical international society; and Dukelow & Nuse, *The Dictionary of Canadian Law* (2nd ed., 1995) at 625, who define public international law as follows:

a code of rules which controls the conduct of independent nations in their relations with one another.

¹⁵ Brownlie, *Principles of Public International Law* (5th ed., 1998), at 1-2.

¹⁶ Brownlie, *id.*, at 2.

¹⁷ As found in the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

¹⁸ See Emanuelli, *supra*, note 9, at 39; Brownlie, *supra*, note 15, at 3; and Jennings & Watts, *supra*, note 11, at 24.

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

...

Generally, the principal sources of international law are the first three on the list: international conventions, customary law, and general principles of law; however, even these three sources entail some uncertainty as to their application.

International conventions are bilateral or multilateral instruments signed with obligations and benefits for states or individuals. They generally include, *inter alia* treaties, agreements, and covenants, and lend themselves to relatively straightforward incorporation into domestic law. It is, however, noted that many of these documents include aspirational declarations, programmes of action, guidelines, and protocols, also known as “soft law”.¹⁹ Although such general statements or declarations are useful as they allow obligations to be formed “in a precise and restrictive form that would not be acceptable in a binding treaty,”²⁰ by its very nature, “soft law” does not set out how these principles may be applied in domestic legal orders.²¹ Rather, since state sovereignty is one of the basic tenets of international public law,²² there is generally

¹⁹ In “New Ways to Make International Environmental Law” (1992) 86 A.J.I.L. 259, at 269, Palmer remarks that “soft law” leaves large amounts of discretion to the states: “Frequently, what is expressed is a series of political statements or values.”

²⁰ Birnie & Boyle, *International Law and the Environment* (1992), at 27. See also VanderZwaag’s comments on the utility of “soft law” in VanderZwaag, *Canada and Marine Environmental Protection Charting a Legal Course Towards Sustainable Development* (1995), at 41:

Nevertheless, the creative force of “soft law” principles should not be underestimated... this twilight realm of international law, “soft law”, has the potential to enlighten and guide law reforms at the international, regional and national levels. As crucibles for further social, economic, political, technological, cultural and scientific thinking, the principles shed light on the major “spark points” for energizing further legal development. [Emphasis added.]

²¹ Birnie & Boyle, *id.*, at 123, observe that: “What is lacking, however, is any comparable consensus on the meaning of sustainable development, or how to give it concrete effect in individual cases.”

²² A basic norm of customary international environmental law is that states have the sovereign right to exploit their own resources so long as no damage is caused to other states. See *Trail Smelter (U.S. v. Canada)* (1941), 3 R.I.A.A. 1905. This norm has been reproduced in “soft law”

no legal impetus for states to implement “soft law” declarations even if they are a party or signatory to them. Therefore, while these principles are laudable, it is important to note that they have been criticized for being rather vague,²³ failing to set out how states may implement them in domestic legal systems.

The second source, customary law, is also difficult to implement in the domestic legal order. A party relying on customary law must meet the two criteria of consistent international practice and *opinio juris*²⁴ and must prove that this custom is established in such a manner that it has become binding on the other party.²⁵ These criteria require that the party provide wide-sweeping objective and subjective evidence of the establishment of a custom; this distinction is problematic as it is often difficult to determine what states believe as opposed to what they say.²⁶ Contrary state practice can be regarded as either a breach of an old custom or the seed of a new one.²⁷ Therefore, unless the impugned custom is formally ratified and adopted into national legislation, it could be difficult to situate the custom in the domestic legal order.

The third key source of international law are the general principles of law recognized by civilized nations. This is yet another category whose application becomes problematic at times. First, it is difficult to define exactly what general principles of law are, and second, there is no way of identifying who makes up the group of “civilized nations”,²⁸ now commonly referred to as a community

documents such as the *Stockholm Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, U.N. Doc. A/CONF. 48/14/Rev.1, reprinted at (1972) 11 I.L.M. 1416, Principle 21, and the *Rio Declaration on Environment and Development*, 13 June 1992, U.N. Doc. A/CONF.151/5/Rev.1, reprinted in (1992) 31 I.L.M. 874, Principle 2.

²³ See Panjabi, “From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law” (1993) 21 Den. J. Int’l L. & Pol’y. 215, at 272; and VanderZwaag, *Canada and Marine*, *supra*, note 20, at 38-39.

²⁴ Kindred, Castel, Fleming, Graham, de Mestral, Reif, Vlastic & Williams, *International Law Chiefly as Interpreted and Applied in Canada* (5th ed., 1993), at 174.

²⁵ See *Asylum (Colombia/Peru) case*, (1950) I.C.J. Rep. 4 (266), at 14-15 (276-7); and *Nicaragua v. United States* (Merits) (1986) I.C.J. Rep. 4 (14), at 88 (98), para. 186.

²⁶ Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95 A.J.I.L. 757, at 757.

²⁷ Roberts, *id.*, at 790.

²⁸ See the dissenting opinion of La Forest J. in *R. v. Finta*, *supra*, note 2, at 773, where he quotes Green, “Canadian Law, War Crimes and Crimes Against Humanity” (1988), 59 Brit. Y.B. Int’l L. 217, at 226:

... a major problem would arise in seeking to ascertain just what is meant by the ‘general principles of law recognized by the community of nations’. . . . The difficulty lies in determining what are ‘general principles of law’ and what percentage of the world’s States constitutes a sufficient proportion to be considered ‘the community of nations’. Does this collection have to include every major power or be representative of all the leading legal systems of the world?

of nations.²⁹ Sir Robert Jennings and Sir Arthur Watts describe this source of international law as follows:

The legal principles which find a place in all or most of the various national systems of law naturally commend themselves to states for application in the international legal system, as being almost necessarily inherent in any legal system within the experience of states... The intention is to authorise the Court to apply the general principles of municipal jurisprudence, insofar as they are applicable to relations of states.³⁰

One subset of this source of law is domestic law, necessitating a comparison between the different national judicial systems.³¹ The use of general domestic principles as principles of international law is not automatic; domestic principles must be “transportable” into international law.³² These principles are adapted for use into international law over time, as Brownlie explains:

It would be incorrect to assume that tribunals have in practice adopted a mechanical system of borrowing from domestic law after a census of domestic systems. What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. Thus, it is impossible, or at least difficult, for state practice to evolve the rules of procedure and evidence which a court must employ. An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.³³ [Emphasis added.]

Although certain domestic general principles occupy an important position in international law, such as the principle of good faith, equity, estoppel, abuse

²⁹ See Dinh, *supra*, note 9, at 347, who writes that:

... étant entendu qu’il ne faut pas s’arrêter à la lettre de la formule désuète: «nations civilisées» - à tort ou à raison, tous les États sont considérés aujourd’hui comme répondant à cette appellation.

See also Emanuelli, *supra*, note 9, who writes at 101:

L’expression «principes généraux de droit reconnus par les nations civilisées» est héritée d’une époque où les penseurs occidentaux, encouragés par les progrès de la science et la montée des idées libérales, considéraient certaines nations comme des modèles de civilisation. Elle paraît aujourd’hui dépassée, car elle implique que d’autres nations ne sont pas civilisées, ce qui, dans le contexte des Nations Unies, est difficilement acceptable. Il conviendrait plutôt de parler de principes généraux reconnus par l’ensemble des nations.

³⁰ Jennings & Watts, *supra*, note 11, at 36-37 [footnotes omitted].

³¹ Emanuelli, *supra*, note 9, at 101.

³² Dinh, *supra*, note 9, at 348.

³³ See Emanuelli, *supra*, note 9, at 102; and Brownlie, *supra*, note 15, at 16.

of law, unjust enrichment, clean hands doctrine and issue estoppel,³⁴ Jennings and Watts admit that these principles generally have a limited application:

In thus opening the way for the operation as international law of general principles of municipal jurisprudence, it must be noted that such principles are in the municipal sphere applied against a background of national laws and procedures. Unless there is some sufficient counterpart to them in the international sphere, or sufficient allowance is made for them in abstracting the principles from the various municipal rules, the operation of the principles as a source of particular rules of international law will be distorted.³⁵ [Emphasis added.]

Another subset of this source of general principles of international law is found in the international legal order itself. These principles include: reciprocal respect of sovereignty, the principle of the continuity of the state, and the principle of the need to exhaust internal mechanisms before resorting to international law.³⁶

Given the uncertainties surrounding the identification and use of these general principles of international law, it is therefore not surprising that the International Court of Justice has “shown considerable discretion in the matter”³⁷ and has seldom found occasion to prefer the application of “general principles of law” over that of conventional or customary international law.³⁸

Paragraph 1 of Article 38 is not meant to create a hierarchy of sources,³⁹ however, there are a number of rules governing interpretation of these sources. As Brownlie notes:

Source (a) relates to *obligations* in any case; and presumably a treaty contrary to a custom or to a general principle part of the *jus cogens* would be void or voidable. Again, the interpretation of a treaty may involve resort to general principles of law or of international law. A treaty may be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties.⁴⁰

This concept of *jus cogens* being a peremptory norm is a comparatively recent development in international law. Therefore, there is no general agreement

³⁴ Jennings & Watts, *supra*, note 11, at 38.

³⁵ Jennings & Watts, *supra*, note 11, at 37 [footnotes omitted].

³⁶ Emanuelli, *supra*, note 9, at 102.

³⁷ Brownlie, *supra*, note 15, at 16.

³⁸ Jennings & Watts, *supra*, note 11, at 37-38 [footnotes omitted].

³⁹ See Emanuelli, *supra*, note 9, at 119-120; Brownlie, *supra*, note 15, at 3; and also Jennings & Watts, *supra*, note 11, who note at 25 that:

Furthermore, the sources of international law are not self-contained but interrelated, and each source gives rise to rules which have to be understood against the background of rules deriving from other sources, so that any non-consensual element in one source of law may indirectly affect the rules deriving from other sources.

⁴⁰ Brownlie, *supra*, note 15, at 4 [footnotes not included].

on which rules are of a *jus cogens* character.⁴¹ *Jus cogens* is described by Brownlie as follows:

Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like ‘fundamental’ or, in respect to rights, ‘inalienable’ or ‘inherent’. Such classifications have not had much success, but have intermittently affected the interpretation of treaties by tribunals. In the recent past some eminent opinions have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens*.

The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.⁴²

Jurists have noted that the least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.⁴³ These examples were confirmed by the International Court of Justice in the case, *Barcelona Traction (Second Phase)*,⁴⁴ where the majority judgment of the ICJ noted that these were not simply obligations of a state arising *vis-à-vis* another state, but rather, obligations “towards the international community as a whole”.

Articles 53 and 64 of the *Vienna Convention on the Law of Treaties*,⁴⁵ provide that existing or new peremptory norms prevail over treaties. Article 53 defines a peremptory norm as:

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.

As the authors Emanuelli and Charles de Visscher point out, the difficulty in deciding whether a norm is to be considered *jus cogens* rests in the fact that the

⁴¹ Jennings & Watts, *supra*, note 11, at 7.

⁴² Brownlie, *supra*, note 15, at 514-15 [footnotes not included].

⁴³ See Arbour, *Droit international public* (3e éd., 1997) at 35; Brownlie, *supra*, note 15, at 515; and Jennings & Watts, *supra*, note 11, at 8.

⁴⁴ See *Barcelona Traction, Light and Power Co. (Belgium v. Spain) (Second Phase)*, (1970) I.C.J. Rep. 3, at 33, para. 33, where the majority of the ICJ noted that obligations towards the international community as a whole are those which “...all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.” Paragraph 34 set out a similar list of examples as that found in the text and noted that such obligations can derive from, *inter alia*, principles, rules, the body of international law, and international instruments of universal or quasi-universal character.

⁴⁵ Can. T.S. 1980 No. 37, signed 23 May 1969, entered into force 27 January 1980 (acceded to by Canada on 14 October 1970).

Vienna Convention does not provide criteria for its definition.⁴⁶ As the establishment of the norms of *jus cogens* is uncertain, de Visscher aptly concludes that the proponent of a rule of *jus cogens* will have a considerable burden of proof.⁴⁷

Another uncertainty surrounding the operation of a rule of *jus cogens* is with respect to the relationship among the various rules of *jus cogens*. In particular, what is the legitimacy of an act done in reliance of one rule of *jus cogens* but resulting in a violation of another such rule?⁴⁸

III. APPLICATION OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL ORDER

1. Internalization of International Law

(a) General Uncertainties Surrounding Reception

As mentioned above, the three key sources of international law are international conventions, customs and general principles of law. It has been noted that Canada's system of receiving international law into the domestic legal order is neither monist nor dualist; it is a hybrid of the two, demanding the implementation of conventional international law but allowing for the incorporation of customary international law.⁴⁹ As straightforward as this assertion may appear, it is not without its uncertainties.

First, it is generally agreed that international conventional law does not have a formal place in the domestic legal order unless it is ratified by the executive and implemented by the legislature.⁵⁰ Historically, this two-step process is

⁴⁶ See Emanuelli, *supra*, note 9, at 125; and de Visscher, "Positivisme et «Jus Cogens»" 40 (1971) Rev. D.I.P. 5, at 7, where the author observes:

L'obstacle véritable à l'introduction du *jus cogens* dans le droit international positif réside dans son indétermination et, par conséquent, dans son défaut d'effectivité.

⁴⁷ de Visscher, *Théories et réalités en droit international* (4e éd., 1970), at 295-96. Discussing the considerable debate over the adopting of Article 53, the author notes at 296:

Par ailleurs – et cette considération a certainement pesé sur le vote final – l'obligation faite de démontrer que la norme en discussion est non seulement d'application quasi universelle, mais qu'elle est appliquée en tant qu'impérative, rendra probablement très rare le recours au *jus cogens*.

⁴⁸ Jennings & Watts, *supra*, note 11, at 8.

⁴⁹ van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can. Y.B. Int'l L. 3, at 4.

⁵⁰ Sullivan, *Driedger on the Construction of Statutes* (3rd ed., 1994), at 396.

explained by the English parliamentary tradition whereby the sovereign who negotiates and signs the treaty cannot usurp Parliament's law-making power.⁵¹

Despite this seemingly straight forward reception process, a number of questions arise. First, how does the Court interpret a convention if the implementing statute only includes parts of the convention? Also, can the Court give any weight to a convention that has been ratified by the executive but not yet or incompletely implemented by legislation? Henri Brun and Guy Tremblay remark that though an international convention must generally be incorporated by legislation, nothing prevents judges from inspiring themselves of the convention in the development of the common law.⁵² However, as noted by David Dyzenhaus, Murray Hunt and Michael Taggart, judicial reliance on a convention that is halfway internalized by the domestic legal system may raise serious concerns about whether or not it accords with democratic principles and the fundamental structure of the state:

Courts throughout the common law world have, for some time, given effect to international legal obligations (especially human rights norms) by way of administrative law doctrines and techniques. When the source of the international obligations constraining executive discretion is a convention ratified by the executive, but not incorporated by parliament into legislation, traditional alarm bells ring. Such "backdoor" incorporation seems to amount to executive usurpation of the legislature's monopoly of law-making authority, or to judicial usurpation of the same, or to a combination of both.⁵³

Secondly, although customary international law may not require formal implementation, it is difficult to pinpoint exactly when a practice or a belief may be relied upon as a custom. The simple existence of an alleged custom in international law may not be enough for it to be internalized into the domestic legal order. As Brun and Tremblay remark, a prohibitive custom that is universally

⁵¹ See Schabas, "Twenty-five Years of Public International Law at the Supreme Court of Canada" (2001) 80 Can. Bar. Rev., *Commemorative Edition on the 125th Anniversary of the Supreme Court of Canada*, 174-195, at 177, where the author refers to: *Arrow River & Tributaries Slide & Boom Co., Re*, [1932] S.C.R. 495, at 510 (*per* Lamont J.); and *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141 (*per* Laskin C.J.).

⁵² Brun & Tremblay, *supra*, note 14, at 658. See also van Ert, *supra*, note 49, who writes at 53 that:

Treaty provisions of a purposive, interpretive, or general nature will often be more susceptible to judicial application by means of the treaty presumption than specific, particular, or detailed commitments, which will usually require implementing legislation to be given domestic legal effect.

⁵³ Dyzenhaus, Hunt & Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) Oxford University Commonwealth Law Journal 5, at 5.

recognized is akin to a rule of common law in the internal legal order; however, a permissive custom will necessitate legislative incorporation in order to be admitted into the domestic legal order.⁵⁴ In general, not all customary law principles appear to be automatically admitted into domestic law and a number of outstanding questions remain, including: Which customs prevail in cases of conflict? Also, which customs become *jus cogens*? If one incorporates evolving or developing customs or “soft law” into domestic law, does that not subvert what has been defined as one of the basic principles of Canadian constitutional law — the democratic principle?

Thirdly, the incorporation of general principles of law into the domestic legal order presents its own set of difficulties. As noted above, general principles of law consist of both international law as well as domestic law from other nations. Although general principles of international law may be incorporated into domestic law, it is more difficult to conceive of how the domestic general legal principles of other nations are “incorporated” into the Canadian legal order. Instead, a more appropriate conception of these general principles of law is to view them as comparative legal sources. The problems we encounter when using such principles as guidelines include the difficulty in knowing which countries present appropriate comparisons and the uncertainty of knowing exactly how many countries are needed to form a meaningful comparison. These difficulties of comparative law analyses are discussed further below.

In practical terms, it seems that there is no easy or automatic way of internalizing international law into the domestic legal order.⁵⁵ It may be possible to characterize the reception of international conventions as the interweaving of two legal orders in a fugue-like fashion and the reception of customary and general principles of law as more of a fusion of the two orders. However, given the uncertainties surrounding the internalization of international law, we have seen that there are numerous exceptions to these general observations. Indeed, the legitimacy of international law as a source of law in the domestic legal order will always be scrutinized and called into question.

Therefore, while generally agreeing with the opinions of the authors cited above, we emphasize that the reception of international law into the Canadian

⁵⁴ Brun & Tremblay, *supra*, note 14, at 657-58.

⁵⁵ See Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U. J. Int’l L. & Pol. 501, reproduced in “Emerging Challenges: Applications of International Law in Canadian Courts”, *International Law for Canadian Judges: Primer and Approaches*, Montréal, QC, 9-12 November 2001, Tab 11, at 506:

... the domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national. Just as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation.

legal system must in itself form part of the argument advanced by counsel. In other words, if parties wish to rely on a certain principle of international law as a binding obligation, they should endeavour to establish how that principle became binding and how it applies to their case. This is all the more necessary when combining two shifting orders of law together: international and constitutional law.

(b) Difficulties of Combining Two Shifting Orders of Law

International law and constitutional law are each politically complex and socially dynamic areas of law in their own right. In using international law to circumscribe and decide cases in domestic constitutional law, there is an inevitable collision between these two forces. In particular, the principal difficulties in combining these two shifting orders of law include: the limited nature of constitutional issues, potential conflicts between presumptions of constitutional law and those of international law, and the broad scope of international law and the unwritten principles of the *Constitution*.⁵⁶ These problems need to be considered by the constitutional litigator when pleading international law principles before the Court.

(i) Scope of Constitutional Issues

First, the constitutional litigator must be aware of the potential conflict between the limited nature of constitutional issues and the oftentimes general and abstract nature of international law. In the case, *Moysa v. Alberta (Labour Relations Board)*,⁵⁷ Sopinka J. remarked that:

If the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so. This policy of the Court not to deal with abstract questions is of particular importance in constitutional matters. See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 363-65.

... To address the questions would require that this Court make pronouncements well beyond the issues presented in the actual appeal. The adjudication of the actual dispute does not require the resolution of the abstract questions of law raised in the constitutional questions. [Emphasis added.]

In the case, *Borowski v. Canada (Attorney General)*,⁵⁸ Sopinka J., again writing for the Court, made the following remarks on mootness:

⁵⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

⁵⁷ [1989] 1 S.C.R. 1572, at 1580.

⁵⁸ [1989] 1 S.C.R. 342, at 353.

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice....

In other words, the Court limits the scope of its review to the issues at bar and does not venture into moot questions to satisfy its own or other academic curiosity. It is true that one may find it difficult to trace a dominant theme or theory on international law developed in the case law. However, this is not surprising. Questions of constitutional law affecting international law are brought before the Court on a fortuitous basis. Therefore, the Court's pronouncements on these narrow questions are limited to the evidence brought before the Court. The Court is obliged to respond to each question as it relates to the particular case and cannot expound on a treatise of law. International law has traditionally developed in a global manner and is not neatly absorbed by a domestic court of law charged with answering a narrow question put before it.

(ii) Potential Conflicts between Statutory Interpretation Presumptions

Constitutional law entails many complex statutory interpretation rules. The legal presumption of validity is characterized by Mr. Justice Barry Strayer of the Federal Court, Trial Division (now of the Federal Court of Appeal) as follows:

It has long been said by the courts that they will presume an impugned law to be valid where there is an ambiguity in its scope that would otherwise allow the law to be characterized either as valid or invalid depending on the meaning ascribed to it. The presumption is said to apply to lead the court to conclude both that the enacting legislature intended to stay within its assigned powers and to stay within its assigned geographical territory, unless a contrary interpretation is inevitable. [Emphasis added.]⁵⁹

⁵⁹ Strayer J. (as he then was), *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3rd ed., 1988), at 251-52.

Also, generally, a legislative provision is to be construed so as to permit it to serve a useful purpose. As Pierre-André Côté observes:

A corollary of the rule of effectivity favours the interpretation that best promotes the validity of the enactment, over one that invalidates it.⁶⁰

There is a possibility that this constitutional law presumption may conflict with another presumption: implementing legislation is meant to comply with and give effect to the obligations set out under an international instrument.⁶¹ This presumption is rebuttable, though and in the case of a conflict between the intended meaning of the legislation and the underlying international convention, the legislation prevails.⁶²

These conflicts of presumption seem inevitable when combining two areas of law which are as dynamic as constitutional and international law.⁶³

(iii) Broad Principles of International Law and Underlying Constitutional Principles

The broad nature of international law and the uncertain nature of the underlying principles of constitutional law can both add to the complex interplay between international and constitutional law.

With respect to international law, the Court has had to consider whether it is at times so broad as to be unconstitutionally vague. In the *Finta* case, writing for the majority, Cory J. stated that although it may be argued that international law is so broad that it is uncertain and therefore, unconstitutionally vague, there are indicia in international law that indicate the certainty or stability of certain international legal principles:

In my view, the fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain. This material is often helpful in determining the proper interpretations to be given to a statute. Further, the fact that there may be differences of opinion among international law experts does not necessarily make the legislation vague. It is ultimately for the court to determine the interpretation that is to be given to a statute...⁶⁴

⁶⁰ Côté, *The Interpretation of Legislation in Canada* (3rd ed., 2000), at 369.

⁶¹ Sullivan, *supra*, note 50, at 397. See also Côté, *id.*, at 367-69.

⁶² Sullivan, *supra*, note 50, at 397 and 463.

⁶³ For a detailed discussion on this point, see Puig, "Hiérarchie des normes: du système au principe" (2001) R.T.D. civ. 749.

⁶⁴ *Finta*, *supra*, note 2, at 867-68.

Cory J. relied on principles established in *Irwin Toy Ltd. v. Quebec (Attorney General)*,⁶⁵ where it was recognized at page 983 that:

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.

In his minority opinion, La Forest J. wrote, confirming this approach:

To the extent that arguments of vagueness apply to the jurisdiction section... I consider this to be based first of all on a limited view of the nature and content of international law. As Williams and de Mestral, *supra*, at p. 12, note, even though there is no comprehensive codification, international law can nevertheless be determined. Given our common law tradition, we should be used to finding the law in a number of disparate sources...⁶⁶

La Forest J. relied on the standard for unconstitutional vagueness set out by the Court in *R. v. Nova Scotia Pharmaceutical Society*;⁶⁷ and *U.N.A. v. Alberta (Attorney General)*,⁶⁸ and found that the argumentation of international law based on “the contents of the customary, conventional and comparative sources provide enough specificity to meet these standards for vagueness.”⁶⁹

Also, in the *Suresh* case, the Court considered whether the terms “danger to the security of Canada” and “terrorism” were unconstitutionally vague. Acknowledging the difficulty of defining value-based international terms, the Court wrote:

We also accept that the determination of what constitutes a “danger to the security of Canada” is highly fact-based and political in a general sense. All this suggests a

⁶⁵ [1989] 1 S.C.R. 927.

⁶⁶ *Finta*, *supra*, note 2, at 785.

⁶⁷ [1992] 2 S.C.R. 606, Gonthier J., at 643, summed up the standard of vagueness as follows: “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate”.

⁶⁸ [1992] 1 S.C.R. 901, McLachlin J. for the majority wrote, at 930:

... the absence of codification does not mean that a law violates this principle. For many centuries, most of our crimes were uncodified and were not viewed as violating this fundamental rule. Nor, conversely, is codification a guarantee that all is made manifest in the *Code*. Definition of elements of codified crimes not infrequently requires recourse to common law concepts: see *R. v. Jobidon*, [1991] 2 S.C.R. 714, where the majority of this Court, *per* Gonthier J., noted the important role the common law continues to play in the criminal law.

⁶⁹ *Finta*, *supra*, note 2, at 786.

broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review...⁷⁰ [Emphasis added.]

With respect to terrorism, the Court relied on definitions found in recently negotiated international instruments on the subject and held that “[w]e are not persuaded, however, that the term ‘terrorism’ is so unsettled that it cannot set the proper boundaries of legal adjudication.”⁷¹

The interpretation of underlying constitutional principles also presents uncertainties. In *Reference re Secession of Quebec*,⁷² the Court held that the animating principles underlying the written document must be subject to a “profound investigation”⁷³ in order to understand the full meaning and purpose of the *Constitution*. These principles include: federalism, democracy, constitutionalism, the rule of law,⁷⁴ and respect for minorities. As was the case with international legal principles, it appears that the interpretation of underlying constitutional principles raises the same fugue or fusion question. Indeed, the Court has set out these two possible approaches in the *Secession Reference*.

The fugue possibility is found at paragraph 52, where the Court acknowledges that these underlying principles may inspire the interpretation of the *Constitution*:

The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”, to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government. [Emphasis added.]

⁷⁰ *Suresh*, *supra*, note 5, at para. 85.

⁷¹ *Suresh*, *supra*, note 5, at para. 96.

⁷² *Supra*, note 3.

⁷³ *Id.*, at para. 148.

⁷⁴ We note that these principles have sometimes been referred to as “unwritten” principles; however, we prefer to use the term “underlying.” For example, the rule of law is a principle that is explicitly set out in the preamble to the *Constitution Act, 1982*: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law” and was implicitly included in the preamble to the *Constitution Act, 1867*, by virtue of the words “with a *Constitution* similar in principle to that of the United Kingdom.” See *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (sub nom. Reference re Manitoba Language Rights)*, [1985] 1 S.C.R. 721, at 750, for further elaboration.

The fusion possibility is also implicitly included as a possible interpretation approach. In certain circumstances, underlying principles of constitutional law can create new obligations as described at paragraph 54:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force”, as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments...

Although the *Secession Reference* does not make explicit reference to a combining of the underlying constitutional principles with other notions of the domestic legal order in creating new obligations, we cannot imagine circumstances where these underlying principles could create new obligations of a “powerful normative force” in isolation from other principles of domestic law.

As with the various sources of international law, some general interpretation rules govern the underlying principles and the principles explicitly set out in the *Constitution*. At paragraph 53, the Court noted that it had cautioned in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,⁷⁵ that the recognition of these underlying principles could not be taken as an invitation to dispense with the written text of the *Constitution*:

...On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble “invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text”. [Emphasis added.]

Although grounded in constitutional law,⁷⁶ these underlying principles of the *Constitution* are not easy to apply in a concrete manner.⁷⁷ The difficulty is seen

⁷⁵ [1997] 3 S.C.R. 3, at paras. 93 and 104.

⁷⁶ For a discussion on the origins of these principles, see Tremblay, *The Rule of Law, Justice, and Interpretation* (1997), Chapter 7 in particular.

⁷⁷ For further discussion, see Monahan, “The Public Policy Role of the Supreme Court of Canada in the Secession Reference” (1999) 11 N.J.C.L. 65; Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91; and R.

in the recent case of *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*.⁷⁸ Akin to this difficulty is the challenge of applying broad notions of international customary or “soft law”. It is not without struggle that the Court attempts to apply these underlying constitutional and international law notions in domestic cases, mindful of potential charges that its application could be seen as being political, unprincipled or undemocratic.

2. Rising Use of International Law in Canadian Constitutional Litigation

(a) Historical Uses of International Law in Canadian Constitutional Cases

The Supreme Court of Canada has a long history of pronouncing on how international law can be used in the determination of constitutional law cases. For example, as early as 1936, the Court examined the need for treaty obligations to be transformed into domestic law in conformity with the division of legislative powers⁷⁹ and in 1943 the Court considered whether or not it could apply customary international law directly without a formal transformation into domestic law.⁸⁰

With the enactment of the *Constitution Act, 1982*, the number of cases making use of international public law instruments increased dramatically. Writing on this development in the jurisprudence of the Court, Mr. Justice Gérard La Forest reported that, between 1984-1996, the Court made use of key international human rights instruments in fifty cases in interpreting the *Canadian Charter of Rights and Freedoms*.⁸¹ Since then, that number has doubled.⁸² La

Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can. Bar Rev. 67.

⁷⁸ 2002 SCC 13.

⁷⁹ The case, *Canada (Attorney General) v. Ontario (Attorney General)*, [1936] S.C.R. 461, was eventually heard by the Privy Council: [1937] A.C. 326.

⁸⁰ *Reference re Powers of Ottawa (City) & Rockcliffe Park (Municipality) to Levy Rates on Foreign Legations & High Commissioners’ Residences*, [1943] S.C.R. 208. For a more detailed discussion, see Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 Can. Bar Rev., *Commemorative Edition on the 125th Anniversary of the Supreme Court of Canada*, 534 at 537.

⁸¹ Being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See La Forest J., “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can. Y.B. Int’l L. 89 at 90-91, footnotes 2 and 3, for a list of these cases; and La Forest J., “The Use of International and Foreign Material in the Supreme Court of Canada” in *Proceedings of the 1988 Conference of the Canadian Council on International Law: Canada and Europe: An Evolving Relationship Travaux. Conseil canadien de droit international: Le Canada et l’Europe: une relation en constante évolution* (Ottawa: The Council, 1988) at 232, footnote 4.

Forest J. thus explained the necessity of taking into account the applicable international law in *Charter* cases:

The protection of human rights is not a uniquely Canadian concept and just as the drafters of the *Charter* drew on the experience and successes of the international human rights movement, so too would it be necessary for the Canadian courts to look abroad.⁸³

The authors, Maxwell Cohen, Q.C. and Ann Bayefsky observe that:

The very fact...that the “supreme law of Canada” represented by the *Charter*, is indissolubly linked by language and ideology to important international instruments and principles to which Canada subscribes, assures the inevitability of some resort to these “external” international legal documents and ideas in order to be certain that on appropriate occasions the “proper” meaning is given to that *Charter*.⁸⁴

Soon after the enactment of the *Constitution Act, 1982*, the Court examined the scope of application of international law in the Canadian legal order in a number of key cases. In the case, *Reference re s. 94(2) of the Motor Vehicles Act (British Columbia)*,⁸⁵ Lamer J. (as he then was) expressly recognized that international law and opinion is of use to the courts in elucidating the scope of fundamental justice:

[Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration

⁸² See Bastarache J., “The Honourable G.V. La Forest’s Use of International and Foreign Material in the Supreme Court of Canada and His Influence on Foreign Courts” in Johnson *et al.*, eds., *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, Faculty of Law, University of Manitoba, 2000) 433, at 433-34, where Bastarache J. remarked that since 1985, in the sole area of human rights, the Court has referred to international law almost one hundred times.

⁸³ La Forest J., “The Use...” *supra*, note 81, at 230-31. See also at 231, where La Forest J. writes:

... it is clear that, from the time then-Minister of Justice, Pierre Trudeau, began his initiative for a Canadian Charter of Rights in 1968, the United Nations International Year of Human Rights, not only was the United Nations experience influential in his proposals, but so were the American and European Human Rights documents. Indeed, much of his 1968 proposal for a constitutional human rights document involved a comparison of the approaches taken by the American *Bill of Rights* and by the *European Convention on Human Rights* to the specific rights and freedoms that have subsequently been enshrined in the *Charter*.

See also Trudeau, *A Canadian Charter of Human Rights* (1968), at 10, 16-17, 19-20, 22.

⁸⁴ Cohen & Bayefsky, “The Canadian Charter of Rights and Freedoms and Public International Law” (1983) 61 Can. Bar Rev. 265, at 267.

⁸⁵ [1985] 2 S.C.R. 486.

of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law. [Emphasis added.]⁸⁶

Also, in *Slaight Communications Inc. v. Davidson*,⁸⁷ Dickson C.J. observed at pp. 1056-57 that:

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

Further in *Reference re Public Service Employee Relations Act (Alberta)*,⁸⁸ at p. 348, Dickson C.J., dissenting on another point, stated:

... The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.

This approach was confirmed in the 1990 case, *R. v. Keegstra*.⁸⁹

In the recent 1998 case, *Reference re Secession of Quebec*,⁹⁰ the Court examined the issue of whether or not it could answer a question of international law. The response of the Court at paragraph 20 confirmed the approach already taken by the Court:

... this Court would not, in providing an advisory opinion in the context of a reference, be purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question... [Emphasis added.]

As for the contention that the Court, as a domestic court, must examine domestic law rather than international law, the Court confirmed its past practice at paragraph 22:

...*In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system.* For example, in *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the

⁸⁶ *Id.*, at 512.

⁸⁷ [1989] 1 S.C.R. 1038.

⁸⁸ [1987] 1 S.C.R. 313.

⁸⁹ [1990] 3 S.C.R. 697, at 750 and 790-91.

⁹⁰ *Supra*, note 3.

power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86). [Emphasis added.]

In order to ensure that it was not discussing what would be a moot question, the Court delimited the boundaries of its foray into international law at paragraph 23:

...Question 2 of this *Reference* does not ask an abstract question of “pure” international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order.

(b) *Recent Uses and Approaches*

(i) Examination of Four Recent Cases

This section examines four recent cases that illustrate how international legal principles are considered or applied in the domestic legal order. The cases examined are: *Finta*, *Baker*, *Burns* and *Suresh*. Although a number of cases decided in the last decade have considered some important international law principles, we have limited our discussion to these four cases as they demonstrate a good range of the relationships and complexities between the international and domestic orders of law. This section does not analyze the *ratio decidendi* of each decision. Rather, it focusses on the aspects of the decisions discussing how international law is used in the domestic legal order. Besides setting out the issues of internalization addressed in each case, we also discuss whether the Court has taken a fugue or fusion approach to the use of international law.

By the “fugue approach”, we mean to include any case that has treated international legal obligations as separate from domestic ones and has required a formal intersection or interweaving of international law into the domestic legal order.

By the “fusion approach”, we refer to those cases that have used international legal obligations to inspire the interpretation of domestic obligations, resulting in the merging of elements of each order into a unified whole.

1. *R. v. Finta*

In the 1994 case, *R. v. Finta*,⁹¹ the respondent, Imre Finta, was charged with a number of offences, constituting crimes against humanity and war crimes, pursuant to the domestic *Criminal Code*,⁹² for acts allegedly committed in 1944 at or around Szeged, Hungary. This was a very lengthy decision and considered the application of international law to the domestic criminal legal order to sanction crimes that were committed outside of Canada. The decision resulted in a four to three split in favour of the respondent. Our discussion is confined to the key international law issue that seemed to divide the Court: the standard of the *mens rea* requirement for war crimes and crimes against humanity.

The majority opinion, written by Cory J., confirmed that s.11(g) of the *Charter* allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place.⁹³ He seems to have taken a fugue approach to the use of international law in the domestic criminal order as he then went on to observe that:

As Cherif Bassiouni has very properly observed, a war crime or a crime against humanity is not the same as a domestic offence. (See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992).) There are fundamentally important additional elements involved in a war crime or a crime against humanity.⁹⁴ [Emphasis added.]

Cory J. wrote that the additional element involved in crimes against humanity is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people. With respect to war crimes, the additional element is that the actions constitute a violation of the laws of armed conflict.⁹⁵ Therefore, Cory J. did not accept the appellant's argument that proof of the *mens rea* with respect to the domestic offences provides the element of personal fault required for offences under section 7(3.71) and that proof of further moral culpability is not required.⁹⁶ He wrote:

I cannot accept that argument. What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.

⁹¹ *Supra*, note 2.

⁹² R.S.C. 1985, c. C-46, s. 7(3.76) [am. 1985 (3rd Supp.), c. 30, s. 1].

⁹³ *Finta*, *supra*, note 2, at 807.

⁹⁴ *Finta*, *supra*, note 2, at 811.

⁹⁵ *Finta*, *supra*, note 2, at 813-14.

⁹⁶ *Finta*, *supra*, note 2, at 814.

With respect to war crimes, the distinguishing feature is that the terrible actions constituted a violation of the laws of war. Although the term laws of war may appear to be an oxymoron, such laws do exist. War crimes, like crimes against humanity, shock the conscience of all right-thinking people. The offences described in s. 7(3.71) are thus very different from and far more grievous than any of the underlying offences.

With respect to the *mens rea* of crimes against humanity and war crimes, Cory J. seems to suggest that these crimes are largely creations of the international legal order and quite separate from any crimes in the domestic legal order. Therefore, in order to try these crimes in domestic courts, the approach to be taken is somewhat fugue-like, maintaining a division between the domestic and international legal orders.

Writing for the dissenting opinion, La Forest J. disagreed with the majority's finding that a higher mental element is required for war crimes and crimes against humanity. He observed that neither the jurisdiction nor the definition sections of the *Code* (section 7(3.71) and section 7(3.76) respectively) allude specifically to a mental element; these sections only refer to behaviour that constitutes an act or omission that is contrary to international law.⁹⁷ In his view, the lack of express discussion of the mental requirement is "largely because nobody ever really thought that there was a need for an individual *mens rea* that went beyond that required for the basic nature of the conduct, whether that be murder, assault, robbery or kidnapping."⁹⁸ He went on to state that "...it seems justified to use our established common law rules of *mens rea* where the international law does not have specific standards."⁹⁹

This statement seems to suggest that La Forest J.'s dissenting opinion follows a fusion rather than fugue approach. Although this is not explicitly set out in his opinion, it is possible to argue that La Forest J.'s approach attempts to merge elements of the two into a unified fusion. He explained that the standard set by the majority was too high and not in accordance with domestic law:

In my view, this is far too high a standard; a *mens rea* need only be found in relation to the individually blameworthy elements of a war crime or crime against humanity, not every single circumstance surrounding it. This approach receives support in Canadian domestic law. In *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 964-65, this Court held that reading in such a requirement for every element of an offence misconstrues and overgeneralizes earlier decisions of this Court... [Emphasis added.]¹⁰⁰

⁹⁷ *Finta*, *supra*, note 2, at 754.

⁹⁸ *Id.*

⁹⁹ *Finta*, *supra*, note 2, at 755.

¹⁰⁰ *Finta*, *supra*, note 2, at 756.

To further buttress his position, La Forest J. found that not only did Bassiouni, the writer relied on by the majority opinion, not represent the consensus of legal writers, but that the international law emerging out of the *Charter of the International Military Tribunal* and the war crimes and crimes against humanity decisions at Nuremberg did not support the need for a higher *mens rea* requirement.¹⁰¹ La Forest J.'s examination of the history of international law as *jus gentium* and *jus naturalis* appears again to suggest that he did not view international law as an entirely separate and distinct order from domestic law:

Indeed, as one goes back through the history of international law, knowledge of international law has never been a requirement for culpability. Traditionally, the western and Christian conception of international law especially in this area can be seen to coincide with the dictates of natural law; under the Roman Law, for example the *jus gentium* which was applied to non-Romans was presumed because it coincided with the *jus naturalis*. In Grotius' theory of international law, which applied to all individuals as well, the dictates of international law followed as dictates of natural reason. Piracy or slavery would be contrary to international law as long as the accused had preyed on ships or traded in slaves, regardless of whether the pirates or slavedealers were aware of how their conduct was classified under international law. In the international realm as much as the domestic, blameworthiness in criminal law does not consist of knowingly snubbing the law, but rather in deliberately engaging in certain types of conduct that international law prohibits.¹⁰² [Emphasis added.]

2. *Baker v. Canada (Minister of Citizenship & Immigration)*

Possibly the most widely discussed case with respect to the use of international law in a case that did not rely on constitutional law is *Baker v. Canada (Minister of Citizenship & Immigration)*.¹⁰³ The appellant, a woman with Canadian-born dependent children, was subject to a deportation order. She applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*,¹⁰⁴ from the requirement that an application for permanent residence be made from outside Canada. A senior immigration officer replied stating that no sufficient humanitarian and compassionate reasons warranted the processing of the application in Canada and cited no reasons for the decision. The issue before the courts was whether the officer

¹⁰¹ *Finta, supra*, note 2, at 762-63.

¹⁰² *Finta, supra*, note 2, at 763.

¹⁰³ *Supra*, note 8.

¹⁰⁴ *Immigration Act*, R.S.C. 1985, c. I-2.

was required to make the best interests of the appellant's children a primary consideration, pursuant to the *Convention on the Rights of the Child*.¹⁰⁵ The Court was divided in a five to two split; the majority allowed the appeal and relied on, *inter alia*, a ratified but unincorporated international convention to inform its analysis, whereas the minority opinion disagreed with the use of an unincorporated convention in a non-*Charter* case.

Writing for the majority, L'Heureux-Dubé J. appears to have taken a fusion approach to the use of international law in this administrative law case. L'Heureux-Dubé J. noted that although discretionary decisions are generally given considerable respect,

... that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.¹⁰⁶

Despite the absence of a mention of international legal norms in this list of "boundaries", it appears that the majority decision employed the fusion approach and found that international norms inform the fundamental values of Canadian law. As L'Heureux-Dubé J. explained:

The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C [humanitarian and compassionate] power.¹⁰⁷ [Emphasis added.]

A number of legal academics seem to confirm that the fusion approach was taken in these majority reasons. In particular, it has been described as using international law as "persuasive" rather than binding authority;¹⁰⁸ as "illuminat[ing]" the fundamental values of Canadian society;¹⁰⁹ as "evidence for and of" such fundamental values;¹¹⁰ and as an application of "treaty presumption."¹¹¹

¹⁰⁵ Can. T.S. 1992 No. 3.

¹⁰⁶ *Baker*, *supra*, note 8, at 855, para. 56.

¹⁰⁷ *Baker*, *supra*, note 8, at 862, para. 71.

¹⁰⁸ See Knop, *supra*, note 55, at 505.

¹⁰⁹ See Dyzenhaus, Hunt & Taggart, *supra*, note 53, at 15.

¹¹⁰ See Dyzenhaus & Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193, who observe at 234 that:

... the obligation [to give primacy to the interests of the children] arises out of a complex confluence of factors that led, in this case, to an overlap between the language of the statute, which is both evidence for and evidence of "fundamental" Canadian values; the guidelines, which play basically the same role; and the Convention, whose sheer existence

Writing for the minority, Iacobucci J. agreed with the reasons and disposition of L'Heureux-Dubé J. apart from the effect of international law on the exercise of ministerial discretion in a non-constitutional law case. The approach taken by Iacobucci J. seems to be fugue-like, in keeping the two legal orders distinct from one another. He found that:

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague... because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.¹¹²

Iacobucci J. cautioned against adversely affecting the balance maintained by the Parliamentary tradition, or inadvertently granting the executive the power to bind citizens without the necessity of involving the legislative branch.¹¹³

We note that this caution only extends to administrative non-constitutional law cases. For constitutional law cases, Iacobucci J. indicates that he would adopt a more fusion-like approach to the application of international law, stating that:

...I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.¹¹⁴

3. *United States v. Burns*

In the 2001 *United States v. Burns*¹¹⁵ case, the respondents, Burns and Rafay, both Canadian citizens, were each wanted on three counts of aggravated first degree murder in the State of Washington. If found guilty, they would face

is evidence of international legal norms and whose ratification without any express reservation is an indication that it too can play the role of evidence for and of fundamental values.

¹¹¹ van Ert, *supra*, note 49, at 49.

¹¹² *Baker, supra*, note 8, at 856, para. 78.

¹¹³ *Baker, supra*, note 8, at 856-57, para. 79.

¹¹⁴ *Baker, supra*, note 8, at 866, para. 81.

¹¹⁵ *Supra*, note 4.

either the death penalty or life in prison without the possibility of parole. The Minister of Justice for Canada ordered their extradition pursuant to section 25 of the *Extradition Act*¹¹⁶ without seeking assurances from the United States under Article 6 of the *Extradition Treaty between Canada and the United States of America (amended by an Exchange of Notes)*¹¹⁷ that the death penalty would not be imposed, or, if imposed, would not be carried out.

In a unanimous decision, the Court found that the appeal should be dismissed in favour of the respondents. Section 25 of the *Extradition Act* creates a broad ministerial discretion whether to surrender a fugitive. The Court held that while constitutionally valid, the Minister's discretion is limited by section 7 of the *Charter*. The issue was whether the threatened deprivation was in accordance with the principles of fundamental justice. Here the Court seems to have adopted the fusion approach in its use of international law. Among the various domestic legal considerations, the Court identified a number of international and comparative legal factors favouring extradition only with assurances that the death penalty would not be sought.

At the international level, the Court considered a number of indicia that the abolition of the death penalty has emerged as a major Canadian initiative at the international level and reflects a concern increasingly shared by most of the world's democracies, including:

- Canada's international advocacy of the abolition of the death penalty itself;¹¹⁸
- initiatives to abolish the death penalty on the international level;¹¹⁹
- punishments available to *ad hoc* international criminal tribunals;¹²⁰

¹¹⁶ [Rep. S.C. 1999, c. 18, s. 47].

¹¹⁷ Signed 1971, Can. T.S. 1976 No. 3, in force March 22, 1976.

¹¹⁸ See paragraph 85 of *Burns, supra*, note 4, which lists as examples: Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur, U.N. Doc. E/CN.4/1997/60, at para. 79; Extrajudicial, summary or arbitrary executions: Note by the Secretary-General, U.N. Doc. A/51/457, at para. 145; United Nations Commission on Human Rights Resolutions 1997/12 (Canada voted in favour), 1998/8 (Canada sponsored the resolution and voted in favour), and 1999/61 and 2000/65.

¹¹⁹ See paragraph 86 of *Burns, supra*, note 4, which lists as examples: resolutions adopted by the Parliamentary Assembly of the Council of Europe (Resolution 1044 (1994)) and the European Parliament (resolutions B4-0468, 0487, 0497, 0513 and 0542/97 (1997)) calling on all countries to abolish the death penalty, and the declaration of June 29, 1998 of the European Union's General Affairs Council.

¹²⁰ See paragraph 88 of *Burns, supra*, note 4, which lists as examples: the exclusion by the United Nations Security Council of the death penalty from the punishments available to the International Criminal Tribunals for the former Yugoslavia (Resolution 827, May 25, 1993) and for Rwanda (Resolution 955, November 8, 1994). This exclusion was affirmed in the Rome Statute of

- assurance provisions found in other international documents;¹²¹
- documents requiring states to refuse extradition in the absence of effective assurances;¹²² and
- the fact that personal characteristics of the fugitive are treated as mitigating factors in death penalty cases.¹²³

With respect to comparative law factors, the Court took into account the following comparative analyses:

- state practices increasingly favouring the abolition of the death penalty;¹²⁴ and
- a concern in other jurisdictions (the United States and United Kingdom) of potential wrongful convictions in death penalty cases.¹²⁵

Although it seems that the Court took a fusion approach to the use of international law in this case, we note that it did so cautiously. In particular, the Court did not make a finding that there was an international law norm against the death penalty, instead, it simply observed that there was enough evidence to suggest it. It held at paragraph 89 that:

This evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty. It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment. [Emphasis added.]

the International Criminal Court, signed on December 18, 1998 and ratified on July 7, 2000 by Canada.

¹²¹ See paragraph 82 of *Burns, supra*, note 4, which lists as examples: Article 11 of the Council of Europe's *European Convention on Extradition*, Eur. T.S. No. 24, signed December 13, 1957, which is virtually identical to Article 6 of the Canada-U.S. treaty, and Article 4(d) of the Model Treaty on Extradition passed by the General Assembly of the United Nations in December 1990.

¹²² See paragraph 84 of *Burns, supra*, note 4, which cites *United Nations Commission on Human Rights Resolutions* 1999/61 (adopted April 28, 1999) and 2000/65 (adopted April 27, 2000).

¹²³ See paragraph 93 of *Burns, supra*, note 4, which lists as examples: Article 6(5) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada is a party, which prohibits the execution of individuals who were under the age of 18 at the time of the commission of the offence; and Article 37(a) of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which states a similar proposition.

¹²⁴ The Court relied on statistics provided by Amnesty International of the increasing number of countries that have become abolitionist; see *Burns, supra*, note 4, paras. 90-92.

¹²⁵ See *Burns, supra*, note 4, paras. 105-116.

4. *Suresh v. Canada (Minister of Citizenship and Immigration)*

In the case, *Suresh v. Canada (Minister of Citizenship and Immigration)*,¹²⁶ released earlier this year, the appellant was a Convention refugee from Sri Lanka who had applied for landed immigrant status. In 1995, the Canadian government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security Intelligence Service that he was a member and fundraiser of an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka. On the advice of an internal memorandum, the Minister of Citizenship and Immigration issued an opinion declaring him to be a danger to the security of Canada under section 53(1)(b) of the *Immigration Act*, concluding that he should be deported. Although the appellant presented submissions to the Minister, he had not been provided with a copy of the internal memorandum, nor was he provided with an opportunity to respond to it. The appellant applied for judicial review.

In a unanimous decision, the Court allowed the appeal in favour of the appellant, holding that deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by section 7 of the *Charter*. Consistent with its constitutional law jurisprudence, the Court held that:

The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms" ...¹²⁷

It appears that the Court took a fusion approach to the use of international law in the interpretation of section 7 of the *Charter* as it wrote:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather, our concern is with the principles of fundamental justice. We look to inter-

¹²⁶ *Supra*, note 5.

¹²⁷ *Suresh, supra*, note 5, at para. 46. This paragraph refers to the previous decisions of *Burns, supra*, note 4, paras. 79-81; *Reference re Public Service Employee Relations Act (Alberta), supra*, note 88, at 348, per Dickson C.J. (dissenting); *Reference re s. 94(2) of the Motor Vehicles Act (British Columbia), supra*, note 85, at 512; *Slaight Communications Inc. v. Davidson, supra*, note 87, at 1056-57; *R. v. Keegstra, supra*, note 89, at 750; and *Baker, supra*, note 8.

national law as evidence of these principles and not as controlling in itself. [Emphasis added.]¹²⁸

However, in doing so, the Court again took a cautious approach to the determination of whether or not a norm constitutes a custom of *jus cogens*. Noting the practical and theoretical difficulties of pinpointing when a norm becomes a peremptory norm,¹²⁹ the Court chose instead to focus on three indicia that the prohibition of torture could be considered a norm of *jus cogens*:

- a great number of multilateral instruments that explicitly prohibit torture;¹³⁰
- domestic practices of other states;¹³¹ and
- decisions and writings of international courts and authorities.¹³²

The Court also noted that Canadian rejection of torture is reflected in the international conventions which Canada has ratified: the *International Covenant on Civil and Political Rights*¹³³ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹³⁴ It held that Article 33 of the *Convention Relating to the Status of Refugees*,¹³⁵ which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to everyone. Taking the fusion approach, the Court found that international law generally rejects deportation to torture, even where national security interests are at stake and that “[t]his is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.”¹³⁶

(ii) Analysis of Approaches: Fugue, Fusion or Hybrid?

With the rise in the use of international law in constitutional law cases, we see that some cases warranted a fugue approach, such as: the majority decision in *Finta* and the minority opinion in *Baker*; whereas others warranted a fusion approach, such as the minority opinion in *Finta*, the majority decision in *Baker*, and the *Burns* and *Suresh* decisions. We are not suggesting that there is only

¹²⁸ *Suresh, supra*, note 5, at para. 60.

¹²⁹ *Suresh, supra*, note 5, at para. 61.

¹³⁰ *Suresh, supra*, note 5, at para. 62.

¹³¹ *Suresh, supra*, note 5, at para. 63.

¹³² *Suresh, supra*, note 5, at para. 64.

¹³³ Can. T.S. 1976 No. 47.

¹³⁴ Can. T.S. 1987 No. 36.

¹³⁵ Can. T.S. 1969 No. 6.

¹³⁶ *Suresh, supra*, note 5, at para. 75.

one appropriate approach nor that these are the only two approaches available. Indeed, it seems that the very nature of the split in the *Finta* and *Baker* decisions suggests that perhaps a hybrid approach may be another possible option.

More and more, we are seeing a rise in the use of international law to circumscribe the limits of constitutional law. As Iacobucci J.'s comments in his dissenting opinion in the *Baker* case suggest, the *Charter* may be seen as a conduit or vehicle for international law to be used in the domestic legal order. Despite the increased use of international law in cases heard by the Court, we note that one of the key limits to the Court's use is that it has never seen itself as a final arbiter of international law. For instance, in both *Burns* and *Suresh*, the Court acknowledged that an argument may be made for holding that the prohibition against the death penalty and torture were notions of *jus cogens*, but stopped short of making that conclusion.

We also observe that most of the cases examined above made use of international law in constitutional law cases in a comparative manner, which does not require that a final determination be made on the 'state' of international law. Instead, it seems that comparisons with other jurisdictions has been the method employed by the Court to assess where the Canadian law stands against other jurisdictions. A number of recent cases have confirmed the Court's using of international or comparative law as indicators that inspire or inform domestic law; see *R. v. Advance Cutting and Coring Ltd.*,¹³⁷ and *Lavoie v. Canada (Public Service Commission)*.¹³⁸

The rise of the use of international law in constitutional law cases before the Court is not without its challenges; these new challenges are examined below.

3. New Challenges Accompanying Rise of Use of International Law

(a) *Need to Accommodate Increasing Number of Parties*

Accompanying the steady growth in the use of international law in constitutional cases is the increase in the number of parties pleading principles of international law before the Court, including specialized interveners and *amici*

¹³⁷ 2001 SCC 70, at paras. 11 and 13 where in his minority reasons, Bastarache J. relied on a consideration of the United Nations *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), the United Nations *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, and the *African Charter on Human and Peoples' Rights*, to inform his analysis.

¹³⁸ 2002 SCC 23, at para. 56, where in his majority reasons, Bastarache J. relied on arguments by the respondents with respect to references to practices in Switzerland, the United States and Australia as well as international documents including the *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966), to inform his analysis.

curiae. For example, in the 2001 *Burns* case, the Court had the benefit of five interveners:

- two were international bodies;
- one represented the Senate of another country; and
- two were associations of lawyers.¹³⁹

This is an increase at least in the number of interveners since the last extradition cases heard a decade ago. For example, in *Kindler v. Canada (Minister of Justice)*,¹⁴⁰ and *Ng, Re*,¹⁴¹ the Court heard arguments from one and two international interveners respectively.¹⁴²

In the 1999 *Baker* case, out of five possible interveners, one was an international law intervener.¹⁴³

And finally, in the *Suresh* case, decided by the Court in early 2002, there were eight interveners:¹⁴⁴

- two were international bodies and relied on international law principles;
- three were not international bodies but nevertheless relied on international law principles;
- one pleaded using comparative American law; and
- only two did not plead international law principles.

From these recent cases, it appears that the Court has acknowledged the increasingly important role that non-traditional international law actors play in influencing the development of international law.

(b) Need for International Law Evidence

As the cases involving international matters become more complex, we foresee that there will be an increasing need for international law evidence. The

¹³⁹ The interveners included Amnesty International, the International Centre for Criminal Law & Human Rights, the Senate of the Republic of Italy, the Criminal Lawyers' Association, and the Washington Association of Criminal Defence Lawyers.

¹⁴⁰ [1991] 2 S.C.R. 779.

¹⁴¹ *Supra*, note 4.

¹⁴² In the *Kindler* case, only Amnesty International appeared as the sole intervener; in *Ng, re*, Amnesty International and a representative for the State of California appeared as interveners.

¹⁴³ The five interveners included Canadian Foundation for Children, Youth and the Law, the Defence for Children International — Canada, the Canadian Council for Refugees, the Charter Committee on Poverty Issues, and the Canadian Council of Churches.

¹⁴⁴ The interveners included the United Nations High Commissioner for Refugees, Amnesty International, the Canadian Arab Federation, the Canadian Council for Refugees, the Federation of Associations of Canadian Tamils, the Centre for Constitutional Rights, the Canadian Bar Association and the Canadian Council of Churches.

production and tendering of international law evidence in a domestic law case is a challenging task. As Brownlie notes:

In the first place, there is in fact a serious problem involved in finding reliable evidence on points of international law in the absence of formal proof and resort to the expert witness. Secondly, issues of public policy and difficulties of obtaining evidence on the larger issues of state relations combine to produce the procedure whereby the executive is consulted on questions of mixed law and fact...¹⁴⁵

The Court has generally relied on published documents, provided by international interveners, to fill this need. As issues grow in complexity, this method of evidence may not be sufficient to meet the demands of the issues examined by the Court.

(c) Need for New International and Comparative Law Models

As the argumentation of domestic constitutional law cases continues to look to international and comparative law sources, there is a need for new international analyses and comparative models to be argued before the Court. What has been unhelpful in the past are recitations of principles of public international law *qua* binding law without a discussion on their application in the domestic legal order. The Court has greeted with skepticism such blanket statements on the binding nature of international law. Instead, what is needed is an argument on the relevance of international law principles to the case to be decided. As international law is generally non-binding or without effective control mechanisms, it does not suffice to simply state that international law requires a certain outcome.

Using comparative law in constitutional cases is helpful as it provides an indication of other states' practices and may shed light on Canadian practices, especially if the jurisdiction under examination is comparable to that of Canada. Basing himself on the theory set out by E. Lambert, in his *Encyclopedia of the Social Sciences*,¹⁴⁶ the author Alan Watson sees at least three models of comparative law:

- descriptive comparative law: an inventory of the systems of the past and present as a whole as well as individual rules;
- comparative history of law: examines ethnological jurisprudence, institutions, folklore, legal sociology, and philosophy of law; and

¹⁴⁵ Brownlie, *supra*, note 15, at 41 [footnotes omitted].

¹⁴⁶ iv (London, 1931), 126ff.

- comparative legislation: defines the common link between domestic doctrines of law.¹⁴⁷

Typically, what is argued before the Court belongs to the first category: descriptive comparative law. However, this type of comparative law can be somewhat limited as it does not shed light on how the principle being compared can be incorporated into domestic law. Instead, what is sometimes needed is a more nuanced approach to comparative law.¹⁴⁸ Without the depth of the other comparative methodologies, it is possible that arguments and therefore judgments may succumb to the pitfalls of comparative law, including: superficial analyses, misunderstanding and mischaracterizing foreign law, improper or inappropriate comparisons, and the overgeneralization of complex issues.¹⁴⁹

IV. CONCLUSION: SUMMARY AND RECOMMENDATIONS

Over the past decade, a number of cases decided by the Supreme Court of Canada have discussed the application of public international law in constitutional litigation and have situated principles of international law within the Canadian legal order. As the examination of the cases has shown, there are a number of challenges that arise with the increased use of international law in constitutional cases:

- principles of public international law are difficult to define;
- the application of principles of international law to constitutional law cases is cumbersome as there are questions of their legitimacy and the place they should occupy in or alongside domestic law; and
- there are many value-laden terms attached to the use of particular international principles/documents; these do not translate automatically into legal principles.

¹⁴⁷ Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed., 1993), at 3.

¹⁴⁸ See Knop, *supra*, note 55, at 507, who notes that "...comparativists, unlike internationalists, are attentive to the nature of translation, its significance and justification." Further, at 528, Knop remarks that:

Unlike international law's vertical perch, comparative law's horizontal vantage point allows it to see the place of the domestic, as well as the foreign, legal system in giving meaning to a foreign law within that system. By recognizing the role of the local in interpreting a law from elsewhere, the comparative perspective disturbs both the conventional comfort of international lawyers in portable neutral meaning and the anxiety of their critics about unmodified imperialism.

¹⁴⁹ Watson, *supra*, note 147, at 10-12.

As our examination of the recent cases indicates, in some cases there was an interweaving of two separate orders of law in the style of a fugue; in others, international law was applied in the domestic legal order in a fusion manner. For those who fear that perhaps a false dichotomy is set up by the subtitle of this paper, rest assured that we did not intend to hamstring the dialogue by suggesting that there are only two valid approaches and that one is preferred over the other; indeed, many cases have used elements of both approaches. Rather, our intention is to bring attention to these dominant approaches and to highlight the need to assess how one approach may be more appropriate in a given case.

In our opinion, as the use of international law continues to rise, the Court will need more guidance from counsel with respect to the scope and limitations of international law. In particular, we suggest that the following issues be considered by the constitutional litigator intending to use international law:

- Is this a case where there is a binding obligation? Or is it a value?¹⁵⁰
- What is the nature of the binding obligation? Is it based on conventional law that has been ratified and implemented into domestic law by legislation or a principle of *jus cogens*?
- Is the international law simply a statutory interpretation aid?

And of course,

- Are the international law principles to be applied to the domestic legal order in a particular case as a fugue or fusion of voices?

Courts should look forward to increased dialogue on this topic.

¹⁵⁰ On the need to define the two, see Toope, *supra*, note 80, at 541.

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