

The Domestic Application of International Law: A Canadian Perspective[†]

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[†] Editor's note: The following is a reproduction of presentation slides that accompanied the author's talk. A narrative or prose style text of the presentation was not available for publication. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject.

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IL IN CANADA: The “Hesitant Embrace”

- Historically, Canadian lawyers/judges hesitant to argue, consider, apply international law

Jutta Brunnée and Stephen Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) 4 Can YB Int’l L 59

- Why? Lack of familiarity, pre-*Charter*, pre-ICL
- Increasingly, courts being asked to consider international and comparative law – esp. in *Charter*, refugee cases

IL IN CANADA: Overview

- In Canada, legal effect of IL varies greatly depending on the source of international law
- General rule: most IL obligations are not directly justiciable in Canadian courts
 - The only exception to this general rule is for prohibitive customary international law norms
- Focus on IHRL for this lecture

TREATIES: Create Obligations

- General rule at IL: upon signature and ratification, state is bound by treaty
- Canada has signed and ratified most of major IHRL treaties:

Refugee	ICCPR (+ OP)
Genocide	CEDAW (+OP)
Torture	CRC
CERD	Rome Statute
ICESCR	CRPD

TREATIES: Binding Effect

- While states are bound to give legal effect to signed and ratified treaties, this does not necessarily mean that treaties automatically become domestic law.
- i.e. While treaty obligations are binding *on* Canada, they may not be binding *in* Canadian law [Hesitant Embrace, *supra*, 15].

TREATIES: Require Transformation

□ Canada is “dualist” re: treaty obligations:

Fed Gov’t can enter into binding IHRL agreements without legislature, but ratified treaty will only have domestic legal effect if there is validly enacted federal or provincial legislation that “transforms” the treaty rule into Canadian law

Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia, 2007 SCC 27 at para. 69

TREATIES: Transformation through Legislation

- Transformation requires an explicit legislative act through which the government adopts and implements the treaty obligation
 - a pre-ambular reference is not enough
- Rare but not unheard of in Canada:
 - *Criminal Code* amended to implement Torture Convention and Rome Statute
 - *Immigration and Refugee Protection Act* implements some aspects of Refugee Convention

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TREATIES:

Charter as implementing legislation?

- While Canada claims internationally that the *Charter* is its means of implementing IHRL treaty obligations, Canadian courts have refused to find that the *Charter* is sufficient to transform IHRL obligations into Canadian law

Ahani v. Canada (Attorney General) (2002), 58 O.R. (3d) 107 (Ont. C.A.)

TREATIES:

Human Rights Treaty Body Decisions

- Views of the UN HRC are not akin to a foreign judgment and cannot be “enforced” in a Canadian court
- Interim measures recommendations from the HRC are a “non-binding request” that is unenforceable in a Canadian court

Gauthier v. Canada (Speaker of the House of Commons), [2006] F.C.J. No. 757 (F.C.)

Ahani v. Canada (Attorney General) (2002), 58 O.R. (3d) 107 (Ont. C.A.)

CIL:

Adoption of Prohibitive Rules

- Prohibitive rules of CIL are automatically adopted or incorporated into Canadian law, *unless* there is express conflicting Canadian legislation

R. v. Hape, [2007] S.C.J. No. 26 legislation [para 39]

- Prohibitive rules of CIL can be pleaded before the Canadian courts, similar to actions based on common law

Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law," (2008) 53 McGill L.J. 537

OTHER RULES OF CIL?

- Unclear, absent conflicting Canadian legislation, whether "positive" CIL is similarly adopted into the law of Canada
- The status of *jus cogens* (pre-emptory) norms in the face of conflicting domestic legislation is also unclear

UN SECURITY COUNCIL

- UN Security Council decisions are binding on member states, including Canada, but are not automatically part of domestic law.
 - Canada may make such orders and regulations necessary to provide for implementation and enforcement of UN Security Council resolutions.

United Nations Act, R.S.C. 1985, c. U-2, s.2

UN GENERAL ASSEMBLY

- UN General Assembly resolutions are not legally binding – they are recommendations.
- May evidence CIL, in which case the custom rather than the resolution is the source of the legal obligation.
- The same is true of statements issues from international conferences, declarations, codes of conduct, and other non-treaty statements.

AS INTERPRETATIVE AID

- Canadian courts acknowledge importance of interpreting domestic law in a manner that accords with the principles of CIL and treaty obligations

Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.J. No. 39, para 82

- IL is relevant to interpretation of legislation, but also administrative discretion there under

Baker, supra, para 73

IL as Interpretive Aid to *Charter*

- Canada's IHRL obligations can assist with interpretation of *Charter* rights

Hape, supra, para. 55; *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, para. 69.

- State practice, even where it does not lead to a finding of CIL, can help elucidate principles of fundamental justice under s. 7 of the *Charter*

Minister of Justice v. Burns, [2001] 1 S.C.R. 283, para. 79-92

AS INTERPRETATIVE AID: *Charter*

- Interpretations by a treaty monitoring body can shed light on the scope of a similar *Charter* right

Health Services, supra, para. 76

- Treaties, soft-law instruments, and judgments from regional human rights treaty bodies to which Canada is not a party are persuasive in the same fashion as comparative law sources

CONFLICTS: IL AND DOMESTIC LAW

- It is open to Canada to legislate contrary to a treaty or CIL
- Such legislation is determinative of Canada's domestic law, even if it would put Canada in breach of its international legal obligations

Bouzari v. Iran, [2004] O.J. No. 2800 (Ont. C.A.) at para. 66

WHAT NEXT?

- Canadian courts increasingly being asked to consider and apply international law
- Balancing tension between sovereignty and membership in global community of nations
- Lack of clarity re:
 - Status of non-prohibitive CIL and *jus cogens*
 - Revisiting *Ahani* line of cases?