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Article abstract

This paper examines the role of unimplemented international treaty norms in the Canadian domestic legal system. The discussion focuses on the decision of the Supreme Court of Canada in *Suresh*, which is first investigated in some detail. In a unanimous judgement, it was held that the untransformed *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ought to inform the interpretation of the principles of fundamental justice in section 7 of the *Charter* and assist in deciding whether the exercise of power to deport under the *Immigration Act* was constitutional, given that the appellant could face torture if *refoulé*. The author refers to other recent decisions from the country's highest court where unimplemented treaty obligations were used in the interpretation of Canada's domestic law, namely, the *Baker* case in 1999 and the *Hudson* case in 2001. In conclusion, these developments are put in the broader contemporary strategy favouring contextual legislative interpretation, which includes resorting to international law, a trend that can be traced back to the adoption of the *Charter* in 1982.

THE *SURESH* CASE AND UNIMPLEMENTED TREATY NORMS

By Stéphane Beaulac[*]

This paper examines the role of unimplemented international treaty norms in the Canadian domestic legal system. The discussion focuses on the decision of the Supreme Court of Canada in *Suresh*, which is first investigated in some detail. In a unanimous judgement, it was held that the untransformed *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ought to inform the interpretation of the principles of fundamental justice in section 7 of the *Charter* and assist in deciding whether the exercise of power to deport under the *Immigration Act* was constitutional, given that the appellant could face torture if *refoulé*. The author refers to other recent decisions from the country's highest court where unimplemented treaty obligations were used in the interpretation of Canada's domestic law, namely, the *Baker* case in 1999 and the *Hudson* case in 2001. In conclusion, these developments are put in the broader contemporary strategy favouring contextual legislative interpretation, which includes resorting to international law, a trend that can be traced back to the adoption of the *Charter* in 1982.

Ce texte examine les normes internationales issues de traités non implantés et leur rôle en droit interne canadien. La discussion se concentre sur la décision de la Cour suprême du Canada dans l'affaire *Suresh*, qui est tout d'abord analysée en détail. Dans un jugement unanime, on a décidé que le *Pacte international relatif aux droits civils et politiques* et la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, qui ne sont pas mis en œuvre au Canada, devraient aider à l'interprétation des principes de justice fondamentale sous l'article 7 de la *Charte* et à savoir si l'exercice du pouvoir de déporter en vertu de la *Loi sur l'immigration* était constitutionnel, vu la possibilité de torture en cas de refoulement. L'auteur voit d'autres décisions récentes où le plus haut tribunal du pays a considéré ces obligations conventionnelles non transformées lors de l'interprétation de lois canadiennes, soit les causes *Baker* en 1999 et *Hudson* en 2001. En conclusion, il est suggéré que ces développements s'inscrivent dans la stratégie générale moderne favorisant l'interprétation législative contextuelle, qui comprend le recours au droit international, une tendance forte depuis l'adoption de la *Charte* en 1982.

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On January 11th 2002, the Supreme Court of Canada handed down its much anticipated decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*[1]. This case deals with several issues of constitutional law and administrative law, including questions of freedom of expression, of freedom of association and of fundamental justice, protected by articles 2(b), 2(d) and 7 of the *Canadian Charter of Rights and Freedoms*[2] respectively, and questions of judicial review of ministerial decisions in the context of the *Immigration Act*[3]. However, this unanimous decision, by "the Court", also has very interesting ramifications for public international law and its relation with Canadian law[4].

Indeed, the decision in *Suresh* further dwells upon the issue of the role of legal norms expressed in international conventions which Canada has signed and ratified but has yet to implement through legislation in domestic law. The traditional position about unimplemented treaty norms is the direct result of the so-called dualist approach to international conventions[5], inherited from the British tradition[6], which was expressed by Lord Atkin in the 1937 decision of the Judicial Committee of the Privy Council in the famous *Labour Conventions* case:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration

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1 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*].

2 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.) 1982, c. 11 [*Charter*].

3 *Immigration Act*, R.S.C. 1985, c. I-2 [*Immigration Act*].

4 See, generally, Gérard Vincent La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int'l L. 89.

5 One must not confuse the domestic legal effect of treaties and that of customary international law; in Canada, the former is generally considered dualist and the latter is generally considered monist. According to the dualist theory, international law is only applicable domestically if there has been some kind of incorporation in the domestic legal order, the two systems being considered as separate. Pursuant to the monist theory, the rule is that international law forms part of the law of the land, without any need of internal implementation, a position based on the view that both laws are fundamentally part of the same legal system. Monism can take one of two forms: either that international law has primacy over domestic law or, the other way around, that municipal law trumps international law. The author Hans Kelsen is the most notorious defender of the monist theory, and he favoured the former form of monism; see Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts — Beitrag zu einer Reinen Rechtslehre* (Tübingen: Mohr, 1920) at 102 ff.; and, Hans Kelsen, "La transformation du droit international en droit interne" (1936) 43 R.G.D.I.P. 5. See also, generally, Heinrich Triepel, *Droit international et droit interne* (Oxford: Oxford University Press, 1920) at 73 ff.; Heinrich Triepel, "Les rapports entre le droit interne et le droit international" (1923) 1 R.C.A.D.I. 73; and, Giuseppe Sperduti, "Dualism and Monism: A Confrontation to be Overcome?" (1977) 3 Italian Y.B. Int'l L. 31. Finally, it is noteworthy that these dualist and monist theories are closely linked to the fundamental question of the sources and foundations of our legal order; see on this issue, Luigi Ferrari-Bravo, "International and Municipal Law: The Complementary of Legal Systems," in Ronald St. John Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law* (Dordrecht: Martinus Nijhoff, 1983) at 715.

6 See, generally, Edwin D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains" (1932) 40 R.C.A.D.I. 305; Arnold Duncan McNair, "L'application et l'interprétation des traités d'après la jurisprudence britannique" (1933) 43 R.C.A.D.I. at 247; Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 43-48; and, Patrick Daillier and Alain Pellet (eds.), Nguyen Quoc Dinh, *Droit international public*, 5th ed. (Paris: Librairie général de droit et de jurisprudence, 1994) at 226 ff.

of the existing domestic law, requires legislative action[7].

It would follow that the legislative transformation of treaty obligations is required to incorporate them within the internal legal order of Canada[8], which must be done according to the division of powers in sections 91 and 92 of the *Constitution Act, 1867*[9].

This long-standing constitutional principle has been reconsidered[10], most implicitly, by the decisions of the Supreme Court in the 1999 case of *Baker v. Canada (Minister of Citizenship and Immigration)*[11], which was applied in the 2001 case of *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[12]. Briefly, this traditional rule was challenged with the recognition that the principles and values reflected in international conventional law, even though unimplemented into domestic law, may contribute to the contextual interpretation of Canadian legislation. It is this issue that will be the focus of the following remarks on *Suresh*.

The paper starts by reviewing the facts that gave rise to the case, provides a succinct account of the decision, and indeed looks more particularly at the use of unimplemented treaty norms.

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7 *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326 (P.C.) at 347. The Judicial Committee of the Privy Council later expressed the view that international law will be trumped by conflicting case law and statutes in *Chung Chi Cheung v. The King*, [1939] A.C. 160 at 168, where Lord Atkin wrote: "The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally determined by their tribunals."

8 See, generally, Ronald St. John Macdonald, "The Relationship Between International Law and Domestic Law in Canada," in Ronald St. John Macdonald, Gérald L. Morris and Douglas M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974), 88 [Macdonald, "International Law and Domestic Law"]; Alice Desjardins, "La mise en oeuvre au Canada des traités relatifs aux droits de la personne" (1981) 12 R.G.D. 359; and William A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar Rev. 174.

9 Constitution Act 1867, (U.K.), 30 & 31 Vict., c. 3. It is interesting to note that, unlike the situation in Australia, there is no distinct federal power to incorporate treaties in Canada. The Australian courts have indeed interpreted broadly the competence of the Commonwealth Parliament over "external affairs" in order to include the authority to incorporate treaty obligations both at the federal and the state legislative levels; see William J. Perry, "At the Intersection — Australian and International Law" (1997) 71 Austl. L.J. 841; and, Stephen Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 Adel. L. Rev. 213.

10 See Irene Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation" (1998) 27 Can. Council Int'l L. Proc. 132; Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U.N.B.L.J. 11; Stephen J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 534 [Toope, "International Law and the Supreme Court of Canada"]; Burke Conforti, "Notes on the Relationship between International Law and National Law" (2001) 3 Int'l L. Forum 18; and, Hugh Kindred, "The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court," [forthcoming].

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

12 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [*Hudson*].

I. Factual context and judicial proceedings

Manickavasagam Suresh, the appellant, is a citizen of Sri Lankan of Tamil descent who came to Canada from Sri Lanka in 1990. In April 1991, the Refugee Division of the Immigration and Refugee Board recognized him as a refugee under the *Convention Relating to the Status of Refugees*[13]. Pursuant to section 53(1) of the *Immigration Act*, such a recognition disallows the government to return the asylum seeker "to a country where a person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political group or political opinion".

Also in 1991, the appellant applied for landed immigrant status, which was never finalised because the Solicitor General and the Minister of Citizenship and Immigration started proceedings to deport him. The alleged grounds for deportation were that he was a member and fundraiser for the Liberation Tigers of Tamil Ealam ("LTTE"), an organisation supposedly engaged in terrorist activities in Sri Lanka. In order to commence such a procedure, the authorities must file a certificate under section 40.1 of the *Immigration Act* alleging that the applicant is inadmissible to Canada on security grounds, which they did on October 17 1995 based on the recommendation of the Canadian Security Intelligence Service. The latter expressed the opinion that the appellant was currently engaged in terrorist activity in Sri Lanka and was acting in Canada under the auspices of the World Tamil Movement. Suresh was arrested and detained the next day.

When such a certificate is filed, the Federal Court must determine, pursuant to section 40.1 of the *Immigration Act*, whether it "is reasonable on the basis of the evidence and information available". In the case at hand, the Court made this determination in August 1997 and deemed the certificate filed reasonable. What followed was a deportation hearing, where it was decided that the appellant should indeed be deported, not on grounds of direct involvement in terrorism[14], but on the grounds of membership in a terrorist organisation[15].

On September 17 1997, the Minister notified the appellant that she was considering issuing an opinion declaring him to be a danger to the security of Canada under section 53(1)(b) of the *Immigration Act*, which permits the deportation of a Convention refugee on security grounds even where his or her life or freedom would be threatened by the *refoulement*. Consequently, the appellant submitted written arguments and documentary evidence arguing that he did not pose a threat to Canadian security and that he would face some form of torture or even death if he was deported to Sri Lanka. The immigration officer who considered the case recommended the deportation in a memorandum which was not provided to the appellant and to which he did not have the opportunity to respond orally or in writing. This recommendation was followed and, on

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[13] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force 22 April 1954), online : <http://www.unhchr> [*Refugee Convention*].

[14] *Immigration Act*, supra note 3 s. 19(1)(f)(ii)

[15] *Ibid.* s. 19(1)(f)(iii)(B) and 19(1)(e)(iv)(C).

January 6th 1998, the Minister ordered the deportation of Suresh on security grounds, a decision not required to be accompanied by reasons.

The appellant applied to the Federal Court for judicial review of this decision, claiming that it was unreasonable, that the procedures under the *Immigration Act* were unfair, and that the order violated his *Charter* rights and freedoms. The Court dismissed the appellant's application on all grounds, stating that the Minister's decision was not unreasonable and that there was no constitutional infringement. This judgement was confirmed by the Federal Court of Appeal, which also dismissed the application, hence the present appeal.

II. Decision of the Court

The Supreme Court of Canada determined that there were four questions in regard to Suresh's appeal, namely (i) what ought to be the appropriate standard of review with respect to ministerial decisions under section 53(1)(b) of the *Immigration Act* ; (ii) whether the conditions for deportation in the *Immigration Act* are constitutionally valid in view of the *Charter*, and more particularly (a) the principles of fundamental justice, (b) the vague for vagueness doctrine, and (c) freedom of expression and freedom of association ; (iii) whether the procedures for deportation set out in the *Immigration Act* are constitutional under the *Charter*; and, (iv) whether the Minister's order here should be set aside and a new hearing ordered in light of the conclusions to the previous questions.

Under this heading, the reasons given by the Supreme Court with respect to all but one part of the third question will be examined. The aspect of the decision dealing with the validity of the deportation conditions under the principles of fundamental justice in article 7 of the *Charter* will be analysed separately later in the paper (section 3), because that is where the issue of the use of unimplemented treaty norms arose in *Suresh.*

A. Standard of Review

The Court began by clarifying some points. First, it is the standard with regard to the substantive judicial review that is here relevant, not that concerning the review of the procedural adequacy of the ministerial decision. "At this point, our inquiry is into the standard of review to be applied to the second and third issues — the Minister's decisions on whether Suresh poses a risk to the security of Canada and whether he faces a substantial risk of torture on deportation"[16]. The Court also pointed out that because in the end a new hearing will be ordered on procedural grounds, it is not required to address the issues of substantial judicial review. It is thus in *obiter dictum* that it "offer[ed] the following comments to assist courts in future ministerial review"[17].

What is then the standard to be adopted in order to review the decision of the

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[16] *Suresh, supra* note 1 at para. 27.
[17] *Ibid.*

Minister on whether a refugee constitutes a danger to Canadian security and whether the refugee faces a substantial risk of torture if deported? Pursuant to the principles identified in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[18] the standard of review must be determined according to the functional and pragmatic approach, the gist of which is the legislative intention found in the empowering legislation. Here, the language used in the *Immigration Act* commands deference, as well as the following other factors:

> (1) the presence or absence of a clause negating the right of appeal;
> (2) the relative expertise of the decision-maker;
> (3) the purpose of the provision and the legislation generally; and
> (4) the nature of the question.[19]

Taken together, all these elements suggest that Parliament intended to grant the Minister broad discretion under section 53(1)(b) of the *Immigration Act*, which should not be reviewed unless patently unreasonable. This approach finds support in the case law[20] and was not modified by the Court in *Baker*, which "does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process"[21]. Further, the aspect of the Minister's decision concerning the risk of torture would bring in constitutional interests, namely those protected in section 7 of the *Charter*[22]. Nevertheless, the Court opined that the same deference is warranted, that it should only "intervene if the decision is not supported by the evidence or fails to consider the appropriate factors"[23], and that the standard is thus patent unreasonableness[24].

B. Constitutionality of the deportation conditions

There are three elements that the Supreme Court must consider in answering the question of whether the conditions for deportation in section 53 of the *Immigration Act* are constitutional under the *Charter*. Namely, (a) whether they are contrary to the principles of fundamental justice in article 7, (b) whether they are unconstitutionally vague, also under section 7, and (c) whether they infringe freedom of expression and freedom of association.

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[18] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 29-38.

[19] *Suresh, supra* note 1 at para. 30.

[20] See *Pezin v. British Columbia (Superintendant of Brookers)*, [1994] 2 S.C.R. 557; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

[21] *Suresh, supra* note 1 at para. 37.

[22] See *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States v. Burns*, [2001] 1 S.C.R. 283 [*Burns*].

[23] *Suresh, supra* note 1 at para. 39.

[24] Interestingly, the Court defines *patently unreasonable* as follows: "unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures;" *ibid.*, at para. 41.

1. PRINCIPLES OF FUNDAMENTAL JUSTICE

The first of these issues is thus whether a deportation "to a country where the person's life or freedom would be threatened" authorised by section 53(1)(b) violates the right of everyone "to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" under section 7 of the *Charter*.

This part of the decision will be dealt with later (section 3) because that is where the issue of unimplemented treaty norms comes into play. Suffice it to state here the conclusion reached by the Court, according to which the principles of fundamental justice in section 7 command that, baring exceptional circumstances,[25] "the Minister should generally decline to deport refugees whereon the evidence there is a substantial risk of torture"[26]. Therefore, section 53(1)(b) of the *Immigration Act* in itself does not violate section 7 of the *Charter*.

2. UNCONSTITUTIONAL VAGUENESS

There are other grounds, however, on which the appellant challenged the applicable legislation, the next one based on the so-called vague for vagueness doctrine[27]. Essentially, it is argued that the expression "danger to the security of Canada" and the term "terrorism" found in section 53 *Immigration Act* are unconstitutionally vague. The test for vagueness was set out in *R. v. Nova Scotia Pharmaceutical Society*[28] — "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate"[29].

Although the phrase "danger to the security of Canada" found in section 53(1)(b) is not defined in the *Immigration Act*, the Court did not think that it suffers of vagueness. These terms can be defined and ought to be given "a fair, large and liberal interpretation *in accordance with international norms*"[30], including article 33(2) of the *Refugee Convention* concerning the protection against *refoulement* incorporated into the Canadian legal order with the *Immigration Act*. According to the Court, there is such a danger if the person "poses a serious threat to the security of Canada"[31], based on objectively reasonable suspicions supported by evidence that the person will cause substantial harm. Interestingly, the Court consulted the *travaux préparatoires*[32] of the *Refugee Convention*

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25 On this, the Court wrote: "A violation of s. 7 will be saved by s. 1 'only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like:' see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at 486 at 518; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 9;" see *Suresh, supra* note 1 at para 78.

26 *Suresh, supra* note 1 at para. 77.

27 On this, generally, see Stéphane Beaulac, "Les bases constitutionnelles de la théorie de l'imprécision : partie d'une précaire dynamique globale de la Charte" (1995) 55 R. du B. 257.

28 *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. at 606.

29 *Ibid.* at 643.

30 *Suresh, supra* note 1 at para. 85 [emphasis added].

31 *Suresh, supra* note 1 at para. 90.

32 On the use of extrinsic aids like parliamentary material, parliamentary debates, and *travaux préparatoires* in

to help in the construction of the domestic legislation[33].

As regards to the term "terrorism" in section 19 of the *Immigration Act*, dealing with ground to deny refugee status, the Court found that it "provides a sufficient basis for adjudication and hence is not unconstitutionally vague"[34]. Although there is no consensus on a definition[35], it would be possible to ascertain the meaning of the word by reference to international instruments, namely, the recently negotiated *International Convention for the Suppression of the Financing of Terrorism*[36], which defines terrorism as an

> act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

This definition was followed with respect to section 19 of the *Immigration Act*[37].

At first blush, it appears somewhat incongruous that, to interpret a term in a domestic statute, the Supreme Court resorted to an international treaty which is not only unimplemented into the Canadian legal order, but which was not even ratified by the Canadian government. Indeed, at the time of the judgement in *Suresh*, on January 11th 2002, Canada had merely signed the *International Convention for the Suppression of the Financing of Terrorism* (on February 10th 2000); it is only on February 19th 2002 — that is, over a month after *Suresh* was handed down — that Canada ratified this treaty[38]. It is

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the interpretation of written legal norms, see Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 McGill L.J. at 287; Stéphane Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000) 63 Sask. L. Rev. at 581; and, Stéphane Beaulac, "*Travaux Préparatoires* and the Interpretation of Treaties" [forthcoming in 2003].

33 *Suresh, supra* note 1 at para. 86, where the Court referred to the *Refugee Convention, travaux préparatoires*, A/CONF.2/SR.16 at 8.

34 *Suresh, supra* note 1 at para. 93.

35 On the question, see the following authors: John Bowyer Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (New York: Basic Books, 1978) at x; Warren R. Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (Boulder, U.S.: Westview Press,1982) at 6; Christopher C. Joyner, "Offshore Maritime Terrorism: International Implications and Legal Response" (1983), 36 *Nav. War Colo. Rev.* 16 at 20; Geoffrey Levitt, "Is 'Terrorism' Worth Defining?" (1986) 13 Ohio N.U.L. Rev. 97 at 97; Oscar Schachter, "The Extraterritorial Use of Force against Terrorist Bases" (1989) 11 Hous. J. Int'l L. 309 at 309; Douglas Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993) 8 Fla. J. Int'l L. 65 at 72; and, Ileana M. Porras, "On Terrorism: Reflections on Violence and the Outlaw"(1994) Utah L. Rev. 119 at 124.

36 *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 39 I.L.M. 270, online: <http://untreaty.un.org>, (entered into force 10 April 2002) [*Convention for the Suppression of the Financing of Terrorism*]. This treaty, in turn, refers to a list of treaties relating to terrorism.

37 *Suresh, supra* note 1 at para. 96-98.

38 On the status of the *Convention for the Suppression of the Financing of Terrorism, supra* note 36, online:

absolutely crucial to point out, however, that the Court used the proposed international definition of terrorism, not to interpret *per se* section 19 of the *Immigration Act*, but rather to decide whether or not the term is intelligible enough under section 7 of the *Charter* and its vague for vagueness doctrine, which has a completely different purpose not bringing into play the question of transformation of treaty obligations[39].

Thus this reference to a treaty provision does not challenge the traditional relationship between international law and internal law. It just appears to constitute another utilisation of such norms domestically, namely, to decide whether the legislation at issue is unconstitutionally vague. And for such purposes, the status of the treaty in relation to Canadian law would not bear much relevance, if at all.

3. FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION

Here, the Court observed that the *Immigration Act*, following the *Refugee Convention*, distinguishes between the power to refuse entry to a refugee upon arrival, provided for in article 19(1), and its power to deport or *refouler* the refugee after entry, provided for in section 53(1) of the *Immigration Act*. Further, given that section 53(1) refers to section 19(1) for the class of refugee that can be deported (*inter alia*, for being engaged in terrorism), an interpretative question arises as to whether Parliament intended to include terrorist activities or membership after the refugee has entered the country. This ambiguity is left unanswered because the Court is of the view that on either interpretation, section 2 of the *Charter* is not breached.

The argument of the appellant was that the certificate issued by the Minister under section 40.1 of the *Immigration Act* and the order declaring him a danger to Canadian security under section 53(1)(b) on the ground of membership to the LTTE violates freedom of expression and freedom of association, under sections 2(b) and 2(d) of the *Charter* respectively. The Court rejected both these contentions. Briefly, the case law[40] is clear that section 2 "does not protect expressive or associational activities that constitute violence"[41] and that, in any event, limits on such activities are likely to be justified under section 1 of the *Charter*. In the end, no section 2 violation was established.

C Constitutionality of the deportation procedures

The appellant claimed that the procedure followed by the Minister to decide the

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United Nations <http://untreaty.un.org>.

39 Therefore, it seems that the following commentators are mistaken when they write, about the use of this definition of terrorism, that "the Court indirectly incorporated it into Canadian law through judicial notice. This marks a significant departure from its own jurisprudence related to the use of international treaties." See Christina Johnson and Mark C. Power, "*Suresh*: Some Aspects of Public International Law" (2002) 28 CCIL Bulletin 11 at 13.

40 See *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*]; *R. v. Zundel*, [1992] 2 S.C.R. 731.

41 *Suresh, supra* note 1 at para. 107.

risk of torture he faces should he be returned to Sri Lanka, which is set out in the *Immigration Act*, violated his rights guaranteed under the *Charter*. In order to decide of the constitutional protection of section 7, the Court found it "helpful to consider the common law approach to procedural fairness articulated by L'Heureux-Dubé J. in *Baker*"[42]. Essentially, the duty of fairness and the principles of fundamental justice under section 7 of the *Charter* must be identified based on the statute involved and the rights affected[43]. The Court balanced the different factors, including the nature of the decision to deport, the statutory scheme of the *Immigration Act*, the importance of the right affected if deported (here, against torture), the legitimate expectations in challenging the decision, and the procedure actually used by the Minister.

In the end, the conclusion was that the procedure provided for by legislation and that followed in the case at bar was in breach of the *Charter* principles of fundamental justice. "Weighing these factors together with all the circumstances", the Court wrote :

> we are of the opinion that the procedural protection required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the [*Immigration Act*] under s. 53(1)(b) — that is, none — and they require more than Suresh received.[44]

In concrete terms, it means that Suresh should be informed of the case to be met, must be given an opportunity to challenge the information relied upon by the Minister, including the assurances given by a foreign government; it also means that written reasons for the decision must be given by the Minister.

D. Remedy

It was seen that the deportation conditions provided for in the *Immigration Act* were not unconstitutional under any of the three grounds argued by the appellant. It is rather in the procedure that followed to decide whether to deport Suresh that the principles of fundamental justice protected in section 7 of the *Charter* were violated in the present case. The remedy ordered by the Court is to "remand the case to the Minister for reconsideration in accordance with the procedures set out in these reasons"[45].

III. Discussion

It is under this heading that the part of the *Suresh* decision in which the Supreme

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42 *Ibid.* at para. 113.

43 *Ibid.* at para. 21 where the Court refers to *Baker*; *Knight v. Indian Head School Division No. 19*, [1990] 1 ,S.C.R. 653 at 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

44 *Suresh, supra* note 1 at para. 121.

45 *Ibid.* at para. 130.

Court dwelled upon the question of the use of unimplemented treaty obligation will be examined in detail. Such references to international law were made in the context of deciding that section 53(1) of the *Immigration Act*, which allows deportation "to a country where the person's life or freedom would be threatened", does not violate section 7 of the *Charter*.

It is not the first time that the Court hinted that treaty obligations which have yet to be incorporated in the Canadian legal order may nevertheless be resorted to in order to interpret domestic legislation. Before examining the recent developments in that regard with *Suresh*, it shall be useful to briefly look at the previous cases, both very recent, where the Court addressed the issue.

A. Case law on unimplemented treaty norms

1. THE *BAKER* CASE

The decision which first explicitly opened the door to considering treaty obligations not yet transformed for internal use is *Baker* or, more precisely, the majority reasons, written by Justice L'Heureux-Dubé[46]. In that case, the Court had to decide whether the order to deport a woman with Canadian-born dependent children should be judicially reviewed. The appellant had applied for an exemption based on humanitarian and compassionate considerations under section 114(2) of the *Immigration Act*.

In order to determine the scope of "humanitarian and compassionate consideration", the majority looked at the Minister's guidelines, but also to international instruments. The latter included the *Convention on the Rights of the Child*[47] given that the interests of children form part of humanitarian and compassionate reasons. This treaty was ratified by Canada but has yet to be implemented which, according to the case law[48], meant that the international norms it contains could not have direct application within the Canadian legal system. Then, Justice L'Heureux-Dubé made the following most significant remarks:

> I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law. *Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review*[49].

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[46] Justices Cory and Iacobucci wrote a set of concurring reasons, actually pointing out their disagreement in using unimplemented treaty obligations in interpreting Canadian domestic legislation.

[47] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, Can. T.S. 1992 No. 3, online: <http://untreaty.un.org> (entered into force 2 September 1990) [*Convention on the Rights of the Child*].

[48] The majority referred to *Francis v. Queen*, [1956] S.C.R. 618 at 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 172-173.

[49] *Baker, supra* note 11 at para. 69-70 [emphasis added].

This passage was followed by a reference to *Driedger on the Construction of Statutes*[50], stating that international law, both customary and conventional, is part of the legal context of statutory interpretation. It was also pointed out that the role of international human rights in construing domestic law has been recognised in other common law countries[51].

As a result, the majority considered the values and principles of the *Convention on the Rights of the Child*, mainly those concerning the best interests of children and how they should be taken into account when making decisions relating to and affecting their future[52]. This special protection for children and childhood would find supports in other international instruments, including the 1948 *Universal Declaration of Human Rights*[53] and the 1959 *Declaration of the Rights of the Child*[54], which would further provide context to interpret section 114(2) *Immigration Act* and decide whether the decision at hand was a reasonable exercise of the Minister's power.

2. THE *HUDSON* CASE

There is another judicial pronouncement by the Supreme Court which is relevant to the foregoing analysis, although it does not deal, strictly speaking, with unimplemented treaty obligations. In the case of *Hudson*, the role recognised to such norms in *Baker* was explicitly referred to and international law was also resorted to as part of the legal context to interpret the domestic legislation at issue.

Unlike *Baker*, which dealt with a question of human rights, *Hudson* is an environmental law case; but like the former, it is a majority judgement by Justice L'Heureux-Dubé[55]. Here, the appellants were companies providing landscaping and lawn care services that made regular use of pesticides, which were approved by the Federal *Pest Control Products Act*[56]; the requisite licenses under the Quebec's *Pesticides Act*[57] were also obtained. The city of Hudson, the respondent, charged the appellants with the use of pesticides, in violation of municipal by-law no. 270, which was adopted pursuant to the enabling legislation. The appellant sought to have by-law 270 declared inoperative and *ultra vires* of the town's authority.

It is in determining the extent of statutory authority enjoyed by the respondent to

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50 Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 330.

51 The majority referred to the decision of the New Zealand Court of Appeal in *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257, at 266; and to a judgement by the Supreme Court of India, *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 at 367.

52 *Baker*, *supra* note 11 at para. 71.

53 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, (1948) 71 in its preamble [*Universal Declaration of Human Rights*].

54 *Declaration of the Rights of the Child*, GA Res. 1386 (XIV), 14th Sess., UN GAOR, Supp. No. 16, UN Doc. A/4354, (1959) 19, 20, in its Preamble.

55 Justices Iacobucci, Major and LeBel wrote a set of concurring reasons.

56 R.S.C. 1985, c. P-9.

57 R.S.Q., c. P-9.3.

regulate the use of pesticide on its territory, provided for in the *Cities and Towns Act*[58], that the majority referred to international law[59]. Justice L'Heureux-Dubé quoted the excerpt of *Baker* reproduced above and referred again to *Driedger on the Construction of Statutes*, which clearly expressed the view that both international treaties and *customary international law* should inform the contextual construction of statutes. Accordingly, the interpretation of section 410(1) *Cities and Towns Act* and of by-law 270 which allows the respondent to regulate pesticide use on its territory was said to be consistent with the so-called precautionary principle at international law[60].

This principle was given a formal definition in the *Bergen Ministerial Declaration on Sustainable Developments*[61], and the majority pointed out that it was now "codified in several items of domestic legislation"[62], including the *Oceans Act*[63], the *Canadian Environmental Protection Act, 1999*[64], and Nova Scotia's *Endangered Species Act*[65]. What is not elucidated is the nature of the precautionary principle in terms of sources of international law[66]. Justice L'Heureux-Dubé did not refer to any treaty provision, be it implemented or not, which seems to indicate that the rule she was alluding to was customary[67]. In any event, it is certainly fair to argue that this case, like

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58 R.S.Q., c. C-19, as amended. [*Cities and Towns Act*]

59 *Hudson, supra* note 12 at para. 30.

60 On this, see the recent literature by David VanderZwaag, "The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces" (1998) 8 J. Envtl. L. & Pol'y. 355; Tim O'Riordan, James Cameron & Andrew Jordan (eds.), *Reinterpreting the Precautionary Principle* (London: Cameron May, 2001); and, Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002).

61 *Bergen Ministerial Declaration on Sustainable Development*, A/CONF.151/PC/10, 6 August 1990, at para. 7: "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

62 *Hudson, supra* note 12 at para. 31.

63 S.C. 1996, c. 31 at para. 6 of the preamble.

64 S.C. 1999, c. 33, s. 2(1)(a).

65 S.N.S. 1998, c. 11, at ss. 2(1)(h) and 11(1).

66 The sources of international law are generally regarded as being those provided for in article 38(1) of the *Statute of the International Court of Justice*, 1 U.N.T.S. xvi, which reads: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (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."

67 *Hudson, supra* note 12 at para. 32 where she wrote, extensively quoting: "Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (David Freestone and Ellen Hey, "Origins and Development of the Precautionary Principle", in David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law* (1996) at 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (James Cameron and Julie Abouchar, "The Status of the Precautionary Principle in International Law", in *ibid.* at 52). See also Owen McIntyre and Thomas Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221 at 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to

Baker, is in favour of resorting to international law to help in the interpretation of statutes, whether the norm is customary or conventional, and whether or not the latter has been incorporated in the domestic legal order.

B. Unimplemented treaty norms and the *Suresh* case

In deciding that section 53(1)(b) of the *Immigration Act*, which allows deportation "to a country where the person's life or freedom would be threatened", does not violate the principles of fundamental justice in section 7 of the *Charter*, a balance had to be struck between "Canada's interest in combating terrorism and the Convention refugee's interest in not being deported to torture"[68]. In order to do so, the Court took into account not only the Canadian perspective, but examined also the situation at international law.

1. TORTURE AND CANADIAN LAW

Domestically, there is a fundamental Canadian belief about the appropriate limits of the criminal justice system — encapsulated in section 12 of the *Charter* proscribing cruel and unusual treatment or punishment — that torture or death is an unacceptable form of punishment[69]. "Torture is an instrument of terror and not of justice, [and] is seen in Canada as fundamentally unjust"[70]. Further, even though Suresh's appeal is against his expulsion to face torture in another country, the *Charter* is implicated because, as it was decided in *United States v. Burns*: "Section 7 is concerned not only with the act of extraditing, but also the *potential* consequences of the act of extradition"[71]. This principle applies as much in the context of *refoulement* as in that of extradition. Thus when there is a sufficient connection between Canada's action and the human rights deprivation, the Court will seek to reach a balance between the government's interest in protecting public security and the constitutional commitment to liberty and fair process.

2. TORTURE AND INTERNATIONAL LAW

The Court continued its analysis of whether section 53(1) *Immigration Act* violates section 7 *Charter* by putting the issue in its international context[72] — "A

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be "part of the Customary International Law" (*A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53 at para. 27). See also *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."

68 *Suresh, supra* note 1 at para. 47.

69 See *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1072-1074.

70 *Suresh, supra* note 1 at 51.

71 *Burns supra* note 22 at para. 60 [emphasis in original]. See also *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at 522, where La Forest J. wrote that section 7 of the *Charter* was also interested in "the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country."

72 Court refers to the case *Pushpanathan v. Canada (Minister of Citizenship and Immigration), supra* note 18.

complete understanding of the [*Immigration Act*] and the *Charter* requires consideration of the international perspective"[73]. It is here that conventional obligations not yet implemented in the Canadian domestic legal order were used to assist in interpreting the applicable law.

Similar to what the majority of the Court did in *Baker* (to which, incidentally, there is no reference here), the Court put it in most explicit terms that unimplemented treaty obligations have no direct application within the Canadian legal system. But they are nevertheless useful for interpretation purposes:

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 Court may be informed by international law. Our concern is not with Canada's international obligation *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself[74].

It must be pointed out that, unlike *Baker* where such international norms were utilised to construe domestic legislation (section 114(1) *Immigration Act*), in the present case it is in interpreting a constitutional right enshrined in the *Charter* (the principles of fundamental justice in section 7) that they were used. This latter type of references has occurred in the past, like in *Slaight Communications Inc. v. Davidson*[75] and *R. v. Keegstra*[76] as the majority in *Baker* pointed out[77].

Now, from an international perspective, the first argument made was that the prohibition on torture constituted a peremptory norm of customary law, generally referred to as rule of *ius cogens*[78]. Of course, the Court did not have to decide the international legal status of the right against torture, but it nevertheless stated that the indicia of such a *ius cogens* norm "suggest that it cannot be easily derogated from"[79]. The evidence in

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[73] *Suresh, supra* note 1 at para. 59.

[74] *Ibid.* at para. 60.

[75] *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 [*Slaight Communications*].

[76] *Keegstra, supra* note 40.

[77] *Baker, supra* note 11 at para. 70.

[78] *The Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), defines a peremptory norm at article 53: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See also, concerning new rules of *jus cogens*, article 64. The possible existence of such overriding principles of international law was alluded to by the majority of the International Court of Justice in the *Barcelona Traction Case (Second Phase)*, (Belgium v. Spain) judgement [1970] I.C.J. Rep. 3 at 32, where the twelve judges spoke of simple obligations between states and of obligations "towards the international community as a whole." They continued as follows: "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." See also, on ius *(jus) cogens*, the following authors: Brownlie, *supra*, note 6 at 512-515; and, Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiedliiten Kustannus, 1988).

[79] *Suresh, supra* note 1 at para. 65.

support of this includes (i) the large number of multilateral international instruments explicitly prohibiting torture[80], (ii) the domestic general practice of states officially prohibiting the use of torture in the administration of justice[81], and (iii) the numerous international authorities, both doctrinal[82] and case law[83], that recognise the prohibition on torture as a peremptory norm[84].

The Court then focussed on two treaties that Canada ratified but has yet to transform into the domestic legal system, namely, the *International Covenant on Civil and Political Rights*[85], ratified in 1976, and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*[86], ratified in 1987. The relevant provisions of the *ICCPR* are article 4[87] and article 7[88], which however do not specifically say anything on the expulsion of a person to face torture elsewhere. It is *General Comment No. 20* to the *ICCPR* which addresses this issue by stating that "States parties must not expose individuals to the danger of torture [...] upon return to another country by

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80 The Court refers to the *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20 (entered into force 21 October 1950), art. 3; the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20 (entered into force 21 October 1950), art. 3; the *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20 (entered into force 21 October 1950), art. 3; the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949. 75 U.N.T.S. 287, Can. T.S. 1965 No. 20 (entered into force 21 October 1950), art. 3; the *Universal Declaration of Human Rights*, *supra*, note 53, at art. 5; the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 3452 (XXX), UN GAOR, 30th Sess., Supp. No. 34, UN Doc. A/10034 (1975); the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), Can. T.S. 1976 No. 47 (entered into force 23 March 1976) [ICCPR], at art. 7; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, E.R.S.5.41, (entered into force 3 September 1953) at art. 3; the *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, 9 I.L.M. 673, O.A.S.T.S. 36 (entered into force 18 July 1978) at art. 5; the African *Charter on Human and Peoples' Rights*, 27 June 1981, 21 I.L.M. 58, 7 H.R.L.J. 403 (entered into force 21 October 1986) at art. 5; the *Universal Islamic Declaration of Human Rights*, 9:2 *The Muslim World League Journal* 25 (1981) at art. VII.

81 *Suresh*, *supra* note 1 at para. 63.

82 See Hannikainen, *supra* note 78 at 509, and Malcom N. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997) at 203-204.

83 See *Prosecutor v. Furundzija* (1998), 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); and, *R. v. Bow Street Metropolitan Stipendiary Magistrate et al., Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (House of Lords).

84 *Suresh*, *supra* note 1 at para. 64.

85 *ICCPR*, *supra* note 80.

86 *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 June 1984, Can. T.S. 1987 No. 36, 23 I.L.M. 1027, minor changes reprinted in 24 I.L.M. 535, 5 H.R.L.J. 350, (entered into force 26 June 1987) [*CAT*].

87 *ICCPR*, *supra* note 80 at art. 4 which in part, reads: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. [...] 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

88 *Ibid.* at art. 7 which in part, reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

way of their extradition, expulsion, or refoulement"[89]. As regards the CAT — more particularly article 1[90], article 2[91], article 3[92], article 16[93] — the Court opined that its import is clear: "a state is not to expel a person to face torture, which includes both the physical and mental infliction of pain and suffering, elsewhere"[94].

This categorical rejection of deportation to a country where a person would likely face torture, however, appears to be qualified by another international instrument which, unlike the previous two, Canada has both ratified and incorporated into its legal system, namely the *Refugee Convention*. Indeed, after the general prohibition of *refoulement*, article 33(2) of this treaty puts a *caveat*: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country". The Court, however, rejected the argument that the anti-deportation provisions in the *ICCPR* and the *CAT* can be derogated because of the *Refugee Convention*, holding that the former unimplemented instruments expressed a "prevailing international norm"[95]. Obviously, the fact that the *Refugee Convention* was transformed, unlike the other two, had no bearing whatsoever on this conclusion.

In closing the examination of the international context, the Court expressed the view that the way that the relevant international instruments ought to inform the interpretation of the principles of fundamental justice under section 7 *Charter* is essentially this — "international law rejects deportation to torture, even where national security interests are at stake"[96]. Based on this international perspective, as well as on the Canadian one, it was held that save in the most extraordinary circumstances, the

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89 Human Rights Committee, *General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN HRCOR, 44th Sess., UN Doc. HRI/Gen/1/Rev.1, 30 (1994).

90 *CAT*, *supra* note 86 at art.1 which reads: "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

91 *Ibid.* at art. 2 which in part, reads: "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever [...] may be invoked as a justification of torture."

92 *Ibid.* at art. 3 which reads: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

93 *Ibid.* art. 16 in part, reads: "2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

94 *Suresh*, *supra* note 1 at para. 68.

95 *Ibid.* at para. 72. The Court, in order to support the conclusion that the *CAT* enjoys a dominant status in international law referred to, *inter alia*, Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/XXV/Concl.4 (2000).

96 *Suresh*, *supra* note 1 at para. 75.

refoulement of a person to a country where he or she is likely to face torture constitutes an unjustifiable infringement of the *Charter*[97]. Given those rare cases where deportation will be permissible, section 53(1)(b) *Immigration Act* does not *per se* violate the *Charter*, and it is in exercising his or her statutory discretion that the principles of fundamental justice must be respected by the Minister which, in the case at bar, was not the case[98].

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As far as unimplemented treaty obligations are concerned, the most significant aspect coming out of this decision appears to be that the role of such international norms in the interpretation of the country's domestic law continues to grow and be explicitly recognised. In *Baker*, it was the unimplemented *Convention on the Rights of the Child* that was used as an aid to construe the federal *Immigration Act*. In *Hudson*, another piece of internal legislation, the Quebec *Cities and Towns Act*, was interpreted in light of the international precautionary principle, which appears to be of the nature of customary international law[99]. Now in *Suresh*, the Court used the norms expressed in the unincorporated *ICCPR* and *CAT*, and even referred to *ius cogens*, to help ascertain the content of a constitutional right, that is, a guarantee enshrined in the supreme law of the land, the *Charter*. We impatiently await the decision in *Gosselin v. Québec (Procureur général)* to see whether such permissive approach will be pursued further[100].

Admittedly, there is nothing groundbreaking in resorting to international law to interpret the *Charter*. The majority in *Baker* referred to the decisions in *Slaight*

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97 *Ibid.* at para. 76.

98 *Ibid.* at para. 79.

99 The effect of customary international law on the domestic legal system of Canada is somewhat ambiguous, although the traditional position was to favour the monist theory: see Macdonald, "International Law and Domestic law," *supra* note 8 at 109-111. It is in *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioner's Residences*, [1943] S.C.R. 208, where the Supreme Court confused the situation as regards the status of customary international law in Canada. Since then, it has vacillated from favouring direct incorporation (see, for example, *Municipality of St. John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263) to requiring transformation of the customary norm (see, for example, *La République Démocratique du Congo v. Venne*, [1971] S.C.R. 997). It is noteworthy also that the Court failed to discuss the customary law of self-determination in the *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, which makes some think that a dualist position with respect this source of international law was adopted: see Toope, "International Law and the Supreme Court of Canada," *supra*, note 10, at 17. This situation contrasts with other common law jurisdictions, where it is clear that norms of international customs have direct application in the domestic legal order: see, in the United States of America, *Paquete Habana* (1900), 175 U.S. 677 (U.S.S.C); in the United Kingdom, *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.), and, *I Congreso del Partido*, [1983] 1 A.C. 244 (H.L.); in Australia, *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.A.).

100 *Gosselin c. Québec (Procureur Général)*, [1999] R.J.Q. 1033, is a decision by the Quebec Court of Appeal in which the question of the use of unimplemented treaty norms was discussed in the context of social benefit legislation, by Justice Baudouin of the majority, but mainly by Justice Robert in dissent. Leave to appeal at the Supreme Court of Canada was granted on 1 June 2000, No. 27418, and the case was heard by the full bench on 29 October 2001.

Communications Inc. v. Davidson[101] and *R. v. Keegstra*[102], as instances where the Court applied this method of interpreting the constitution[103]. There are many other cases that did the same, including the *Reference Re Public Service Employee Relations Act*[104] and the recent decision in *R. v. Burns*[105]. In fact, since the very beginning of the *Charter* in 1982, legal commentators have well documented and have strongly advocated recourse to international instruments as an aid to the construction of constitutionally protected rights and freedoms[106].

Similarly, even the *Baker* ruling should perhaps not be deemed unprecedented because, to a large extent, it really only falls in line with the long-recognised rule of statutory interpretation according to which a legislative provision ought to be construed in conformity with international law, be it of customary or conventional nature, and be the latter implemented or not[107]. Indeed, already in 1968, Justice Pigeon wrote that there is a "rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law"[108]. This was picked up in the 1990 case of *National Corn Growers*

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101 *Slaight Communications*, *supra* note 76 at 1056-1057, *per* Dickson C.J. in dissent.

102 *Keegstra*, supra note 40 at 749-755.

103 *Baker*, *supra* note 11 at para. 70.

104 *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313.

105 *Burns*, *supra* note 22.

106 See, among many authors, Stephen J. Toope, "Canada and International Law" (1998) 27 Can. Council Int'l L. Proc. 33; William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Scarborough, Can.: Carswell, 1996); Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992); Michel Lebel, "L'interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne — Critique de la démarche suivie par la Cour suprême du Canada" (1988) 48 R. du B. 743; Graham Zellick, "The European Convention on Human Rights: Its Significance for Charter Litigation," in Robert J. Sharpe ed., *Charter Litigation* (Toronto & Vancouver: Butterworths, 1987), 97; M.Ann Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985) 23 U.W.O. L. Rev. 9; Daniel Turp, "Le recours en droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel" (1984) 18 R.J. Thémis 353; Mel Cohen and Anne F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 *Can. Bar Rev.* 265; John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Sup. Ct. L.Rev. 287; Errol P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 Alta L. Rev. 383; and, Guy Tremblay, "La Charte canadienne des droits et libertés et quelques leçons de la Convention européenne des droits de l'homme," (1982) 23 C. de D. 795. See also, with regard to the Quebec provincial human rights legislation, Marie Caron, "L'utilisation du droit international aux fins d'interprétation et d'application de la Charte des droits et libertés de la personne du Québec" (1984) 1 R.Q.D.I. 307.

107 La Forest, *supra* note 4 at 100, in a paper written in a non-judicial capacity, wrote that human rights principles "are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law." See also Toope, "International Law and the Supreme Court of Canada," *supra* note 10 at 534.

108 *Daniels v. White and the Queen*, [1968] S.C.R. 517 at 541. See also *Composers, Authors, and Publishers Assn. of Canada Limited v. CTV Television Network*, [1968] S.C.R. 676; *Zingre v. The Queen*, [1981] 2 S.C.R. 392. As well, see the authors R. Sullivan, *supra* note 50, at 330; Pierre-André Côté, *Interprétation des Lois*, 3rd ed. (Montreal: Thémis, 1999) at 466-468.

Assn. v. Canada (Import Tribunal)[109], the 1998 cases of *Ordon Estate v. Grail*[110] and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[111], and was behind many other Supreme Court interpretations[112].

What appears to constitute a paradigm shift in the case law of the Court, however, is to expressly address the issue of the employment of unimplemented treaty obligations and, in effect, to recognise to such international norms an explicit role within the domestic legal system, more particularly in the contextual approach to the interpretation of Canadian legislation[113]. It might indeed signal that, at least as far as Canada is concerned, the era of strict separation between the international legal order and the internal legal order is fading away[114], a development that might make the Kelsens[115] and the Allotts[116] of the world think that there is some hope in creating a single juristic reasoning, within a single legal order, for a single social consciousness, to meet the needs of a single human reality[117].

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[109] [1990] 2 S.C.R. 1324 at 1371, where Justice Gonthier wrote: "where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations."

[110] [1998] 3 S.C.R. 437 at 526, where Iacobucci and Major JJ. observed: "Although international law is not binding upon parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations."

[111] *Supra* note 18 at 1019-1020, where Justice Bastarache stated: "Since the purpose of the [*Immigration Act*] incorporating Article IF(c) [of the *Refugee Convention*] is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article IF(c) in domestic law."

[112] See, for instance, *R. v. Parisien*, [1988] 1 S.C.R. 950; *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Re Canada Labour Code*, [1992] 2 S.C.R. 50; *Canada (Attorney General) v. Ward*, [1993] 2 R.C.S. 689; *Thomson v. Thomson*, [1994] 3 R.C.S. 551 at 578.

[113] This appears to be linked to the idea of "persuasive authority" of foreign norms over domestic legal system: see H. Patrick Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261. See also Karen Knop, "Here and There: International Law in Domestic Courts" (2001) 32 N.Y. U.J. Int'l L. & Pol. 501.

[114] Indeed, it is reasonable to think that there is no way back to the Supreme Court's antagonistic approach towards unimplemented treaties that was adopted in *Francis v. The Queen*, *supra*, note 48; *MacDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, *supra* note 48; *Schavernoch v. Foreign Claims Commission*, [1982] 1 S.C.R. 1092; see *contra*, the early decision in *Arrow River and Tributaries Slide and Boom Company v. Pigeon Timber Company*, [1932] S.C.R. 495.

[115] On Kelsen's work and how he advocated a monist theory which considered international law and domestic law as part of one legal system, see the references, *supra* note 5.

[116] See Philip Allott, *Eunomia — New Order for a New World* (Oxford: Oxford University Press, 1990); and Philip Allott, *The Health of Nations* (Cambridge: Cambridge University Press, 2002). Professor Philip Allott, of Trinity College, Cambridge, is considered by many as the most illuminating contemporary international scholar on legal theory of universal governance.

[117] On the creation and transformation of human constructed reality through the use of language and intellectual concepts, see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1961); Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1958); Charles Kay Ogden & Ivor Armstrong Richards, *The Meaning of Meaning — A Study of the Influence of Language upon Thought and of the Science of Symbolism*, 2nd ed. (London: Kegan Paul, 1927).