UNIMPLEMENTED TREATIES IN CANADA: A COMPARATIVE LOOK AT THE ROLE OF DOMESTIC COURTS

by

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ABSTRACT

If international law is to matter, it has to reach individuals. This is what motivates the writing of this paper. International law is made up of different sources and treaty law is one of them. When a country ratifies a treaty, it shows its intention to be bound by that treaty. However, the process of making international treaties part of domestic law is different in every country. In Canada the process has an additional requirement, which is the implementation into domestic legislation, without this requirement courts and individuals cannot rely on treaties. Nevertheless, recent case law has showed that courts are more willing in considering unimplemented treaties for statutory interpretation. As we mentioned, the process is different in every country but there are countries that are more open to international law, we chose the Netherlands and Mexico as an example. In those countries once a treaty is ratified it becomes part of the domestic jurisdiction and courts rely on international law as much possible. This paper does not intend to criticize the Canadian process it only intends to layout the relevant issues and make suggestions. Even though the government and the process for treaty authorization are different between nations, courts should try to rely on unimplemented treaties as an aid to statutory interpretation as much as possible.

This thesis is dedicated to the following people:

Mom:

Ma, un millón de gracias por apoyarme, escucharme y motivarme, pero sobre todo por enseñarme a siempre seguir adelante y hacer todo por volver mis sueños realidad.

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Tios, Adry and Pete, thanks for all the support and encouragement.

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(in LL.M)
Thanks for the laughs and great support, finally we all made it.

(in Mexico)
Thanks for always believing in me.

In loving memory of those whom I loved and cannot share this with me right now, but I know you must be proud.

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I. INTRODUCTION

Globalization is making international law and international relations between states an important concern. However, most of the misunderstandings relating to international law are due to a failure to recognize law where it exists. International law has developed to formalize, establish, maintain, change or terminate myriad relations, as well as regulate them and determine its consequences. International law is about legally binding rules and customary practices that define the rights and obligations of states. One of the purposes of international law is to maintain international order, and by maintaining that order nations can better pursue their national interests, either foreign or domestic. However, and even though originally international law was created for states to regulate their relations, international law is now shifting in such a way that it is now also applicable to individuals. According to Anne-Marie Slaughter and the liberal theory, international law seeks to achieve the goals and values of a society and it does so by primarily regulating states.[1] Thus, she argues that "individuals and groups interact with each other in the shadow of government institutions, directly through government institutions, and through government institutions with the individuals and groups of other states," which might mean that many if not most global problems have domestic roots.[2] Therefore if international law is to matter, it has to reach individuals.

International law is made up of different sources, customary law, treaty law, general principles of law and other sources. Therefore not all international law is customary law.

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[1] Anne-Marie Slaughter, "A Liberal Theory of International Law" in *Proceedings of the American Society of International Law*, April 2000, at 240-249, in Jutta Brunnée, *International Law and Compliance: Theories and Practice* (Toronto 2002) at 58.
[2] *Ibid,* at 62.

Negotiations between states are increasingly being concluded through international treaties, and because international law should also reach individuals, those treaties are becoming a source on which individuals can rely on as much as they would rely on its domestic law.

In the first section of this paper we will give a brief description of the concept of "international law", and some reasons why nations obey international law and why international law matters. Then we will move to treaty law and we will concentrate on "treaty law" as a source of international law. We will concentrate on treaty law because there is a great deal of binding international law by way of so many recently concluded treaties, which impose obligations similar to those found within domestic statutes.[3]

There is a process to treaty law and according to the *Vienna Convention on the Law of Treaties* ("Vienna Convention")[4] (the law of treaties) a country that signs and ratifies a treaty is showing its intention to be part of the treaty. For example, in a leading case in Australia, *Teoh,*[5] the Australian High court stated that "ratification[6] of an international convention is not

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[3] Jutta Brunnée & Stephen J. Toope, "*A Hesitant Embrace: The Application of International Law by Canadian Courts*" (2002) forthcoming in Can. Y. Int'l L., citing to manuscript on file with authors, at 9.

[4] *Vienna Convention on the Law of Treaties,* (1969) 1155 U.N.T.S. 331, in force 1980.

[5] *Minister for Immigrations &Ethnic Affairs v. Teoh*, (1995), 183 C.L.R. 273 (Australia H.C.) at para. 34 per Mason C.J. and Deane J.

[6] The signing of a treaty cannot usually constitute an acceptance by a party to become legally binding. Signature is more frequently a part of the negotiation process that involves the adoption and authentication of a treaty's text. "Adoption" is not defined in the Vienna Convention, but in international practice the terms refers to the stage where states agree on the final form and content of the agreement. The "authentication" is the procedure by which the parties signal their agreement with the treaty, by way of saying that it includes all the terms and circumstances negotiated. The first steps to be bound by a treaty are that the country expresses its consent by signing such treaty, then by ratifying it. Therefore, the Vienna Convention is little bothered with form it is more concerned to establish clearly when states actually consent to be bound. The Vienna Convention reads as following: "The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".(*Vienna Convention on the Law of Treaties, supra* note 4). In most cases, treaties make explicit provision about how consent is to be formally registered, thus, two methods stand in practice: ratification and accession. Ratification, involves a state that has participated in the process and has signed the text. It refers to any number of procedures where a party that participated in the negotiation of a treaty expresses its final consent to be bound. This step usually takes place after the state takes any steps necessary under its domestic law to permit it either to give such final consent or to perform the treaty's obligation once undertaken. (John Currie, *Public International Law*, (Toronto: Irwin Law, 2001) at 120). Accession is the route followed by the state that did not originally negotiate or sign a treaty but that subsequently wishes to adhere to the agreement

to be dismissed as a merely ineffectual act. Rather, it is a positive statement by the Executive to the world and to the citizens that the Executive and its agencies will act in accordance with the convention."[7]

In order for individuals to access international law, we have to ensure the domestic application/enforcement of international law. The following chapter deals with the core issue of the paper: the reception of international law into domestic law in Canada. It is generally said that Canada treats customary international law as automatically incorporated into domestic law, but demands the transformation (implementation) of treaty law.[8] This means individuals can only rely upon treaties that actually are implemented into domestic legislation, not on unimplemented treaties.

This raises an important issue since Canada has ratified several treaties and unfortunately not all of them have gone through the process of implementation and therefore are not a source on which courts or individuals can rely.

However, since Canadian law is based on the constitutional history of Great Britain, there is a separation of powers between the legislature and the executive, and since the Canadian system is modeled on the British system, the executive has full power to conclude treaties (sign and ratify), but has no power to change or enact domestic law. That is something reserved to the federal legislative branch. Therefore the legislative branch is the only one that can implement treaty law into domestic law.

Although international law increasingly affects individuals within states, their ability to rely upon international law in national courts remains limited. This leaves a few open

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and usually treaties prescribe the way to accede to such agreement. (Mark W. Janis, *An Introduction to International Law*, (New York: Aspen Law & Business, 1999) 3rd ed., at 22).

[7] *Minister for Immigrations &Ethnic Affairs v. Teoh*, (1995), 183 C.L.R. 273 (Australia H.C.) at para. 34 per Mason C.J. and Deane J.

[8] Gibran Van Ert, *Using International Law in Canadian Courts*, (USA: Kluwer Law International, 2002) at 51.

questions: what happens after signing and ratifying an international treaty? What happens if the treaties are not implemented? And what is the status of an unimplemented treaty in domestic law?

In order for individuals to be able to rely on international law there needs to be a link between international law and individuals, because they cannot rely on international law on their own. That link should be domestic courts. Courts also comply with international law, because as was mentioned above, through international law states pursue their national interests and some of those interests are domestic, therefore by obeying an international norm it becomes an internally binding domestic obligation to do the same within the country. Indeed, the judicial role is of particular importance because courts influence the development not only of domestic law but of international law as well.[9]

If courts cannot rely directly on unimplemented treaties they should rely on them by using them as a tool to interpret domestic legislation. We will discuss key cases such as *Baker v. Canada*[10] and *Ahani v. Canada*,[11] cases that set the standard for the new trend taken by courts in relying on unimplemented treaties as an aid to statutory interpretation.

In order to understand this issue foreign jurisprudence should be considered, and we will compare the approach taken by Canada with that of other countries that have a more open reception to international law. Those countries are the Netherlands and Mexico. We chose them not only because their constitutions recognize the importance of treaties, but because of the process by which treaties become part of domestic law in these countries (i.e

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[9] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 7.
[10] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. at 817 (hereinafter "*Baker*")
[11] *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002), 208 D.L.R. (4th) 57 (S.C.C.). (hereinafter "*Ahani*").

they do not require implementation) the constitutional status given to treaty law and the fact that courts in these countries rely on treaties for statutory interpretation.

This paper will outline the problem, describe a different approach and ultimately argue that courts need to take an open approach, recognizing that the future of Canadian integration of international law depends on courts and their willingness to accept that treaty law, including unimplemented treaties should be considered as aid for statutory interpretation.

II. INTERNATIONAL LAW AND THE LAW OF TREATIES

A. What is International Law?

International law is a set of legally binding rules and customary practices that define the rights and obligations of international legal subjects and govern their interactions.[12] It is the law between states. International law has very little hierarchical organization; it has no formal written constitution establishing general law making or law enforcing institutions. It depends for its enforcement largely on consensual dispute resolution mechanisms and political or economic pressure.[13]

In order to clarify what international law means we will divide the legal universe into two parts: international law and domestic law. International law among other things prescribes rules governing relations between states. Domestic law, on the other hand, prescribes rules governing everything else, mostly the conduct of individuals, corporations, governmental institutions and other private entities within a state.[14]

"Public" international law primarily governs the activities of governments in relation to other governments. "Private" international law deals with the activities of individuals, corporations and other private entities when they cross national borders.

International law is a system containing principles, customs, standards and rules by which relations between states and other international persons are governed. Originally, only

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[12] John Currie, *Essentials of Canadian Law, Public International Law*, (Toronto: Irwin Law, 2001) at 1.
[13] *Ibid*, at 4.
[14] Carter Trimble, *International Law* (New York: Aspen Law and Business, 1999) 3rd ed., at 2.

states had personality at international law,[15] but today, international organizations and individuals have certain rights and obligations under international law.[16]

B. Enforcing International Law: Why Do Nations Obey International Law?

Most of the misunderstanding of international law is due to a failure to recognize law where it exists. Through what we call foreign policy, nations establish, maintain, change, or terminate myriads of relations. Law has developed to formalize these relationships, to regulate them and determine their consequences. A major purpose of foreign policy for most nations at most times is to maintain international order so that they can pursue their national interests, foreign and domestic. That order depends on an "infrastructure" of agreed assumptions, practices, commitments, expectations, reliances. These too, comprise international law and they are reflected in all what governments do.[17]

In international relations, the principal unit is the nation (state). The relations between nations regularly commence with agreements that involve law. International relations and foreign policy, then, depend on a legal order, operate in a legal framework, assume a host of

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[15] S.A. Williams, et al, *An Introduction to International Law Chiefly as Interpreted and Applied in Canada*, (Toronto: Butterworths, 1987) 2nd ed., at 1.

[16] International law developed in the political environment of Europe from the sixteenth century onwards. However, the prevailing view in the study of international law as we know it today, is that it emerged in Europe in the period after the Peace of Westphalia (1648), which concluded the Thirty Years War. (Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (New York; Routledge, 1997) 7th ed. at 9.) During the nineteenth century international law expanded due to the rise of new states. In the twentieth century there were important developments with the creation of certain international organizations, such as: The Permanent Court of Arbitration (1899), The Permanent Court of International Justice (1921), succeeded in 1946 by the International Court of Justice, The League of Nations (1920) and its successor the United Nations in 1945 and many others.

[17] L. Henkin "How Nations Behave, The Role of Law and One its Limitations", 2nd ed. (1979) at 13-27, in Jutta Brunnée, *International Law and Compliance: Theories and Practice* (Toronto 2002) at 2.

legal principles and concepts which shape the policies of nations and limit national behavior.[18]

The traditional mechanism of international enforcement is "reciprocity" and states obey international law because they want other states to do the same.

The best-known adjudicatory body for traditional international law is the International Court of Justice (I.C.J.). The I.C.J. remains the principal forum for resolving disputes between states.[19]

States have searched for other methods to enforce international rules and regulations by individuals. Some of the enforcement mechanisms are:

a) Arbitration: The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention), ratified by almost 90 countries, establishes that a decision by an international arbitral panel will be enforced by the domestic courts. The World Bank created the International Centre for the Settlement of Investment Disputes (ICSID) to resolve disputes between foreign investors and the host country through conciliation and arbitration.[20]

b) Regional and Specialized Courts: The new regional courts of Europe, such as the European Court of Justice and the European court of Human Rights – whose decisions are as effective as those of any domestic court – are among the most dramatic examples of new mechanisms of international law.[21]

c) Domestic Courts: Lately the domestic courts of most countries have found themselves considering more and more cases that have an international dimension. Courts

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[18] *Ibid,* at 6.
[19] Barry E. Carter, *et al*, *International Law*, (New York: Aspen Law & Business, 1999) 3rd ed., at 20.
[20] *Ibid*, at 23.
[21] *Ibid.*

are more committed to enforcing international law even though they sometimes decline to hear certain cases because of concerns about the extraterritorial impact of their decisions.[22]

However, and even though there are several mechanisms for enforcement, the question of "why do nations obey international law?" remains among the most perplexing questions in the field of international law and international relations.

According to Oran Young, there are differences in being obligated to do something because of a moral reason, a normative reason and a legal reason.[23] Harold Hongju Koh elaborates by arguing that these moral, normative and legal reasons are in fact conjoined in the concept of obedience. A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system.[24]

As was mentioned above, one of the purposes of international law is to maintain international order, as this order enables nations to pursue their national interests, either foreign or domestic. Therefore it is proven that international law exists and that it is reflected in all that states do. However, and even though originally international law was created for states to regulate their relations, now international law is shifting from applying to states to also being applicable to individuals. This brings us back to the fact that states pursue their national interests through international law and many of those interests are not only for the state, but for their citizens.

Not all international law is customary law. The negotiations between states are increasingly being concluded with the signature of international treaties, and those treaties

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[22] *Ibid.*

[23] Harold Hongju Koh, "Why Do Nations Obey International Law?", Book Review of *The New Sovereignty: Compliance with International Regulatory Agreements* by A. Chayes & A. Handler Chayes, and of *Fairness in International Law and Institutions* by T.M. Franck, (1997) 106 Yale L.J. 2599, in Jutta Brunnée, *International Law and Compliance: Theories and Practice* (Toronto 2002) at 290.

are becoming a source on which individuals can rely on as much as they can rely on domestic laws within states.

However and due to the structure of international law and the different types of domestic regulations in different countries individual cannot rely on international law on their own, they need a link, an engine that would make the machine function properly and fulfill its purposes. We consider that the link between international law and individuals should be domestic courts. They are the only authority that can make the interaction with international law increasingly effective and they should apply international law and permit individuals rely on it and on treaties in particular.

As we have concluded international law is law and one of the reasons why states comply with it is because they want other states to do the same. This also applies to courts, however it is not the only reason why courts comply with international law when they do. Courts also comply with international law because as it was mentioned above, through international law states pursue their national interests and some of those interests are domestic, therefore by obeying an international norm it becomes an internally binding domestic obligation to do the same within the country.

C. Does International Law Really Matter?

There remains a certain skepticism about the effectiveness of international law, and whether it really "matters". Some believe that international law is a charade: governments

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[24] *Ibid.*

comply with it only if it is convenient to do so and disregard it whenever a contrary interest appears.[25]

Yet, and thanks to international law, there are boundaries between countries, nationals of different states are respected and have rights and obligations in other states, the sovereign status of nations is recognized, commerce between different states is permitted and the international society is moving towards greater development.

But the skepticism does not only concern international law itself, it entails the difficulties related to the domestic application of international law. Like Jutta Brunnée and Stephen Toope said: "domestic courts are unfamiliar with international law and therefore reluctant to apply it domestically".[26]

Other commentators have suggested that the problem rests in the difficulty of defining "public international law", but such a premise cannot be true, since there is a great deal of binding international law that is well defined with precisely stated obligations.[27]

Because international law exists one way in which it can be given effect is through its application by domestic courts. Many countries are open to international law because of the way their government is constituted so as to give the Executive the power to commit the country to certain treaties and then the Legislative branch ratifies or authorizes these treaties. Because of the participation of the Legislative branch in this process, international law becomes part of domestic law automatically and courts are able to apply international law more easily than in countries where the intervention of the Legislative branch is different.

In countries where the process is different or where enforcement requires an additional step such as the implementation, courts cannot rely on international law (treaties). Courts

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[25] Barry E. Carter, *supra* note 19, at 31.
[26] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 9.

cannot make law because they do not have the power to make law, however they could try to apply international law (treaties) as an aid to interpret domestic legislation.

Canada, for example, is one of these countries. It has a two-sided approach to international law; a "monist" approach to customary law, considering it automatically as part of domestic law and a "dualist" approach to treaty law, requiring transformation of international treaty law into domestic law. With customary law there is no need for interpretation or application because the law itself forms part of domestic law it is a practice done by states. Treaty law is different. The Executive has the power to commit the country at an international level, but does not have the power to legislate. The Legislature is the branch that represents individuals that are citizens of a nation (Canada in this case). That is, citizens democratically choose the people that will make the law, statutes, rules and regulations that will bind individuals domestically, therefore the Legislative branch has to approve international rules. However, the fact that this process is not done automatically can become a problem for domestic courts. How should courts apply a treaty that was ratified by the Executive yet not transformed into domestic law by the Legislative? Courts cannot create law, but they can enforce it, interpret it and help or encourage people to rely on it. Therefore courts are the best hope for international treaties to be relevant in countries where the approach to international law remains relatively closed.

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[27] *Ibid.*

D. Nature and Importance of Treaties

Many international disputes are concerned with the validity and interpretation of international agreements; the practical content of state relations is embodied in agreements.[28] Those agreements are treaties.

Treaties may take the form of reciprocal undertakings between two states (bilateral treaties) or more generalized agreements between several states or most of the states in the world (multilateral treaties). States make treaties about every conceivable topic, and they can be "treaty-contracts" or "law-making treaties".

Many different terms have been attributed to treaties, the most common of which include the following: "conventions", "charters", "covenants", "protocols", "pacts", "acts", "statutes", or simply "agreements. The term used has no legal significance in itself. All treaties, whatever their designation and as long as they represent the express will of the parties to be bound by their terms in accordance with international law, are equally binding upon the parties.[29]

The word "treaty" in a general international law sense includes all the many different sorts of explicit international agreements. However art. 38(1)(a) of the ICJ *Statute* contains an implicit definition of treaty. It specifies that the Court may apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States". The main idea is that states should be bound by what they expressly have consented to.[30]

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[28] Ian Brownlie, *Principles of Public International Law*, (New York: Clarendon Press, 1998) at 607.
[29] John Currie, *supra* note 12, at 105.
[30] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 13.

Throughout the years states have confirmed that an express agreement between them must be honored in good faith. This agreement is subject to binding rules external to the agreement, and those rules are the "law of treaties".

The law of treaties serves much the same function in international law as the law of contracts does in municipal law. Traditionally the law of treaties was found in customary international law. However, the law of treaties can now be found in the Vienna Convention that was adopted in 1969, came into force in 1980 and only applies to treaties made after its entry into force (article 4).

Some have considered the Vienna Convention as a quasi-constitutional document, second in importance only to the UN Charter.[31] The Vienna Convention currently has 93 parties and 45 signatories, and for the purposes of treaty law sets forth the following terms:

> "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
>
> "Ratification", "Acceptance", "Approval" and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;[32]

Thus, the Vienna Convention excludes from its definition any agreement involving private parties or international organizations, as well as non-written international agreements.[33] Agreements between states which are governed by municipal law and

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[31] John Currie, *supra* note 12, at 107.
[32] *Vienna Convention on the Law of Treaties, supra* note 4, at s. 1.
[33] Mark W. Janis, *An Introduction to International Law*, (New York: Aspen Law & Business, 1999) 3rd ed., at 15.

agreements between states which are not intended to create legal relations at all are also excluded from this definition.[34]

However, the Vienna Convention establishes that treaty obligations must be performed in good faith and certain formalities govern the process of creating a binding treaty. An initial consent to a treaty framework is often manifested by signature and if it is so specified in the treaty this would give rise to binding obligations. This does not mean that by signing a treaty a state is bound, a state can be bound by a treaty when it ratifies it according to the procedural requirements of its constitution.

If the Vienna Convention is the law of treaties that governs or tries to govern international law, and there is a great deal of binding international law by many recently concluded treaties which impose obligations similar to domestic statutes (for example many international trade agreements, environmental treaties and law of the sea conventions),[35] then international law not only exists but is relevant.

But once again this leaves a question open: what is the impact of international law in domestic jurisdictions (treaty implementation) in Canada?

The recent law-making treaties have harmonized domestic laws as states parties to these treaties implement them domestically. Therefore the first question leads into a second question: why is this interaction between international law and domestic law so important and useful?

If we base our comments on liberal theory and monism, the interaction between international law and domestic law in not only salient and useful, it is something that is

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[34] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (New York; Routledge, 1997) 7th ed. at 130.
[35] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 9.

necessary for the interaction between states and the appropriate application of international law. However, we will try to answer both questions in the following sections of this paper.

III. NATIONAL COURTS AND INTERNATIONAL TREATIES IN CANADA: THE RECEPTION OF INTERNATIONAL LAW INTO DOMESTIC LAW

For some states the relationship between domestic and international law is regulated in the national constitution. For example the constitutions of Japan and the Federal Republic of Germany specifically declare that international law forms part of domestic law.[36] This has the effect of placing international law above the ordinary rules of domestic law but not above the constitutions of either state. Similar rules prevail in a number of countries such as the Netherlands and Mexico.[37] This would make a country more open to international law, not only because the constitutions establish the importance of treaties, but because of the process by which treaties become part of domestic law.

Countries can have two approaches to international law: dualist and monist. The "dualist" approach requires the transformation of international law into domestic law whereas the "monist" approach treats international law as automatically incorporated into domestic law. However, it is unlikely that the debate between dualism and monism will be resolved in the near future because the differences in legal philosophy and constitutional imperatives are simply too great. As a result, rather than focus on these debates, it might be more useful to concentrate on the law and on ensuring that adequate means exist within domestic legal frameworks to guarantee respect for international law by state authorities.[38] Therefore, it is important to concentrate not on the theoretical framework that can be constructed to demonstrate the similarities or differences between legal systems, but on the view that a court will be most likely to take in a given case.

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[36] S.A. Williams, et al, *supra* note 15, at 30.
[37] *Ibid.*

In Canada courts and litigants are starting to look directly to international law in order to answer a wide range of domestic legal questions.[39] However, the prominence of international law is relatively new in Canada: until relatively recently, the case law primarily governed the reception of public international law into the law of England. The constitutional history of Great Britain brings a separation of powers between the legislature and the executive in Canada, and since the Canadian system is modeled on the British system, the executive has full power to conclude treaties, but has no power to change or enact domestic law. That is something reserved to the federal legislative branch. Due to this division of powers, the reception of international law into Canadian domestic law, specifically with treaty law, is a question that can no longer be ignored and to understand it we will give a brief overview of this process.

A) Reception of International Law in Canada

The extent to which international law is received into the domestic Canadian legal system is a question of domestic constitutional law.[40] There is no provision in the *Constitution Act, 1867* that addresses the reception of international law, except s. 132 that refers to the treaties signed by the British Empire and which therefore might be considered to deal with the relationship between domestic and international law in Canada. The only other express reference to international law is in the *Constitution Act, 1982* s. 11(g) (*Canadian Charter of Rights and Freedoms*).[41]

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[38] *Ibid*, at 26.
[39] Gibran Van Ert, *supra* note 8, at 2.
[40] John Currie, *supra* note 12, at 199.
[41] S.A. Williams, et al, *supra* note 15, at 35.

The Canadian Parliament plays no necessary role in the making of treaties.[42] The executive branch government has the power to make treaties without Parliamentary authority. Despite the absence of any constitutional obligation to obtain approval from Parliament, the federal government's practice is to obtain parliamentary approval for most treaties in the interval between signature and ratification.[43] However, the federal government seeks Parliamentary approval only for the most important treaties.

1. Models of Reception

There are two models of reception of international law. The first of these models is the "transformationist" model which establishes that a rule of international law cannot have effect domestically unless it has been transformed into a domestic legal rule by one of the domestic system's law-making processes.[44] Under this model the international legal rule has no direct effect at all in the domestic legal system. This approach is said to be dualist because it preserves the receiving legal system's ability to accept, reject or modify the effect of the international legal rule in the domestic legal system as it sees fit.[45]

The other model is the "adoptionist" or "incorporationist" model which assumes that international legal rules are automatically part of the domestic legal order and form part of the fabric of legal rules that have direct legal effect for sub-national actors, such as individuals and corporations.[46] Here there is no transformation of international legal rules by

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[42] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1998) vol. 1 at c. 11, s. 11.3 (c).
[43] *Ibid.*
[44] John Currie, *supra* note 12, at 200.
[45] *Ibid.*
[46] *Ibid.*

a domestic legal process. This approach is said to be monist because both international and domestic rules comprise one set of rules.

In practice, international law and municipal law have so many points of contact, especially with the gradual extension of international rules to cover situations considered solely of the concern of municipal law, that the adoption of an *a priori* approach will either result in the over-simplification, or distortion, of what is basically a complex problem.[47]

The Canadian legal system incorporates both of these models. In particular, it is generally said that when it comes to customary international law, Canada takes an adoptionist approach, whereas in the case of treaty law, Canada takes a distinctly transformationist approach,[48] to which we will now turn.

2. The Reception of International Treaty Law

The majority of treaties entered into by Canada each year are not intended to change Canada's domestic law. But occasionally, and with growing frequency, states conclude treaties which purport to regulate their domestic affairs.[49] The general rule in Canada is that treaty law has to be transformed; that is, international treaties (even those that have been signed and ratified by Canada and therefore bind it internationally) have no formal and direct legal effect of their own.[50] To have such effect they have to be transformed or implemented through the domestic law-making process. That is why a treaty cannot be invoked in a Canadian court unless it has been implemented.

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[47] D. W. Greig, *International Law*, (Toronto: Butterworths, 1976) 2nd ed. at 53.
[48] John Currie, *supra* note 12, at 201.
[49] *Ibid.*
[50] *Ibid.*

While the transformation process sounds simple, it is remarkably not as simple. Transformation is an explicit legislative act through which Parliament or a provincial legislature adopts the treaty obligation and implements it within Canadian law. However, in practice, there are many other ways in which such implementation can be accomplished.

As we already mentioned, the majority of treaties entered into by Canada are not intended to change Canada's domestic law, therefore not all treaties require changes to be made to domestic law. However, and even though the intention is not to modify domestic law, there are some treaties whose terms are not part of the law of Canada and that therefore require implementation. Implementation is a process that can be broadly described as the specific actions (including legislative, organizational, and practical actions) that states take to make international treaties operative in their national legal system.[51]

A treaty may be incorporated directly by textually reproducing all or part of its text within a statute, either in its body or as a schedule.[52] Alternatively, a previous statement may indicate that a given piece of legislation is passed to fulfill specific treaty commitments. Some acts simply declare that a treaty is to be applied as law other statutes use wording which, while somewhat less direct, is nonetheless effective.[53]

Sometimes treaty-related legislation will include a provision indicating the legislature's approval of a treaty, however, this does not suffice to implement a treaty.[54] Another method is the "inferred implementation" of a treaty through the enactment of new legislation or through the amendment of existing legislation.[55]

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[51] Elizabeth Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001) November, 11 J. Env. L. & Prac. at 405.
[52] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 25.
[53] Gibran Van Ert, *supra* note 8, at 181.
[54] *Ibid* at 184.
[55] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 25.

Other treaties may be partially implemented in the cases where their provisions have been emulated in domestic legislation or their goals are consistent with the government's policy measures. In such cases, the direct applicability of these treaties will be limited only to those provisions that are implemented, however the rest of the treaty should be considered relevant.[56]

The Canadian application of international law, as well as the transformation and implementation processes are matters of constitutional law since they have their roots in the British Parliamentary system[57] and the separation of powers. According to Gibran Van Ert, international law in Canada is also determined by four features of the Canadian constitution: parliamentary sovereignty, the prerogatives of the Crown, federalism and human rights guarantees.[58]

As we have already mentioned, the executive branch has the sole power to conclude internationally binding treaties but has no power to change or enact domestic law since the executive does not have the power to make domestic law. This separation of treaty conclusion and treaty implementation powers means, of course, that there is no (domestic) legal or constitutional obligation on Parliament to transform or implement a treaty entered

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[56] Elizabeth Brandon, *supra* note 51, at 407.

[57] The constitutional history of Great Britain brings a separation of powers between the legislature and the executive in Canada. In the seventeenth century courts had held that only Parliament could enact domestic legislation, putting and end to royal proclamations with domestic legislative effect. Since the Canadian system is modeled on the British system, the executive has full power to conclude treaties, but has no power to change or enact domestic law. That is something reserved to the federal legislative branch. (John Currie, *supra* note 10, at 205). By contrast in the vast majority of countries outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. (Peter Malanczuk, *supra* note 34, at 66).

[58] Of the four features, the first two are English in origin, as is the common law. Actually it is from England that most of the rules for applying international law in Canada derive. (Gibran Van Ert, *supra* note 8, at 52.)

into by the executive branch. If this existed, it would force the legislative branch to follow the executive branch's lead.[59]

If a treaty requires changes in the domestic legal system[60] and it is not implemented by Parliament the result is that Canada will be in breach of its international legal obligations to other states parties and may be internationally responsible to those states for any resulting prejudice. For example, if a dispute comes before an international tribunal, and the issue is whether a state is in breach of international law, it is only to be expected that preference will be given to the rules of international law rather than to the rules of the municipal systems of the states involved in the litigation. A state cannot plead its municipal law as an excuse for failing to fulfill its international obligations.[61] The rule of treaty law, providing that domestic legal impediments are no excuse for failing to perform a binding treaty obligation is set forth in article 27 of the Vienna Convention.[62]

It could be argued that a treaty which is not implemented should not be considered by a Canadian court because Canadian courts should only be governed by implemented legislation and not an underlying treaty. However, consideration must also be given to the common law presumption that Canada's legislators do not intend to violate Canada's international obligations and the concomitant rule of construction that Canadian law should therefore be interpreted as far as possible consistently with international law as much possible,[63] and in other to clarify this issue we will return to it further.

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[59] John Currie, *supra* note 12, at 207.
[60] Not all treaties require changes in the domestic law. For example if the existing domestic law is sufficient to give the effect to the treaty, then obviously no action is required.
[61] D. W. Greig, *supra* note 47, at 53.
[62] *Vienna Convention on the Law of Treaties, supra* note 4, at s. 27.
[63] Anne F. Bayefsky, "International Law in Canadian Courts" (1990) October, Can. Council Int'l L., Canada, Japan and International Law, at 276.

At the same time there is no doubt that if the domestic legislation cannot be interpreted in conformity with the treaty it is the domestic legislation which will prevail. According to Anne F. Bayefsky, courts have suggested that only where domestic legislation is ambiguous on its face will the court consider the treaty as an aid to interpretation.[64] However, Canadian courts have not always taken a rigorous approach, courts do not rely on international treaties that are not implemented but try to interpret them in a way that can be in accordance with domestic law.

B) The Role of Domestic Courts with Implemented and Unimplemented Treaties

As we mentioned earlier, there is a need for international treaties to be implemented into domestic legislation before a court can rely on or apply such a treaty. Implementation of international law may be achieved through legislative, regulatory and policy measures by governments, depending on the type of action required by each international agreement or legal statute or regulation. National courts also have a role in implementation, by interpreting and applying the laws enacted by governments to meet their international obligations.[65]

It is fair to say that courts are making a concerted effort to mediate the relationship between international and domestic law. Former Supreme Court Justice Gérard La Forest, writing in 1996, pointed out that Canadian courts were becoming "international courts" in many areas of law so, in his view it is important that judges acknowledge their new role and

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[64] *Ibid.*
[65] Elizabeth Brandon, *supra* note 51, at 400.

adopt and "international perspective".[66] In other words, Canadian courts are encountering more and more international law in many different cases and in many different areas. These include topics as diverse as immigration and refugee law and deportation issues, with *Baker v. Canada*[67], *Ahani v. Canada,*[68] family law, environmental law and investor-state disputes under Chapter 11 of the North America Free Trade Agreement (NAFTA) to name a few.[69]

It is therefore of note that recent decisions of the Supreme Court of Canada show that international law is relevant to the interpretation of domestic law, even in the case of international treaties that have not been implemented into domestic legislation.

1. Implemented Treaties

A treaty that has been implemented into domestic legislation is applied as Canadian law. Courts must rely on the relevant treaty to interpret the statute, and on the international rules of treaty interpretation to interpret the treaty and resolve any textual ambiguities[70] or some other ambiguity with domestic legislation. Courts tend to rely on these interpretive options in order to avoid a breach of Canada's international commitments. The primary rule of interpretation of international law is that treaties must be interpreted so as to give effect to their purpose.[71]

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[66] G.V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y. B. Int'l L. 89 at 100.
[67] *Baker v. Canada, supra* note 10.
[68] *Ahani v. Canada, supra* note 11.
[69] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 3.
[70] *Ibid*, at 27.
[71] Elizabeth Brandon, *supra* note 51, at 411.

In summary, we can consider that while treaties may have to be implemented to have domestic legal effect, courts will read domestic implementing legislation so as to conform with the corresponding treaty wherever possible.[72]

It is clearly accepted that international law implemented into Canadian law automatically becomes applicable to domestic law. But what happens when a treaty has not been implemented? Do courts take the same approach? Recent judicial developments have gone further, suggesting that the domestic legal effects of treaties may not be limited to those that have been implemented by legislation after all.[73]

2. Unimplemented Treaties

There are also cases where treaties that Canada has ratified remain unimplemented into domestic law, and according to Canadian law, are not applicable law in Canada. However, this insistence on a more or less formal transformation process ignores the interrelationship between international law and domestic law. As Stephen Toope has argued: the process of relating international law to domestic law is not a translation of norms from outside. Rather, Canadian voices join with foreign voices, weaving an increasingly rich and multi-textured narrative of international law.[74]

Some of the treaties invoked by litigants in Canadian courts will be unimplemented in Canadian law and the rigorous application of the implementation requirement might seem to require that such unimplemented treaties be wholly ignored by courts. However, the practice

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[72] *Ibid,* at 221.
[73] *Ibid.*
[74] Stephen Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U.N.B. L.J. 11 at 27.

of Canadian courts has been rather different. While unimplemented treaties are not formal sources of law, they nevertheless have legal consequences.[75] This can be seen in some recent cases.

One of the earliest attempts by courts to reconcile unimplemented treaties with domestic legislation was in the *Arrow River* case (hereinafter "Arrow River").[76] According to the *Lakes and Rivers Improvements Act*[77] the company Arrow River constructed a system for moving timber down a river, including a river which runs along the border between Canada and the United States. The legislation also permitted Arrow River to charge a toll for the use of its system. The Pigeon Timber Co. objected on the basis that the *Webster-Ashburton Treaty* of 1942, between the United Kingdom and the United States, provided that all bordering "water communications" would remain free and open to use by the nationals of both countries.

The Ontario Court of Appeal held that even though the treaty was not implemented, there was a presumption that the legislation was intended not to conflict with binding international agreements. However, if the legislation could be construed in such a way as to avoid a conflict with a treaty obligation binding upon Canada, even if unimplemented, it was incumbent upon the courts to do so.[78] The Supreme Court of Canada allowed the appeal on the basis that it could not be so narrowly construed. As a result the legislation was held to grant the right to the Arrow River to charge tolls notwithstanding the treaty.

As John Currie has noted in his discussion of the background and impact of the case, "the interesting issue is that all of the judges who wrote opinions in the judgment went to

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[75] Gibran Van Ert, *supra* note 8, at 207.
[76] *Arrow River & Tributaries Slide & Boom Co. Ltd. v. Pigeon Timber Co. Ltd.* [1932] S.C.R. 495.
[77] *Lakes and Rivers Improvements Act*, R.S.O. 1927, c.43 [now R.S.O. 1990, c.L.3].
[78] *Re Arrow River and Tributaries Slide and Boom Co. Ltd.* (1931), 2 D.L.R. 216 (Ont. C.A.) at 217.

considerable lengths to show that, while the domestic legislation prevailed, there was in fact no conflict between the legislation and the treaty. All judgments read down the treaty in such a way as to avoid any conflict between its terms and the domestic legislation."[79]

However, the question that remained unanswered by the case was whether there was any general duty on the courts to interpret domestic law and unimplemented treaties in such a manner as to avoid (if possible) any conflict between them. There have been some recent signals from the Supreme Court suggesting that in cases, which involve the *Canadian Charter of Rights and Freedoms* it would be appropriate for courts to have regard to Canada's international human rights treaty obligations.[80] Which means that in this type of cases courts are taking more into consideration international law.

This approach to interpretation may be justifiable in the *Charter* cases given the fact that much of the inspiration for its provisions was drawn from Canada's international human rights treaty commitments. However, the remaining question is whether such a presumption should apply to the interpretation of ordinary statutes which do not involve implemented treaties. *Baker* and *Ahani*, discussed below, are two recent cases that deal with this question.[81]

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[79] John Currie, *supra* note 12, at 222.

[80] John Currie, *supra* note 12, at 223.

[81] *Suresh v. Canada* is another recent case that deals with the domestic application of international law. Suresh came to Canada from Sri Lanka in 1990, was recognized as a Convention refugee in 1991 and applied for landed immigrant status. In 1995 he was detained by the government and started proceedings to deport him to Sri Lanka on the grounds he was a member and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorist activity in Sri Lanka. Suresh challenged the order for his deportation on various grounds of substance and procedure. (*Suresh v. Canada (Minister of Citizenship and Immigration)* (2002) S.C.C. 1, in Jutta Brunnée & Karen Knop, *Public International LawSuplement* (Toronto: 2002/03) at 91). Suresh contended that if he was returned to Sri Lanka he was going to face torture upon his return. At the Federal Court he argued that the prohibition against torture was a peremtory norm of international law and therefore binding on Canada notwithstanding those provisions of the Immigration Act that permitted his deportation. He argued that customary international law can become part of domestic law by absorption into common law and that the prohibition against torture is part of customary international law as found in the Convention Against Torture and the International Covenant on Civil and Political Rights, and that the non-derogable nature of these conventions has achieved the status of *jus cogens* under customary international law. (*Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 2 FC 592 (FCA)). As we see this case

The idea that treaties are not part of Canadian law unless they have been implemented by statute might be considered somewhat restrictive. According to Jutta Brunnée and Stephen Toope, there are two considerations which suggest that the approach by courts is both correct and compatible with legitimate concerns over the proper roles of the executive, legislators, and the judiciary: "First, where a treaty does not actually affect domestic law, the concern that the authority of Parliament or the provincial legislatures could be usurped by federal executive action seems misplaced. In any event, it remains open to Parliament or provincial legislatures to deviate from treaty provisions through explicit statutory action. Second, where no legislative action is required to bring domestic law in line with Canada's treaty commitments, it seems absurd to insist on explicit statutory implementation."[82] Because of this, courts should not defer to a subsequent government argument that the treaty obligation has no relevance because it has not been expressly transformed. Instead, they should treat Canada's commitments as implemented and should rely on the treaty to interpret domestic law in the manner they have outlined.[83]

The precedent set by the cases of *Baker* and *Ahani* demonstrates that an unimplemented treaty may indeed be highly relevant to courts and decision-making.

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deals with various grounds of substance and procedure, however at the Supreme Court, the court explained that: "international treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. Even though Suresh was not relying on treaties but on *jus cogens* norms of customary international law, the approach used by the court for unimplemented treaties was correct and relevant for future reference. (Gibran Van Ert, *supra* note 8, at 170). However we will leave this case aside because the important issue dealt with was customary international law and *jus cogens.*

[82] Jutta Brunnée & Stephen J. Toope, *supra* note 3, at 30.

C) *Baker v. Canada*

Courts are still inclined to avoid deciding cases on the basis of international law however, this does not mean that international law is given no effect, or that its broad relevance is denied. The avoidance strategy is more subtle: even when they invoke or refer to international law Canadian courts generally do not give international norms concrete legal effect in individual cases.[84] Especially following the Supreme Court's decision in *Baker*, courts seem to be treating international law, whether custom of treaty law, as binding on Canada whether it is implemented or not, in the same manner.[85]

Ms. Marvis Baker, who was a Jamaican citizen came to Canada in 1981 and became an illegal immigrant. Although she had 4 children in Canada she did not acquire permanent residence status. In 1992 she was ordered to be deported. In order to prevent her deportation, and the consequent separation from her Canadian children she applied for permanent residence requesting an exemption from the rule that one must apply for permanent residency from outside Canada. She sought to rely on humanitarian and compassionate grounds pursuant to section 114 (2) *Immigration Act.*[86] Her application was denied.[87]

Ms. *Baker* appealed, arguing that the ministerial discretion under the section had been improperly exercised because the best interest of her children had not been considered as a primary factor in assessing her application. The legislation required no such consideration, but Ms. *Baker* maintained that such requirement should be read in due to Canada's treaty

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[83] *Ibid*, at 31.
[84] *Ibid,* at 3.
[85] *Ibid,* at 4.
[86] *Immigration Act,* R.S.C. 1985, at c. I-2 s. 114 (2).
[87] *Baker v. Canada, supra* note 10.

commitments under the *Convention on the Rights of the Child*,[88] which states in article 3(1) that states parties are required to consider the best interest of children when decisions are made that affect their future. However this treaty is not implemented into Canadian legislation.

The first question for the Supreme Court was how to give effect to the unimplemented treaty. The court had to consider whether the terms of the Convention on the Rights of the Child should be taken into account even though it was not expressly incorporated into the Immigration Act.[89] The court took a narrow view on this question and held that the treaty could not be applicable because it was not implemented into Canadian law. However it went on to find that the values reflected in the convention could shape statutory interpretation. This enabled the convention to be indirectly applied to domestic statutes and the exercise of statutory discretion, even though it did not have binding status.[90]

The majority of the court noted that they were not referring to international law, because according to international law Canada had certain obligations. However, and even though the treaty could not be applicable domestically, the majority of the court noted that it was not applying the unimplemented treaty directly but instead they were using it as an aid for the interpretation of domestic law.[91]

Madam Justice L'Heureux-Dubé, speaking for the majority of five judges, acknowledged the general rule that unimplemented treaties are not part of Canadian law,

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[88] *Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990).
[89] Elizabeth Brandon, *supra* note 51, at 404.
[90] *Ibid.*
[91] Mayo Moran, "Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle Method" forthcoming in David Dyzenhaus, *The Unity of Public Law* (Oxford: Hart Publishing, 2003), citing to manuscript in file with author, at 8.

citing *Francis v. The Queen*[92] and *Capital Cities Communications.*[93] However, she also found that the immigration officer who rejected Ms. *Baker*'s claim did not reasonably exercise his discretionary power when making the decision in question, because any reasonable exercise must be responsive to the interests of the children.[94] She held that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[95]

Madam Justice L'Heureux-Dubé also agreed that the provisions in the Convention had no direct application within Canadian law, because the treaty was not implemented. However, she also stated that: "...another indication of the importance of considering the interest of children... is the ratification by Canada of the Convention..."[96] She also pointed out that there is some domestic significance in Canada's ratifying these kind of treaties, even though the ratification is not enough to give the documents domestic force.[97]

Thus the Supreme Court in *Baker* clearly concluded that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and the justification for this is that the legislature is presumed to respect the values and principles enshrined in international law. In addition, as we already mentioned Madam Justice L'Heureux-Dubé also refers to the important role of international human rights law as an aid in interpreting domestic law.[98]

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[92] *Francis v. The Queen*, [1956] S.C.R. 618.
[93] *Capital Cities Communications v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.
[94] *Baker v. Canada, supra* note 10, at 827-828.
[95] *Ibid,* at 861.
[96] *Ibid.*
[97] Mayo Moran, *supra* note 91, at 10.
[98] *Baker v. Canada, supra* note 10.

However, Justice Iacobucci (writing for himself and Justice Cory) voiced strong concern for the effects of such a general approach to statutory interpretation on the rule of transformation. He argued that:

> ...the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.[99]

In considering international human rights values "as an aid in interpreting domestic law" that "may help inform...statutory interpretation," Justice L'Heureux-Dubé appeared to set out a presumption of conformity or an obligation on courts to construe domestic legislation in accordance with international human rights law where possible. Prior to *Baker*, international law was only one of many sources, following *Baker* there appears to be a presumption in favour of reading domestic legislation in conformity with unimplemented treaties.[100]

This decision might be confined to the domestic effect of unimplemented human rights law. However, it is not clear on what basis a principle distinction could be made between the domestic statutory effect of unimplemented human rights treaties and of unimplemented treaties generally.[101]

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[99] *Ibid,* per Iacobucci J. at 866.
[100] Elizabeth Brandon, *supra* note 51, at 404.
[101] John Currie, *supra* note 12, at 225.

D) *Ahani v. Canada*

Mr. Ahani, an Iranian citizen who came to Canada in 1991, was declared a Convention refugee in 1992. Soon after his arrival in Canada, the Canadian Security Intelligence Service (CSIS) suspected that he was a terrorist, trained assassin and a member of the Iranian Ministry of Intelligence Security, which sponsors a wide range of terrorist activities, including the assassination of political dissidents around the world. As a result, the government undertook a four-step deportation procedure that the Supreme Court held to be valid. The deportation order claimed that *Ahani* should be removed from Canada because he was engaged in terrorist activities. *Ahani* challenged the deportation order on the basis that, if he were to be deported it was likely that he would be subject to torture in Iran.[102]

He petitioned the United Nations Human Rights Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights*,[103] which Canada had ratified but not incorporated into its domestic law. The Committee made an interim request, requesting that Canada stay *Ahani*'s deportation order until the Committee had considered the communication. Canada refused (the Committee's opinion was not binding to Canada).[104] *Ahani* then sought an injunction restraining his deportation pending the Committee's consideration of his petition. He made two submissions in support of his appeal for injunctive relief. First, he argued that the principles of fundamental justice under s.7 of the *Canadian Charter of Rights and Freedoms* gave him a right not to be deported until the Committee made a final decision. Second, he argued that he had a legitimate expectation of

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[102] *Ahani v. Canada (A.G.)* (2002), 58 O.R. (3d) 107 (C.A.).
[103] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, Can. T.S. 1976 No. 47 (entered into force 23 March 1976).
[104] *Ahani v. Canada, supra* note 102.

not being deported pending the Committee's consideration of his petition. The trial judge refused to issue the stay.

The Court of Appeal concluded that *Ahani*'s arguments based on access to the Committee were valid for two reasons. First, the Committee has no power to bind Canada because even if the treaty was implemented, the Committee's opinion would be merely recommendatory. Second, by ratifying such a treaty, Canada did not consent to stay domestic proceedings.[105]

Laskin and Charron JJ.A. adhered instead to the traditional position that unincorporated treaties are not binding and therefore cannot be enforced in domestic courts.[106] For example, Laskin J.A. held that "to give effect to *Ahani*'s s. 7 argument would mean that, the court would have to transform a non-binding request in an unincorporated treaty that has never been part of Canadian law into a binding obligation enforceable in Canada by a Canadian court."[107]

As the majority of the court acknowledged, *Ahani* was not asking to interpret the Charter in conformity with international human rights law, but he was seeking to use the Charter to enforce Canada's international commitments directly in a domestic court.[108] The Court readily accepted that international commitments were "an important indicator" of fundamental Canadian legal principles.[109]

By denying that unimplemented treaties had "any legal effect in Canada"[110] the majority did not mean that treaties had no effect whatsoever on Canadian law. Indeed, as we already mentioned, it recognized that unimplemented treaties may be used as interpretative

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[105] Jutta Brunnee & Stephen J. Toope, *supra* note 3, at 32.
[106] *Ahani v. Canada,(Minister of Citizenship &Immigration)* [2002], O.J.No. 81 (Ont. S.C.J.) at para. 34.
[107] *Ahani v. Canada, supra* note 102, at para. 33.
[108] *Ibid,* at para. 31.
[109] *Ibid,* at para. 30.

tools, and thus have indirect legal effect. But like Elizabeth Brandon says: it appears that courts continue to underestimate the relevance—indirect or otherwise—of international law to the domestic sphere.[111]

The majority found that the Canadian government had acted consistently with the terms of the relevant treaty in deciding to deport *Ahani*, and that Canada's domestic statutory regime for deporting Convention refugees showed a willingness to comply with international human rights standards.[112] It also argued that even if Canada did not act in good faith, then it was for other states and not domestic courts to "take it to task" over the matter.[113]

The dissenting judgment of Rossenberg J.A. contrasted significantly with the majority opinion on the issue of international law. He issued a powerful dissent. He rejected the government's contention that its ratification of the relevant treaties did not impose binding obligations on the government.[114] While he agreed on the importance of the principle of good faith set forth in the Vienna Convention, he found unconvincing the government's rationale that review of executive action was limited because the relevant international conventions were not binding in Canada.[115] He also agreed that a ratified but unincorporated treaty did not give the appellant rights that could be enforced in a domestic court.[116]

We agree with Elizabeth Brandon when she argues that "the approach taken by Justice Rosenberg recognizes international law as an active influence on Canadian law, not merely as an aid to statutory interpretation, therefore it may go further than the majority's view.

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[110] *Ahani v. Canada, supra* note 106, at para. 31.
[111] Elizabeth Brandon, *supra* note 51, at 434.
[112] *Ahani v. Canada, supra* note 106, at para. 46.
[113] *Ibid,* at para. 47.
[114] *Ibid,* at para. 70.
[115] *Ibid,* at para. 96.
[116] *Ibid,* at paras. 92-93.

This is an encouraging indication that courts may be open to a more liberal approach to treaty implementation in the future."[117]

E) The Effects of Applying Unimplemented Treaties

The trend represented by *Baker* and *Ahani* demonstrates that an unimplemented treaty may be highly relevant to domestic legislation and decision-making, even though it is not directly applicable. The Supreme Court of Canada in *Baker* widened the purview of the contextual approach to statutory interpretation. It concluded that the legal context should include any relevant values and principles expressed by the international community and reflected in Canadian legislation or policy.[118]

A direct effect of allowing reference to a treaty as a means of interpreting implementing legislation has been to raise the issue of how the treaty, in turn, is to be interpreted. Should the courts apply traditional domestic rules of statutory construction in order to understand the terms of a treaty, or should international legal rules of treaty interpretation be preferred?[119] Here too the Supreme Court of Canada has chosen to take an outward looking approach that favours the primacy of treaty law over domestic law. For example, in the *Pushpanathan* case,[120] the issue was the meaning to be given to the expression "acts contrary to the purposes and principles of the United Nations" which appears in article 1F(c) of the *Convention Relating to the Status of Refugees.*[121] The

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[117] Elizabeth Brandon, *supra* note 51, at 436.
[118] *Baker v. Canada, supra* note 10, per L'Heureux-Dubé J. at para. 67.
[119] John Currie, *supra* note 12, at 219.
[120] *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 at 1029-35
[121] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. (entered into force 4 October 1967).

provision is implemented in Canada by means of incorporation by reference in the *Immigration Act.*[122] In this case the Court affirmed that as a general rule courts will be required to interpret implementing legislation so as to conform not only with treaty terms, but with treaty obligations, and since treaty obligations are international obligations, they can only be understood from an international legal perspective.[123]

An unimplemented treaty can provide valuable guidance to a court in seeking to clarify the provisions of a statute.[124] These decisions indicate what Toope calls: "a healthy judicial development" a recognition that international law and Canadian law cannot exist separately, but that one necessarily informs the other.[125] Gibran Van Ert expresses a similar view when he acknowledges the influence of international law on domestic law and applauds the judicial trend marked by *Baker.* He suggests that the courts have justifiably drawn from international law by invoking established common law principles rather than creating new procedures.[126]

The implication from *Baker* and *Ahani*, is that the provisions of any treaty ratified by the government can be relevant in many ways to domestic laws and decision-making. As a result, international principles and treaties need not be specifically implemented into domestic law to be relevant or persuasive, to the process of statutory interpretation.[127] This development represents a sharp divergence from the traditional judicial approach discussed above, which asserted that treaties are of no domestic effect unless implemented through legislation.[128]

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[122] *Immigration Act*, *supra* note 84, c. I-2.
[123] John Currie, *supra* note 12, at 220.
[124] *Ibid,* at para. 70.
[125] Stephen Toope, *supra* note 74, at 23.
[126] Gibran Van Ert, *supra* note 8, at 213.
[127] Elizabeth Brandon, *supra* note 51, at 433.
[128] *Ibid,* at 437.

Thus, Canadian courts have not always taken such a rigid approach. Courts do not rely on international treaties that are not implemented but try to interpret them in a way that can be in accordance with domestic law. Canadian courts should be obliged to interpret domestic law in conformity with the relevant international norms, as much as it is possible. As well courts must carefully delineate their own role in giving domestic effect to international law.

Foreign jurisprudence should be considered in order to compare the Canadian approach taken by courts with the approach taken by foreign courts. A useful comparison could be made with countries that are more open to international law, due to the constitutional status given to it, or to the fact that courts rely on international law for statutory interpretation. Good examples of these countries are the Netherlands and Mexico.

IV. COMPARATIVE LAW

As described in the last chapter, Canadian courts are taking a more open approach to international law, specifically in relation to the issue of unimplemented treaties.

The new approach by courts has to do with their interests in complying with Canada's international obligations. Thus, we need to compare this approach with the approach taken by foreign courts, and it would be useful to examine the situation in countries that are more open to international law. While it might be useful to use other common law countries as comparators, it might be most useful to compare the approach taken by Canadian courts with countries where international law has some type of hierarchy over certain legislation or statutes, and has a strong value according to the Constitution. Two of the best examples of countries that are more receptive to international law are the Netherlands and Mexico.

Both countries are civil law countries. They have a similar type of government to the one Canada has, although the legal process for treaty making is different and the approach taken by the courts is more open to international law.

Taking into consideration what is done in other countries can always be helpful to improve what is done in a particular country. Therefore Canadian courts might want to observe what is done in other jurisdictions in order to better understand the issues arising and the solutions taken elsewhere. This better understanding would enable Canadian courts to apply international law in the best way possible.

A. The Netherlands

The priority given to international law in the Netherlands is a well know fact, and a partial explanation to this may be found in the fact that the Kingdom of the Netherlands owes its formal existence to a treaty: the Vienna Convention of 1815.[129]

The separate parts of the Kingdom of the Netherlands are united on the legal basis of the Charter of the Kingdom. The Charter is the highest national legal instrument in the Kingdom and the Constitution of the Netherlands is subordinate to it.[130]

According to the Constitution, the government is bound to promote the development of the international rule of law. However, crucially, the Kingdom shall not be internationally bound by a treaty that has not been submitted to Parliamentary approval and the cases where the Parliamentary approval is not required must be specified.[131] The approval is granted by a way of an Act of Parliament, which may provide the possibility of tacit approval.[132]

If an international treaty conflicts with the Constitution, that treaty may be approved by the Chambers of the Parliament only if at least two thirds of the votes are cast in favor. Provisions of treaties and of resolutions by international institutions are binding on all persons by virtue of their content and become binding after they have been published.

The most important provision of the Dutch Constitution (art. 94) establishes the following:

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[129] *Ibid,* at 146.
[130] Stefan A. Riesenfeld, *et al, Parliamentary Participation in the Making and Operation of Treaties, A Comparative Study*, (Netherlands: Martinus Nijhoff Publishers, 1994) at 109.
[131] J. G. Brouwer, "National Treaty Law and Practice: The Netherlands" in *National Treaty Law and Practice, Austria, Chile, Colombia, Japan, The Netherlands, United States*, edited by Monroe Leigh, *et. al,* (Washington: The American Society of International Law, 1999) Studies in Transnational Legal Policy, No. 30, at 135.
[132] *Constitution of the Netherlands*, www.oefre.unibe.ch, February 2002.

> Statutory regulations shall not be applicable if such application is in conflict with provisions of the treaties that are binding on all persons or of resolutions by international institutions.[133]

The unusual Dutch openness to the internal effect of international law, both to treaty law and other international legal norms, may find some explanation in the fact that, as a small country with considerable global trading and investment interests, the Netherlands places more emphasis on the rule of law in international relations.[134]

1. The Domestic Status of International Treaties with National Courts

The internal effect of treaties in the legal order of the Netherlands has been expressly regulated in a monist way since the 1953 revision of the Constitution. Although before 1953, the Netherlands' Constitution required Parliamentary approval for treaties, but not for "other international agreements," the distinction between the two was unclear. However, most treaties were concluded as international agreements in order to use the easier method of approval.[135] In 1953, it was decided that all international agreements should be subject to parliamentary approval. In 1983 the Constitution was again amended and the reference to international agreements was replaced by a reference to treaties.[136] The change in terminology was not intended to have any material effect. According to the official

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[133] *Ibid.*
[134] Peter Malanczuk, *supra* note 34, at 68.
[135] Henry G. Schermers, "Netherlands, Effect of Treaties in Domestic Law", in *The Effect of Treaties in Domestic Law*" edited by Francis G. Jacobs and Shelley Roberts (London: United Kingdom National Committee of Comparative Law, 1987) at 109.
[136] *Ibid,* at 110.

definition, a treaty is still considered to be any agreement, irrespective of its name or form, that binds the Kingdom of the Netherlands under public international law.[137]

A treaty, that has been ratified by the government and approved by the Parliament, automatically becomes part of Dutch law after it has been published. This is done without any separate act of incorporation or transformation being required.[138]

The Constitution provides that provisions of treaties and decisions of international organizations which according to their contents, may be binding on everyone, will have this effect from the time of their publication. The direct effect of a treaty relates to its applicability by domestic courts without the necessity of any further implementation or execution by an international or national authority. A provision of a treaty, which has this character is often called "self-executing"[139] and there are no indicators that the Dutch courts are particularly restrictive or liberal with respect to accepting the direct effect of treaties.

To determine whether a treaty provision is self-executing or not, courts not only examine the nature, contents, wording and parties intentions they also examine the domestic legal context in which the treaty provision is requested to be enforced by the courts.[140] However, the self-executing character of a treaty provision may vary depending on the situation.[141] Unquestionably, according to Art. 94 of the new Constitution, international treaties override at least statutory rules.[142] Courts are not the only organs of government

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[137] *Kamerstukken II*, 1979-1980, 15049 (R 1100), No. 3, at 6 in *supra* note 131, at 135.
[138] Stefan A. Riesenfeld, *supra* note 130, at 112.
[139] *Ibid*, at 113.
[140] J. G. Brouwer, *supra* note 131, at 150.
[141] J. G. Brouwer, *Verdragsrecht in Nederland, Treaty Law in the Netherlands: A Study of the Relationship between International Law and Municipal Law in a Historical Context*, (Netherlands: 1992) at 330.
[142] Lori Fisler Damrosch, *et. al, International Law, Cases and Materials*, (USA: West Publishing, 2001) 4th ed., at 241.

involved in applying treaty law; administrative and legislative organs also must respect international undertakings.[143]

Dutch courts are not entitled to question the validity of treaties. In that respect treaties are equal to statutes. Parliament is the only body that can decide if a law (treaty) is in conformity with the Dutch Constitution. Pursuant to the principle that all legislation must be hierarchically related—in the sense that lower legislation may not conflict with higher—the treaty-making organs are not authorized to conclude treaties that conflict with the Constitution, just as it is not permissible for the legislature to enact a bill that deviates from the Constitution.[144] Therefore courts are not entitled to question the legality of acts of Parliament.[145]

Although the Netherlands has no system of constitutional judicial review, which is similar in approach to the tradition of the United Kingdom, Dutch courts can obtain the authority to overrule acts of Parliament, not on grounds of unconstitutionality but on the ground that such acts may conflict with certain treaties or resolutions of international organizations.[146] However, there is a safeguard built into the Dutch constitutional procedures. As we already noted, the Dutch Parliament has to consent to treaties which conflict with the Constitution by a majority necessary for constitutional amendments.[147]

Dutch courts will try to avoid conflicts between domestic legislation and international treaties by interpreting both the treaty and the national legislation in such a way as to avoid conflict between them.[148] This is something that might happen in Canada, however the restriction on the reliance on unimplemented treaties, does not allow this approach to be fully

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[143] J. G. Brouwer, *supra* note 131, at 145.
[144] *Ibid,* at 147.
[145] Henry G. Schermers, *supra* note 135, at 113.
[146] *Ibid,* at 109.
[147] *Ibid.*

followed. The reality is that international law is of great relevance to the Dutch legal order and international treaties can be more important than domestic statutes, therefore domestic courts rely on them as much as they would rely on domestic law.

B) Mexico

According to the Mexican Constitution, the President is authorized to sign international treaties. However, treaties also always have to be submitted to the Senate for its approval (ratification). Hence, according to article 76 section I:

> The senate has the authority to approve international treaties and diplomatic conventions.[149]

The Senate's authority to ratify treaties does not mean that it ratifies every single treaty that is subject to its authorization. For example, the Senate did not ratify a treaty (*Tratado sobre la Imprescriptiblidad de Crímenes de Guerra)* that did not have provisions for the prescription or limitation of actions based on war crimes because it was considered unconstitutional.[150]

There is no specific section in the Mexican Constitution dealing with international law, however many of the articles prohibit the signing of treaties restricting individual guarantees and/or rights and freedoms set forth in the Constitution.

Once a treaty is ratified and published in the Official Gazette, it becomes part of the domestic law and the Mexican Constitution establishes in art. 133 that:

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[148] J.G. Brouwer, *supra* note 141, at 330.
[149] *Constitución Política de los Estados Unidos Mexicanos*, (México: Ediciones Delma, 1998) 50th ed., art. 76 I.
[150] Modesto Seara Vázquez, *Derecho Internacional Público*, (México: Editorial Porrúa, 1993) at 208.

> This Constitution, the laws of the Congress of the Union that stem there from, and all treaties that are in accordance with it, made or which shall be made by the President of the Republic, with approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound by said Constitution, laws, and treaties, any provisions to the contrary that may appear in the Constitutions or laws of the States notwithstanding.[151]

This means that domestic legislatures (the legislatures of the rest of states in the country) have to draft local legislation or laws in accordance with the Mexican Constitution and international treaties in order to avoid conflicts between them (domestic legislation and the Mexican Constitution and international treaties). Nevertheless, there have been cases in Mexico where treaties have been struck down for not being in conformity with domestic definitions of what constitutes a treaty.[152]

Depending on the dispute that arises and the type of judgment, courts rely on the applicable statute(s) however if there is no provision in a specific statute about treaty law, they rely on the Mexican Constitution or on other applicable law. For example, article 12 of the Federal Civil Code establishes that Mexican law would rule everyone who is inside the Mexican territory, unless such laws provide for the application of foreign law or there is another applicable provision found in a treaty or international convention that Mexico has ratified.[153]

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[151] *Constitución Política de los Estados Unidos Mexicanos*, *supra* note 149, art. 133.
[152] Jorge Cicero, "International Law in Mexican Courts" (1997) October vol. 30 #4-5 Van. J. Transnat'l L., at 1040.
[153] *Código Civil Federal*, (México: Compañía Editorial Impresora y Distribuidora, 2002) art. 12.

1. The Domestic Status of International Treaties with National Courts

International sources have a great importance in Mexican domestic law. As we have mentioned, Mexico's system does not require the domestic introduction of treaties by special legislation, instead treaties acquire a national status once ratified, approved and duly published. Judges are bound to give primacy to constitutional treaties over state laws, but they are also bound to give primacy to the Constitution over international treaties.[154] Mexican courts would refuse to give effect to an unconstitutional treaty. Nevertheless and, despite the treaty's supremacy, it is the political branches that decide whether a treaty should remain in force.

In Mexico's monist system, one could hardly limit the interactions between treaties and domestic laws to instances of normative conflict. However, Mexican case law has shown that the fulfillment of international treaties is a concern of the society and the country. Cases in which a private party invoking a treaty seeks civil remedies against another private party do not necessarily concern the public interest. The treaty-based challenges to public acts, controversies about governmental fulfillment of treaties, and attempts to block the domestic performance of a treaty, are of more interest.[155]

Individuals are able to rely on treaties and courts must apply them, so long those treaties are not unconstitutional. The high courts in Mexico have final authority over the domestic interpretation of treaties. There are several ways of ensuring the consideration of treaties in *amparo* (*habeas corpus*)[156] litigation and jurisprudence. For example, the usual

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[154] Jorge Cicero, *supra* note 152, at 1042.
[155] *Ibid*, at 1055.
[156] Is a recourse for individuals which consists of a writ against acts of authority or general norms that violate individual constitutional guarantees

way of making treaty-based human rights effective before the courts is by relying exclusively on corresponding constitutional guarantees.[157]

In Mexico, courts also interpret both the treaty and the national legislation in such a way as to avoid a conflict between them.

V. CONCLUSIONS

By way of summary, while courts have clung to the requirement of transformation before a treaty can have domestic legal effect in Canada, such position masks an uncertain relationship between domestic law and treaties.[158]

In the case of implementing legislation, there is a clear presumption that it should be read if possible to conform to treaty obligations binding upon Canada. Although it is clear that, in the case of a conflict between domestic legislation and a treaty, the courts will give precedence to domestic legislation. However the effect of a treaty that is not expressly implemented through domestic legislation remains ambiguous. Is there a general presumption that all legislation should be read in conformity with Canada's treaty obligations? Or is such a presumption limited to human rights treaties? Or is there no such presumption at all but merely a permissive rule allowing courts to have regard to Canada's treaty obligations as an aid to statutory interpretation?[159]

As we mentioned, the Vienna Convention establishes that if a country signs and then ratifies a treaty is showing its intention to be part of such a treaty. The ratification of an international treaty should not be considered as a merely ineffectual act. Rather, it should be

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[157] Jorge Cicero, *supra* note 152, at 1057.
[158] John Currie, *supra* note 12, at 226.

seen as a positive statement by the Executive to the world and to the citizens that the Executive and its agencies will act in accordance with the treaty and they want to be bound by it.

If the intentions of the Executive are not to follow or be bound by a treaty, then there would not be any purpose in the Executive signing a treaty, there would not be any relevance of such act. Madam Justice L'Heureux-Dubé stated in *Baker* that: "...another indication of the importance of considering the interest of children... is the ratification by Canada of the Convention...,"[160] which meant that, even though a treaty was not implemented, Canada ratified it with the intention of protecting the rights set forth in such a treaty.

However, we believe that the core of this issue does not rely on the fact that in Canada the intention of Executive was or was not to become bound by a treaty, we believe this issue has more to it. The fact that Canada treats customary international law as automatically incorporated into domestic law, but demands the transformation (implementation) of treaty law comes from the British system since the Canadian system is based on it. The Executive has full power to conclude treaties, but has no power to change or enact domestic law. That is something reserved to the federal legislative branch. Therefore the legislative branch is the only one that can implement treaty law into domestic law.

Democracy is part of almost every system around the world and it means that the citizens of a nation have the choice of choosing who will represent them, govern them and create its legislation. Due to this every power in the government has its own role. The role of the Executive, among other things, is to only commit Canada at an international level, by way of signing and ratifying different treaties. The next step in the process belongs to

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[159] *Ibid,* at 225.
[160] *Baker v. Canada, supra* note 10, at para. 862.

somebody else. The Parliament has to approve what the Executive signs and verify that it does not go against domestic law, which means that they would not approve everything that the Executive signs. However, what happens if Parliament will approve, the treaty is not against domestic legislation but for some reason it has not been implemented into domestic law? Well, that treaty would not be applicable.

Justice L'Heureux-Dubé maintains that "considering and comparing judgments from various jurisdictions makes for stronger more considered decision, even if the result is the same".[161] In light of the above courts should take a more open approach and compare what is done elsewhere.

The comparison with the reception of treaty law in both the Netherlands and Mexico is relevant because of the fact that both countries have an open approach to international law. Both countries do not need the additional implementation requirement. However, the fact that both countries do not have the implementation requirement means that the process is different, but might also mean that the Legislature would have to approve most of the treaties submitted by the Executive and there would not really be a filter as there is one in Canada. One could argue this however, in both countries the Legislature would not approve a treaty if it is against the constitution, in Canada the Legislature would implement only the part of the treaty that is not against domestic law. This though could be a positive side to the Canadian process since it allows the Legislature to implement part of a treaty and not necessarily all of it as it happens in other jurisdictions such as the Netherlands and Mexico.

Many people have argued that international law needs a mechanism to be enforced and respected and it would seem important to study the role of domestic courts as enforcers of

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[161] Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court", 34 1998, Tulsa L.J. 15, at 39.

international law.[162] In many circumstances domestic courts seem to be the best hope for putting international law into action.

Canadian courts should consider relying on unimplemented treaties as an aid to statutory interpretation as it is done in courts in other countries, the Netherlands and Mexico for example. Taking into consideration the fact that if Canada ratified a treaty it was because it had the intention to become bound by it.

The decision in *Baker* revealed a growing awareness by courts, of the relevance of international law and its effect on the operation of Canadian laws and policies. This was confirmed with *Ahani*. Courts should be prepared to use unimplemented treaties to inform their decisions. By incorporating a broader view of international law into legal arguments, courts will help ensure a better relation between Canada's international commitments and the domestic application of them.

Is there any justification for treating the domestic reception of treaties any differently than customary international law? We have just lay out all the relevant issues that involve the application or relevance of unimplemented treaties into domestic jurisdiction, but all the questions asked await further judicial development as Canada continues to define its future which currently separates international law from domestic law in relation to unimplemented treaties.

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[162] Steven R. Ratner, "International Law: The Trials of Global Norms", Spring 1998, Foreing Pol. Y., at 65.

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