

# INSIDE AND OUT: THE STORIES OF INTERNATIONAL LAW AND DOMESTIC LAW

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## Introduction

In his marvellous novel, *The Storyteller*,<sup>1</sup> Mario Vargas Llosa tells three interrelated stories using two distinct narrative voices. The first voice is authorial, an author close to Vargas Llosa himself: a Peruvian writer fascinated by the process of storytelling and by questions of identity. The second voice is much more mysterious, the voice of Tasurinchi, a Machiguengas Indian storyteller – or so it seems. I give away very little of the plot by telling you that Tasurinchi is not who he appears. Or is he? Tasurinchi tells part of his own story, but more importantly he tells the story of the Machiguengas. Tasurinchi begins his life as Saül Zuratas, a Peruvian Jew with a deforming birthmark on one side of his face. He is a university pal of the Peruvian author. Because of the deformity, Saül's nickname is "Mascarita", the mask. It turns out that the mask of deformity is far less relevant than Saül's later adopted mask as a Machiguengas storyteller. Or is it?

My enigmatic questions hint at the mysterious reflections of this work of genius. Vargas Llosa is preoccupied by what shapes our identities, and the respective roles of inheritance and will. He is also preoccupied by the power of the story, and the storyteller, in transmitting and creating social myths that shape communal identity and promote social cohesion. Can one be simultaneously inside and outside a given society? If one is, in some sense, an outsider, can one ever feel truly integrated in a "foreign" society? What is the role of stories in enabling social integration?

Consider the words of the great American legal theorist, Lon Fuller, addressing the role of the judge – at least in the common law tradition:

[the judge] ought to be proud that his [or her] contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old

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<sup>1</sup> Mario Vargas Llosa, *The Storyteller* (New York: Penguin Books USA, 1990).

story.<sup>2</sup>

Like the Machiguengas storyteller, the judge tells stories about history, obligation, aspiration, and our communal lives together. The judge can never be sure how much of the story she tells is inherited and how much is new creation. How much of the judge's identity is found in tradition and how much is found in self-willing?

To connect these seemingly random thoughts, I must invoke the recent writings of a well-known American international lawyer, David Kennedy of Harvard University. Kennedy argues that international law should root its objects and methodology in new approaches to comparative law.<sup>3</sup> Instead of being concerned with "governance", international law should strive for cultural understanding. For Kennedy, current international law aspires inappropriately to transcend culture. I accept the validity of this critique, but would reject the conclusions that Kennedy draws, largely because he is firmly committed to dichotomous thinking. International law is either inside our system – treated as binding – or by implication, international law is best seen as "foreign" law that needs to be translated into domestic systems and interpreted into local culture.<sup>4</sup> My argument is that international law is both outside and in. It is not only a foreign story but is part of our story. So those charged with relating the story of international law in Canada are best analogized to storytellers, rather than to translators. Like most storytellers, they are preoccupied with questions of identity and human social relationships. The telling of the story can build identity and social cohesion. In Canada, the story of international law is about us and about others. Our story of international law must be read with other "foreign" narratives. In more traditional terms, Canadian interpretation and implementation of international law builds international law even outside our borders. So international law is inside and out.

This returns us to the story of Saül Zuratas. While studying law and ethnology in university, Saül discovers the Indians of Amazonia. He becomes fixated with their struggle to maintain identity in the face of the economic and cultural expansionism of white Peruvian – implying Western – society. One day Saül disappears. The story circulates that he has made aliyah to Israel. However, over

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<sup>2</sup> L.L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940) at 140.

<sup>3</sup> See D. Kennedy, "New Approaches to Comparative Law: Comparativism and International Governance" (1997) 1997:2 *Utah L. Rev.* 545; see also D. Kennedy, "The Disciplines of International Law and Policy" (1999) 12 *Leiden J. Int'l L.* 9.

<sup>4</sup> Kennedy's arguments are pulled in this direction by K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U.J. Int'l L. & Pol.* 501.

time it emerges that Saùl has instead gone deep into Amazonia, severing his connections to the world he knew in Lima and becoming a Machiguengas. We do not know of Saùl's early days with the tribe, but learn that he is accepted when he discovers that he is viewed as a storyteller:

One day, as I arrived to visit a family, I heard them saying behind my back: "Here comes the storyteller. Let's go listen to him." It surprised me a lot. "Are you talking about me?" I asked. "Ehé, ehé, it's you we're talking about". So there I was – the storyteller. I was thunderstruck. There I was. My heart was like a drum. Banging away in my chest. Boom Boom. Had I met my destiny? Perhaps.<sup>5</sup>

Telling a story is rewarding. It is rich with implications for the speaker and the listener, and for their relationship.

### The Story of International Law in Canada

Who tells the story of international law in Canada? In a sense, we all do, or at least we are all potential storytellers. Every refugee claimant, every person who invokes an internationally recognized right, every lawyer who argues from international sources, every law professor who writes as an "eminent publicist" (to quote art. 38 of the *Statute of International Court of Justice*), every environmentalist who speaks of sustainable development or precaution – we all tell part of the story of international law.

For the sake of precision, we must focus on two formal legal actors, the legislature and the courts, in their storytelling roles. Have their stories about international law shaped our identity and helped to bind our society together? My short answer is "yes, to some extent, but they could both do better. Their stories are not as compelling as they could be." Let me explain.

First, a few basic propositions. It is trite law that international treaties are not "self-executing" in Canada. Our dualist constitutional framework requires the transformation of treaties by legislative action within the strictures of the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*.<sup>6</sup> Like most "trite" law, this brief résumé masks as much as it reveals. On the other hand, no one could ever

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<sup>5</sup> *Supra* note 1 at 210.

<sup>6</sup> See generally, R.St. J. Macdonald, "The Relationship Between International Law and Domestic Law in Canada" in R.St. J. Macdonald, ed., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 88. See also W.A. Schabas, "Twenty-five Years of Public International Law at the Supreme Court of Canada" (2000) 79:2 Can. Bar Rev. 174.

describe the law concerning the interplay of international customary law and Canadian domestic law as “trite”. “Confused” and “incoherent” would be more apt descriptors.

A detailed analysis of the status within domestic law of treaties ratified by Canada is now required. The power to conclude treaties is vested in the Governor-in-Council as delegated authority under the Royal Prerogative.<sup>7</sup> Nonetheless, as Justice Rand stated in *Francis v. R.*,<sup>8</sup> in the absence of a constitutional provision declaring a treaty to be the law of the state, legislative transformation of the international obligation is required to implement the obligation within domestic law. With the continuing vitality of the *Labour Conventions* case, we also know that transformation must take place within the jurisdictional confines of the *Constitution Act 1867*.<sup>9</sup> Unlike in Australia, there is no independent federal treaty implementation power.<sup>10</sup>

The key question is what constitutes “transformation”? Here the story of international treaty law in Canada becomes complex, and the other formal storyteller – the courts – joins in the narrative. In a narrow sense, transformation is an explicit legislative act through which Parliament or a provincial legislature adopts the treaty obligation and implements it within Canadian law. But even with this narrow understanding, practice is diverse. A treaty text may be incorporated directly by reproducing all or part of the treaty within a statute, either in its body or as a

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<sup>7</sup> See P.W. Hogg, *Constitutional Law of Canada Loose-leaf Edition*, vol. 1 (Scarborough: Carswell, 1997), at p. 11-2.

<sup>8</sup> *Francis v. R.*, [1956] S.C.R. 618, 3 D.L.R. (2d) 641. Justice Rand was in dissent in *Francis*, but not on this point. See also *Capital Cities Inc. v. Canada (CRTC)*, [1978] S.C.R. 141, 81 D.L.R. (3d) 609. But see *R. v. Martin*, [1994] 72 O.A.C. 316 (Ont. C.A.), at para. 4, where the Court held that a “general implementing power” could give domestic effect to an international treaty, even in the absence of express transformation. The power was granted merely “to implement an intergovernmental arrangements and commitments”.

<sup>9</sup> See *Attorney General for Canada v. Attorney General for Ontario (Labour Conventions Case)*, [1937] A.C. 326 (P.C.) at 347-48 (per Lord Atkin); see also *Arrow River & Tributaries Slide & Boom Co.*, [1932] S.C.R. 495, at 510 (per Lamont J.)

<sup>10</sup> See generally J.W. Perry, “At the Intersection – Australian and International Law” (1997) 71. A.L.J. (No. 11) 841; and S. Donaghue, “Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia” (1995) 17:2 *Adelaide L. Rev.* 213. The power to implement treaty obligations has historically been read into the “external affairs power” of the Federal Parliament under the Australian Convention.

schedule.<sup>11</sup> Alternatively, a preambular statement may indicate that a given piece of legislation is passed to fulfil specific treaty commitments.<sup>12</sup> Less direct is the common Canadian practice of “inferred implementation” through the enactment of new legislation or through the amendment of existing legislation.<sup>13</sup> Whether this form of inferred implementation constitutes real “transformation” is a hard question, one that leads to considerable pressure being placed on our courts to sort out the status of the treaty commitment, an issue that gives rise to various interpretative difficulties. Even greater difficulties arise when “transformation” is said to occur as a result of prior statutory, common law, or even administrative policy conformity with the new treaty obligation.<sup>14</sup>

Courts have traditionally attempted to deal with the wide-ranging uncertainties of statutory transformation of treaty obligations by invoking judicially-crafted interpretative presumptions. The first presumption is that if a domestic statute is read as transforming a treaty, a court should have reference to the treaty to interpret the act, and to the international law rules of treaty interpretation to interpret the treaty.<sup>15</sup> In practice, this has meant that interpretation will depend principally upon the court’s understanding of Arts. 31 and 32 of the *Vienna Convention on the Law*

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<sup>11</sup> See R. Sullivan, *Driedger on the Construction of Statutes*, 3<sup>rd</sup> ed. (Toronto: Butterworths, 1994) at 396 [hereinafter *Sullivan*]. See, e.g., the *Comprehensive Nuclear Test Ban Treaty Implementation Act*, S.C. 1988, c.32 [not in force at 13.12.2000]. Even express incorporation in a statute may be read narrowly, with a court seeking the precise intention of Parliament to “transform” specific treaty provisions. In *Pfizer v. The Queen*, [1999] 4 F.C. 441, the Federal Court held that referential incorporation of the WTO Agreement (cast as approval of the treaty) did not constitute “transformation”. On the other hand, in *R.v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, the Supreme Court relied on mere references to an international treaty to interpret the “purposes” of an Act that did not expressly transform the treaty.

<sup>12</sup> See *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

<sup>13</sup> See *Sullivan*, *supra* note 11.

<sup>14</sup> See the discussion of so-called “passive incorporation” in E. Brandon, “How International Are Our Courts?” [unpublished manuscript on file with author] (2000), at 18-19, 21 and 22.

<sup>15</sup> The restrictive approach of *Schavernoeh v. Foreign Claims Commission*, [1982] 1 S.C.R. 1092 at 1098 (per Estey J); and *Capital Cities Inc. v. Canada (CRTC)*, *supra* note 8 at 173 (per Laskin C.J.) (where only manifest statutory “ambiguity” would allow reference to an underlying treaty obligation for purposes of interpretation), has not recently been followed, with the Supreme Court moving to the position established in 1984 by the Ontario Court of Appeal. See *R. v. Palacios* (1984), 7 D.L.R. (4th) 112 (Ont. C.A.); *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4<sup>th</sup>) 449 [hereinafter *National Corn Growers*]; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; and, most recently, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4<sup>th</sup>) 193 [hereinafter *Pushpanathan*].

of *Treaties*.<sup>16</sup> Although I commend the approach, I would caution that mere reference to the *Vienna Convention* rules may not provide a rich understanding of the complexity of treaty interpretation. There is simply no golden rule of treaty interpretation. In international law practice “purposive” approaches are mixed with “plain meaning” approaches in a rather unprincipled *mélange*.<sup>17</sup>

Other presumptions are more important when the status of treaty transformation is less clear. Without having to opine on the precise direct effect of a given treaty within Canadian law, courts have been able to offer flexible presumptions such that in interpreting Canadian statutes one should presume that a legislature intended to act in conformity with Canada’s international obligations,<sup>18</sup> or, alternatively phrased, that a court should strive to interpret a provision so as to be consistent with international law.<sup>19</sup> The latter presumption has been widely invoked in cases under the *Canadian Charter of Rights and Freedoms*, which makes sense given that the *Charter* nowhere states expressly that it is transforming international treaty commitments. Vague presumptions are all that is available to our courts. As concerns the *Charter*, the presumption has been rephrased as a more positive obligation to use international human rights law as “guidance” in interpretation.<sup>20</sup> The lead was taken by former Chief Justice Dickson who suggested that because the *Charter* accords with the contemporary spirit of the international human rights movement, international human rights law should be “relevant and persuasive” in

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<sup>16</sup> *Vienna Convention on the Law of Treaties*, 1115 U.N.T.S. 331.

<sup>17</sup> Compare the world court’s approach to treaty interpretation in the *Interpretation of Peace Treaties Case*, [1950] I.C.J. Rep. 65 and [1950] I.C.J. Rep. 221 (Second Phase) to that in the *Reparations Case*, [1949] I.C.J. Rep. 174.

<sup>18</sup> See, e.g., *Daniels v. The Queen*, [1968] S.C.R. 517 at 541.

<sup>19</sup> See, e.g., *National Corn Growers Association*, *supra* note 15; *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at 409-10 (per Dickson J.); and *Pushpanathan*, *supra* note 15. The presumption was phrased in wide terms by Justice MacKay of the Federal Court in *José Pereira E. Hijos S.A. v. Canada (Attorney General)* (T.D.), [1997] 2 F.C. 84 at para. 20:

In construing domestic law, whether statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law.

<sup>20</sup> In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 837-38 (per McLachlin J.) [hereinafter *Keegstra*], even the dissenters held that s.2 (b) of the *Charter* should be interpreted “as a matter of construction” in a manner consistent with international approaches. But their concern was not to allow international law to restrict the full scope of *Charter* rights. On the latter point, see also *R. v. Cook*, [1998] 2 S.C.R. 597 at para. 147 (per Bastarache J.).

*Charter* interpretation.<sup>21</sup> The persuasiveness of international law seems especially strong in interpreting s. 1 of the *Charter*, most probably because its reference to a “free and democratic society” invites international comparisons.<sup>22</sup>

In the 1987 Labour trilogy, Chief Justice Dickson attempted to introduce a distinction between general international human rights law which served as the context for the *Charter*'s adoption and was therefore “relevant and persuasive” in *Charter* interpretation, and human rights treaties to which Canada is a party, which would serve as the benchmark for all *Charter* rights. The *Charter* should be presumed to guarantee protection “at least as great” as that afforded under Canada's treaty obligations.<sup>23</sup> The Court subsequently ignored this distinction. This is a loss, not only in *Charter* cases, but in all cases where international law is invoked. That part of international law that is “inside” Canada is not only persuasive, it is obligatory. When we fail to uphold our obligations, we tell a story that undermines respect for law internationally.

The interpretative presumptions articulated by our Courts have not been adequate to deal with the uncertainty caused by the practices of various legislatures and governments in treaty transformation. I do not blame the courts. How can they deal cogently with utterly inconsistent practice and even open hypocrisy? The problem is revealed by the case of treaties ratified by Canada but which remain “untransformed” – at least in explicit terms – into Canadian law. This governmental approach is especially common *vis-à-vis* human rights treaties. In the absence of express legislative transformations, are solemn international obligations of the Canadian Government to be given no account by Canadian courts? One might be tempted to say “yes -- that is the nature of our constitutional system”. But what if the point is put somewhat differently? Canada ratifies an international treaty on the basis of prior domestic law conformity. The Government then responds to the questioning of international treaty monitoring bodies by saying that Canada has

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<sup>21</sup> *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 348 (per Dickson C.J. in dissent, though not on this point) [hereinafter *The Labour Trilogy*]. See also the discussion in G. V. La Forest, “The Use of International and Foreign Materials in the Supreme Court of Canada” (1988) 17 Can. Council Int. L. 230 at 232-33.

<sup>22</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57 (per Dickson C.J.), 59 D.L.R. (4<sup>th</sup>) 416; *Keegstra*, *supra* note 20.; and *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927.

<sup>23</sup> *The Labour Trilogy*, *supra* note 21 at 350. See also *Schabas*, *supra* note 6 at 186 and G. Van Ert, “International Law in Canada [:] Principles, Customs, Treaties and Rights” (2000) (unpublished Master of Laws Thesis, University of Toronto).

already implemented its treaty obligations. Should courts simply defer to a subsequent government argument that the international treaty obligation has no relevance because it has not been expressly “transformed”? What of the assertion of prior compliance? What of Canada’s reputation for good faith in reporting upon implementation as an aspect of its treaty obligations? Should the government be held to its word?

These sorts of questions must have influenced the majority judgment in *Baker v. Canada*,<sup>24</sup> a controversial decision that has already generated significant debate.<sup>25</sup> *Baker* involved both the statutory basis for, and the proper scope of, Ministerial discretion concerning a deportation order. Ms. Baker was an illegal immigrant who had lived in Canada, supporting herself as a nanny, since 1981. In 1992 an immigration officer ordered her deportation. Since 1981, Ms. Baker had given birth to four children in Canada. They were Canadian citizens. She also had four children in Jamaica. After the birth of her last child, Ms. Baker was diagnosed with paranoid schizophrenia. To prevent her deportation and the consequent separation from her Canadian children, for two of whom she was sole caregiver, Ms. Baker requested an exemption from the rule that one must apply for permanent residency from outside Canada. Under the *Immigration Act*<sup>26</sup> and Regulations<sup>27</sup> an exception was available on humanitarian or compassionate grounds. The application was denied, and the Immigration Officer’s notes, including disparaging comments about Ms. Baker, and about Canadian immigration policy, were submitted in evidence at trial.

The Supreme Court’s decision, *per* Justice L’Heureux-Dubé, was complex and wide-ranging, necessarily focussing upon process standards in administrative law. For our purposes, however, the key ruling was that even though Canada had never explicitly transformed its obligations under the *Convention on the Rights of the Child*<sup>28</sup> into domestic law, an immigration official is nonetheless bound to consider the “values” expressed in that *Convention* when exercising discretion. In the *Baker* case, the *Convention*’s emphasis upon “the best interests of the child” should have

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<sup>24</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

<sup>25</sup> See, e.g., *Knop, supra* note 4; *Schabas supra*, note 6; and S.J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” [2001] *Can. Bar Rev.* 534.

<sup>26</sup> R.S.C., c. I-2, 114(2) (1985).

<sup>27</sup> S.O.R./78-172, s. 2.1 (1978).

<sup>28</sup> *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.



weighed heavily in considering Ms. Baker's application. Justice L'Heureux-Dubé stated, and a majority of the Court agreed, that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."<sup>29</sup> Justices Iacobucci and Cory dissented on this point, stating that the Court should go no further than to reaffirm the traditional presumption of statutory conformity with international obligations.<sup>30</sup> The idea that untransformed international "values" should shape Canadian law was cause for concern, just as it was some fifty-four years earlier when a judge of the Ontario Supreme Court took an analogous approach in *Re Drummond Wren*,<sup>31</sup> suggesting that international perspectives should shape Canadian "public policy" which would in turn affect statutory interpretation. Most Canadian constitutional lawyers have treated *Re Drummond Wren* as a noble aberration. However, *Baker* may turn it into something quite different.

The Supreme Court of Canada is not alone in suggesting that values contained in untransformed treaty obligations may shape the proper interpretation of domestic law. In the equally controversial decision of *Minister of Immigration & Ethnic Affairs v. Teoh*,<sup>32</sup> the Australian High Court invoked the doctrine of "legitimate expectations" to give rise to a procedural right to notice and an opportunity to present argument if a statutory decision-maker proposed to act contrary to the terms of a ratified but unimplemented treaty.<sup>33</sup> Chief Justice Mason and Justice Deane held that the fact of non-transformation does not mean that ratification holds no significance for Australian law, both statutory – and with care and reticence – even common law. Their reasoning can be analogized to the doctrine of "holding out" as an element of good faith:

ratification of an international convention is not to be dismissed as a merely platitudinous or ineffectual act. Rather, it is a positive statement by the Executive

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<sup>29</sup> *Baker*, *supra* note 24, at para. 70.

<sup>30</sup> *Ibid.* *per* Iacobucci J. (dissenting in part).

<sup>31</sup> *Re Drummond Wren*, [1945] O.R. 778 (Ont. S.C.).

<sup>32</sup> (1995), 183 C.L.R. 273. See also the New Zealand case of *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.); and the Indian case of *Vishoka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), cited in *Baker* to support the broad proposition that international human rights law can be used by common law courts to aid in the interpretation of domestic law.

<sup>33</sup> For generally favourable commentary on *Teoh*, see *Donaghue*, *supra* note 10; and P. Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 Sydney L. Rev. 177. For critical observations, see P. Heerey, "Storytelling, Postmodernism and the Law" (2000) 74 The Australian L.J. 681.

to the world and to the citizens that the Executive and its agencies will act in accordance with the convention.<sup>34</sup>

The *Teoh* decision caused apoplexy within the Australian government, and various bills were lodged in Parliament to overturn the judgment.<sup>35</sup> Such legislation was unnecessary even for those opposed to the Court's approach in *Teoh*, since the Court had already provided an escape hatch for the government. A mere "Executive Statement" could oust any "legitimate expectation." Shortly after the judgment, such a general "Executive Statement" was issued covering all ratified but unimplemented treaties. Governments are jealous of their wiggle room!

*Baker* and *Teoh* are salutary challenges to governmental hypocrisy (or perhaps incompetence) in ratifying international treaties and failing to address the domestic law implications of those treaties. Viewing unratified treaties as persuasive authority in interpreting domestic statutes and in shaping administrative discretion is a healthy development. As Justice Brennan argued in the famous Australian case on aboriginal property rights, *Mabo II*, international law can serve to provide "a basic legal environment" in which domestic law rights can be recognized.<sup>36</sup> This observation is more compelling if one considers treaty commitments undertaken voluntarily by national governments.

William Schabas was right in suggesting, however, that *Baker* was also a missed opportunity.<sup>37</sup> That the opportunity was missed is not surprising, for the failure flows from the most perplexing problem facing anyone trying to understand the relationship between international law and domestic law in Canada: the effect to be given to customary international law. In *Baker*, the Supreme Court could have concluded that the "best interests of the child" test has solidified as a norm of customary international law. One would not, then, have been forced implicitly to apply an untransformed treaty rule. Instead, the Court would have had to clarify the age-old question whether international customary law forms part of the law of Canada. Back in 1972, Ronald St. J. Macdonald argued convincingly that until the

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<sup>34</sup> *Teoh*, *supra* note 32, at para. 34 (*per* Mason C.J. and Deane J.). It should be noted that there is considerable doubt as to the "stability" of the *Teoh* decision given changes in the composition of the High Court. See *Donaghue*, *ibid.* at 253.

<sup>35</sup> See *Heerey*, *supra* note 33, at 690.

<sup>36</sup> *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1. On international law as relevant "context", see also *Schabas*, *supra* note 6, at 186 (here regarding the "context" for adoption of the *Canadian Charter of Rights and Freedoms*).

<sup>37</sup> *Schabas*, *ibid.* at 182.

confusing judgment of the Supreme Court of Canada in the *Foreign Legations Case*,<sup>38</sup> Canadian law was relatively consistent in favouring a “monist” theory under which customary law applied in Canada of its own force.<sup>39</sup>

Since *Foreign Legations*, Canadian Courts have vacillated on the status of customary international law in Canada.<sup>40</sup> Since the advent of the *Charter*, the situation has not improved. While international human rights law has consistently been held to be relevant and persuasive, the Supreme Court has never clarified when customary international law might be compelling or even binding. One could, of course, read Justice La Forest’s reasons in *Kindler* as at least accepting implicitly that a customary law rule could directly shape Canadian law. He emphasized the importance of universal practice and international consensus in shaping norms that would have an impact in Canada. Although he used different words, the analysis is close to the traditional invocation of practice and *opino juris* as the measure of existence for customary law. In Justice La Forest’s view, the norm against the death penalty was not strong enough to guide domestic law -- unlike norms against genocide, slavery and torture.<sup>41</sup> Query whether or not *U.S.A. v. Burns and Raffay*<sup>42</sup> can be read to support the emergence of a binding customary law rule against the

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<sup>38</sup> *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners’ Residences* [1943] S.C.R. 208.

<sup>39</sup> Macdonald, *supra* note 6, at 109.

<sup>40</sup> See, e.g., *Municipality of Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263 (seeming to favour direct incorporation); *La République Démocratique du Congo v. Venne*, [1971] S.C.R. 997 (where changes to customary law did not operate automatically within Canadian law); and *Reference Re Mineral and Other Natural Resources of the Continental Shelf*(1983), 145 D.L.R. (3d) 9 (Nfld. C.A.) (implicitly requiring transformation of customary law).

<sup>41</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at 833 (per La Forest J.), 84 D.L.R. (4<sup>th</sup>) 438). It should be noted that Australian courts have also been struggling with the question of customary international law’s role in the domestic legal system. See *Mathew*, *supra* note 33, at 194-95. In Israel, the Supreme Court has taken an expansive view of the direct operation of customary international law in Israeli law, but has reduced the effect of this approach by imposing a heavy burden to prove the existence of custom. It seems likely that the reason for this burdensome imposition is that the cases on custom have usually arisen in contexts where national security concerns are strong. See E. Benvenisti, “The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights” in B. Conforti & F. Francioni, eds, *Enforcing International Human Rights in Domestic Courts, International Studies in Human Rights*, vol. 49 (The Hague: Martinus Nijhoff Publishers, 1997) 202 at 209-213. Within the United States legal system, customary law is applied automatically and is controlling unless displaced by domestic positive law. *The Paquette Habana* (1900), 175 U.S. 677. See also H.A. Blackmun, “The Supreme Court and the Law of Nations” (1994) 104 Yale L.J. 39 (demonstrating that “positive law” seems often to displace international customary law).

<sup>42</sup> (15 February 2001) SCC File 26129; <www.lexum.umontreal.ca/csc-scc>.

death penalty.

In the *Quebec Secession Reference*, the Supreme Court, in answering an argument put by the *amicus curiae*, hinted that it would not have jurisdiction to decide questions of “pure international law.”<sup>43</sup> If this means simply that customary law becomes part of “the laws of Canada” for the purposes of the Court’s jurisdiction under s. 3 of the *Supreme Court Act*,<sup>44</sup> the observation is unobjectionable. If, on the other hand, the implication is that the Supreme Court cannot directly apply international customary law, this would be unfortunate, for the well-known reasons offered up by Lord Denning in the *Trendtex* case.<sup>45</sup> Given that the Supreme Court’s international law analysis in the *Secession Reference* failed completely to engage with the customary law on self-determination, a dualist position may unfortunately have been implicitly adopted.<sup>46</sup> In the upcoming *Suresh* case, the Supreme Court will be given an opportunity to clarify their position. The Court should finally allow Canada to align itself firmly with the eminently sensible U.S. and U.K. positions. The Court could do worse than simply reaffirming the observation of Robertson JA, in the Federal Court of Appeal decision in *Suresh*:

principles of customary international law may be recognized and applied in Canadian Courts as part of the domestic law, ... in so far as those principles do not conflict with domestic law.<sup>47</sup>

This statement accepts the need for automatic incorporation, but upholds the democratic accountability of domestic legislatures and courts. The opportunity for plain speaking on this thorny question was missed in *Baker* and should now be taken up.

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<sup>43</sup> *Reference re Secession of Québec* [1998] 2 S.C.R. 217 at paras. 11-12.

<sup>44</sup> R.S.C. 1985, c. S-26, s. 3.

<sup>45</sup> *Trendtex Trading Corp. v. The Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.) (stressing (a) the need for domestic legal systems to allow changing international law to effect internal change as well; and (b) the reciprocity inherent in “comity” and its value for internationally engaged states). See also Macdonald, *supra* note 6 at 111.

<sup>46</sup> See S.J. Toope, Case Comment [on the *Secession Reference*] (1999) 93 A.J.I.L. 519.

<sup>47</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)* [2000] 2 F.C. 592 (F.C.A.); (2000) 183 D.L.R. (4<sup>th</sup>) 629 at 659 *per* Robertson J.A.

### The Power of Storytellers

The issue of customary international law's status within Canadian law returns to the themes of *The Storyteller*. Our official storytellers have thus far failed to develop a compelling narrative. International law is both inside and outside Canadian law. The Canadian story of international law is not merely a story of "persuasive" foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than "comparative law", because international law is partly *our* law. The decisions that we take in Canada, in our government policies, in our legislative acts and in our courts, contribute to the wider story of international law around the globe. The *Secession Reference* will contribute to the law of self-determination. Canada's efforts to protect the arctic environment have already changed rules of territory and the law of the sea.<sup>48</sup> The politically charged decision to protect straddling fish stocks by using force has arguably led to new international regulation on conservation of this increasingly scarce resource.<sup>49</sup>

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. Oftentimes, the story will be one of persuasion, but sometimes the story will be one of obligation -- to norms that we have helped to articulate through processes of interaction and the construction of shared expectations.<sup>50</sup>

None of this would surprise Saúl Zuratas, a.k.a. Tasurinchi. Over time, this Machiguengas storyteller reaches into his own past as a Jew and he begins to weave together mythologies of Amazonia and the ancient middle east. As his own acceptance into the Machiguengas is complete, he is free to allow different stories to blend together, stories from inside and outside. Ultimately, Tasurinchi blends together even the name of the creator. The great spirit of the Machiguengas becomes known in Tasurinchi's stories, in part, as Jehova. The story of one people's remarkable survival is linked to another people's survival. The joining of stories is

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<sup>48</sup> See, e.g., M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge U.P., 1999), at 92-97.

<sup>49</sup> The point here is descriptive, rather than normative. My own view is that Canada's use of force to seize a Spanish trawler on the high seas was both illegal and unwise.

<sup>50</sup> J. Brunnée & S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Col. J. Trans. L. 19.

not a denial of the specificity of culture but a recognition that stories build together – protecting and reshaping cultures.

The process of Michiguengas storytelling moves the Peruvian author immeasurably, just as the story of building allegiance to international law can move us today. For ours is a story of resisting the weight of mere power, of upholding the sanctity of nature, of struggling to promote respect for all persons, of fulfilling our need to connect with one another. Remember E.M. Forster’s invocation: “only connect”. Storytelling is a tremendous gift, a gift that helps us connect. The reflections of our anonymous Peruvian author – undoubtedly close in thought to the living author, Vargas Llosa – offer fitting closure:

I was deeply moved by the thought of that being, those beings, in the unhealthy forests of eastern Cusco and Madré de Dios, making long journeys of days or weeks, bringing stories from one group of Machiguengas to another and taking away others...

... the fleeting, perhaps legendary figures of those ... [storytellers] who — by occupation, out of necessity, to satisfy a human whim — using the simplest, most time-hallowed of expedients, the telling of stories, were the living sap that circulated and made the Machiguengas into a society, a people of interconnected and interdependent beings.<sup>51</sup>

From inside Canada, we can join with those outside, telling the story of international law, and helping to create a human society of interconnected and interdependent beings.

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<sup>51</sup> *Supra* note 1 at 93.