

## Case Comment

# *Ahani v. Canada:* A Persuasive Dialogue within the Courts

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### **Abstract**

*This paper is a comment on Ahani v. Canada (OCA). Canadian courts are presently involved in a dialogue over the role of international law domestically. The courts' own grappling with various norms of international law, however, has helped to clarify and reinforce the status of these norms. In Baker v. Canada, the Supreme Court gave a new prominence to the "persuasive approach" of applying international law. Ahani demonstrates that while the persuasive approach has begun to be internalized into Canadian law, the courts are still at odds with how persuasive international law should be. To complicate this account, the Supreme Court's discussion in Suresh of peremptory norms of international law demonstrates that an over-emphasis on the "persuasive" approach can in fact weaken the role of international law domestically. At the same time, the dialogue within the courts is linked to a much more general dialogue. The importance of cases such as Ahani ultimately stretches beyond the domestic context.*

### **Résumé**

*Cet article est un commentaire sur le cas Ahani c. Canada. Les tribunaux canadiens sont actuellement engagés dans une discussion sur le rôle du droit international au plan domestique. Cependant, les efforts-mêmes de ces instances pour essayer de comprendre et maîtriser diverses normes du droit international ont servi à éclaircir et à renforcer ces normes. Dans Baker c. Canada, la Cour Suprême a donné une nouvelle importance à « l'approche persuasive » dans l'application du droit international. Le cas Ahani démontre qu'alors que l'approche persuasive a*

*commencé à être adoptée par le droit canadien, les tribunaux ne sont toujours pas d'accord sur la question de savoir jusqu'où doit aller la persuasion en droit international. Pour compliquer les choses, la discussion de la Cour Suprême dans le cas Suresh sur les normes péremptoires en droit international montre que trop d'emphase sur l'approche « persuasive » peut en fait affaiblir le rôle du droit international à l'intérieur du pays. Il faut noter par la même occasion que cette discussion à l'intérieur des tribunaux est liée à une discussion bien plus générale. En fin de compte, l'importance de cas tel que celui d'Ahani s'étend bien au-delà du contexte domestique.*

On the night of June 18, 2002, Mansour Ahani, an Iranian Convention refugee and suspected terrorist, was deported from Canada to Tehran. This marked the end of his nine-year battle to prevent his deportation, which saw his case reach the Supreme Court of Canada on two occasions. In his first case, Mr. Ahani challenged a deportation order made by the Canadian government, on the ground that he would face a serious risk of torture were he to be returned to his native Iran.<sup>1</sup> He claimed that the prohibition on torture in international law is non-derogable and therefore superseded any provisions in the *Convention Relating to the Status of Refugees* that would allow for the *refoulement* of refugees.<sup>2</sup> Mr. Ahani's appeal to the Supreme Court was ultimately dismissed. The Court ruled that whereas Mr. Ahani had been given the proper procedural protections to prove his case, he had failed to establish that he faced a substantial risk of torture if deported. As he had exhausted all of his rights of review, it was now open to the Canadian government to deport Mr. Ahani.

In a last effort to prevent his removal from Canada, Mr. Ahani filed a “communication” with the United Nations Human Rights Committee (the Committee) for relief under the Optional Protocol of the International Covenant of Civil Political Rights (the Optional Protocol).<sup>3</sup> His claim was based on Articles 1 and 2 of the Protocol. These articles, respectively, call on signatory states to recognize the competence of the Committee, and to allow for individuals to bring claims once they have exhausted all available domestic remedies.<sup>4</sup> The Committee made an “interim measures” request that Canada stay the deportation order until it had considered Mr. Ahani’s communication.<sup>5</sup>

The Optional Protocol of the ICCPR has been ratified by Canada but not implemented into Canadian law. By ratifying the Optional Protocol, state parties agree to recognize the Committee. However, since the language of the Protocol and the Committee’s rules of procedures are permissive, the Committee is only empowered (under the Optional Protocol and the Rules of Procedure) to express its views and make requests to state parties. In this sense, parties are not legally bound to yield to the committee’s requests or findings. Given the permissive language of the Protocol, the Canadian government took the view that the interim measures request was not binding and, as a result, chose not to accede it, wishing again to deport Mr. Ahani immediately. Mr. Ahani applied to the Superior Court of Ontario for an injunction to restrain his deportation pending the Committee’s consideration of his communication. The effect of such an injunction would have been to force the Canadian government to follow the Committee’s request. The central question in *Ahani II* then was whether Canada was bound – either on the principles of the *Charter of Rights and Freedoms* or of international law – by the procedures of a ratified but non-implemented international instrument, notwithstanding the fact that the relevant procedures are permissive only.

This question was ultimately answered in the negative. Both the Superior Court and the Court of Appeal of Ontario denied the request of Mr. Ahani for an injunction. His application for leave to appeal was further dismissed 2-1 by the Supreme Court of Canada on May 16, 2002.<sup>6</sup> This cleared the way for his deportation. Mr. Ahani’s fate since his return to Iran is uncertain. What is more certain, however, is that his attempts to stay his deportation will help to shape how Canadian courts conceive of and apply international law in future cases. Of particular significance are the majority and dissenting judgments of the Court of Appeal. What we see emerge from those respective judgments is the continuation of an ongoing debate within the courts that is in fact part of a reconceptualization of the role of international law. The purpose of this paper is to examine that

debate in more detail and how *Ahani II* fits into it. The significance of this debate is underscored by looking to other recent Canadian cases that address issues of international law. What we shall see, ultimately, is that the impact of *Ahani II* resonates beyond the domestic context.

The starting point of my analysis is the case of *Baker v. Canada*.<sup>7</sup> In that case, we are presented with competing visions of the relationship between international law and domestic courts. At issue in *Baker* was the deportation order of Ms. Baker, the mother of four dependant Canadian-born children, who had remained in Canada without legal status for over a decade. The issue, with respect to international law, was whether Canadian immigration officials had to give primary consideration to the interests of Ms. Baker’s children when exercising their discretion on whether to issue a deportation order. The language of “the primary interest of the child” is found in the *Convention on the Rights of the Child*, a convention that Canada has ratified but never implemented into domestic law.<sup>8</sup> As Knop points out, there are essentially three different views of international law at play in *Baker*. First, there is Iacobucci J.’s minority judgment that takes a strict or traditional view of how the domestic courts can apply international law. On this view, “an international convention ratified by Canada is of no force or effect until its provisions have been incorporated into domestic law by way of implementing legislation.”<sup>9</sup>

By contrast, the lawyers for Ms. Baker and two of the interveners took the view that international law should be applied by “default.” On this view, “the legislature is presumed to comply with international law” and, as a result, statutes and the *Charter of Rights and Freedoms* should be interpreted to comply, as much as possible, with international conventions, “regardless of whether the conventions have been incorporated by domestic legislation.”<sup>10</sup> In other words, on this view, upon ratification, a treaty or convention is not only binding on Canada as a matter of international law, but domestic law should then be interpreted so as to conform to that instrument. Finally, the majority judgment introduces a view that fits not entirely within either of these two positions. On the one hand, L’Heureux-Dubé J. follows on previous rulings that “international treaties are not part of Canadian law unless they have been implemented by statute.”<sup>11</sup> On the other hand, she also takes the view that non-implemented conventions that Canada has ratified do play a role in domestic law. On her view, international human rights law can be used as a tool to “help inform the contextual approach to statutory interpretation and judicial review.”<sup>12</sup>

The view that international law can inform a court’s interpretation of domestic law, particularly the *Charter*, had been recognized prior to *Baker*.<sup>13</sup> *Baker* is a good star-

ting point for examining the debate over international law, however, to the extent that the stricter traditional view does not prevail.<sup>14</sup> One could say that L'Heureux-Dubé J.'s majority decision marks a new-found prominence for the "persuasive" approach. It is an affirmation on the part of the Court that ratified international law should not be relegated solely to those cases where a treaty or convention has been implemented. As we shall see, *Ahani II* is significant because it demonstrates that the issue of how persuasive these non-implemented instruments should be is far from resolved. The role of the Canadian courts in international law can thus be seen as one of debate or dialogue – a dialogue that has a two-fold effect. First, in addressing the applicability of international law, the courts are better enunciating the evolving relationships between international and domestic law (whereas before the role of unimplemented ratified treaties may have been considered inconsequential). Second, to the extent that the courts are grappling with these issues, they are playing a role in internalizing the values or principles of international law. In other words, the mere exercise of examining these issues may also have the effect of reinforcing the principles that the courts are trying to elucidate.<sup>15</sup>

The traditional reading of international law in Iacobucci J.'s judgment in *Baker* is fairly easily grasped. In short, on that judgment, international law is only binding on Canadian courts when incorporated into domestic law by way of an implementing legislation. In other words, non-incorporated ratified international conventions have no force or effect in Canadian law. One could then ask whether this view simply reduces international law to domestic law, *i.e.* whether international law only exists as a function of domestic law.<sup>16</sup> However, without delving too far into that issue, we can see how Iacobucci J.'s judgment relegates the role of Canadian courts solely to arbiters of domestic law and, in the process, establishes a clear division between what is binding as a matter of domestic law and what may be binding as a matter of international law. In this case, Iacobucci J. gave no legal authority to the *Convention on the Rights of the Child* because there was no mechanism, through the domestic courts or otherwise, for binding Canada as a matter of domestic law to the non-implemented convention. Any discussion of international law ended there. The final implication of this judgment, then, is that in choosing not to implement the *Convention on the Rights of the Child* into domestic law, Canada is free domestically to do what it wants with this and other non-implemented international "obligations."<sup>17</sup> In other words, despite their prior ratification, Canada need only follow – as a matter of domestic law – various non-implemented conventions when it is in Canada's interest to do so.

The more traditional reading of international law by Iacobucci J. in *Baker* is also reflected in the majority judgment of *Ahani II*. The issue of bindingness is one-step removed in this case, however. Similar to the *Convention on the Rights of the Child*, the Protocol has also been ratified but not implemented into Canadian law. The difference arises because the relevant provisions of the Protocol are non-binding. As we have seen, the powers of the Human Rights Committee are framed in permissive terms. This difference proved ultimately to be a decisive consideration. Writing for the majority, Laskin J.A. did not give any weight to the Committee's request to stay the deportation.<sup>18</sup> In the first place, citing the majority judgment in *Baker*, Laskin J.A. reiterates the view that international treaties such as the Protocol are "not part of Canadian law unless they have been incorporated into Canadian law."<sup>19</sup> More important, given the absence of any provisions for making the Optional Protocol formally binding, whether as a matter of international or domestic law, Canada was free to disregard the Committee's request. The matter was entirely within Canada's discretion and Canada could deport the appellant as it wished. The further question then was whether Canadian law – in particular, the principles of fundamental justice under s. 7 of the *Charter* – went beyond the obligations of the Protocol, so as to bind Canada to the Committee's request. Once again, Laskin J.A. followed the Supreme Court's lead in *Ahani I* and took the view that the appellant had been given the proper procedural protections to present his case.<sup>20</sup> Mr. Ahani's deportation was thus consonant with the principles of fundamental justice.

By not giving any weight to a ratified but non-implemented instrument, albeit a non-binding one, Laskin J.A.'s judgment might be seen as a step away from L'Heureux-Dubé J.'s understanding of international law in *Baker*. On my view, however, we can still situate the majority decision of *Ahani II* within the ongoing dialogue about the role of international law in Canada. In the first place, Laskin J.A. does not ignore the persuasive role of international law. He merely takes the appellant's position to be extending the reach of international law too far. On Laskin J.A.'s view, to adopt the appellant's position would be to interpret s. 7 of the *Charter* in such a way as to make a *non-binding*, as opposed to simply *unimplemented*, commitment binding.<sup>21</sup> Now, whether or not this is an accurate reading of how the appellant sought to invoke the Optional Protocol is debatable. Indeed, the dissenting judgment is precisely at odds with this view. Before we turn to that judgment, however, it is important to note a further way that Laskin J.A. may have been participating in the "dialogue." The conclusion of the majority judgment is that the federal government is not bound by the Optional Protocol, as a matter of inter-

national or Canadian law, and thus cannot be compelled to implement it as a matter of domestic law. This decision was backed by a well established line of precedents.<sup>22</sup> Nevertheless, Laskin J.A. stayed the deportation to give the appellant a chance to appeal to the Supreme Court. In so doing, the majority may have been tacitly accepting that the final word had yet to be pronounced on this matter. More generally, by acknowledging that the Supreme Court may want to weigh in on these issues, the majority may have been displaying a certain awareness that the role of international law is unsettled and constantly evolving.

Another element of the *Ahani II* case that points to an ongoing dialogue about international law is the fact that there was a dissenting judgment. Rosenberg J.A., in dissent, took the view that the appellant had a right, under s. 7 of the *Charter*, to have his deportation stayed pending review by the Human Rights Committee:

However, I think there is a generally held consensus in Canada that in the human rights context an individual whose security is at stake should within reason be given the opportunity to access remedies at the international level, and that necessarily the executive should not unreasonably frustrate the individual's attempt to do so.<sup>23</sup>

Framed in these terms, Rosenberg J.A.'s understanding of the issues in *Ahani II* appears to be extending the persuasive role that L'Heureux-Dubé J. ascribes to ratified non-implemented international conventions in *Baker*. According to Rosenberg J.A., an order enjoining the appellant's deportation would not bind the government to any decisions made under the Protocol. Canada would still be free not to comply with any decision of the Committee. Canada would not be free, however, to disregard the jurisdiction that the federal government has conferred upon the Committee by ratifying the Protocol.<sup>24</sup> In other words, even though the views and requests of the Committee are not binding, Canada's ratification of the Optional Protocol helps to inform a more robust understanding of the guarantees accorded under s. 7 of the *Charter*:

[The appellant] claims only the limited procedural right to reasonable access to the Committee, upon which the federal government has conferred jurisdiction. He submits that the government, having held out this right of review, however limited and non-binding, should not be entitled to render it illusory by returning him to Iran before he has a reasonable opportunity to access it. I agree with that submission and that it is a principal of fundamental justice that individuals have fair access to the process in the Protocol.<sup>25</sup>

With these words, in effect, Rosenberg J.A. was either trying to internalize the principles underlying the Optional Protocol's obligations into the Canadian *Charter*, or was recognizing that these principles have already been internalized. One could query then whether Rosenberg J.A.'s decision brings us closer to the third view in *Baker*, that international law should be applied by default.<sup>26</sup>

Clearly, however, we are not at the stage where international law will be applied by default, especially given that Rosenberg J.A. was writing in dissent. Moreover, the Supreme Court ultimately dismissed the appellant's application for leave to appeal.<sup>27</sup> This decision, however, was not without its own dissent. L'Heureux-Dubé J. disagreed with the ruling of Bastarache and Binnie JJ. that the Court not weigh in on these issues.<sup>28</sup> Since reasons are rarely given for judgments in leave applications, one can only speculate as to what guided the decisions of the respective judges. Did the panel's views parallel those of the Court of Appeal? That is, was L'Heureux-Dubé J. swayed by the dissent of Rosenberg J.A.? Did she take the view that this was precisely a case where the persuasiveness of international law should guarantee greater procedural protections, a principle she so strongly enunciated in *Baker*? Did Bastarache and Binnie JJ., by contrast, simply follow the lead of Laskin J.A.'s more restrained understanding of how international law should be applied in this case? Again, this is just to speculate.<sup>29</sup>

The cases of *Baker* and *Ahani II*, however, do offer questions for more immediate discussion. Might Rosenberg J.A.'s view, which can be seen to extend L'Heureux-Dubé J.'s persuasive reading of international law in *Baker*, become more prominent? Will this bring us closer to a default view of international law in the domestic context? The answers to these questions are uncertain. They are important because the more views like those of Rosenberg J.A. become prominent, the more the courts will look to make Canada comply with the international instruments that it has ratified, whether they are implemented into Canadian law or not, by reading the *Charter* and statutes in-line with those instruments. What is more certain, though, is that the courts are increasingly faced with these issues. As a result, the courts have become engaged in a dialogue, by helping to enunciate better what their role should be in applying international law. In turn, they are helping this role to evolve.<sup>30</sup> They are helping to redefine Canada's interaction with international law and the relationship between the courts and international law.

If one gives credence to the idea that there is a dialogue within the Canadian courts over the role of international law, then the next step would be to situate this debate within a more general context. The case of *Suresh* is particularly instructive in this respect.<sup>31</sup> For the purposes of this discus-

sion, the issue of note in that case is the Supreme Court's discussion of peremptory norms of customary international law (*jus cogens*). The Court's examination of that issue, on the one hand, serves as what is perhaps a cautionary tale of invoking the persuasive understanding of international law. In *Suresh*, the Court may have weakened the status of peremptory norms in Canadian law. The Court's general discussion of peremptory norms, on the other hand, suggests that the debate over international law in the courts may have a more profound impact than I have suggested until now. In short, this debate may actually transcend the domestic context. In helping courts to internalize principles of international law domestically, cases such as *Ahani*, *Baker*, and *Suresh* may also be reinforcing principles of international law generally or *internationally*.

*Suresh* was the most recent discussion by the Supreme Court of the issue of peremptory norms. Indeed, this issue is one that hovered over the second *Ahani* case, and that was central to the first. As a definition for peremptory norms, the Court endorses in *Suresh* the definition contained in Article 53 of the *Vienna Convention on the Law of Treaties*:

[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>32</sup>

*Suresh* and *Ahani I* were heard at the same time and the Court used the analytical framework in *Suresh* to render judgment on the issues in *Ahani I*.<sup>33</sup> The particular norm in question in both cases was the prohibition on deportation to torture. The Court discusses the status of this norm in *Suresh* when addressing the content of the principles of fundamental justice under s. 7 of the *Charter*. The Court did not pronounce definitively in *Suresh* on whether the prohibition on deportation to torture has attained the status of a peremptory norm, but suggested there was strong evidence to that effect.<sup>34</sup> At the same time, the Court's discussion of this prohibition provides some initial answers to more general questions about the status of peremptory norms in Canadian law. In particular, prior to *Suresh*, the Supreme Court had yet to clarify whether judges could apply these norms directly, as a matter of Canadian law or of international law binding on Canada, or whether these norms had somehow to be filtered through Canadian law.<sup>35</sup>

A central feature of peremptory norms of customary international law, if we follow the definition endorsed by the Court in *Suresh*, is that there can be no derogation or modification of these norms (except by way of a subsequent norm). At first blush then, the Court's definition of pe-

remptory norms as being non-derogable appears to bear some similarity to the "default view" of applying international law that we saw in *Baker*.<sup>36</sup> The Court's discussion of peremptory norms in *Suresh*, however, is ultimately much more evocative of the persuasive understanding of international law. Moreover, by giving peremptory norms merely an informative or persuasive role, the Court may actually ascribe a weaker role to peremptory norms, as a matter of domestic law, than would be suggested by the Court's own definition. As a basic proposition, the Court begins by saying that international law can inform its decision.<sup>37</sup> In this case, the Court was concerned with which principle of international law should guide its *Charter* interpretation, in the face of an apparent conflict between various principles. As we saw in *Ahani I*, the Court was looking at the interplay between the prohibition on deportation to torture and the right of states to *refouler* refugees in cases where security interests are at stake. After an examination of the relevant sources of international law, the Court concluded by endorsing the prohibition against torture. In other words, "the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*."<sup>38</sup>

Without passing judgment on the soundness of the Court's *Charter* analysis, we can quickly point to potential shortcomings with how the Court treats peremptory norms. We have seen that, on the Court's own definition, peremptory norms can only be derogated from or modified by way of another such norm. By implication, this would mean that peremptory norms would take priority over any international treaty or domestic law. The force of peremptory norms arises precisely because of the international consensus required for them to take root. Once a norm has been identified as a peremptory norm of international law (which the Court seems to suggest is almost the case for the prohibition on deportation to torture in *Suresh*), it would be increasingly harder for an individual state to deviate from that norm; *i.e.* to justify a law or practice different from that of the international consensus. In this sense, the individual state would be bound by the peremptory norm. Domestic law and practices, *inter alia*, would thus be required to conform to the peremptory norm.<sup>39</sup> The Court in *Suresh* does not give as robust a status to peremptory norms, however. As we have seen, on the facts of *Suresh*, the discussion of peremptory norms by the Court is restricted to its *Charter* analysis. This would perhaps not be so problematic had the Court stated, for example, that it is *obliged* to interpret the *Charter* so as to conform with the prohibition against the deportation to torture – because of the

peremptory norm's status as a peremptory norm. Again, this is not what the Court did. The Court only went so far as to say that the prohibition *informs* Canadian courts in their application of domestic law. Moreover, the prohibition does not ultimately take priority over Canadian law. The Court allows for derogation from the prohibition in certain rare cases, where national security is at risk. In so doing, the Court was ostensibly saying that these norms do not *bind* the courts.<sup>40</sup>

The Court's discussion of the prohibition on torture thus leaves us with somewhat conflicting conclusions. On the one hand, the Court gives a strong recognition to the prohibition on deportation to torture, as a matter of Canadian law. After all, the Court states that the prohibition is virtually non-derogable, making this perhaps the most decisive factor in the Court's *Charter* analysis. On the other hand, peremptory norms are only treated as a tool or factor for interpreting the *Charter*. What this would mean, at the extreme, is that these norms could only play a role domestically by virtue of previously established domestic law (through which to inform and gain expression).<sup>41</sup> One could query then whether the persuasive view has become too persuasive in Canadian courts. As we have seen, the international consensus required for a norm to become peremptory would suggest that these norms somehow supersede Canadian law, instead of merely informing it. This raises the further question, in turn, of whether international law will ever be accorded any independent priority over Canadian domestic law. Indeed, by ascribing a persuasive role to peremptory norms, the Court is able to skirt the question, for example, of whether peremptory norms should be considered part of Canadian law (*e.g.* as part of the common law, or under its own heading), or part of a higher order of law, to which Canadian law is subservient.<sup>42</sup> For the time being, the final result of the Court's decision in *Suresh* may be that international law (peremptory norms included) is only strictly binding on Canada, as matter of Canadian law, by way of an implementing legislation. Any other norm of international law, even those which carry the consensus of the international community, will only be given expression in Canadian law – however strong – by virtue of its informative or persuasive value.<sup>43</sup> This is perhaps a tacit disregard of the significance of an international consensus. At the very least, the Court's view of peremptory norms of customary international law in *Suresh* may be inconsistent with the definition that the Court first introduces of those norms.

The Court's discussion of peremptory norms is relevant in another way to the dialogue in the courts of the role of international law. As we have seen, the Court endorses, if only equivocally, the prohibition of deportation to torture

as a peremptory norm of customary international law. It is precisely this endorsement that allows us to see that the debate in the courts over international law is inextricably linked to a more general or international dialogue about the role of international law. The Court outlines three indicia in *Suresh* to help determine whether the prohibition on torture has achieved the status of peremptory norm: multilateral instruments, domestic practices, and international authorities.<sup>44</sup> Now, it would be fairly safe to assume that these indicia would apply to most investigations to determine the existence of a peremptory norm. Further, we can assume for the purposes of this discussion that the decisions of a domestic court can be placed in the category of "domestic practices."<sup>45</sup> If this is the case, then by corollary, the judgments of a high court will play a role in the development of a peremptory norm. In other words, a court's endorsement of a principle domestically will lend weight to the view that there is an international consensus concerning that principle. As we have seen, the Court specifically states in *Suresh* that it was not being asked "to pronounce on the status of the prohibition on torture in international law."<sup>46</sup> This statement, however, is perhaps a shrewd display of self-awareness, on the part of the Court, of what it was actually doing. Even though the Court did not affirm unequivocally whether the prohibition on torture is a peremptory norm, the Court's discussion of the status of the prohibition, and subsequent strong endorsement of that norm will only reinforce any emerging consensus about that norm in the future.<sup>47</sup>

This endorsement, then, has a two-fold effect. First, it internalizes an international norm, the prohibition against torture, into domestic law (although perhaps not in as binding a way that a peremptory norm should be). In this sense, the judgment in *Suresh* can be placed alongside the decisions of L'Heureux-Dubé J. in *Baker* and of Rosenberg J.A. in *Ahani II*. Second, the endorsement will also serve to reinforce or "externalize" a norm at the level of international law. If one accepts this reading, then we see that the development of international law, and of peremptory norms, is a reflective process.<sup>48</sup> As certain principles have gained prominence internationally, they have been internalized domestically, which has further reinforced those principles internationally, which will then reaffirm the principles domestically, and so on. The domestic and international fora are inextricably linked.

If we turn back to *Ahani II*, the ultimate effect of the majority judgments of the Court of Appeal, and of the Supreme Court at the leave stage, may be that the status of the Optional Protocol of the ICCPR will be less firm or, at the very least, no stronger than before. The provisions of the unimplemented instrument will continue to have no

formal binding effect domestically. Further, at the international level, this will not assist in raising the principles enshrined in the Optional Protocol to the level of a peremptory norm, as was eventually the case with the *Universal Declaration of Human Rights*, for example. Canada will be able to maintain its status as a state party of the Optional Protocol, yet continue to disregard any of the communications and requests of the UN Human Rights Committee with near impunity.<sup>49</sup> There may yet be hope, however, for those who would wish to see the Canadian government more formally bound to the pronouncements of the Committee.

As we have seen, the introduction and development of the persuasive understanding of international law in the Canadian courts has been a gradual process. The cases of *Baker* and the dissent in *Ahani II* demonstrate that there is a clear shift away from a purely traditional understanding of international law, in the courts' application of international law. The courts are still struggling to delineate how persuasive international law should be. In the case of *Suresh*, we see possible drawbacks of placing too much emphasis on the persuasive reading of international law. At the same time, *Suresh* also shows how the courts' decisions may have more far-reaching implications. It provides a tacit recognition by the Supreme Court that the role of the courts cannot be seen as confined merely to the domestic process, that their judgments themselves may be persuasive in reinforcing various norms internationally (a recognition that may make the Court's reluctance to apply peremptory norms directly or more forcefully all the more troubling). That is not to say that the development of international law is a self-fulfilling prophecy. But by viewing the role of the courts in these cases in terms of an ongoing dialogue, one with definite international implications, we can see that international law may only become better defined and, for better or for worse, more persuasive in future cases.

#### Notes

1. *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2 [hereinafter *Ahani I*].
2. *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force April 22, 1954 [hereinafter *Refugee Convention*] and *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967 [hereinafter *Protocol*]. See in particular Art. 1(F) of the *Refugee Convention*.
3. *Ahani v. Canada (Minister of Citizenship and Immigration)*, 58 O.R. (3d) 11, [2002] O.J. No. 431 (OCA) at 111 [hereinafter *Ahani II*].
4. *Ibid.* at 114.
5. Note: The Committee issued the interim measure request, according to Rule of 86 of its rules of procedure.
6. This decision can be found online at: <[http://www.lexum.umontreal.ca/csc-scc/en/com/2002/html/02-05-16\\_3a.html](http://www.lexum.umontreal.ca/csc-scc/en/com/2002/html/02-05-16_3a.html)> (date accessed: August 2002).
7. [1999] 2 S.C.R. 817 [hereinafter *Baker*].
8. See, e.g., *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.
9. K. Knop, "Here and There: International Law in Domestic Courts," (2000) 32 N.Y.U.J. Int'l L. & Pol. 501 at 510 [hereinafter Knop].
10. *Ibid.*
11. *Baker*, *supra* note 7 at para. 69.
12. *Ibid.* at para 70. Knop, *supra* note 9 at 511–12 also cites this quotation and goes on to characterize the role that L'Heureux-Dubé J. accords to international law as a "persuasive" one.
13. For a good discussion of the evolution of international law in the Canadian courts, see S.J. Toope, "Inside and Out: The Stories of International and Domestic Law," (2001) 50 UNBLJ 11 [hereinafter Toope]. For cases of note, in particular *Slaight Communications Inc. v. Davidson*, [1989] 107 R.C.S. 1038 at 1056–57. See also *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 paras. 79–81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 512; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 348, *per* Dickson, C.J. (dissenting); *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 750. Note that these cases were cited on this point with approval by the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] SCC 1 [hereinafter *Suresh*] at para. 46.
14. Knop, *supra* note 9, cites an earlier case where the persuasive view of international law was forwarded in dissent.
15. This is particularly the case in a common law precedent system. In *Baker*, *supra* note 7, L'Heureux-Dubé J. may only have been trying to determine how international law applied to the case at hand. The judgment's precedential value, however, may have been to reinforce, for future cases, a previously uncertain view on the application of international law to Canadian domestic law.
16. Admittedly this characterization of Iacobucci J.'s view may be a bit rigid, but I cast it in such terms due to the limited scope of this paper. Knop's analysis of transjudicialism is also of note here on the point of domestic courts interpreting international law. Domestic courts need not be seen as merely applying international law, as "police," but also as shaping it. Knop makes this point in her explanation and critique of what she terms the "traditional model"; see Knop, *supra* note 9 at 515–19.
17. Even further yet, Canada is free to decide whether or not it wants to ever make these "obligations" true obligations, *viz.* binding in domestic law, by introducing implementing legislation. If so, Canada would again be largely free, in the implementing legislation, to designate which coercive structure should ensure compliance, be it a Canadian court or international adjudicative body.
18. *Ibid.* at 118–19.
19. *Ahani II*, *supra* note 3 at 118.

20. *Ibid.* at 120.

21. See, e.g., *Ahani II*, *supra* note 3 at 117:

Absent implementing legislation, neither has any legal effect in Canada. Of course, Canada's international human rights commitments may still inform the content of the principles of fundamental justice under s. 7 of the Charter. But Ahani is not merely asking this court to interpret s. 7 in a way that is consistent with international human rights norms. Instead, he seeks to use s. 7 to enforce Canada's international commitments in a domestic court. This he cannot do.

22. See, e.g., *ibid.* at 118.

23. *Ibid.* at 135. See also *ibid.* at 133.

24. *Ibid.* at 134.

25. *Ibid.* at 134.

26. That is, we presume that our statutes and *Charter* should be read in conformity with ratified international obligations.

27. If anything, especially in light of the Court's treatment of *ius cogens* in *Suresh*, one could say that we are moving towards a stage where the default concerning international law, in the Canadian courts, is that it be applied only in a persuasive way, unless implemented.

28. Briefly, the provision governing leave applications is s. 37 of *Supreme Court Act*, R.S. 1985, c. S-26. Under that section, the Court will grant leave to appeal, *inter alia*, "where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision." Further, the *Act* goes on to outline in more detail what the test will be for being granted leave to appeal. The basic test is that question ought to be one of "public importance." The Court also retains a residual discretion, however, to hear cases that it deems it ought to hear. See, e.g., s. 43(1)(a): the Court will "grant the application if it is clear . . . that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it."

29. Note: It would have been interesting to have seen the reasons for the judgment in this case, because we would have been able to see how strongly the majority was endorsing Laskin J.A.'s interpretation of international law. Although we may never know what guided the judges' decision, the judgment by the panel remains significant because the mere fact that there was a dissent (again paralleling the Court of Appeal decision) demonstrates that there is a debate in the courts over the role of international law, and that this debate has yet to be resolved conclusively. This point is only further reinforced when one considers that it is uncommon for there to be a dissent among the judges of a leave application panel.

30. Are courts dealing with these issues more and more simply because – for various social reasons – there are more cases that touch on international law? Or is it because, by recognizing a greater role for international law, the courts have helped foster

a greater attention to international law, thus engendering more cases in this area of law? I suspect it is a combination of both.

31. The facts in *Suresh*, *supra* note 13, are somewhat analogous to those of *Ahani I*. The Canadian government ordered the deportation of Mr. Suresh, a Convention Refugee, on the grounds that he constituted a threat to national security. The government's claim that Mr. Suresh was a threat was based on the allegations that he was a member of and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), and that these constituted terrorist activities. Mr. Suresh was ultimately successful in staying deportation on the grounds that he faced a serious risk of torture if returned to his native Sri Lanka. Unlike in *Ahani I*, the Supreme Court took the view in *Suresh* that the appellant had not been given the proper chance to establish that he would face a risk of torture if he were deported.

32. *Suresh*, *supra* note 13 at para. 61.

33. *Ahani I*, *supra* note 1 at para. 2.

34. See *Suresh*, *supra* note 13 at para. 65, for instance:

Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.

This paragraph goes a long way to suggesting that the prohibition against torture has attained a status that is close to that of a peremptory norm, but is not unequivocal enough to conclude that the Court sees the norm as a peremptory one.

35. On this point, see Toope, *supra* note 13 at 20–21. As Toope points out, writing prior to the *Suresh* decision, the Supreme Court had yet to clarify when customary law might be "compelling or even binding," as a matter of Canadian law. *Suresh* was thus viewed as an opportunity for the Court to clarify whether judges are to apply these norms in a direct or monistic manner, or in a more dualistic manner, *i.e.*, through the vehicle of another domestic law.

36. That is, a peremptory norm would override domestic law even where it has not been formally implemented into the domestic law. (As an aside, Toope points out, at 16–18, that the courts of late have adopted a very limited notion of what constitutes implementation, *viz.* by way of an implementing instrument. Toope gives an account of various other ways of characterizing international law as being implemented.) The default view is the broader view of how international law should apply, however, because this view would have all ratified international instruments override domestic law, and not just those norms which have achieved the most widespread consensus.

37. *Suresh*, *supra* note 13 at para. 60.

38. *Ibid.* at para. 75.

39. It is here that the question of the status of peremptory norms in Canadian law is perhaps best illustrated. Are peremptory norms to take priority over domestic law to the extent that



these norms form part of the corpus of domestic law (e.g., as part of the common law, or under its own heading as Canadian law)? Or do these norms take priority over Canadian law as a matter of “pure international law” that takes priority over domestic law? Again, please see Toope, *supra* note 13 at 20–22, for a more complete examination of this question.

40. As Toope, *supra* note 13, says at 17, the Supreme Court has ignored the distinction between what is persuasive and what is obligatory, and this is a loss to both *Charter* and international law cases. Moreover, this distinction is not merely one of semantics, and has definite practical implications. The Court’s ultimate conclusion was that a refugee could be deported, notwithstanding the risk of torture, in rare circumstances where national security would be at risk (*Suresh*, *supra* note 18 at para. 76–79). However small, this is a derogation from the prohibition – it is not absolute. The Court arrived at such a position as a result of the balancing process that courts engage in as part of the s. 7 analysis. This suggests that, because of the *Charter*’s specific interpretive tests, it may not always be appropriate to use the *Charter* as a vehicle for giving expression to international law (especially in those cases where we are dealing with the most firmly entrenched of norms.) These tests may skew the proper application of international norms. What this has meant, in practical terms, is that Canadian government officials – citing reasons of national security – have continued to insist on trying to deport various persons who face a risk of torture, often at the expense of those persons’ procedural rights. This is the case, for example, for Mahmoud Jaballah, an Egyptian refugee claimant. The Canadian government has sought the deportation of Mr. Jaballah, notwithstanding a threat of torture on his return, based on the Canadian Security Intelligence Service’s allegations that he is a threat to national security. Government officials have refused to reveal the case against Mr. Jaballah, however, again citing the need to protect confidential information. (See, e.g., online: <<http://cbc.ca/stories/2002/08/23/jaballah020823>>, date accessed August 2002). Admittedly I am exposing my own bias here on these cases, but query whether these cases might have been treated differently by government officials had the Court accorded an independent status, or more binding reading, to the prohibition on deportation to torture.
41. As it stands, in a judgment subsequent to *Suresh*, the Superior Court of Ontario took a more attenuated view on the role of peremptory norms. In *Bouzari v. Islamic Republic of Iran*, for example, Swinton J. states that “[c]ustomary rules of international law are directly incorporated into Canadian domestic law unless ousted by contrary legislation.” *Bouzari v. Islamic Republic of Iran*, 00-CV-201372 (May 1, 2002) Ont. Sup. Ct at para. 39 [hereinafter *Bouzari*]. In that case, Swinton J. was drawing on the Federal Court of Appeal judgment in *Suresh v. Minister of Citizenship and Immigration* (2000), 183 D.L.R. (4th) 629 (F.C.A.) at 659). As Swinton J. later goes on to say at para. 59, “A rule of *jus cogens* is a higher form of customary international law.” Presumably then, Swinton J.’s judgment can be read to mean that peremptory norms of

international law are directly incorporated into Canadian domestic law, unless ousted by contrary legislation (since *jus cogens* is merely a higher form of custom). However, since Swinton J. makes reference to the Federal Court of Appeal judgment in *Suresh*, it is not clear that the Supreme Court’s view on peremptory norms is consistent with Swinton J.’s. Swinton J. does point out at para. 39 that the appeal in *Suresh* was allowed on another basis. However, since the Supreme Court only treated the prohibition against deportation to torture as an interpretive tool, it is not clear that the Court would endorse Swinton J.’s view of customary law being directly incorporated in Canadian law. For the time being this appears to be an open issue for future courts to weigh in on.

42. Some have suggested for similar reasons that the persuasive reading of international law is actually a step backwards in the role of international law. In earlier case law, for example, courts adopted the presumption that a court should interpret legislation so as to be consistent with international law. See Toope, *supra* note 13 at 16–17 for an account of the various presumptions adopted by the courts in applying international law. I would like to thank Jutta Brunnée for helpful comments on some of the potential downsides of the persuasive approach of international law. Prof. Brunnée’s concerns about the persuasive reading of international law extend beyond the issue of peremptory norms. Briefly, on her view, the persuasive approach is problematic because, on that approach, the influence of international law is at the judge’s discretion. The persuasive approach may lead courts to consider international law in more cases, but its influence in each of these cases may be diminished. This concern is particularly pressing in the human rights context. In the alternative, courts should follow a presumption of conformity, whereby the courts would have an obligation to interpret domestic law consistently with Canada’s international obligations, so far as possible – i.e., not against any clear contrary legislative intent.
43. However, if one follows Swinton J.’s reading of *Suresh* in *Bouzari*, then this statement needs to be qualified. As we have seen in note 41, *supra*, Swinton J. allows peremptory and other customary norms to be directly incorporated into Canadian law, absent contrary legislation. This view, while perhaps allowing for a more robust expression of customary international law, still does not accord a peremptory force, as a matter of domestic law, to peremptory norms. What this would mean, conceivably, is that the legislature could override a peremptory norm with subsequent legislation. Again, it is not clear that Swinton J.’s view is consistent with the Supreme Court’s analysis of peremptory norms.
44. *Suresh*, *supra* note 13 at para. 62.
45. One could argue that the judgments in *Suresh* or *Ahani I* and *II* can be placed under the rubric of international authorities, but that would depend largely on whether one sees these cases as having primarily domestic or international implications. In either event, the distinction is merely one of semantics in this context, and has no effect ultimately on the points I make. I place the judgments of courts within the domestic practices

category because the judgments of courts, interpreting and applying the law, can be a very clear indication of a country's practice or stance on an issue. Note also that Art. 38(1)(d) of the *Statute of the International Court of Justice* lists judicial decisions as "subsidiary means" for the determination of international law.

46. *Suresh*, *supra* note 13 at para. 65.
47. See, e.g., *Bouzari*, *supra* note 41 at para. 61 where Swinton J. rules that given the judgment in *Suresh*, and the cases cited therein, the prohibition on torture has reached the status of a peremptory norm of international law. (This ruling was notwithstanding the Supreme Court's reluctance in *Suresh* to decide finally whether that prohibition was a peremptory norm.)
48. Here again, we see a validation of the view that international law is in part a transjudicial process. See Knop, *supra* note 9 at 515–19 and 533. Knop's discussion of the merging of international and comparative law, at 525, is also instructive in this context.
49. Rosenberg J.A. appears to show some exasperation on this point in *Ahani II*, *supra* note 3 at 138, when he says that if Canada is concerned that the Optional Protocol will be used to shield terrorists, then Canada should denounce the Protocol, instead of continuing as a state party but not fully living up to its associated obligations.

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