Foreword

Aspects of International Law: From Interpretation to Law Making

Louis LeBel
Counsel, Langlois Lawyers
Former Justice, Supreme Court of Canada (2000 - 2014)

Once again, the *Canadian Journal of Comparative and Contemporary Law* has published a collection of essays on important and sensitive legal issues, this time in Public International Law. We owe this new collection to the initiative of Professors Lorne Neudorf, Chris Hunt, and Robert Diab and the Faculty of Law at Thompson Rivers University.

Its title is simply "Problems of Interpretation in International Law". This modest title understates the importance of this collection. It does not pretend, as a textbook might claim to do, to fully review the state of the law. Rather, it opens views on the actual life of International Law. It reviews a number of current difficult issues and looks ahead to the developing future of International Law. It shows that interpretation does not operate solely as a technique to elicit meaning from text. It means more than that as it moves beyond this stage to discuss how interpretation impacts on the creation of the law and on the sometimes tense relationship between International Law and domestic legal systems.

This collection looks at International Law from the perspective of legal interpretation. Such a topic is well known to lawyers, judges, and academics everywhere in Canadian law. Nevertheless, the nature of legal interpretation and of its core principles, even after *Rizzo*[1] and the rise of

1. *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27.

the modern principle of interpretation, remains an ongoing controversy.[2]

As we go through the contributions of the authors of these essays, the problems that interpretation raises in International Law seem close to those that must be addressed in Canadian law.

Some of the contributions focus on narrower issues which also come up in Canadian law. For example, Judge Abdulqawi Yusuf and Dr. Daniel Peat reflect on "*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice". This method is often used and discussed to resolve legal interpretation problems, but the analysis of the authors leads them to a fundamental question on the nature of legislative interpretation. Beyond the words of a text, how purposive can any interpretation be? What is the goal of interpretation? We might ask whether it would possible to find a common purpose in the international community, as readers of statute pretend to discover an intention of Parliament or legislature according to the canons of statutory interpretation. In the discussion of this question, it might be bold to assume the existence of a community of interpretation sharing the same values and processes. It might look more like a hope than a fact, resting on a blind faith in the unicity of International Law.

The issue of whether there exists a truly International Law also comes up when other contributions focus on the interpretation of a key international instrument governing the interpretation, like the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Disagreements extend to the interpretation of principles of interpretation. The paper of Professor Juliette McIntyre raises this problem as it discusses the strikingly different approaches between the High Court of Australia and the Supreme Court of Canada. In their interpretation of the *Vienna Convention*, both high Courts embrace a stated goal, ensuring the uniformity of its interpretation given its critical importance in

2. For *e.g.* Stéphane Bernatchez, "De la vérité à l'intersubjectivité, et du texte au contexte vers une conception réflective de l'interprétation du droit" in Stéphane Beaulac & Mathieu Devinat, eds, *Interpretatio non cessat*: *Mélanges en l'honneur de Pierre-André Côté* (Cowansville: Éditions Yvon Blais, 2011) 79.

the development of International Law. Despite this shared purpose, the author asserts that one court, the Supreme Court of Canada, has shifted to a more teleological method while another, the High Court of Australia, remains wary of moving away from a more textualist approach. In the end, beyond the desire to foster the unity of International Law, the methods of interpretation of International Law, as they are applied in practice, remain distinct according to the holdings of two judicial bodies belonging to the same legal culture, the Common Law.

Other contributions seem to lead to an acknowledgment that International Law may take a regional colour. An interesting example is found in the article of Professor Lucas Lixinski, "The Consensus Method of Interpretation by the Inter-American Court of Human Rights". The author sets out the strengths and the drawbacks of the method as it is used by the Inter-American Court to reinforce the application of human rights. His analysis supports a view that the effectiveness of International Law principles and rules varies as they are applied in different parts of the world, either by regional judicial institutions or by national courts.

The same concern about the unicity of International Law underpins the paper of Dr. Daniel Peat on "Interpretation and Domestic Law: The Prosecution of Rape at the International Criminal Tribunal for the former Yugoslavia". The author considers the relationship between International Law and national laws when the latter are used to interpret International Law by giving substance to international instruments. This essay confirms a tension about the nature of International Law as to whether it constitutes an essentially autonomous system of law or necessarily incorporates elements of national legal systems.

In Canada, it is well established that International Law is given at least interpretive or comparative law value. The jurisprudence of the Supreme Court of Canada, since *National Corn Growers v Canada (Import Tribunal)*[3] accepts that consideration from International Law is appropriate in the interpretational Canadian laws. For example, it seeks to ensure consistency between Canadian laws and treaties on which they are based.

3. [1990] 2 SCR 1324.

But the influence of domestic law as a source of interpretation in International Law raises more concern among a number of International jurists, as Dr. Peat acknowledges. For example, a prominent scholar, Mr. Antonio Cassese, both in his judicial and academic work, asserts that the use of national laws may compromise the uniformity of International Law. Moreover, doubts arise about the possibility of relying on truly exhaustive reviews of the national legal systems of the world. But despite these reservations, according to the author, the practice of International Courts, like the International Criminal Tribunal for the former Yugoslavia ("ICTY"), appears to confirm the relevance of a review of domestic laws to give substance to the general provisions of international instruments like the *Rome Treaty* or the *Statute of the ICTY*.

The relationship between International Law and domestic laws stands at the center of other essays as some of the authors move beyond strict issues of interpretation; they focus on the nature of that relationship and on the scope of its impact on International Law and on national legal systems. In his comments on a sad chapter of the legal and political history of Canada, Mr. Gib van Ert reviews the attempts of British Colombia, a century ago, to exclude Chinese and Japanese immigrants. His contribution shows that, on one side, International Law, as found in treaties between the British Empire and Japan, contributed to the definition of the scope of provincial and federal powers in a former British colony like Canada. On the other side, it illustrates how national law may limit the effectiveness of validly concluded treaties. The treaties with Japan needed to be received into the domestic order of Canada to become effective. The treaties between the British Empire and Japan were undoubtedly law governing their relationship within the international order as independent political actors. But at the same time, within the Dominion of Canada, these treaties would not be binding law until they became part of the domestic law of the Dominion of Canada. A two-way relationship between the different legal orders is needed to create an effective or holistic legal system. It suggests that legal orders situated at different levels do not easily remain totally autonomous.

Two other contributions focus on the use of interpretation to identify sources of law or even to create law. This process of creation involves the

discovery of new materials or sources that finally contribute to defining and fleshing out the rules and principles of International Law and to moving it into new directions.

For example, Professor Marie-Claire Cordonier Segger explores in depth the nature of the interpretative process as such in her paper "Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development". She focuses on the quest for relevant materials in order to bring into the interpretation of economic agreements concerns about problems of sustainable development. Interpretation becomes a process of acknowledgment of relevant sources to broaden the scope of the agreements. This requires the recognition of a variety of soft law and of consensus arising out of it. It is interpretation in the sense that it adds to the sources used in the interpretation process. This approach invites us to look beyond the text of agreements to the conduct or practice of international actors. It includes a range of emerging standards in the process, but leaves open the problem of the triggering points at which those developing concerns acquire a normative effect because they become part of international customs or find their way into the interpretation of a text.

The problem of the sources of interpretation in international agreements is raised by Professor Joshua Karton in another context in his paper "Choice of Law and Interpretive Authority in Investor-State Arbitration". First, the author acknowledges a growing backlash against investors' state arbitration. He then looks for a solution in a new approach to the interpretation of the instruments governing this form of arbitration. As the author points out, this arbitration process faces a problem of democratic legitimacy in many of the states that entered into such agreements. These concerns demonstrate the importance of the connections between domestic and International Law, in order to develop the interpretative principles of such agreements. According to the author, International Law, in such a context does not stand in isolation. Preserving the legitimacy of this particular form of arbitration requires that the process of interpretation give more respect to the law of the states that entered into these agreements to more clearly define rules of choice of law and interpretation governing their application. It

does suggest that the application of International Law in such a context may have to reflect the presence of communities that states represent and their values. The preservation of a link between these values and the interpretation of such agreements is required to reach a proper balance between private and public interests.

Finally, in the paper of Professor Rumiana Yotova, "Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court", the approach of the international laws considers a classic problem of interpretation. It discusses the view and the question of the International Court of Justice on the interpretation of article 38(1)(c) of the *Statute of the International Court of Justice* ("*Statute of the International Court*") which states that the general principles of law common to civilized nations are a source of law. It discusses how those principles can be recognized and accepted for the purpose of the application of this provision of the *Statute of the International Court*.

The essay of Professor Yotova raises concerns about the scope of the process of interpretation. The review of the jurisprudence of international courts of justice confirms tensions between different methods of interpretation in International Law. One would be based essentially on consideration of International Law itself and another would rely on a more comparative approach extending to national legal systems. These disagreements reflect conflicts between the strands of opinion about the scope of the interpretative process itself.

In the end, in the application of a provision like article 38(1)(c), the problem of interpretation concerns the development of the substance of legal rules through a process of identification of the sources of law themselves. As the author shows, this highly complex process goes beyond abstract word play. It seems to show that the life of the actors of the international community actually becomes a main source of law, even in the interpretation of critically important instruments like the *Statute of the International Court* or of the *Vienna Convention*.

Interpretation is not formally acknowledged as a source of law in such instruments, but it is recognized as a necessary and legitimate process, reflecting the life of the actors participating in the development

of the international community, as it seeks to determine the sources of law, their nature and their reach. The process of interpretation raises a basic question: how is law born and what is law? Is there a common International Law? How worldwide is International Law?

The problems raised in this collection of papers illustrate the richness and diversity of International Law. Their authors do not close the issues, but they open them to new chapters in their evolution.