The van Ert Methodology of Domestic Reception

Gibran van Ert, *Using International Law in Canadian Courts*.
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Reviewed by Jamie Cameron*

Introduction

To those who might describe themselves as "non-internationalist," international law—what it is, where and how it applies, whether it is law, and why it matters—presents difficult and uncomfortable questions. Absent an anchor in domestic law, which is the stock in trade of Canada's legal community, international law can be dismissed with relative ease: If international obligations bind the executive, critics ask why violations are currently little more than "diplomatic incidents," which may be "politically embarrassing" but are "legally insignificant."[1] From this viewpoint, this chaotic and inaccessible body of law is not considered part of Canadian law, except "as a comparative curiosity, an interesting fiction, or collection of occasionally useful supporting documents."[2]

Gibran van Ert confronts these misconceptions in his recently released book, *Using International Law in Canadian Courts*. The book is an ambitious project, which seeks to "advance this country's efforts to fulfil with honour the duties of its statehood."[3] For Canada to discharge those duties, the author indicates, it must be understood that international legal obligations bind the entire state, including its legislature and judiciary. *Using International Law* explains how the integrity of our

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[1] Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 4. Current to April 1, 2002; for updates and developments see <http://www.gibvanert.com>.

[2] *Ibid.* at 276 (referring, specifically, to international human rights law).

[3] *Ibid.* at 3.

domestic law depends on its respect for, and compliance with, international law. From that perspective, the book is an exercise in harmonizing bodies of law that have been treated as separate and in tension, if not in conflict, with each other. The author insists that international law is part of domestic law and argues that fulfilling the duties of statehood need not compromise Canada's sovereignty as a nation.

The domestic application of international law is governed by common law rules of reception that Canada inherited from Britain and adapted to local circumstances in the years following *Statute of Westminster*[4] independence in 1931. Broadly speaking, the two main rules of domestic reception are incorporation and implementation. They are based on the principles of respect for international law and self-government. Under that scheme, customary international law applies domestically through its incorporation into common law doctrine, but treaty obligations do not become binding in Canadian law unless implemented by the federal or provincial legislatures. International law is in tension with the concept of self-government and the two "do not sit easily together."[5] Neither can have free rein over the other, for that would permit one to consume the other, and balance between the two is necessary to ensure the survival of both.

Seeking to explain how that balance should be achieved across a range of reception issues, van Ert writes at a level of abstraction, yet hopes that his work will serve "first and foremost as a guide for practitioners."[6] His book provides a "complete account of the Canadian law of reception in order that courts and counsel tackling questions of international law may proceed from a common starting-point."[7] Van Ert maintains that the law of reception is not "a haphazard collection of ancient case-law overlaid with an equally haphazard modern jurisprudence" but is instead "a complete and internally-consistent system" of rules and principles for the application of international law.[8] To rationalize this system and render it accessible, he employs a "principle-based analysis," which places the "spotlight" on specific questions of domestic reception.[9]

Using International Law is clearly reasoned, but complex and comprehensive in its treatment of the issues. It introduces van Ert as an author who is confident, straightforward, and methodical, without being dogmatic. Internationalists, along with experts on federalism, treaty interpretation, administrative law, and the enforcement of human rights guarantees, should congratulate him before debating "the van Ert methodology of domestic reception". Though the book's painstaking analysis of

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[4] *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4.
[5] van Ert, *supra* note 1 at 6.
[6] *Ibid.*
[7] *Ibid.* at 3.
[8] *Ibid.*
[9] *Ibid.* at 11.

specific questions of reception cannot be discounted, the creation of a methodology to address these issues should be seen as its primary contribution.

This review approaches the author's methodology of domestic reception from a constitutionalist's perspective. Although the book addresses the use of international law in Canadian courts, it also engages principles of constitutional law, as the balance between respect for international law and self-government unavoidably rests on a conception of institutional role. Accordingly, the domestic reception of international law cannot be disentangled from fundamental issues about institutional relations between the executive, legislative, and judicial branches of government.

The van Ert Methodology of Domestic Reception

Though it is not "self-evidently so," van Ert acknowledges that Canada's rules of reception are "a matter of constitutional law."[10] He gives pause, though, because our written texts are silent on the application of international law. This does not create a "constitutional vacuum", however, for the rules of reception are unwritten principles that are "of a constitutional nature."[11] Whatever the constitutional status of common law reception rules may be, it is clear that the domestic application of international law rests on a series of relationships between institutions. For instance, the executive can bind the state to obligations internationally, but cannot guarantee their enforcement as domestic implementation is the prerogative of the legislative branch. Nor can the courts implement treaty obligations as a matter of judicial initiative; that authority also rests with the legislature. Under that scheme, the domestic reception of international law depends, institutionally, on the co-operation of the law-making branch of government. The problem for van Ert is that respect for international law suffers under the constraints of self-government. Without challenging the state's prerogative to reject international law domestically, he recalibrates the balance to create a presumption in favour of its reception.

The following analysis explains how the author's methodology applies to customary international law and the treaty presumption, before turning to the constitutional implications of reception under the division of powers and the enforcement of human rights. First, a better understanding of van Ert's conceptual framework is required. He envisions the principle of respect as a matter of identity and membership in the international community.[12] Over time, that principle has been embedded in the common law rules of reception: as scholars of Blackstone's rank explained, if Britain did not respect international law, it would be isolated "from the community of civilized states."[13] Yet, applying the principle of respect for international

[10] *Ibid.* at 47.
[11] *Ibid.* at 48.
[12] *Ibid.* at 8.
[13] *Ibid.* at 7.

law detracts from self-government because that view of reception binds the state, inside its own borders, to the will of the international community. At the same time, the state's prerogative to disregard international law and break its agreements fundamentally subtracts from the principle of respect for international law. *Using International Law* shows how Canada can apply international law without surrendering its prerogative of self-government.

Though he makes an exception for the division of powers, van Ert argues that respect for international law should be Canada's "default" position. By this he means that domestic reception should be assumed, and that international law should apply, as part of Canadian law, unless it offends or causes detriment to the self-government principle.[14] Under van Ert's scheme, self-government prevails only sparingly and by way of exception. Yet, his methodology does not ignore the institutional consequences of its default status for institutional law. To the contrary, it rests on certain assumptions about the nature of institutional roles in this context. Thus, van Ert argues that the legislatures can defend the principle of self-government by enacting laws which violate international law or choosing not to implement the executive's treaty obligations. Because the legislatures are sovereign and can disregard it, the role of "asserting" respect for international law is confided in the judiciary. For that reason, courts risk upsetting the balance between the two principles of reception when they "take it upon themselves to vindicate self-government rather than leave that responsibility to the legislature."[15]

From an institutional perspective, the incorporation of customary international laws that are "demonstrably in place" is less problematic than the implementation of treaty obligations.[16] For that reason, the principle of respect for international law has its "freest reign" in this area, and the incorporation doctrine "invites courts not only to adjudicate consistently with international law but to adopt international customs as the rules upon which their adjudication is based."[17] Incorporating customary international law into the common law does not detract from the principle of self-government because the legislature has the power to alter or modify the common law by statute. When it enters the domestic system this way, customary international law remains subject "to the exercise of self-government through statutory action."[18] Even so, van Ert acknowledges that "doubts and misunderstandings" about the relationship between custom and the common law, as well as the common law and statutes, "have concealed how firmly Canadian law embraces customary international law."[19]

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[14] *Ibid.* at 211.
[15] *Ibid.* at 219.
[16] *Ibid.* at 51.
[17] *Ibid.* at 137.
[18] *Ibid.* at 138.
[19] *Ibid.* at 137.

Unlike customary international law, treaty obligations implicate relations between the executive and legislative branches, as well as between the legislatures and the courts. The general rule of reception is that treaty obligations do not have domestic effect until implemented by the legislature. Consequently, "[s]elf-government's suspicion of international law is as much a discomfort with prerogative powers as it is a wariness of the international law-making process."[20] The source of this discomfort, which is traced in British history to contests between the Crown and the emerging processes of parliamentary democracy, is the fact that the executive does not have the power to make laws. The Crown prerogative over foreign affairs permits the executive to enter into treaty obligations that bind the state internationally, but not domestically. The extent to which such obligations are discharged domestically is within the province of the legislature. As van Ert explains, "[i]t is not the externality, but the absence of a deliberative, representative and participatory legislative process, that founds self-government's objection to the direct application of international law in Canada."[21]

Implementation of International Law

In the absence of express language to that effect, it may not be clear whether legislation implements Canada's treaty obligations. Answering that question engages principles of statutory interpretation, including the application of the treaty presumption. Despite its unquestioned sovereignty to do so, the legislature's competence to enact statutes in violation of international law is curbed by "an important practical qualification."[22] In van Ert's view, the presumption of international legality, or treaty presumption, "*requires* our courts to interpret domestic law consistently with Canadian treaty obligations," whether those obligations are implemented or not.[23] Controversy is inherent in interpretation, and the application of this presumption is no exception. Two issues of implementation which attract van Ert's attention are (1) the so-called ambiguity requirement and (2) the application of unimplemented treaty obligations in administrative law.

The Ambiguity Requirement

The perennial debate surrounding the ambiguity requirement is whether the treaty presumption only applies when domestic legislation is "ambiguous". The difficulty in determining when a statutory provision is ambiguous, for the purpose of reception, has produced a healthy jurisprudence over the years. Yet, the author rejects the ambiguity requirement because it "erodes the principle of respect for international

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[20] *Ibid.* at 68.
[21] *Ibid.* at 174.
[22] *Ibid.* at 65.
[23] *Ibid.* at 121 [emphasis added].

law, without advancing *in any important way* the principle of self-government."[24] In his view, dispensing with that requirement does not prejudice self-government, as the legislature can violate international law; to do so, however, it must employ "unmistakeable language" and not "leave the court to do its dirty work."[25] For that reason van Ert proposes that legislation in violation of international law be subject to a "no ambiguity requirement."[26] Though he acknowledges that this version of the treaty presumption sets aside the implementation requirement, he suggests that it is "only to a minor extent."[27] As long as the presumption is rebuttable by the legislature's clear and unmistakeable intent to violate international law, its application does not "in any way prejudic[e] the principle of self-government."[28]

Under this view of reception, however, the executive branch seemingly would have the power to bind domestic law to international obligations, without any requirement that such obligations be adopted by the legislatures. Moreover, van Ert's methodology would require the courts to enforce implemented and unimplemented treaty obligations. Instead of asking whether international law has been received in Canadian law, van Ert *assumes* reception and places a burden on the legislature to exercise its power to dissent from international law. Under this methodology, the legislature's participation is not a prerequisite of domestic reception.

Application of Unimplemented Treaty Obligations in Administrative Law

On the question of administrative law, the interval between *Capital Cities Communication v. Canadian Radio-Television Commission*[29] and *Baker v. Canada (Minister of Citizenship and Immigration)*[30] shows how much ground the principle of respect for international law has gained over the years. In *Capital Cities*, a majority of the Supreme Court rejected the treaty presumption's application to the Canadian Radio-Television Commission.[31] In stark terms, van Ert describes the majority's conclusion that Canada's unimplemented treaty obligations do not bind administrative decision makers as being "in direct conflict" with the subsequent decision in *Baker*, as well as "unmeritorious ... in its own right."[32] The author discusses *Baker* at some length before concluding that the default position of administrative law, "like that of

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[24] *Ibid.* at 125 [emphasis added].

[25] *Ibid.* at 127.

[26] *Ibid.*

[27] *Ibid.* at 218.

[28] *Ibid.* at 130. Note that van Ert's unmistakeable signal requirement is reminiscent of the late Beetz J.'s analysis of the emergency branch of peace, order and good government doctrine in *Reference Re Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373 at 459-72, 68 D.L.R. (3d) 452.

[29] [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609 [*Capital Cities*].

[30] [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*].

[31] van Ert, *supra* note 1 at 112.

[32] *Ibid.* at 225.

Canadian law in general, is respect for international law."[33] Though the presumption of international legality can be rebutted in special cases, he found that the dissenting opinion in *Baker* did not advance persuasive grounds for protecting the principle of self-government in those circumstances.[34]

Westminster constitutionalists might not be so eager to accept this methodology; from their perspective, the domestic reception of international law under van Ert's model is two steps removed from the democratic underpinnings of the self-government rationale. Once the executive undertakes obligations, the courts are invited, if not required by the author's approach, to interpret them as binding domestic law. Yet, neither the executive branch nor the judiciary is democratically accountable; moreover, as noted above, the legislature is cast under this model in negative terms. This view presents sovereignty and self-government as elements of raw political power which obstruct the reception of international laws that are presumed to be principled in nature.

Having reached these conclusions, the author defends self-government on one question of domestic reception: the division of powers between the federal government and the provinces. In the *Labour Conventions* case,[35] the Privy Council infamously held that the federal government lacked the constitutional authority to implement treaty obligations which encroached on provincial jurisdiction under section 92 of the *Constitution Act 1867*.[36] In doing so, Lord Atkin concluded that "an incursion by the federal government into provincial jurisdiction by means of the treaty power" was "as much an affront to the self-government principle" as any attempt would be for the executive to make domestic law in a unitary state.[37] The necessary result of the *Labour Conventions* doctrine is the non-performance of treaty obligations which fall under section 92, except when the provinces decide in their own right to adopt such obligations.

On this question, one might have expected the author to side with the critics of the Privy Council.[38] Their support for a federal treaty power would have the effect of advancing the domestic reception of international law. Van Ert canvases the debate on federalism and treaty implementation from 1937 to the present and concludes that the *Labour Conventions* rule is "the best means of balancing the reception system's principle of respect for self-government and respect for international law."[39] In his

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[33] *Ibid.* at 227.

[34] *Ibid.* See *ibid.* at 214-26.

[35] *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.), [1937] 1 D.L.R. 673 [*Labour Conventions*].

[36] *Constitution Act 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92, reprinted in R.S.C. 1985, App. II, No. 5.

[37] van Ert, *supra* note 1 at 192.

[38] See *e.g.* F. R. Scott, *Labour Conventions Case*, (1956) 34 Can. Bar Rev. 114; V.C. MacDonald, *The Canadian Constitution Seventy Years After*, (1956) 15 Can. Bar Rev. 401.

[39] van Ert, *supra* note 1 at 206.

view, any other result would enable the federal government to violate the jurisdiction of the provinces. This would amount to "an unconsensual imposition of law by one community upon another, thus denying the imposed community its self-government."[40] Yet, if the author is correct in his conclusion that Canada has found ways to overcome the federalism obstacle to treaty implementation, it remains unclear why self-government is compelling on this issue but not others in *Using International Law*.

His point may be that removing the federalism constraint for treaty implementation defeats provincial self-government. In other instances, such as application of the treaty presumption, it is difficult for self-government to prevail, but the principle is not defeated because the presumption is, in theory, rebuttable. Under the division of powers, however, the provinces would lose jurisdiction under a principle of interpretation that granted the federal government the constitutional authority to implement treaty obligations on subjects allocated to the provinces. If the provinces have the sovereignty to reject international law, within federalism, it is the *constitutionalization* of a federal implementation power that threatens the destruction of their self-government.

Reception of International Human Rights Law and the Charter

The interaction between international and Canadian laws, and particularly the *Canadian Charter of Rights and Freedoms*,[41] has not as yet received the critical attention it deserves. In addressing that challenge, van Ert explains that his purpose is to propose a theory that justifies reliance on international standards of the *Charter* and domestic human rights context. Before proposing his own theory, he provides an insightful analysis of the late Chief Justice Dickson's contribution to the promotion of international human rights law.[42] There, the author's model applies the presumption of international legality, "corrected" by the doctrine of the universality of human rights, to "assure broad access to international sources and greater respect for international law."[43]

Van Ert's universal presumption of international legality renders respect for international law the default position in Canadian human rights law. Here, as elsewhere in *Using International Law*, international standards apply until displaced. The author asks whether domestic guarantees are consistent with international human rights law, and those that fail the standard must be brought into compliance. Though it can be rebutted, this presumption of reception and compliance "introduces a serious domestic commitment to international human rights law by *forcing* litigants and

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[40] *Ibid.*

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

[42] van Ert, *supra* note 1 at 252-60.

[43] *Ibid.* at 270.

courts to look to that body of law to determine the nature and scope of domestic rights guarantees."[44]

The author theorizes that special rules apply to the reception of international human rights law because of the universality of human rights, the *Charter*, and the "perceived priority of human rights over other areas of law."[45] International human rights instruments are different from trade pacts and other agreements because "they attempt to express the legal significance of being human."[46] It is a mistake to assess their relevance on the basis of their legal status as binding or non-binding rules.[47] It is the universality of *human* rights which supports a theory that all but negates the principle of self-government.

Under van Ert's methodology, self-government is, at best, a "rarely-used *exception* to the *rule* of respect for international law."[48] In this, he makes no pretense of balancing the twin principles of reception. The difficulty, however, is that human rights guarantees are akin to the federalism constraint of the *Labour Conventions* rule: in both instances, the constitutionalization of respect for international law negates self-government. Just as federal treaty implementation in areas of section 92 jurisdiction emasculates provincial self-government, the implementation of international human rights law through *Charter* interpretation undercuts legislative self-government because the *Charter* jurisprudence is itself entrenched. The judicial implementation of non-binding and unimplemented international human rights law is only subject to self-government in the limited sense that section 33 permits legislatures to override the *Charter* guarantees. Even so, some guarantees cannot be touched and the override must be re-enacted every five years in any case.[49]

Once again, van Ert proposes a methodology which advances respect for international law by drawing the question of reception further away from the self-government principle. It is one matter for the executive to undertake treaty obligations which are not incorporated into domestic law; it is yet another for the courts to bypass the legislatures, whether under the *Charter* or human rights statutes, and incorporate international standards that are unimplemented and may not even be binding on Canada.

Conclusion

This review concludes with three brief comments. First, whether in agreement with van Ert or not, and whether an internationalist or not, it would be impossible for

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[44] *Ibid.* at 274 [emphasis added].
[45] *Ibid.* at 233.
[46] *Ibid.* at 234.
[47] *Ibid.* at 234.
[48] *Ibid.* at 275 [emphasis added].
[49] *Charter*, *supra* note 41, ss. 33(3)-(5).

any reader of his book not to gain valuable insight into the domestic reception of international law. *Using International Law* is an enormously stimulating book and represents a remarkable achievement on the author's part. This does not mean, of course, that his methodology and its applications should not be closely debated.

Second, from the constitutionalist's perspective, the ease with which van Ert discounts or dispenses with the self-government principle is troubling. Though he is an internationalist whose methodology marks a step forward for the domestic application of international law, that goal is achieved by minimizing the institutional and ideological importance of the democratic process. The powers of the unaccountable or less accountable branches of government, which are the executive and the judiciary, are substantially enhanced as a result. Accordingly, its institutional consequences should play a vital part in any discussion of the van Ert methodology of domestic reception.

Finally, van Ert's objective was, first and foremost, to provide a guide to the use of international law in Canadian courts which would serve practitioners. Space constraints have not permitted this review to document the author's attention to the structure and details of Canada's reception jurisprudence. Readers should know that here, too, he achieved his objective admirably.