GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS (THE HAGUE; LONDON; NEW YORK: KLUWER LAW INTERNATIONAL, 2002)

By Jaye Ellis[*]

This is a remarkable book that makes a serious and important contribution to scholarship in a number of ways. First, it represents the fruits of an exhaustive review of the relevant legal sources and literature; second, it provides an account of the Canadian system of reception of international law that is at once detailed, concise and clear, despite the complexity of the system and the confusion it generates; and third, because it is in many respects a model of doctrinal research and writing.

The author's stated purpose "is to provide Canadian practitioners and legal academics with a straightforward guide to using public international law in Canadian courts and tribunals (VII)". He accomplishes his goal, without a doubt; indeed, his claims regarding the book's contributions are rather modest. The subject that van Ert takes on is, as he acknowledges, fraught with difficulties. The complexity of the system has already been alluded to. Our reception rules are found in a range of sources, including inheritances from British constitutional law such as royal prerogatives and unwritten constitutional rules, which present certain difficulties for jurists. Furthermore, the rules draw often very fine distinctions between categories of cases, and it is often difficult to grasp the principles underlying these distinctions. This complexity would render the system difficult enough to comprehend. However, adding to the difficulties is the fact that Canadian lawyers, jurists and judges are often not very familiar with international law sources, leading to confusion about the methods by which one identifies, categorises and applies rules of international law in the domestic setting. In addition, in the words of the author, the reception system "has never before been identified or depicted as a 'body' at all, but only an assortment of common-law, statutory, constitutional and interpretive rules (VII)". As a result of these difficulties, van Ert's project is timely and significant, as it will most certainly contribute to a higher level of understanding of the rules and of the principles and policies that underlie them.

The book is timely in another sense, as well. For the past half-century at least, developments in international law have taken that system into areas such as human rights, environmental protection, humanitarian law, and trade in goods and services, to name just a few of the more obvious examples. At the same time, processes of harmonisation of domestic rules among various jurisdictions subjects have accelerated. The phenomenon identified as interdependence or globalisation has made the world beyond state borders seem much closer and more significant, and has made the borders themselves seem more porous, than was the case even a few decades ago. As a result of these and other developments, the relevance of

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international law to municipal law need no longer be emphasised. A recent spate of cases in the Supreme Court of Canada that address the relevance of international law to domestic legal issues has brought this point home. For these reasons, a comprehensive yet accessible work on the subject is most welcome.

The book is intended for an audience of mainly Canadian jurists, but the author does not presume detailed knowledge of public international law, nor of Canadian rules of reception. The author begins at the beginning, so to speak, with basic discussions of the origins and foundations of the Canadian reception system, as well as international law and its sources. Having laid the groundwork, he takes up the presumption that legislatures do not intend to legislate in violation of international law (the presumption of legality); the role and status of customary and conventional international law in Canadian law; the distinction between treaties that have been transformed into Canadian law through legislation and those that have not; and the use of international human rights law before Canadian courts, which he treats as a special case. I will have more to say on this in a moment.

The structure of the book is such that those with a basic familiarity with these topics can move on to the more substantive chapters. However, the book is much more than a manual for practitioners; it presents a carefully crafted and elegantly presented conceptual framework for making sense of the reception system. It is thus well worth reading as a whole in order better to appreciate the development of this line of argument.

The Canadian reception system is presented with admirable and remarkable clarity. The author plunges into the detail, analysing case law in Canada and England on the rules of reception but also on a range of related topics such as the nature of royal prerogatives, constitutional custom, and judicial notice. These detailed discussions testify to the author's own exhaustive knowledge and thorough understanding of the rules, their origins, and debates about their interpretation. However, the presentation is such that the reader does not get lost in this detail. The author brings the reader back to the surface, placing the detail in a broader context and providing guidance for understanding the interrelationships among the ideas presented.

The fact that the author manages to lead the reader through the dense underbrush and myriad diverging pathways that the legal landscape presents is a noteworthy accomplishment. He relies on a simple yet effective device, namely continual reference to two fundamental principles, respect for international law and self-government, that are in tension with one another. An underlying purpose of rules of reception, the author suggests, is to strike an appropriate balance between these two principles. This device permits van Ert to make sense of this complex and difficult body of rules, and to do so without oversimplifying.

The author's intent seems to be to make every effort to get at the underlying logic of the various strands of doctrine and jurisprudence and to make as much sense of it as he can. As a result of this approach, he is able to identify unity where others have seen divergence; coherence where others have seen confusion. However, his

analysis is not strained. Where unity and coherence are not to be found, the author says so and proposes a way out of the difficulty, with reference to the twin principles of respect for international law and self-government. He is as aware as any of the most vocal critics of judicial decisions on this topic that the courts often display a neglect of, disregard for or even ignorance of the rules of reception and the system of public international law. He is gracious yet pointed in his criticism of Canadian courts, and is in fact quite forceful in his criticism of the approaches of various benches to international human rights law, stating, for instance, that the approach taken by the Supreme Court threatens the principle of respect for international law.

In this chapter on international human rights law, the author gives himself more leeway, developing his conceptual framework to a greater extent than is the case in the other, more doctrinal chapters. After a discussion and analysis of the various ways in which international law has been taken up by Canadian courts, he presents, in a section entitled "In need of a theory", a more explicitly critical analysis of this issue. This analysis is structured by two competing approaches that are reflected in the jurisprudence of the Supreme Court, namely the relevant and persuasive approach and the presumption of minimum protection. The former approach is characterised by its comparative nature, in that it treats international human rights law merely as persuasive authority; by its liberal approach to the use of various sources of international law; and, ultimately, by its weak respect for international human rights law. The latter approach treats international human rights norms as "presumptively respected by the Charter (at 254)"; limits reference to a much narrower range of international sources; appears to take up the presumption of legality, though not in an explicit fashion; and takes international human rights norms more seriously than the relevant and presumptive approach.

Van Ert differs from critics such as Anne Bayefsvy, William Schabas and Stephen Toope, who argue that the Supreme Court has failed to give sufficient life to the relevant and persuasive approach. Far from failing to respect this approach, van Ert argues, "the Court has taken that theory very much to heart, and international human rights law in Canada has suffered for it [footnote omitted] (at 263)". Similarly, van Ert expresses concerns with the presumption of minimum protection, in particular its stricter approach to the sources of international law that Canadian courts may apply. The theory that he proposes, labelled the universal presumption of international legality, embodies the presumption of international legality that already forms part of the Canadian reception system, but takes a more generous approach to sources, arguing that non-binding instruments and conventions to which Canada is not a party should be available to Canadian courts as well as conventions binding on Canada. This chapter is also of interest for its more expanded discussion of the impact of the principles of respect for international law and of self-government, as well as the management of the tensions between the two. This combination of high-quality, thoroughly researched doctrinal writing, on the one hand, and carefully balanced and thoughtfully presented critique, on the other, is bound to push the debates on the Canadian reception system to a higher level.

Van Ert's discussions of case law and doctrine are generally thorough and well-developed. One minor exception is his treatment of the opinion of Justice L'Heureux-Dubé in *Spraytech*[1], which he describes as "somewhat under-reasoned on the interplay between custom, the common law, and administrative law (at 163)". He nevertheless argues that this decision can be reconciled with the rules on reception of international law. Despite my pleasure at seeing the precautionary principle recognised by the Supreme Court as a norm of customary international law and a part of Canadian law, the decision presents a number of puzzles, which, to my mind, van Ert does not resolve. For example, to what extent does the use of a customary principle to construe the granting of regulatory authority to an administrative body represent an innovation in Canadian law, or is it virtually the same thing as using international law to evaluate the exercise of administrative discretion? If this approach is innovative, what might its broader implications be? Are we to understand this decision as an application of the presumption of legality of a statute, or does it represent another form of interaction between customary rules and statutes? It would have been interesting and useful to hear van Ert's thoughts on these matters.

Some questions also remain following van Ert's highly critical discussion of *Suresh*[2]. I agree wholeheartedly with his assessment that this is a difficult, troubling decision, and that there are serious problems with the Court's reasoning. However, this might be an example of an instance in which there is only so much that a court can do. Van Ert argues that the Court relied too heavily on the status of the international prohibition against torture as a customary rule and not enough on Canada's obligations under the *Convention against Torture*[3] and the *Refugee Convention*[4]. The Court recognised that international law prohibits the *refoulement* of a person to a country where he may face torture, regardless of the risk that that person may pose to the security of the country seeking to expel him. However, the wording of s. 53(1)(b) of the *Immigration Act*[5] is, unfortunately, clear on this point: an exception is created to the prohibition on sending a person to a country where his or her "life or freedom would be threatened for reasons of […] membership in a particular social group or political opinion" for certain categories of persons where "the Minister is of the opinion that the person constitutes a danger to the security of Canada". One question which remains is whether torture is subsumed under a threat to life or freedom, or whether the Court could have construed the legislation strictly, concluding that the legislator had not made an explicit exception for threats of torture.

In sum, this is an important book which merits attention. Van Ert's thoroughness of research and clarity of style, combined with his important insights into the strengths, weaknesses and potential for development of the Canadian reception system, represent a significant contribution to legal knowledge.

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1 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241.
2 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 SCR 3.
3 *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* Can. T.S. 1987 No. 36.
4 *Convention Relating to the Status of Refugees,* Can. T.S. 1969 No. 6.
5 *Immigration Act,* R.S.C. 1985, c. I-2.