GLOBALIZATION OF JUDGMENT:
TRANSJUDICIALISM, INTERNATIONAL HUMAN RIGHTS LAW
AND COMMONWEALTH COURTS

by

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A thesis submitted in conformity with the requirements
for the degree of LL.M.
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University of Toronto

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Abstract

LLM 2001
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This paper develops a theory of international human rights law’s relationship to domestic law that mediates between local values and international law’s ambition to govern. It is divided into four parts. Chapter I explores the strengths and weaknesses of various existing approaches to the domestic use of international law. Chapter II identifies five rationales invoked by Commonwealth courts to justify their reliance on international law. Chapter III develops an approach to international law’s relationship to domestic law that is grounded in the case law and that builds on the strengths of existing theories while seeking to address their shortcomings. Chapter IV turns to some of the theoretical questions posed by the invocation of international norms in divergent cultural and legal contexts. Are divergent interpretations permissible? Are they avoidable? Drawing on Hans-Georg Gadamer’s hermeneutic philosophy, it concludes that the same norm can give rise to divergent meanings without succumbing to relativism.
Acknowledgments

I would like to thank Ed Morgan for challenging me to think more critically, deeply and strategically about international law's application in domestic courts and for his invaluable support throughout this process. I would also like to thank Karen Knop for her helpful suggestions and David Dyzenhaus for pointing me to the works of Hans-Georg Gadamer.
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Conclusion
“As it turns out, the law’s creation, like their creators themselves, exist in a tormented state of continuous self-reflection and self-propulsion... One can make an appointment with the doctrinal future, but one can never quell the anxiety over that future.”

Introduction

Once we saw issues and problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world's eye.¹

Seeds of a revolution have been planted in national courts across jurisdictions. Signs of the revolution exist all around as judges turn increasingly to international human rights law in rendering their decisions. The British House of Lords decision in Pinochet represents the best known, widely scrutinized and most dramatic example of such a trend, at least in the West.² As a former head of state, General Pinochet was certainly no stranger to international law and international norms. Yet, international law is also becoming directly relevant to the lives and claims of individuals who have no public or internationally recognized persona. Courts in several different countries have turned to international law to resolve disputes that specifically concern the rights of “ordinary” individuals. Of course, the trend is hardly universal: it has not appealed to all judges and has not taken root in all countries. However, international law has found its way into the national courts of India, Botswana, Israel, Lebanon, Ireland, Egypt, Canada, Australia, England and beyond.³

² R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (Amnesty International and others intervening) [1998] 4 All England Reporter (House of Lords) [hereinafter Pinochet #1]
Extra-judicial factors have undoubtedly spurred the growing judicial reliance on international human rights law in national courts. Judges meet with more frequency at judicial colloquia where they exchange experiences in using international law and receive training on its application. The Internet has advanced international law’s status within scholarship and decision-making in ways that have yet to be fully explained or explored. At the very least, the Internet has facilitated access to information and connected groups


across the world who advocate at the national level with reference to international legal standards. Whereas international resources have historically been difficult to locate, particularly in countries that lack access to expensive law libraries, these sources can now be found readily over the Internet. Moreover, a number of legal clinics and advocacy centres across jurisdictions have dedicated themselves to using international law and supporting lawyers who wish to incorporate international sources into their arguments before domestic courts. Formal and informal e-mail networks permit advocates to exchange opinions and strategies with colleagues in other nations.

Two distinct responses have developed around the question of whether international human rights law represents a source of authority in relation to domestic human rights regimes. One response is characterized by enthusiasm. Proponents of this position tend to approach international law as a source of salvation, a way to overcome seemingly immovable barriers to human rights protection in the domestic order. For example, Kate Millet, a leading American feminist scholar, recently lamented the swing to the political right in her country. She observes, “even though things used to be worse,

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5 Earl Moulton, “Domestic Application of International Human Rights Law” (1990) *54 Saskatchewan Law Review* 31 at 32-33 notes that “the first difficulty facing a practicing lawyer is in locating the relevant instrument.” This should no longer be the case at least for those lawyers with access to the Internet.

6 The Diana Project at the Universities of Toronto, Minnesota, Cincinnati and Yale dedicate themselves to making international legal resources available to scholars, advocates, activists and decision-makers. The URL for the Toronto site (The Women’s Human Rights Resources) is [http://www.law-lib.utoronto.ca/diana/mainpage.htm](http://www.law-lib.utoronto.ca/diana/mainpage.htm). Toronto links to the other Diana sites.

7 See for example Interights at [http://www.interights.org](http://www.interights.org) which supports such advocacy across jurisdictions.

this is not a good moment for American feminism." Invoking that famous call to revolution, Millet asks "what is to be done?" Part of the answer to women's woes, a force that will help bring down patriarchy, according to Millet, is international women's human rights law. "And so" concludes Millet, "I nominate the passage of CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, as the greatest issue of unfinished feminist business before us."10

This growing enthusiasm for international law exists alongside a growing wariness shared by judges, human rights advocates, governments and scholars. On occasion, the resistance takes the form of cultural or religious relativism.11 It represents a desire to protect a culture or people who feel themselves under siege from foreign influences.12 For example, the government of Nigeria refused to contemplate the pleas for clemency based on international legal standards in its decision to whip Bariya Ibrahirmi Magazu for engaging in consensual extra-marital intercourse.13 On other occasions, resistance manifests itself in concerns over democracy and the desire to preserve local institutions, particularly parliamentary decision-making, in the face of rising

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10 Ibid at 668.
11 Savitri Goonesekere, "A Rights-Based Approach to Realizing Gender Equality" available at http://www.meltingpot.fortunecity.com/lebanon/254/savitri.htm; "Rights-based societies are sharply contrasted with duty-based societies. Asian and African societies are then said to have their own concept of human equality and fundamental duties which challenge the basic assumptions that individuals have rights and claims on Governments and the community. Human rights are criticized as Eurocentric Western values, particularly because human rights are often associated exclusively with civil and political rights." Last visited January 31, 2001.
12 Some argue that colonialism is not dead but simply transformed from a political system to an economic one that is supported by a liberal emphasis on civil and political rights over social and economic rights. "As a result, under the rubric of globalization non-Western nations are pressured to accept neoliberal principles of free trade and open markets and the universalist concept of human rights." Peter Schwab and Adamantia Polis, "Globalization's Impact on Human Rights" Human Rights: New Perspectives, New Realities, supra, note 3.
globalization. Still others refuse international norms because of the conviction that local justice is inherently better justice. The reservations to international human rights treaties like those filed by the United States represent one manifestation of such resistance.

Although they adopt opposing stances in the debate over international law’s use in domestic courts, both international law’s enthusiasts and its detractors assume that the question of international law’s application at the local level involves the two domains in a battle from which one or the other must emerge victorious. The former champions international law, while the latter pin their hopes on local legal traditions. This paper argues that it is possible to mediate between the cultures of salvation and resistance that too often dominate discussions concerning international human rights law. It develops a theory of international human rights law’s relationship to domestic law that recognizes international law’s ambition to govern while simultaneously recognizing the efficacy of local values. The analysis is divided into four parts.

Chapter I examines the binding authority and persuasion models, two approaches that have framed the debate about international law’s relationship to domestic law. While the binding authority model emphasizes that judges have an obligation to apply international law, persuasion theory contends that judges should apply international law

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15Regina v. Lord Chancellor, Ex Parte Witham [1998], QB 575 at 585 (QB): “I do not find it necessary to refer to these [European Court] cases, since I consider that the issue may correctly be resolved by reference to the substance of our domestic law...it seems to me, the common law provides no lesser protection of the right of access to the Queen’s court than might be vindicated in Strasbourg.”
where they are persuaded by its logic. Analysis reveals that while the binding authority model expects too much of international law, persuasion expects too little. The binding authority model does not fully recognize the subtle and complex ways in which international law can and must be used in domestic courts. By contrast, the persuasion theory, in its haste to recognize international law’s flexible relationship to the domestic realm, risks giving up international law’s ambition to govern. Identifying the shortcomings of the theories advanced to date under both the binding authority and persuasion rubric serves to identify the criteria that must be met when international law is applied in domestic courts. It also brings to the fore the complex constitutional, strategic and philosophical issues that arise with international law’s domestic application.

Chapter II explores the leading cases of higher level courts from diverse jurisdictions such as Botswana, Nigeria, Nepal, South Africa, New Zealand, Namibia, Australia, India, Canada and England. A review of the rationales invoked by judges to justify their reliance on international law continues the project started in chapter I. It demonstrates that judges sometimes work within the framework of the binding authority model and sometimes within the framework of the persuasion theory. Thus, neither model taken on its own can explain international law’s relationship to domestic law. A review of the rationales invoked by judges to justify their reliance on international law also begins the task of constructing an alternative theory of international law’s relationship to domestic law. Any theory of international law’s relationship to domestic law must be grounded in the case law. It must also accommodate both the commonalities

\[16\text{See for example the reservation of the United States of America to the Convention Against Torture available on-line at www.law-lib.utoronto.ca/diana/conventions/documents.html. Last visited August 27, 2001.}\]
and the differences that are produced when international law interacts with diverse local contexts.

Chapter III builds on the insights of chapter II and takes up the challenges set out in chapter I. It develops an approach to international law's relationship to domestic law that is grounded in the case law and that builds on the strengths of the binding authority and persuasion models while seeking to address their shortcomings. It argues that the five rationales invoked by judges across jurisdictions identified in chapter II can be understood as determinants of international law's weight in domestic decision-making. International law thus attracts the greatest weight in domestic courts when all five rationales are present and pulling in the same direction. This alternative approach is termed "the matrix of considerations." The claim is not that there is a deep structure within the cases or that there is consistency across jurisdictions, but simply that this approach to international law is nascent within the case law. One case from each of Canada, India, England and Nepal provide illustration and demonstrate the efficacy of moving forward by simultaneously looking back at past decisions and looking across at different jurisdictions. This chapter also sets out how the matrix of considerations approach meets the criteria that must be met by an alternative theory as identified in chapter I.

Chapter IV turns to some of the theoretical questions posed by the invocation of international norms in divergent cultural and legal contexts. Are divergent interpretations permissible? Are they avoidable? Will the emergence of divergent interpretations shatter international law's ambition to govern and effectively abandon its norms to cultural relativism? Which is the ultimate arbitrator of meaning, the national or the international
realm? Drawing on Hans-Georg Gadamer’s hermeneutic philosophy as expounded in the landmark book, *Truth and Method*, this chapter concludes that the same norm can give rise to divergent meanings without succumbing to relativism or abandoning international law’s claim to authority. This chapter also explains how variants of the binding authority and persuasion schools are built on theories of language and interpretation that differ in crucial respects but nonetheless both aim at homogenization. Finally, it demonstrates how the matrix of considerations approach finds support in Gadamer’s hermeneutic philosophy. *Miuojekwu v. Ejikeme*, a decision of the Nigerian Court of Appeal helps illustrate the points advanced in this chapter.

This study does not purport to examine every case that relates to international human rights law in national courts across the globe. Rather, the analysis will focus on leading cases within common law jurisdictions of the Commonwealth. Only those cases that cite international law in some substantive way, not simply in passing or as an afterthought, have been included. The emphasis is on decisions of higher level courts because such decisions carry greater legal weight and are intended to guide the decisions of lower courts. The decision to focus on the Commonwealth has practical and philosophical roots.

Commonwealth countries are sufficiently diverse in their legal traditions as well as their social, economic and political composition as to make comparisons both interesting and meaningful. Moreover, emphasis on Commonwealth countries also overcomes the practical issues of language because these decisions are published in English.17 Most importantly, the doctrinal starting point of all the countries examined is

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17 Cases have been identified through various means including a review of proceedings from judicial colloquia relating to the domestic implementation of international human rights law, an examination of
the same: unincorporated treaties are not considered part of the domestic law absent some express act of the legislature.\textsuperscript{18} The fact that international law cannot serve as a direct source of rights in the national case law examined helps bring the major themes of this paper into high relief. In particular, questions are raised about why the invocation of international law is justified. It also points to some of the constitutional implications related to the invocation of international law in national courts and explores the practical effect that international law can have on the development of human rights. Finally it raises questions about the nature of international human rights law and the interpretive issues that arise when judges from diverse legal traditions turn to international legal sources.

This paper seeks to contribute to the legal literature at several levels. First, it offers a framework for understanding the multi-faceted ways in which international law interacts within domestic courts by suggesting that the relationship be understood through the lens of predefined factors that determine international law's weight in a given case. Although various scholars have asserted that international law attracts varying weight in the domestic context, their analysis on this point has not gone far beyond the level of assertion. Some appear to refrain from identifying factors that might control the weight that is assigned to international norms in national courts because such an exercise flouts the claim that judicial reasoning operates within a persuasion framework. The implication is that identifying the elements of judgment undermines the recognition that

\textsuperscript{18}Andrew Byrnes, "Using Gender-Specific Human Rights Instruments in Domestic Litigation" in \textit{Byrnes and Adams, supra}, note 4 at 63.
judges make choices. Still others refuse to consider the possibility that international law might attract varying weight in domestic courts because such an approach seems to undermine the possibility that international law can direct judges towards a sought after result. This paper demonstrates how judicial choice is preserved within the framework of a theory that imposes some criteria on decision-makers.

Moreover, this paper seeks to push international law further into the debate over transjudicialism and transnational judicial dialogue. Although comparative law scholars have opened up and advanced this area of inquiry, international legal scholars have remained largely on the fringes of the discussion. International law's isolation is regrettable and ironic given that international law, by its nature, aims at transcending national boundaries. Yet, studies of international law's use in domestic courts have largely limited themselves to analyzing a single jurisdiction or even a single case. This study aims at contributing to an analysis of international law and transjudicialism by identifying those factors that judges across several jurisdictions find salient within international law. It identifies how international law participates in transjudicialism in ways that are parallel to but also distinct from comparative constitutional law.

In addition, this study aims to contribute to the debate over imperialism versus cultural relativism in international law in two ways. First, the matrix of considerations approach developed in Chapter III permits international law to remain attuned to the local order without necessarily subjugating itself to that order. It recognizes the need to translate international norms into the local context without giving up the notion that international law can be relied upon to change – and not simply examine – the domestic

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legal context. Second, Chapter IV identifies a theory of language and interpretation which contemplates that judges can and will give varying meaning to international norms but which nonetheless insists that language retains meaning and that law remains determinate.

Conclusions drawn in this paper also say something about the role of the judge and the nature of judgment. That judges rely on international law suggests that the judicial task extends beyond simply divining the will of the legislature. At the same time, the judge cannot flout the will of the legislature and must give effect to its dictates. Moreover, the use of international law in domestic courts challenges the claim that legal sources bind decision-making or, alternatively, that they represent tools of persuasion. An examination of judicial reliance on international sources across jurisdictions suggests that these sources sometimes generate options as contemplated by the persuasion theory. At other times, however, international sources create constraints as proposed by the binding authority model.

Finally, this paper has implications for the debate over law’s determinacy and ability to guide decision-making. Some theorists have argued that language is indeterminate because it is always interpreted within a historical context that makes it impossible to derive any pure, unmitigated meaning from words. Within this skeptical movement, some draw on Hans-Georg Gadamer’s monumental book, *Truth and Method*, to support a cultural relativist philosophy. This paper aims to help loosen the relativist grip on Gadamer’s work. It identifies why Gadamer’s theory cannot ground cultural relativist claims and explains how the conclusion that language does not have an
unmediated, transcendental meaning does not necessarily lead to either cultural relativism or skepticism about international law’s ability to govern.
Chapter I: Existing Approaches and Human Rights Advocacy

Once again the international legal voice resounds with a profound ambivalence: universal norms govern states, while the particular sovereign nations govern international norms...such ambivalence inheres in the entire way of thought that is international law.\(^2\)

The question of the relationship of international law to municipal law raises not one but several issues which lead us to the very heart of the nature of international law.\(^1\)

I. Introduction:

"Here and There: International Law in Domestic Courts," a recent and important essay by Karen Knop, argues that international law's relationship to domestic law needs to be re-examined. The essay identifies two models that relate to the domestic use of international law in domestic courts. The "binding authority" model attempts to identify the conditions under which judges have no choice but to give effect to international legal obligations. This model, according to Knop, cannot explain the way in which judges actually invoke international law and ignore the creativity and potential for different interpretations inherent within judging. In contradistinction, the "persuasion school" contends that judges apply international law when they are persuaded by its intrinsic logical power and because they seek legitimacy by linking themselves to courts in other jurisdictions considering the same issues. Knop finds this approach promising but argues that notions of persuasion presented in the legal literature to date must be rejected because they attempt to transplant Western liberal legal traditions into other contexts.

Knop suggests that international law should adopt another version of persuasion drawn

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from comparative law which is more attuned to notions of translation, differences in legal
and cultural traditions, and problems of normative imperialism. She argues that by
blurring the distinction between international and comparative law, internationalists can
better understand the complex and complicated ways in which international and domestic
laws interact.

This chapter surveys the various approaches that have been advanced in favour of
using international human rights law in domestic courts through the spectrum of the
binding authority and persuasion models. The works of leading scholars are used to
illustrate the approaches identified and to set out their shortcomings in relation to human
rights advocacy. Each approach is catalogued as belonging to either the binding authority
or the persuasion theory model. The methodology adopted has several implications.

First, this chapter does not purport to offer an in-depth analysis of the scholarship
or the works individual scholars. The scholarship in this area of law is deep and diverse.
Any attempt to assess it in depth would require a review of the intellectual, political and
legal contexts in which the authors operate as well as a discussion of their reasons for
approaching the subject of international law’s use in domestic courts. But, this is not the
purpose of this chapter. Rather, its goal is more modest. It seeks to identify broad
approaches or arguments advanced in support of international law’s life in domestic
courts and to assess the strengths of each argument in relation to human rights advocacy.
Of course, not all scholars enter into this field with an explicit human rights agenda in
mind. Yet, their arguments have implications for human rights advocacy; hence,
individual arguments are assessed in light of these implications. Second, the decision to
divide the approaches into the binding authority and persuasion models should not be
taken to mean that a single approach exhausts the authors whose work is cited to illustrate the various approaches. At a certain level, the decision to categorize in this way may seem crude and may do injustice to the complexities of various scholars’ thoughts. Again, however, this chapter does not purport to offer a literature review or to analyze fully the theories of individual authors per se. It concerns itself with approaches. The categorization is legitimate in so far as the binding authority model aims at making arguments about why judges must use international law in their arguments even though they may not want to. Persuasion, by contrast, seeks to explain when, how and why judges use international law even though they are not required by doctrine to do so. In this sense, binding authority and persuasion sit on opposite sides of judicial choice, and the various arguments discussed are categorized in relation to their stance on judicial choice. Finally, the method adopted will inevitably appear critical because its objective is to uncover the shortcomings of existing approaches to international law’s use for the purpose of setting out the standard that must be met by any proposed alternative framework. The criticism should not be taken as an exhaustive analysis of the scholarship.

Ultimately, this chapter concludes that a new approach to international human rights law’s relationship to domestic courts is needed for the purposes of promoting human rights in domestic courts. Chapters II and III begin the task of constructing such an approach. This chapter seeks to demonstrate that the task of constructing a new approach to international human rights law’s use in domestic courts is not as daunting as might first appear because the new framework need not proceed tabula rasa. Rather, it can be constructed on the solid foundations already developed by theorists working
within both the binding authority and persuasion models, even though these models may be perceived as working in opposition. In other words, the model proposed in the subsequent sections of this thesis does not seek to demolish the scholarship of others and build a new edifice on their ruins. It instead seeks to reconfigure the existing arguments so that the gaps in one approach can be filled with the strengths of others.

II. The Binding Authority Model

Although the shape and focus of the arguments vary, the approaches that adhere to the binding authority model share a simple objective. They seek to demonstrate that at least some portion of international human rights law binds national courts, and that judges have no choice but to enforce those norms. They may not like the international norms that are presented to them or may remain unpersuaded about their efficacy in a given context, but, judges under the binding authority model must apply international law once it is determined to be relevant. As Karen Knop put its,

the general interest of this model is the hard-wiring of international law into domestic law, the existence of vertical connections that require the courts of a state to enforce that state's international legal obligations.22

The quest to “hard wire” international law in domestic courts no doubt derives from a conviction that judges operate within a culture of resistance when it comes to international law. In this sense, the “hard-wiring” exercise attempts aims at overcoming the culture of resistance by demonstrating to judges that they do not have a doctrinal or

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philosophical choice: they must consider international sources. Several consequences flow from this "hard-wiring" exercise.

1. The All Or Nothing Approach

Variants of the binding authority model assume that international law operates in an all or nothing fashion in domestic courts. Either international law is relevant and totally controlling of judicial decision-making, or it is entirely irrelevant. The binding authority model does not contemplate that international law might carry varying weight within different domestic contexts. Consequently, this "on-off" approach proves unable to explain the case law and the way in which judges actually approach international human rights norms. Rather than seeking to understand what judges are actually doing when they invoke international law, commentators tend to dismiss the case law as hopelessly confusing. Critics of international law celebrate the confusion, while international law's enthusiasts lament it. The critics point to the fact that international law's application at the national level leads to contradictory and unpredictable results as proof that international law lacks coherence and thus authority. The enthusiasts seek to explain what they regard as a muddled state of affairs by lamenting judicial resistance to international law and decrying deficiencies in judicial training. Neither the critics nor

25 Some undertake the futile task of imposing a rationality on the case law from a purely binding authority perspective. See for example Anne F. Bayefsky, International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation (Toronto: Butterworth, 1992). Unable to decide if her goal is to criticize the judges for their inconsistencies and incorrect application of international law or to find an organizing principle that gives coherence to the existing cases, Bayefsky's work is confusing and simply compounds the problem for those seeking to understand international law's relevance to domestic courts.
26 Knop, supra, note 22, at 516 and Byrnes and Adams, supra, note 4.
the enthusiasts, however, fully recognize the possibility that judges might be more concerned with a norm's inner logic and its contribution to the overall persuasive value of a given decision rather than its formal status under international law.\textsuperscript{27}

2. Inability to Privilege Human Rights Claims

Once judges are bound to adopt human rights arguments in an on-off fashion, they cannot make normative distinctions between various international treaties.\textsuperscript{28} Consequently, as Ed Morgan observes, international law has been used by national level courts to limit rights protection.\textsuperscript{29} Significantly, key cases cited by those who argue that the judiciary should look to international law refer to a general obligation to interpret in conformity with international obligations and not to a specific obligation to use international law only to raise the level of available rights protection.\textsuperscript{30}

Some variants of the binding authority model attempt to distinguish between rights enhancing and rights detracting norms. However, their efforts drive them into...

\textsuperscript{27}Knop, \textit{supra}, note 22, at 516.

\textsuperscript{28}Justice Strayer of the Canadian Federal Court of Appeal warned that international norms can sometimes be invoked to limit rather than extend a rights claim. This is an important concern for two main reasons. First, national jurisprudence with respect to the right to equality may be more robust than the protections offered under international law. Indeed, some Courts have used international law to justify narrowing the scope of a particular right. Paola Cardozza, “Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights” 73(5) (1998) \textit{Notre Dame Law Review}, 1217. Second, one must bear in mind that international law encompasses trade treaties and not just human rights instruments. There is a concern that the commitments made at the international level with respect to trade matters can be used to limit or dilute human rights protections available at the domestic level. Some but not all international treaties contain a provision that guards against such a result. For example, the various terrorism conventions do not.

\textsuperscript{29}Edward M. Morgan, “In The Penal Colony: Internationalism and Canadian Constitutionalism” (Fall 1999) 49 \textit{University of Toronto Law Journal} 447 at 475

\textsuperscript{30}See for example Ruth Sullivan, \textit{Dreidger on the Construction of Statutes, 3rd edition} (Markham: Butterworth, 1994) at 330 citing Bloxam v. Favre (1883) 3 P.D. 101 at 107 (C.A.): “every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law.”; Salomon v. Customs and Excise Comrs. [1967] 2 Q.B. 116 at 143-44 (C.A.): there is a \textit{prima facie} presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred; and Daniels v. White and the Queen [1968] S.C.R. 517 at 541: “this is a case for the application of the rule of construction that Parliament is not presumed to
contradictions. For example, Murray Hunt seeks to privilege human rights treaties over other international commitments such as trade or investment agreements by arguing that international human rights law embodies universal values. He dedicates a significant portion of his book to arguing in favour of a judicial duty to interpret in light of international norms absent express legislative language to the contrary. Yet, he also acknowledges the possibility that judges may give varying weight to international norms. Hunt’s approach seems promising: if judges can distinguish between human rights and trade treaties, and if they can give greater weight to rights enhancing norms within human rights treaties, then international law appears to live up to its promise of promoting the progressive realization of human rights. Indeed, his arguments have been adopted by advocates in support of their human rights agendas. Unfortunately, however, this approach does not unequivocally advance a human rights agenda.

First, it is difficult to reconcile the claim that judges have a duty to interpret national law in light of international human rights law with the claim that judges can assign varying influence to international norms in the domestic context. If judges can choose between norms, then Hunt’s interpretive obligation turns out not to be obligatory after all. Second, if international law’s influence in domestic courts stems from its embodiment of “values derived from the lowest of common denominators, common

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32 Ibid at 301.
33 Factum of the Charter Committee on Poverty Issues, supra, note 23.
34 I argue that international law can create obligations in some contexts while remaining a source of persuasion in others. The basis for such a claim is laid out in chapters II and III below. Hunt, by contrast, asserts that international law can have varying weight without fully explaining how this fits into his overall claim that it creates an interpretive obligation.
humanity," it is difficult to understand why judges can be permitted to assign varying weight to international human rights norms. All should be able to make equally good claims to universality. In the end, the insistence that international law binds the judge runs up against the quest to privilege human rights enhancing norms over rights detracting ones.

3. The Narrowing Consequences of Universalism

Another approach evident in the scholarship is to recognize that international human rights law represents universal values. This approach takes various and seemingly unrelated forms. Some point to the rule that norms of customary international law automatically become part of the domestic law. They then seek to argue that certain standards of conduct have attained the status of custom and are thus part of the national law because the values that give rise to these standards are embedded in the common law. William Schabas, for example, has criticized the Canadian Supreme Court for failing to adopt the customary international law route in Baker v. Canada when it considered whether a decision to deport a mother of four Canadian child citizens was

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35Hunt, supra, note 31 at 308.
36See the factum of the Canadian Arab Federation at the Supreme Court of Canada in Suresh v. Canada (Court File No. 2770) which attempts to deal with the ramifications of the Supreme Court of Canada's conclusion that Canadian legislation can be interpreted in light of international norms. The international norms at play in Suresh were norms related to the definition of terrorism that could have a rights detracting impact on Canadian values of freedom of association.
38American scholars in particular are fond of the customary international law route. Their arguments respond to the fact that the United States routinely files declarations along with its ratification of a treaty. These declarations seek to effectively insulate American law from the influence of international treaties by declaring that the substantive terms of the treaty are non-self-executing. In response, American scholars have argued that treaty terms can be used to give meaning to norms of customary international law which in turn has been recognized as a direct source of rights in some American courts See for example Lillich, Richard B., "The Constitution and International Human Rights" (1989) 83 American Journal of International Law 851 at 856-857.
39For example, Earl Moulton, supra, note 5 at 38-39 argues that the Universal Declaration of Human Rights constitutes customary international law.
reasonable in the absence of a consideration of the rights and interests of the children. Observing that two dissenting judges charged the majority with usurping the role of Parliament by relying on international sources, Schabas contends that this debate would have been avoided had the Canadian Supreme Court recognized the *Convention on the Rights of the Child* as an expression of customary international law. Customary international law is treated as part of the Canadian law absent legislation to the contrary because the norms of custom are considered parallel to and part of the common law largely because customary international law purports to express values of a universal nature.

Alan Brudner also takes the universal values approach. He provides a sustained analysis of the claim that at least some international human rights law encompasses universal norms. Brudner distinguishes between “international human rights rules” and “international human rights principles.” The former find their roots in the will of the executive branch of government while the latter encompass those principles of international human rights law that have achieved a higher moral status. Brudner contends that the authoritativeness of such standards rests on their reliability as insights of “the purest moral consciousness of an epoch.” He argues that the incorporation requirement was designed to ensure the subordination of the executive to the general will as embodied by the legislature, and is thus applicable only to treaties that promote executive discretion. However, some provisions within human rights treaties express a

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priori principles of practical reason rather than the whims of the executive; hence, their domestic application does not offend the sovereignty of the general will.\footnote{Ibid at 253.}

Although they respond to the concern that international human rights norms should be separated from and treated differently than other international sources by national courts, arguments rooted in customary international law or the universal nature of international law raise their own concerns. In particular, this approach applies only to a small subset of international human rights norms.\footnote{See Theodore S. Orlin and Martin Scheinin, \textit{Jurisprudence of Human Rights Law: A Comparative Interpretive Approach} (Turku, Finland: Institute for Human Rights, 2000) at 22-26 for a succinct and clear review of the natural law versus positivism debate in international law. "[U]niversality as a major premise of human rights is certainly put into question by reference to actual practice of the law."} It might include the prohibition on torture and genocide and the principle of non-discrimination understood as the right to equal treatment, but there is no agreement that it also includes the best interest of the child, a prohibition on child labour, or the right to equal treatment in the workplace. There is even significant debate about whether the Universal Declaration of Human Rights, the document that gave rise to the international human rights regime, represents customary international law or universal rights.\footnote{Antonio Cassese, \textit{International Law in A Divided World} (Oxford: Oxford University Press, 1989) at 299 insists that the Universal Declaration does not constitute custom but that the Declaration nevertheless represents an important moral and political force. Others insist that the Declaration does constitute custom. See for example J.P. Humphreys, "the Universal Declaration of Human Rights: Its History, Impact and Juridical Character" in Ramcharan B.G. ed. \textit{Human Rights: Thirty Years After the Universal Declaration} (1979) 21}

4. The Resort to Legal Fictions

a. Implicit Incorporation

Other arguments aimed at establishing a judicial duty to apply international law in domestic adjudication rest on legal fictions. The doctrine of implicit incorporation represents one such legal fiction. For example, Ann Bayefsky traces the drafting history
of the *Canadian Charter of Rights and Freedoms* in support of the conclusion that this
document implicitly incorporates international human rights instruments into Canada’s
national laws.\(^{45}\) Bayefsky argues that one can assume incorporation from the fact that
the drafters relied on international norms in writing a constitution. Implicit incorporation
arguments prove unconvincing for two reasons. First, there is little case law to support
the conclusion that reference to the drafting history is sufficient to ground a theory of
implicit incorporation. On the contrary, the case law concerning incorporation requires
explicit statements from the legislatures about intent to incorporate.\(^{46}\) More importantly,
however, the fact that the Charter’s drafter’s considered but did not explicitly incorporate
international instruments into the final version of the constitution undermines rather than
supports the implicit incorporation theory. The lack of reference to international law in
the constitution’s texts suggests that the drafters intentionally rejected international norms
and did not intend judges or decision-makers to reference such norms in decision-
making.

b. **Presumptions of Legislative Intent**

Another approach evident in the scholarship concerning the domestic use of
international law involves presumptions of legislative intent. Some argue in favour of a
general presumption that the legislature intends that all its laws be interpreted in light of
international human rights norms; thus, when judges invoke international norms to
develop the common law, interpret a statute or give content to a constitutional provision,
they are fulfilling the wishes of the legislature rather than subverting legislative
sovereignty. In its weakest form, the presumption of legislative intent posits that


members of the legislature pass laws with existing international norms in mind. Absent indications to the contrary, the legislature intends its enactments to conform with international law in existence at the point of enactment. Judges cannot refer to treaties or customary norms that arose after the time of enactment because these were not known to the legislature when the particular law was passed; hence, it would be impossible for the legislature to act with these international laws in mind.

Another version of the interpretive presumption adopts a slightly different tactic. It holds that international law forms the backdrop against which legislation is not only enacted but also read. The legislature thus intends for judges to interpret domestic law in light of international norms as they evolve. Some stress that an ambiguity must be found in national laws before international sources can be invoked and that international law cannot prevail over conflicting national laws. Murray Hunt, however, argues that national level judges should strive to bring national laws in line with international norms.

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48 The Bangalore Principles, supra, note 3 represent the best known articulation of this presumption. For an interesting personal account of the Bangalore Colloquium, see Kirby, The Honourable Mr. Justice Michael, "The Australian Use of International Human Rights Norms From Bangalore to Balliol – A View From Antipodes" Commonwealth Law Bulletin (October 1992) 1306. For a judicial treatment of this concept, see Schavernock v. Foreign Claims Commission (1982) 136 DLR (3d) 447 at 451-452 per Estey J. See also Woloshyn, Donald F. "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation" 50(1) Saskatchewan Law Review 1 (1985-1986) at 4 and Stephen Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 Adelaide L Rev 213 for a doctrinal analysis of the ambiguity requirement. The Bangalore Principles were drawn up and endorsed at a judicial colloquium convened by the Commonwealth Secretariat in 1988 in Bangalore, India, and attended by a distinguished international group of judges who sat or were to soon sit on the highest courts of their nations. Principle 8 provides that "It is within the proper nature of the judicial process as well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law." Legislative sovereignty is preserved because international law is invoked only where the legislature's will is unclear and the judge can legitimately turn to other sources for meaning to develop national laws.
at all times except when the legislature expressly forbids such a result. Hunt suggest that courts should adopt an *unambiguity* requirement. Judges should ask whether anything prevents reliance on international norms. The implication of Hunt’s argument is that judges should interpret legislative silences as an indication that the legislature wants its laws interpreted in light of international law unless the legislature expressly provides otherwise.

Presumptions of legislative intent reinforce that all branches of government ought to comply with law, absent reasons to the contrary. As such, the presumptions reflect a concern for the rule of law and the promotion of legality. Presumptions of legislative intent are, as a general matter, deeply rooted in the common law. Indeed, it is difficult to comprehend how a legal system built on the notion that legislatures enact laws while judges interpret them could function without presumptions of legislative intent. In the end, however, the presumption of legislative intent is a creature of the common law, a device created by judges, rather than an accurate depiction of the legislature’s wishes. Parliamentarians generally enact legislation without regard for international sources or obligations. Indeed, one can fairly safely assume that members of the legislature tend to be quite ignorant of international law. Hence, attempts to justify recourse to international norms by saying that the legislature would have wanted it so ring hollow.

Moreover, presumptions of legislative intent assume a limited vision of the judiciary’s role in a democracy. It adopts a strict model of legislative sovereignty which holds that the legislature’s role is to enact laws while the judge’s role is to interpret the

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49Hunt, *supra*, note 31 at Chapter 8: Towards an Interpretive Obligation.
50Ibid at 40.
51Ibid.
laws of the legislature so as to give effect to legislative intent. Such an understanding of democracy regards judicial reliance on international law as a threat to legislative sovereignty because only the executive branch of government can ratify an international treaty. If national courts considered international law a source of rights and thereby sought to enforce international legal obligations entered into by the executive, they would be working in tandem with the executive to create legislation; thereby defeating the legislature's exclusive hold on law-making. As one advocate put it to the Australian High Court,

in our constitutional system treaties are matters for the Executive involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law. Were it otherwise, "the Crown would have the power of legislation."

Wanting to avoid this unsatisfactory state of affairs, the presumption of legislative intent approach seeks to reconcile the executive's treaty making function, the legislature's law-making function and the judiciary's interpretive function. It proceeds on the assumption that judges who invoke international law do not defeat legislative sovereignty. On the contrary, the judicial invocation of international law actually recognizes the real intention of the legislature.

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53 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London, UK: St. Martin's Press, 1959) at 39-40. "The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."


55 Not surprisingly then, Hunt turns to Dicey to support the conclusion that courts must use international law as an interpretive aid: "...the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the principles of international law, and will therefore, whenever possible, give such interpretation to a statutory enactment as may be consistent with the doctrines...of international morality." A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. with introduction by E.C.S. Wade (London: Macmillan, 1959) cited in
However, this strategy relies on an unconvincing and unrealistic image of judges. It conceives of judges as mechanical decision-makers who simply identify and apply relevant rules. Legal commentators and judges, however, have all but abandoned such a limited conception of judicial decision-making. For example, Justice Bastarache of the Supreme Court of Canada observes that judging involves both creativity and constraint.

The Courts cannot rewrite the law to secure the effective implementation of the Charter: the Court cannot invent law to force Parliament or legislatures to discharge their obligations to implement human rights. But, the Court has a fundamental contribution to make...Over the past century, we have moved a long way from the English system of writs, in which a right existed only if there was a procedure with which to enforce it.

5. Essentialism and Normative Imperialism

As both Karen Knop and Mayo Moran contend, the binding authority model assumes that international law will have the same content across contexts. It assumes homogeneity. This assumption of homogeneity leads at least some commentators to adopt an essentialist perspective that forecloses more complex analysis because the values and priorities espoused by the commentator are posited as natural, necessary and universal. For example, the American Law Institute’s list of customary international

Hunt, supra, note 31 at 22-23. As Moran, supra, note 24 points out (at page 12 of proof, footnote 40) however, Hunt seems to take a more nuanced approach to judicial reasoning in other parts of his book. See above where I argue that Hunt is driven to contradiction by his commitment to the binding authority model. Moran, ibid at 20.

Moran, supra, note 24 at 9. Moran observes, however, that by focusing on what judges do in the details of their judgments, rather than on what they purport to be doing, it is apparent that judges invoke both domestic and foreign sources in their judgments. In the end, it is the persuasiveness of the substantive norms and not the obligation to apply any given source that guides judges in rendering decisions. See below for a discussion of the persuasion theory.

norms identified in its *Restatement (Third) Foreign Relations Law of the United States* betrays a “normative chauvinism.” This list “is, at best, suspiciously convenient.”

The great majority of rights considered important under U.S. law, as well as virtually every right which recent U.S. governments have been prepared to criticize other governments for violating, are held to be part of customary international law. By contrast, none of the rights which the U.S. fails to recognize in its domestic law, is included.59

Similarly, feminist commentators have argued that the international legal order reflects a male perspective.60 They point out that while international human rights law professes to recognize the dignity and worth of all, it in fact prefers the interests of men over those of women.61 They stress that states create and control international human rights law and that men control states. Not surprisingly therefore, international human rights law is created by the powerful (usually men) and reflects their aspirations. Kelly Askin makes this point with reference to humanitarian law. She notes that international human rights instruments regulate the most intricate details of war in relation to men’s experiences, but leave unmentioned even the most violent crimes committed against women.62 In the same vein, critical race feminists have pointed out that the white-essentialist feminist

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critiques of international law mask class and race dimensions of a given conflict.\textsuperscript{63} The binding authority model, however, tends to ignore international law's limits in favour of a strategy that emphasizes its universality and hence its bindingness.

6. Categorical Denials

One approach adopted to bypass the claim the concern that judicial use of international law usurps the legislature's law making function is to consider international law as an indirect source of rights. For example, proponents of the interpretive use doctrine claim that international law has only an \textit{indirect} influence on the development of national laws. They stress that international law cannot ground a cause of action nor can one go directly to the courts and seek direct enforcement of a treaty provision.\textsuperscript{64} Such a stance proves beneficial because it recognizes that judges look to a number of sources in fulfilling their role as interpreters of legislation. In short, it acknowledges the interpretive role of the judge.

This approach, however, cannot fully explain the case law that has developed within the Commonwealth. Nearly all Commonwealth and common law countries begin from the position that unincorporated treaties are not part of the domestic law absent some express act of the legislature.\textsuperscript{65} Yet, at least some Commonwealth judges increasingly invoke international law as a direct source of rights even in the absence of expressive legislative permission to do so. Depending on the circumstances and the doctrinal backdrop against which international law is operating, international law has

\textsuperscript{64}Hunt, \textit{supra}, note 31 at 40.
been used in various jurisdictions to: advance a constitutional claim; interpret a statute; develop the common law; give rise to a common law cause of action; or ground a claim of legitimate expectation. For example, Courts in Australia have enforced provisions of international treaties on the argument that their ratification gave rise to a legitimate expectation. 66 Similarly, India’s Supreme Court has not hesitated to give effect to international treaties on the theory that they must act in the public interest and in accordance with international law where the legislature has failed to act. 67

7. Doctrinal Confusion

Another strategy is to argue that domestic courts can only invoke international human rights law where national law proves ambiguous and where there is no conflict between national and international law. The main benefit of such an approach is that it does not challenge the legislature’s law-making function. Legislative sovereignty is preserved because international law is invoked only where the legislature’s will is unclear and the judge can legitimately turn to other sources for meaning to develop national laws.

Yet, the ambiguity and conflict requirements advanced in such a strategy also raise problems. These requirements have created contradiction and confusion in those jurisdictions that have adopted them because the precise meaning of either “ambiguity” or “conflict” has been difficult to capture. For example, if a legislature grants immigration authorities the discretion to allow an individual to remain in Canada on humanitarian and compassionate grounds, must the decision-maker still exercise her discretion in conformity with international law? One the one hand, the generous grant of

65 Byrnes and Adams, supra, note 4 at 63.
discretion suggests that the legislature did not intend that administrative decision-makers be fettered by international law; hence, the ambiguity requirement is not met. On the other hand, the precise terms of the administrative discretion remains unclear because the meaning of “humanitarian and compassionate” is subject to interpretation. Case law across jurisdictions suggests that findings of ambiguity or conflict serve more as ex post facto justification for pre-determined conclusions rather than criteria for deciding when international norms can or should apply.

8. **Rationalizing Power**

Harold Koh outlines a transnational legal process to explain how international law is brought “home” to the national level and how it secures obedience from state and non-state actors. Koh argues that the internalization of international norms involves a complex and dynamic interaction between key agents operating in both national and international fora. Their interaction results in the embedding of international norms in national structures, moving international law progressively deeper into the national consciousness from “coincidence to conformity to compliance to obedience.” Koh’s objective is to explain why the legal internalization of international norms by the executive, the legislature and the judiciary ultimately results in obedience, understood as the “gradual transformation and reconstitution” not only of the norm’s domestic status but also, by necessary implication, of the very identity of the person invoking the norm. The norm shapes identity, according to Koh, because its progressive embedding in

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67 See for example *Vishaka and Others v. State of Rajasthan* [1997] 3 Butterworths Human Rights Cases 261
domestic law changes the individual. While she once regarded the norm with indifference, she eventually regards it as a source of law without necessarily recognizing its once contingent status.

Koh’s theory does not fit neatly into the binding theory model because he recognizes that judicial internalization of international norms takes subtle and varied forms and that judges have discretion in choosing whether or not to apply international law. The judge is thus not strictly bound by international law. However, such discretion, according to Koh’s theory, constitutes a passing phase, a point along the path towards a more desirable state of obedience to international law. Hence, Koh’s theory can account for international law’s varying weight in the domestic context. Nonetheless, Koh’s reasons for the varying weight render his argument somewhat unsatisfying from a human rights advocacy perspective though admittedly he is not writing specifically or simply with such an objective in mind. Nonetheless, Koh is a powerful thinker and no one who wants to understand the subtle ways in which international and national human rights laws interact can afford to ignore his theories.

Internalization, according to Koh’s theory, does not necessarily depend on the norm’s internal efficacy or value, but instead turns on the ability and willingness of “norm brokers” to “sell” it and on the corresponding willingness of judges to adopt it. Koh’s theory of internalization thus risks replicating power and appears to sanction agendas that serve the interests of the more powerful over the more marginalized. The internalization of international law translates into the reification of powerful domestic interests. No doubt, in some instances the norm’s inherent value will lead to its being

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accepted by the norm brokers. At other times, however, factors external to the norm and independent of its inherent value can overwhelm its logic. For example, organizations like Human Rights Watch have come under attack for “corrupting the language of human rights” and for serving political interests of their funders at the cost of promoting universal respect for human rights. Koh’s theory risks lending legitimacy to such a result and does not provide the human rights advocate with a standard against which the internalization of international norms can be judged.

III. Binding Authority Re-Examined: International Law As Persuasion

In contradistinction to the binding authority model, the persuasion model stresses an increased willingness of judges to engage international norms as evidenced by the rising attendance at judicial colloquia and the appearance of a growing number of speeches and essays by national level judges focused on international human rights law. Accordingly, the apparent incoherence and contradictions in the case law reflect the failures of the binding authority model rather than the inadequacies of judicial training or the willingness of judges to engage international norms as lamented by proponents of the binding authority model. This persuasion model’s general approach is to regard international law as persuasive rather than binding on national level judges. Hence, the

72 See Abdullah Mutawi, “Iraq and the Corruption of Human Rights Discourse” available on-line at www.cesr.org for a critique of Human Rights Watch’s call for the indictment of Iraqi officials in contrast with its relative silence on the question of the effects of sanctions against Iraq.

73 Again, I would like to stress that Koh does not aim at being prescriptive but wants to describe how international law does interact and relate to national laws despite the claim of some scholars that international law does not belong with the national realm. Yet, the fact remains that Koh’s theory does not offer a standard which human rights advocates can adopt to press for the promotion of human rights norms over others in a consistent and sustained way.

fact that judges may refer to ratified and unratified treaties does not matter so much: it is
the norm's ability to command assent and not its pedigree that matters.

1. Edward Morgan: The Two Faces of International Law

Edward Morgan's analysis of international human rights law in domestic courts
begins from an assessment of the nature of international law itself. Morgan observes that
conceptual coherence remains elusive within international law because the international
human rights law system cannot be reduced to consent (its apologetic element) or natural
law (its utopian element). "[U]niversal norms govern states, while the particular
sovereign nations govern international norms."\textsuperscript{75} International law's contradictions
produce either one of two consequences. Some judges seek to reconcile or sublimate
international law's contradictions and are themselves driven to contradiction. Others
seek to harness international law's slippery character to results-oriented decision-
making.\textsuperscript{76} Either way, international law's inherent contradictions inevitably and
invariably emerge in its application at the national level. Morgan's analysis of the
application of international law to the domestic adjudication of aliens' rights is
particularly poignant.

The doctrinal maneuvering between the powers of the sovereign state and the
rights of the alien in the name of a sovereign law represents a peculiar form of
self-contemplation; and in this it presents itself as just one more manifestation of
a deeply held split personality. We think that we are all fundamentally different
and all fundamentally the same. Nothing quite brings this to the surface of our
thoughts like consideration of aliens and their legal position, because nothing else
presents us in so startling a way with an image of ourselves.\textsuperscript{77}

Morgan points out that judges employ a number of interpretive techniques to
justify their reliance on international law. For example, judges avoid concerns about

\textsuperscript{75} Morgan, Aliens, supra, note 20 at 147.
\textsuperscript{76} Morgan, In the Penal Colony, supra, note 29.
legislative sovereignty by contending that the international norms they employ are really domestic ones.

By applying the external-source/internal source distinction, the Court circumvented the internalization dilemma, thus transforming the inherent contradiction between sovereignty and enforceable international standards into a question of domestic wrong-doing. 78

Hence, judges depict the domestic effect of international law as a positivistic expression of state consent.

Conversely, judges seek to convince their audience that the facts before them raise fundamental and necessary rights that transcend positivism by describing their subjects in sympathetic terms. For example, in the Paquete Habana case, the Court was asked to consider whether a fishing vessel could be confiscated as a prize of war after it was caught in the U.S. blockade of Cuba during the Spanish-American War. Morgan points to the Court’s rationalization that those engaged in the “eminently peaceful” industry of coastal fishing should be exempt from confiscation. The Court reasoned that the permitting confiscation of the vessels would violate “the principles of equity and humanity.”79

Morgan’s work represents a call for vigilance on the part of those who invoke international law in their advocacy and analysis. He suggests that advocates and scholars should not seek conceptual coherence within international law but should instead pursue a functional approach: the functional approach suggests invocation of international law’s

77Loc. Cit.
79Morgan, Internalization, Ibid, at 75.
positivistic and natural law strains as required by context without worrying about conceptual consistency.

Morgan’s work does not fit neatly within the persuasion model in that he does not directly advocates persuasion as a mode of judicial reasoning. Nonetheless, elements of Morgan’s work fit into the persuasion model in so far as he contends that international law generate choices for the judges and advocates who invoke it.80 Thus, like other persuasion inspired arguments, he recognizes international law’s choice enhancing function. In the end, however, unlike others variants on the persuasion model, Morgan’s position appears too suspicious of both international law and judicial choice. He focuses on international law’s inability to bind judges while leaving unexplored the question of whether international law’s contradictions can be ultimately harnessed in favour of human rights protection rather than against it.

2. Transjudicialism: Persuasion and Judicial Dialogue

Persuasion theory makes a virtue of judicial choice and international law’s inability to bind judges in a conceptually coherent manner. Although her work does not directly engage the binding authority model, Ann Marie Slaughter’s analysis of transjudicial communication has focused academic interest on the persuasion theory. Slaughter’s central insight is simple yet salient: “courts are talking to one another all over the world.”81 National and transnational courts and tribunals increasingly reference each other’s decisions. This cross-fertilization of ideas takes place even when “neither the speaking court nor the listening court is bound by a treaty structure or any other direct

80I use the phrases “elements of Morgan’s work” and “in so far as” to highlight that the point made here is not intended as an exhaustive analysis of Morgan’s entire work or theoretical approach to international law.
and formal links." In other words, courts speak to each other across jurisdictions not because they have to but because they want to.

Slaughter observed that national courts cite foreign sources to strengthen their decisions. Slaughter concludes that the appeal of a foreign judgment derives from its "intrinsic rationality rather than from an 'argument of authority.'" Inevitably, transjudicialism will lead national and supranational courts to increasingly conceive of themselves as members of a larger judicial community, one that transcends national boundaries and that is brought together by a commitment to a common enterprise. In particular, courts are drawn together by their common commitment to human rights. Consequently, transjudicialism will result in greater respect for human rights across jurisdictions. Transjudicialism will entrench the concept of a global community of law, constituted not by a world court but rather by overlapping networks of national, regional and global tribunals. By communicating with one another in a form of collective deliberation about common legal questions, these tribunals reinforce each other's legitimacy and independence from political interference. They can also promote a global conception of the rule of law, acknowledging its multiple historically and culturally contingent manifestations but affirming a core of common meaning.

Karen Knop offers a sustained and thoughtful application of Slaughter's thesis along with cogent criticism. Knop endorses transjudicialism's central claim. Domestic courts and judges, according to Knop, do indeed speak to each other across jurisdictions: they attend judicial colloquia, take advantage of the Internet, and increasingly reference

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82 ibid at 119.
84 Slaughter, Typology, supra, note 81 at 136.
85 Helfer and Slaughter, supra, note 83 at 283.
each other's decisions. Drawing on Slaughter's thesis, Knop urges scholars and advocates to understand that "hardwiring" international norms to domestic law is not the only way to introduce international law in domestic courts. Instead, Knop advises scholars and advocates to approach international law through the lens of comparative law. She argues that by "making foreign" the law that international lawyers have sought to make familiar, advocates and scholars can invoke international norms in their arguments and analyses even where it is not properly binding.

However, Knop observes that Slaughter's version of transnational dialogue shades into imperialism because it aims to export American notions of human rights into other jurisdictions. Her main criticism of Slaughter's transjudicialism theory lies in its notion of persuasion. According to Knop, Slaughter's thesis assumes that judges will be persuaded by the norms of liberal democracy; thus, transjudicialism lacks an account of persuasion that distinguishes it from political influence. As Knop puts it,

Transjudicialism's lack of a more fully developed notion of persuasion is traceable to its marketing as an account of the spread of liberal democracy. If the domestic application of international law is equated with the recognition of a global standard of good, then any and every domestic application is desirable. But, this tacitly locates the authority of international law in its embodiment of liberal democracy, rather than understanding its authority as partly created by the reasoning in each case. The persuasiveness of international law is treated as pre-constituted, rather than constituted by the engagement of domestic law with international law in a particular setting.

Knop's interest in persuasion is largely as a theory of judicial reasoning: her central point is that persuasion proves valuable in understanding all applications of international law, not simply those cases in which international law is invoked as a non-binding

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86 Knop, supra, note 22 at 535.
87 Knop, ibid, does not explicitly address the dualism debate.
88 Ibid at 324.
89 Ibid at 505.
source. Knop suggests that international law can avoid some of the pitfalls associated with Ann Marie Slaughter's approach, particularly the charge of imperialism, by adopting a more robust understanding of persuasion derivable from comparative law.

2. Lessons from Comparative Law

Comparative law accepts diversity of opinion and contexts. It does not expect to be adopted unless it entails a convincing logic. Knop suggests that international law's value rests in part on its ability to provoke critical self-reflection among judges rather than its ability to produce a particular result. International law invites internal debates within national jurisdictions. It permits decision-makers to examine the matter before them from another perspective. One way in which this enhanced perspective might be gained is by considering international law as a "mirror" that helps national courts see values that they might not otherwise have considered or known to exist within the national realm.\(^9^0\) International law need not import anything to the domestic realm to fulfill its mandate of invoking critical self-reflection. As Knop puts it,

\[\text{[c]omparing the international and domestic approaches to a legal problem may lead to the recognition of differences and alternatives within domestic law, thereby promoting engagement with diverse internal perspectives on the problem.}\(^9^1\]

Knop also draws on Jennifer Nedelsky's concept of communities of judgment for inspiration. Nedelsky has suggested that international human rights law offers national communities an opportunity to reflect on their legal values. By drawing on the different perspectives of the international community, national judges can render better decisions.

\(^9^0\)Ibid at 531.

\(^9^1\)Ibid at 531. Interesting, Knop's argument sounds very similar to the claim that treaties can help reveal an implicit ambiguity in the meaning of a statute or in the common law.
because the different perspectives allows them to test their opinions against a broader range of perspectives.

Knop proposes that comparative law can also teach international lawyers the consequence of speaking across difference. She notes that both international law's enthusiasts and its critics assume that international law has a homogenizing impact on the places where it is applied. They assume that international law's domestic application will lead to the same result, regardless of the local context. Comparative law, however, understands that no norm can be transplanted from one context to another without undergoing some transformation.

By recognizing the role of the local in interpreting a law from elsewhere, the comparative perspective disturbs both the conventional comfort of international lawyers in portable meaning and the anxiety of their critics about unmodified imperialism.

Every application in international law in domestic courts entails the translation of norms by national judges from the international to the national context. Ultimately, international norms are themselves transformed in their local application.

The domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national....the existing models and their critiques leave unexplored the potential of translation as a method of respecting difference in international law.

92 I am not convinced that international law is as inept at dealing with difference or that comparative law is as sophisticated as Knop's article seems to suggest. For example, Moran B. Callahan, "Cultural Relativism and Interpretation of Constitutional Texts" (Summer 1994) 30 Willamette Law Review 581 begins by stressing the importance of understanding cultural context in interpretation but ends by maintaining that American interpretive methods can, indeed should, be applied to interpretations of India's constitution. At least one scholar has lamented the lack of good quality comparative analysis: Pierre Legrand, "How To Compare Now"(1996) 16 Legal Studies 232. For international sources that have grappled with difference and universalism, see the discussion in Chapter IV.
93 Knop, supra, note 22 at 528.
94 Ibid at 506.
3. **Legislative Sovereignty**

Karen Knop does not explicitly address the legislative sovereignty issue. However, two points advanced in her argument have implications for the legislative sovereignty problem. First, she proposes that one way in which international law may be helpful to domestic law lies in its ability to unearth domestic values. If this is so, then international law thus does not represent a threat to legislative sovereignty because judicial appeals to international norms are not appeals to external or foreign law but rather attempts to understand the full width and breadth of domestic law.  

Second, Knop relies on the interpretive role of judge. Like Murray Hunt, she dismisses images of the judge as merely a discoverer of legislative intent as naïve and notes that it is legitimate, indeed unavoidable, for judges to bring factors to their interpretive task that are not anticipated by legislatures. She urges international lawyers to come to grips with legal realism and indicates that judges will unavoidably bring into play factors that are not anticipated or even sanctioned by the legislature in interpreting and applying domestic laws. “From legal realism on in the United States, students of law have accepted that law is not determinate, that its interpretations involves choices and therefore potentially social preconceptions, political preferences, and other habits of mind notionally exterior to the law.”

However, Knop goes beyond Hunt and others who seek to inject international law into domestic courts by way of the judge’s interpretive role. Hunt acknowledges that

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95 I want to emphasize that Knop does not make this claim. I am extrapolating from the points that she does make. Knop says that her article “should not be taken as preferring the courts over the legislature, but only as recognizing that some interpretation of international law will inevitably fall to the courts.” At footnote 65. Of course, some critics who adopt a strict Diceyan version of the relationship of judges to legislatures would argue that Knop does prefer courts to legislatures by the very fact that she considers it acceptable for courts to reference international treaties. See for example dissent in Baker, supra, note 14.

96Knop, supra, note 22 at 503.
judges do not simply discover law and that their interpretive role gives them choices that extend the law beyond the enactor's original intent. But, judicial choice and creativity for Hunt ends at international law: once she turns to international law, the judge labours under an interpretive obligation. His main objective is to demonstrate that international law limits judicial choice. By contrast, Knop extends judicial choice to include international law. Her theory permits the judge some discretion in determining whether or not to apply a particular norm of international law. Any given norm must, according to Knop, convince the judge of its suitability in the context of a specific fact situation and legal tradition. While Hunt permits international norms to rely on their pedigree for acceptance, Knop does not.

Injecting judicial choice into the domestic application of international human rights law helps remedy the shortcomings of the binding authority model. In particular, judges need not approach international law in an all-or-nothing fashion. Unlike the interpretive use doctrine, persuasion theory provides a coherent explanation for why judges can choose between norms. Consequently, judges can distinguish between rights enhancing norms and rights detracting ones. At the same time, they can avoid the normative restraints of arguments based on customary international law and claims to universalism: judges can invoke international norms even where they have not attained universal status. Persuasion thus can let into the domestic realm less than the interpretive use doctrine but more than the universal rights thesis.

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97Hunt does note that international law can have varying weight. See discussion above.
4. Limits of the Persuasion Approach

a. Ratification and Comparative Law

While the persuasiveness model does respond to many of the shortcomings of the binding authority model and while insights can indeed be drawn from comparative law, the persuasion model runs the risk of conflating international law and comparative law in a way that obscures the crucial differences between them. The central difference between the two regimes, of course, is that international treaties are ratified whereas comparative laws are not. David Kennedy identifies the essential difference between international and comparative law as the difference between "governance" and "understanding."

The comparativist's focus on an "us" and a "them" is replaced by a more universal claim and project: tc empower an international public order above the nation, an international private order below or outside the state, or a complex regime of transnational order. We could overstate this disciplinary difference, of course. Comparativists also participate in a universal project, elaborating a universal legal ideal, a universally applicable comparative method, or an aspirationally universal taxonomy of law. And cultural difference troubles the internationalist, threatens to disturb their emerging order (what about women's rights in Chad or intellectual property in China?), but the internationalist's optic is less "understanding" than "governing." 98

International law has a legal hold on the domestic realm in a way that comparative law does not. In its quest to present an image of legal reasoning that acknowledges the role of judicial choice and interpretation, the persuasion theory does not fully address ratification's place in the overall persuasion framework. It therefore needs to be

98 Karen Knop considers this vision part of the problem. Knop, supra, note 22 at 527: "This picture of international law as a legal order that aspires to transcend cultures and thus to neutrality helps to explain why the traditional model of international law in domestic courts does not recognize the role of culture in interpretation. The determination of international custom or general principles of law abstracts from the laws and practices of different cultures in order to formulate an international legal norm that expresses what is common and therefore acultural." Chapters III and IV of this work contend that one can maintain international law's ambition to govern while simultaneously recognizing the role of culture in norm formation.
supplemented with other perspectives that deal more squarely with the question of obligation and international law.

International law's ambition to govern accounts for its central features: the recognition of customary international law, the requirement that states ratify treaties as an indication of their consent to be bound by its terms and the proliferation of international bodies aimed at encouraging compliance with international norms.99 The binding authority model attempts to come to grips with this central feature of international law: it attempts to explain why domestic authorities, like their international counterparts, should operate under the conviction that international law binds states. The binding authority model stresses that international law may bind decision-makers even when they remain unconvinced by the norm's logic or do not concern themselves with applications of international law in other jurisdictions.100 By contrast, persuasion emphasizes that judges apply transnational norms when they are persuaded by them and want to link themselves to a larger community. The persuasion model thus risks diluting international law's quest to bind judges.101

b. Potential for Regressive Application

The persuasion model also runs the risk of sanctioning a regressive and selective use of international human rights norms. For example, echoing the majority of the

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99 Both its positivistic and natural law impulses aim at governance although they of course offer different justifications for why international law should be obeyed. Positivism focuses on state consent while natural law focuses on the rights that an individual can claim by virtue of her humanity.
100 See for example The Committee on Economic, Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant E/C.12/1998/24.CESCR.
101 Of course I am not suggesting that Karen Knop, a noted international lawyer, does not appreciate the difference between comparative law and a ratified international treaty as a source of law or as a descriptive matter. Rather, the point is that different sources may require different prescriptive justifications. Ratification aims in part at creating binding obligations for the state independent of what a judge thinks of those obligations. Persuasion does not altogether address this issue. One response might be that persuasion represents a statement about theories of judging, not about sources of law. If so, then the persuasion theory
Supreme Court of Canada in *Baker v. Canada*, Knop suggests that one way in which international law can be used is to "show the values" of domestic law. Knop does not conclude that international law's use is exhausted by such an application. She merely indicates that international law's ability to "show the values" of domestic law represents one potential use. Such use must be carefully evaluated, however, because it may serve to entrench an approach to international law with potentially regressive applications. If international law's purpose lies in its ability to "show the values" of domestic law, it need not challenge the existing legal terrain but can remain content with helping decision-makers chart their way through it.\(^\text{102}\) The problem is two-fold. First, contending that international law operates to help reveal national values threatens a result that is precisely opposite to what Knop, with her sensitivity to human rights agendas, intends.\(^\text{103}\) That is, the notion that international law helps "show the values" that already exist at national law presents an invitation to judges to use international law to reinforce their deeply held convictions.

As Ed Morgan's analysis of international law in domestic courts demonstrates, national courts betray a propensity to harness international norms selectively and that this selectivity functions to defeat human rights, not just promote them.\(^\text{104}\) Similarly, Murray must explain how such a theoretical approach makes sense of international law's binding aspirations as expressed through features of the international system such as ratification.

\(^\text{102}\) See Chapter II under the "introspection rationale" below for examples of cases that use international law to "show the values" of national law. The differences between international law and national law can reinforce a particular national norm rather serve to bring national law in line with a more progressive international norm.

\(^\text{103}\) Nora V. Demleiter, "Combating Legal Ethnocentrism: Comparative Law Sets Boundaries" (1999) 31 Arizona State Law Journal 737 at 742: "Yet even more disturbing, comparative law -- when its exclusive aim is to provide a reflection of ourselves -- may lead to a merely superficial analysis of the foreign system." Demleiter cites Uma Narayan, *Dislocating Cultures* (1997) 138 who critiques uses of Third World contexts or individuals as "mirrors for Western reflection."

\(^\text{104}\) See for example, Morgan, *Penal Colony*, supra, note 29 and Morgan, *Internalization*, supra, note 75.
Hunt argues that judges too often invoke international law to limit rights protection. Hunt notes,

There is a danger that reliance on judicial development of the indigenous common law may be inherently backward looking...[R]ights which the common law is prepared to regard as fundamental are those classical liberal rights, such as the right to property and associated freedom interests, which the common law has traditionally prioritized and against which so much regulatory legislation has been deliberately directed by the administrative state.105

Karen Knop might respond that judges who invoke international law in such a manner fail to engage international law in the proper way. International law should expand the judge’s mental horizon. This might be true. However, the other problem with the “shows the values” approach is that it limits international law’s ability to effect fundamental normative change even though it might alter a particular line of precedent. While domestic law is generally rich enough to allow decision-makers to choose between a vast array of norms, sometimes international human rights law contains values that remain uncrystallized within the domestic realm.106 In such circumstances, international law needs to insist on its binding authority or risk losing its full potential to alter the legal landscape.107

One can see the limited normative scope available to international law when it aims simply to “show the values” of domestic law in Baker v. Canada. In Baker, the

105 Hunt, supra, note 31 at page 307.
106 Some scholars would not agree with this proposition. For example, Martha C. Nassbaum claims that “the ideas of feminism, of democracy, of egalitarian welfarisn, are now ‘inside’ every know society.” Martha C. Nassbaum, “In Defense of Universal Values” (2000) 36 Idaho Law Review 379 at 394. The question remains whether these values are ‘inside’ the legal system in a way that might attract support from international law and make a difference for rights claimants. Some scholars have pointed out how international law can help expand the mental horizons of individuals within civil society. These scholars understand “domestic effect” as going beyond national courts. For example, Alicia Ely Yamin, “Transformative Combinations: Women’s Health and Human Rights” (Fall 1997) 52(4) JAMWA 169 argues that public health practitioners should be educated in international law so that they can understand women’s health from a structural perspective indicative of the unequal power relations in society instead of approaching it as an individual matter particular to an individual patient.
107 Morgan, Internalization, supra, note 78 at 72-73.
Supreme Court of Canada reinforced the efficacy of the best interest of the child principle with reference to international law. The court noted Canadian domestic law had already recognized the best interest principle. The Baker case simply raised the question of whether the best interest of the child principle was applicable in the immigration context. In other words, it sought to extend an already well established principle to a new context. It did not introduce a new principle to Canadian law. Yet, the facts of the Baker case offered the Supreme Court of Canada cogent opportunity to affirm other rights recognized at the international level but not yet established within the Canadian legal landscape.

Mavis Baker had been living in Canada without immigration status for over 15 years. She was the sole support provider and care giver to four children who were all born in Canada and thus claimed Canadian citizenship. After the birth of her youngest twins, Mavis Baker suffered severe post-partum psychosis. She subsequently entered the hospital for treatment. During that time, she relied on social assistance for herself and her children. Shortly after being discharged from hospital, Baker applied to remain in Canada on humanitarian and compassionate grounds. Her application outlined the negative impact that deportation would have on her as well as on her children. In particular, she informed immigration officials that if she was deported, she would be deprived of vital medication that would not be available to her in her home country. Her mental health condition would likely worsen and she would be forced to live in abject poverty on the streets of Jamaica. In effect, she would be deported back to mental illness.

Baker also explained that although she had family members in Jamaica, she had not seen them in decades. In any event, they themselves lived in poverty and could not
help to support her. Her mental illness and lack of family support in Jamaica thus meant that Mavis Baker would herself live in abject poverty on the streets. Her humanitarian and compassionate application also relied on the impact that her deportation would have on her children. Given that she would not be able to support them in Jamaica either financially or emotionally, Mavis Baker indicated that she would leave her children in Canada. At least two of the children would be turned over to foster care; the youngest would likely live with their biological father.

Canadian immigration officials turned down Baker’s application to remain in Canada. George Lorenz, the immigration officer who reviewed her case, made the following written comments

PC is unemployed – on Welfare. No income shown – no assets. Has four Cdn.-born children – four other children in Jamaica – HAS A TOTAL OF EIGHT CHILDREN.

This case is a catastrophe [sic]. It is also an indictment of our “system” that the client came here as a visitor in Aug. 81, was not ordered deported until Dec. 92 and in APRIL ’94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare system for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity...

Clearly appalled by the lack of attention paid to Mavis Baker’s children the majority of the Supreme Court turned to the Convention on the Rights of the Child to support the conclusion that immigration officials should be attentive to the rights and interests of children. However, the Court all but neglected Mavis Baker. Baker’s lawyer and at least one intervenor group pointed to the discrimination and stereotypes directed at

Mavis Baker and identified how these stereotypes violated fundamental international norms.\textsuperscript{109}

While the Court briefly -- very briefly -- acknowledged the discrimination evident in the reasons based on sex, marital status and ability, they ignored the discrimination based on class. Consistent with a long line of precedent that is antagonistic to social and economic rights, the Court was blind to any arguments that Mavis Baker was the subject of discrimination on the basis of her poverty even though a number of international treaties prohibit discrimination on this basis.\textsuperscript{110} Sheena Scott and Sharryn Aiken have made similar observations about the Court’s lack of attention to the race dimensions of the case.\textsuperscript{111} International law thus helped reinforce an already well established legal principle that children’s interests should receive high priority in public decision-making, but did little to help establish the efficacy of social and economic rights, a category of rights that remains all but unrecognized in the Canadian legal landscape.\textsuperscript{112}

c. Challenging the Executive

While the binding authority model risks placing too much emphasis on the executive’s treaty-making power at the expense of legislative sovereignty, the persuasion school shifts the focus of inquiry to the judiciary’s role in relation to the executive. Judges, according to the persuasion theory, respond to and adopt international norms where they are convinced by the norm’s inner logic. The implication is that the norm’s formal status in the eyes of international law does not necessarily control the situation. A

\textsuperscript{109} Factum of the Charter Committee on Poverty Issues, supra, note 23.


\textsuperscript{111} Sharryn Aiken and Sheena Scott, “\textit{Baker v. Canada (Minister of Citizenship and Immigration)} and the Rights of Children” at 32-33 [manuscript on file with the author]
judge can be persuaded by an international norm regardless of whether the state has ratified the relevant treaty and independent of the norm’s status as a *jus cogens* norm, an expression of “soft law” or something in between. In this way, the persuasion school replaces the conflict between the judiciary and legislature found in the binding authority model with a conflict between the judiciary and the executive. The executive’s choice to ratify a particular treaty, leave another unratified, enter reservations to a particular provision, or persistently object to a norm of customary international law do not factor into a determination of the norm’s efficacy under the persuasion theory. Thus, the persuasion theory does not escape the constitutional dilemmas posed by the binding authority model. It transforms them.

IV. **Taking Stock: Towards A New Framework**

Edward Morgan traces international law’s ability to bind domestic courts to the “riddle of legal sovereignty [which] permeate public international law.” Given that international law rests on the twin but contradictory foundations of consent and natural law, “it is little wonder that courts have consistently failed to fashion a logical escape.” Ultimately, he concludes that “there is nothing but a functional, if conceptually misguided, approach open to the courts.” Morgan’s work reveals that the binding authority asks too much of international law: its bid to tie judges down by defining a single conception of the sources of international law’s ability to bind decision-makers elusive because of the “riddle of legal sovereignty.” Yet, persuasion theory asks too little of international law. Morgan’s work demonstrates that judges can use international

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112 Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally In the Spotlight?,” 1999 *10(4) Constitutional Forum.*

113 The term “soft law” is used to refer to those emerging norms that have not yet been acknowledged as law within the international system but that are attracting increasing attention and recognition.
law selectively to bolster their own political or moral philosophy, and the persuasion theory runs the risk of sanctioning this result.\textsuperscript{115} Thus, the need to articulate a principled basis for the judicial invocation of international law remains: the use of international law cannot be left strictly to judicial discretion.

International and domestic law require an alternative framework to explain their relationship. This alternative framework can benefit from both the binding authority and persuasion models by drawing on their strengths and learning from their shortcomings. Unlike the binding authority school, an alternative approach must permit decision-makers to privilege rights enhancing norms over rights detracting ones. As a related matter, it must be sufficiently cognizant of the doctrinal differences between jurisdictions and allow international norms to attract varying weight in various domestic contexts. It must also permit judges to recognize that some international law norms attract more compliance than others. In addition, it must offer some explanation of the case law both within and across jurisdictions but not attempt to impose an artificial coherence on the case law or force it into an ill-designed descriptive straightjacket. Thus, it must take into account both the differences and the similarities in the case law, taken as a whole. It should seek to avoid the doctrinal confusion that has built up around the notions of “ambiguity” and “conflict” proposed by some under the binding authority model. The alternative theory must also suggest a convincing vision of the relationship between the legislature, the judiciary and the executive branches of government. It must be able to explain why international law can serve as a binding source of authority in some contexts while still retaining the notion of judicial choice and simultaneously preserving space for

\textsuperscript{114}Morgan, \textit{International Law and the Canadian Courts}, supra, note 78 at 144.
\textsuperscript{115} See for example Morgan, \textit{In The Penal Colony}, supra, note 29.
local interpretations. Yet, it must still be able to explain how international law can challenge the existing legal landscape. It must also take into account the prevailing characteristics of international law itself.

The task may seem daunting; but it simply requires a reconfiguring of some of the main features of the binding authority and persuasion schools. In particular, it requires a framework which retains the particular strengths of each of the approaches including: Karen Knop’s insight that the application of international law involves translation, respect for difference and that its value includes the ability to invoke introspection; Ed Morgan’s point that certainty in international legal argument is elusive and his recommendations about adopting a functional approach to international law’s domestic application; Murray Hunt’s observation that judges have a duty to apply international law and that this duty can be harnessed in favour of a human rights agenda; Alan Brudner’s and William Schabas’ arguments in support of harnessing international law’s claims to universalism; Ann Marie Slaughter’s observation that judging in a modern world involves much more comparison and borrowing from the logic of other jurisdictions; and, Ann Bayefsky’s and Harold Koh’s point that international law can form the backdrop of decision-making and become part of domestic legal culture even when its role is not formally recognized by legislatures and other decision-makers.

How can such a theory be constructed? The next chapter examines decisions of courts across the Commonwealth have sought to give domestic effect to international law absent an express act of incorporation. The seeds of an alternative theory of international law’s relationship to domestic law can be found in these cases.
Chapter Two: The Five Faces of International Law

What is often given less attention in the legal community is how globalization is occurring in the process of judging and lawyering, and how growing international links and influences are affecting and changing judicial decisions.116

We are the lucky one. To this generation much is given. The lawyers and judges of today are living through a remarkable rapprochement between international and municipal law.117

I. Introduction

Judges who invoke international law in national courts seek to alleviate the anxiety of their critics by offering a justification for their reliance on international law. Analysis of cases from various Commonwealth jurisdictions reveals that these rationales can be divided into five interdependent yet discrete categories: concern for the rule of law; a desire to promote universal values; reliance on international law to help uncover values inherent within the domestic regime; a willingness to invoke the logic of judges in other jurisdictions; and, concern to avoid negative assessments from the international community. These rationales are not universal in that they are not cited by all judges all of the time. However, they are also not unique to a particular jurisdiction and can be found in the case law across jurisdictions.

This chapter identifies and explores the rationales invoked by national court judges in support of their reliance on international law. Such an effort has value for several reasons. First, no similar transjurisdictional analysis has been undertaken despite the academic interest in transjudicialism and transnational judicial dialogue. The focus of

116L'Heureux-Dube, supra, note 8 at 17.
academic interest with respect to these issues has been on constitutional rather than international law. Analysts appear hindered by the doctrinal diversity that marks international law's use in domestic courts across the Commonwealth. The emphasis on the rationales or justifications invoked by judges in support of their reliance on international law removes this hindrance; the rationales are not specific to a particular doctrinal context because they are intended to justify the doctrine and hence appeal to logic rather than established legal precedent. An examination of the rationales is thus valuable because it can point to the common elements used by judges across jurisdictions in their decision-making. Subsequent sections of this work will use these common elements to build a new framework that explains international law's relationship to domestic law. An analysis of the five rationales or elements of judgment is also valuable because it reinforces that both the binding authority and persuasion model have something to offer with respect to international law's use in domestic courts.

II. The Rule of Law Imperative

Judges across jurisdictions express the opinion that ratification of a treaty constitutes a legally significant act and that domestic courts should strive to hold national governments accountable to their legal commitments. This rationale can be termed the "rule of law imperative." Although the phrase "rule of law" has various meanings within legal philosophy, it is understood under this rationale as a method of promoting certainty and respect for the law. F.A. Hayek's definition captures the intended connotation under this rationale.

Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced before hand – rules which make it possible to foresee with
fair certainty how the authority will use its coercive powers in give circumstances, and to plan one's individual affairs on the basis of this knowledge.\textsuperscript{118}

Despite international law's status as law from another realm, judges working under this rationale emphasize that the state must be held accountable for its promises. Courts, according to this rationale, must promote respect for the rule of law and help guard against hypocrisy by fulfilling international commitments. Accordingly, the rule of law imperative focuses the judge's attention on whether the national government has ratified an international treaty or is bound by a rule of customary international law.

Judges across the Commonwealth have demonstrated a commitment to the rule of law rationale. For example, New Zealand's Court of Appeal in \textit{Tavita v. Minister of Immigration} dismisses as "unattractive" the argument that immigration officers are entitled to ignore international obligations in determining whether individuals could be deported despite the impact on family members, particularly children. The Court refuses to accept that "New Zealand's adherence to international instruments has been at least partly window-dressing."\textsuperscript{119} In \textit{R. v. Poumako}, this same court took the occasion to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."\textsuperscript{120} This case involves legislation passed to stiffen penalties for murders committed in the course of home invasions. The legislation was motivated by the public outrage that resulted when the accused invaded a woman's home, sexually assaulted and then killed her. The question before the court was whether the accused could be sentenced under the new legislation given that it had been enacted subsequent to the appellant's criminal conduct. Although it sympathizes with the impulse that gave rise to

\textsuperscript{118}Hayek, \textit{The Road to Serfdom} (1944) 72 cited in Luc B. Tremblay, \textit{The Rule of Law, Justice and Interpretation} (McGill-Queen's University Press, Montreal, 1997) at 48-51 at 149 [hereinafter Tremblay]
\textsuperscript{119}Tavita \textit{v. Minister of Immigration} (1994) 2 New Zealand Law Reports 257 at 266 [hereinafter Tavita].
the legislation, the court nonetheless concludes that retroactive legislation would put New Zealand in violation of its international obligations.

Judges in other jurisdictions share New Zealand’s commitment to guarding against hypocrisy. For example, in *Miuojekwu v. Ejikeme*, the Nigerian Court of Appeal determined the legitimacy of a custom called “Nrachi.” Nrachi entitles a man who has no male heirs to keep one of his daughters at home so that she can bear sons and raise them for him. Consequently, the daughter cannot marry. As compensation, she symbolically assumes the status of a son and stands to inherit her father’s estate; a privilege that would otherwise have been denied to a woman. In denouncing this custom, Justice Tobi provides the most sustained analysis of international law. Stressing that Nigeria has ratified the Women’s Convention, Justice Tobi concludes that Nigeria must live up to its international obligations. He writes,

Virginia has protection under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By the Article, State Parties condemn discrimination against women in all of its forms and agree to a policy of eliminating discrimination against women...In view of the fact that Nigeria is a party to the Convention, courts of law should give or provide teeth to its provisions.121

Also animated by the conviction that international obligations should not be reduced to “mere window dressing,” India’s Supreme Court leads many national courts in its commitment to giving effect to international law. *Chopra v. Apparel Export Promotion Council*, raised the question of whether an employer who had unsuccessfully attempted to sexually molest an employee was nonetheless still guilty of sexual harassment. Condemning the employer’s behaviour, the Indian Supreme Court observed that India

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was a party to the Women’s Convention and related international instruments. India must therefore give effect to international law.

These international instruments cast an obligation on the Indian state to gender sensitize its laws and the Court are under an obligation to see that the message of the international instruments is not allowed to be drowned.\textsuperscript{122}

The Court cited several of its own previous decisions that reinforce the Court’s duty to give effect to international law where possible.\textsuperscript{123} Vishaka \textit{v. State of Rajasthan}, a widely celebrated decision of the Indian Supreme Court also invokes the rule of law imperative. Vishaka came before the Indian Supreme Court in the form of a public interest class action, filed by social activists and non-governmental organizations to prevent sexual harassment in the workplace. The case followed a brutal gang rape of a social worker while on duty. The applicants argued that while women suffer sexual harassment on a daily basis in the workplace, neither the executive nor the legislature had taken any appropriate action to protect women from such harm; hence, it was incumbent upon the court to act. In a stunning move by any legal standards, the Supreme Court of India drafted a law relating to sexual harassment in the workplace and declared this the law of the land until Parliament acted to write its own sexual harassment legislation.

In drafting its legislation, the Indian Supreme Court turned to India’s international legal obligations for guidance. It observed that the government of India had made

\textsuperscript{122}Chopra \textit{v. Apparel Export Promotion Council}, (1999) All Indian Reports (Supreme Court) 625 at 635 [hereinafter Chopra].

international legal commitments concerning women’s equality and that the court should ensure the realization of India’s internal obligation.

The Government of India ratified the Women’s Convention on June 25, 1993 with no relevant reservations. It also made official commitments at Beijing to formulate and operationalize a national policy on women... We therefore have no hesitation in placing reliance on the above for the purposes of construing the nature and ambit of constitutional guarantee of gender equality in the Constitution.\textsuperscript{124}

In \textit{Unity Dow v. Attorney General of Botswana}, Botswana’s Court of Appeal considered whether citizenship laws that permitted male citizens to pass on their citizenship to their children but prohibited women from doing the same constituted sex discrimination. Finding that the legislation was discriminatory, the Court observes that Botswana seeks to avoid violating international law where possible.

If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaken given on behalf of the country by the Executive... In this regard, I am bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and obligations under those regimes.\textsuperscript{125}

Justice Horwitz of Botswana’s High Court expresses this same desire to uphold international commitments when the \textit{Unity Dow} case was before him prior to being appealed to the Supreme Court. Noting that Botswana “adheres to”\textsuperscript{126} the International Covenant on Civil and Political Rights, Justice Horwitz concluded

\textsuperscript{\textit{\textsuperscript{124} Vishaka and Others v. State of Rajasthan and Others}, (1999) 3 Butterworths Human Rights Cases 261 at 266 [hereinafter Vishaka ].\textsuperscript{\textsuperscript{125} Unity Dow v. Attorney-General of Botswana [1992] Law Reports of the Commonwealth 623 at 673-674 [hereinafter Unity Dow].\textsuperscript{\textsuperscript{126}Marsha A. Freeman points out that the reference to international instruments was highly problematic in this case because Botswana had not ratified any of the international human rights instruments other than the African Charter of Human and People’s Rights. The court negotiated this difficulty by invoking the incorporation provision of the African Charter preamble and Botswana’s signature of the Declaration on}}
It is difficult if not impossible to accept that Botswana would deliberately discriminate against women in its legislations whilst at the same time internationally support non-discrimination against females or a section of them.127

Within the rule of law framework, international law represents the positivistic128 expression of state consent: a state does not have to adhere to international norms, but once it indicates its intent to do so by ratifying a particular human rights instrument, then it should be held to its commitment. Ratification, on this view, remains central to the court's analysis. The implication is that courts cannot invoke unratified treaties in decision-making. The primary objective is to promote legality or observance for accepted and recognized legal rules wherever possible. The judge's role on this view is tied to promoting fundamental legality or observance for law. The language adopted by the courts reflects this concern as judges employ words like “obligation,” “undertaking,” “commitment,” and “observance” to underscore the legal significance of the obligation and denounce suggestions that ratification need not be undertaken with any sincerity.

Sir Anthony Mason, former Chief Justice of the Australian High Court encapsulates the concern for preventing double standards and hypocrisy as follows:

So, when an Australian convention ratification is announced, they may dance with joy in the Halmaheras, while here in Australia, we, the citizens of Australia, must meekly

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127 Unity Dow, supra, note 119 at 587.
128 The leading proponent of positivism, H.L.A. Hart would not agree that international law constitutes "law" because it lacks the core traits possessed by state law. Others, however, have extended Hart's theories to include international law. For example, Brian Z. Tamanaha argues that Hart's thesis is essentialist and fails to account for the complexity of legal systems, especially in non-Western societies. He aims to redefine Hart's conventionalism by stripping it of its essentialism and concludes that "law is whatever people identify and treat through their social practices as law." This definition is broad enough to include not only international law but also claims to natural law if recognized as law in the sociological sense. See Eduardo Moises Penalver, "The Persistent Problem of Obligation in International Law" (2000) 36 Stanford Law Journal 271 for a brief overview and critique of the claim that obligation in international law is rooted in consent.
await a signal from the legislature, a signal which may never come. Of course, this concept of ratification involving only a statement to the international community, but no statement to the national community, is quite insupportable.\textsuperscript{129}

Partly driven by this concern for promoting the rule of law, the Australian High Court determined in \textit{Minister of State for Immigration and Ethnic Affairs v. Ah Him Teoh}, that the ratification of a treaty by Australian officials gives rise to a legitimate expectation that Australian decision-makers will act in accordance with the treaty. The transcripts of the case reveal the extent to which the Australian bench sought to guard against hypocrisy. The High Court Justices expressed frustration with the government’s argument that ratification could be ignored. Justice Deane’s line of questioning reflects the aggravation of his judicial colleagues.

What was being put to you was that there was an obvious policy and in that context I was putting to you that it is surely relevant that the executive has committed the Australian nation to that obvious policy.\textsuperscript{130}

Similarly, \textit{Slaight Communications v. Davidson}, a decision of the Supreme Court of Canada stresses that international obligations, both customary and conventional, could be used to determine the content of constitutional rights and also to assess the importance of the legislation’s objective in assessing its validity under the Canadian Charter of Rights and Freedoms. Writing for the majority of the Supreme Court in that decision, Chief Justice Dickson looked to the International Covenant on Economic, Social and Cultural Rights to define the duty owed to an employee by an employer seeking to terminate an employment contract. While the rule of law imperative is less obvious in this judgment than others, it is nonetheless evident in the care taken by the Chief Justice to include only


\textsuperscript{130} \textit{Teoh Transcript, supra}, note 43 at 32.
Canada's international legal obligations within the scope of the interpretive presumption. The emphasis on ratified treaties reflects the fact that the rule of law imperative aims at giving effect to those obligations to which the state itself has consented. The rule of law imperative invoked by courts to justify their reliance on international law thus represents a corollary to the classical liberal premise that law is binding because its subjects have consented to be bound.\textsuperscript{131}

Madam Justice L'Heureaux-Dube and Mr. Justice Gonthier of the Supreme Court of Canada later relied on \textit{Slaight Communications} in applying international law to the question of violence against women in \textit{R. v. Ewanchuk}. The accused in this case was charged with sexual assault. He had invited a prospective employee to attend a job interview in his van. The accused then suggested that they move the job interview to his trailer so that they could review some of his work. Once in the trailer, he made sexual advances against the woman who repeatedly asked him to stop but otherwise made no move to leave or end the advances. The trial judge found that the woman had given her implied consent, and dismissed the sexual assault charges. However, the Supreme Court of Canada ruled that the woman did not reject more strenuously to the sexual advances because she was afraid. In a separate concurring opinion, Justices L'Heureaux-Dube and Gonthier turned to international law to underscore that Canadian authorities have an obligation to prevent violence against women. Accordingly, the justices characterize the

\textsuperscript{131}This notion manifests itself at the national level in social contract theories and at the international level in the rhetoric of state consent as the prevailing paradigm of international law. See Martti Koskenniemi, \textit{From Apology to Utopia: The Structure of International Legal Argument} (Helsinki: Finish Lawyer's Publishing Company, 1989) at 52-73 for a brief discussion.
Canadian Charter of Rights and Freedoms as "the primary vehicle through which international human rights achieve a domestic effect."\(^{132}\)

In *Grootboom v. Oostenberg Municipality and Others*, South Africa's High Court took the rule of law imperative to another level. The decision reflected the Court's willingness to traverse into international sources by considering not only the text of the relevant international treaty, but also the meaning attached to the treaty by international authorities. *Grootboom* dealt with the question of whether certain South African municipalities should be ordered to provide shelter and other social services to the applicants who were 390 adults and 510 children. The applicants were squatters who had been evicted from their lands and had no place to live. The Court undertakes a rather detailed analysis of international conventions and related documents in finding that the municipalities had a duty to provide shelter, but not housing, to the children. The Court observed that parents had no right to shelter in their own right but could reap the benefits of their children's rights by virtue of the fact that the best interest of the child principle as recognized under international law mandated that children should remain in the company and care of their parents.\(^{133}\)

In delineating the scope of the South Africa's obligations under international law, the Court referenced the General Comments of the Committee on Economic, Social and Cultural Rights. This is significant because it marks a serious desire to understand the full extent of South Africa's legal obligations as defined by the international body authorized with monitoring compliance with those obligations. The rule of law imperative in the *Grootboom* decision extends not only to showing respect and

\(^{132}\) *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at par. 73.
recognition for the substance of international law but also for the institutions that comprise the international system.

The rule of law rationale links most clearly to the binding authority model because both stress that international law imposes an obligation upon decision-makers to render decisions in accordance with international norms. This obligation arises from the fact of ratification and not simply out of a conviction that the norms themselves are worthy of special consideration. The nature of the promise is not relevant. Rather, the binding nature of the obligation derives from the bare fact that a legal promise has been made. The "rule of law" as envisioned under this rationale gives high priority to engendering respect for law, irrespective of its content, as the mark of a civilized society and a means of promoting certainty in decision-making and thereby guarding against discretionary decision-making.134

III. The Universalist Impulse

In addition to concerns about the rule of law and the duty to keep a legal commitment, judges across jurisdictions also consider what can be termed "the universalist impulse" rationale. International law, when viewed under this lens, identifies those modes of conduct that respect fundamental characteristics of the human condition: the assumption is that these norms are relevant across time, space and culture. The judge, on this view, is mandated to recognize and promote the inherent dignity and equal worth of all individuals. The importance of the task justifies bringing external values into the domestic realm through the domestic application of international law. Ratification proves irrelevant under this rationale because international law is regarded as a statement of

133 Grootboom v. Oostenberg Municipality and Others, 17 December 1999 (High Court of South Africa, Cape of Good Hope Provincial Division)Case No. 6826/99)(hereinafter Grootboom).
universal norms necessary to the inherent dignity of each individual. Thus, courts can invoke unratified treaties in their decisions when these treaties encapsulate universal rights.

For example, in D.K. Basu v. State of W.B. India’s Supreme Court considered whether torture that lead to the death of an inmate while he was being held in custody was compensable under public law as well as the private law of torts. In rendering its affirmative decision, the Court links the violation of individual rights in this circumstance to the defacing of all humanity. It reasons that the prohibition on torture is so vital to the moral fiber of all societies that its violation in one instance amounts to an attack on humanity at large. In the words of the Court,

no violation of any one of the human rights has been the subject of so many Conventions and Declarations as “torture” – all aiming at total banning of it in all its forms...”Custodial torture” is a naked violation of human dignity...whenever human dignity is wounded, civilization takes a step backwards – flag of humanity must on each such occasion fly half-mast”

Similarly, in Valsamma Paul v. Cochin University and Others, the Indian Supreme Court stresses that “all forms of discrimination on grounds of gender is violative of fundamental freedoms & human rights.” Valsamma Paul was born into one of India’s higher castes, a “forward class”, and married into a lower caste, the “backward class.” She claimed that a position at a university that had been reserved for candidates of the “backward class” should be available to her since she belonged to the “backward class” by virtue of marriage. However, the Supreme Court rules that voluntary assumption of disadvantage was not sufficient to entitle her to the reserved university

134 This is the traditional notion of rule of law associated with A.V. Dicey.
136 Mrs. Valsamma Paul v. Cochin University and Others, (1996) All Indian Reporter (Supreme Court ) 1011 at 1020.
post. The judges found that Paul retained the privileges of her birth caste because she had received such benefits as a quality education. The Court dedicates a significant part of its commentary to international law, characterizing international treaties as an expression of the "dignity and worth inherent in the human person." \(^{137}\) The Court observes, for example, that

> [h]uman rights and fundamental freedoms have been reiterated in the universal [sic] Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedom are inter-dependent and have mutual reinforcement. The human rights of women, including the girl child are, therefore inalienable, integral and indivisible part of universal and fundamental freedoms and equal participation by women in political, economic and cultural life are concomitants for national development, social and family stability and growth - cultural, social and economic.\(^{138}\)

In its review of the Nrachi custom\(^{139}\), the Nigerian Court of Appeal also looks to the Women's Convention to help define those practices that are "repugnant to natural justice, equity and good conscience."\(^{140}\) Labelling Nrachi an "uncouth custom [that is] not only against the laws of Nigeria but also against nature," Justice Tobi concludes that Nrachi represents one of those customs that international law seeks to eradicate.\(^{141}\)

Judges do not use the term "natural law," probably because such language sounds too mystical and appears to garb the judge with some transcendental authority.\(^{142}\)

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\(^{137}\) _Loc. Cit._

\(^{138}\) _Loc. Cit._ The Court then identified the relevant provisions of the Women's Convention that applied in this case, focusing on the wide definition of discrimination contained in article 1, the right to an effective remedy set out in article 2, the specific mention of legal remedy contained in article 3 and the requirement to take steps to eliminate gender discrimination in economic and social life contained in article 13.

\(^{139}\) See above for a brief explanation of Nrachi.

\(^{140}\) _Muojekwu, supra_, note 115 at 404.

\(^{141}\) _Ibid_ at 436.

\(^{142}\) Edward Morgan's historical overview of American jurisprudence reveals that judges can go out of their way to elicit sympathy for a cause before invoking the natural law label. For example, in the _Paquete Habana_ case, the Court was asked to consider whether a fishing vessel could be confiscated as a prize of war after it was caught in the U.S. blockade of Cuba during the Spanish-American War. Morgan notes that the Court exempts those engaged in the "eminently peaceful" industry of coastal fishing from confiscation.
However, natural law theory acts implicitly within their decisions as judges invoke words and concepts like "human dignity," and "fundamental freedoms" and "inherent equality" to ground their analysis. Rarely are these terms defined or analyzed, rather there is an assumption that their meanings are self-evident and that their manifestations instantly recognizable. Courts tend to assert that a given norm reflects natural law and generally offer little analysis to justify their choices. For example, the New Zealand Court of Appeal in *Tavita* refers to the state's obligation not to separate children from their parents as a universal human right. The Court did not indicate why the child's right not to be separated from a parent constituted a universal norm; reference to *The Convention on the Rights of the Child* substitutes for detailed analysis.143 Namibia's High Court also looks to international law for guidance on the meaning of dignity and equality of persons. The Court seeks guidance from *The Universal Declaration of Human Rights* and *The African Charter of Human and People's Rights* for guidance in determining how a society emerging from apartheid should promote the dignity and equality of all its citizens. The Court did not explain why the Universal Declaration or the African Charter embodied universal values.144

Judges invoke two techniques to buttress the claim that international norms represent universal rights. First, they point to a widespread commitment to international norms by members of the international community as evidence of the norm's natural law status. *S. v. Williams*, a 1995 decision of the South African Constitutional Court, helps

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143 *Tavita*, supra, note 113 at 266 references "the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in light of the universality of human rights." It also observes that "universal human rights and international obligations are involved."

illustrate the point. This case involved the question of whether the whipping of juveniles pursuant as punishment for a criminal offense constitutes cruel and unusual treatment. In holding that whipping did violate the prohibition on cruel and unusual punishment, the Constitutional Court recognizes that international treaties prohibited corporal punishment as a violation of the inherent right to dignity that attaches to personhood. According to the Court, "the deliberate infliction of physical pain on the person of the accused offends society's notions of decency and is a direct invasion of the right which every person has to human dignity."145 It noted that the prohibition on cruel and unusual treatment "found expression through the Courts and Legislatures of various countries and through international instruments."146 The Court surveyed a number of international instruments and decisions of other national courts on the concept of "cruel and unusual treatment." It found that "the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity."147 The Court places heavy emphasis on the fact that international treaties and national legislation from various jurisdictions prohibit cruel and unusual punishment. The Court regards the widespread commitment to eliminating such punishment as proof that its prohibition represents a dictate of natural law.

In Newcrest Mining, the High Court of Australia addresses whether the expropriation of land from a mining company for conversion into a national park violated the Constitution. The Court holds that the expropriation did not offend constitutional norms. In a dissenting judgment, however, Chief Justice Brennan concludes that because property is protected under international law, Australian law should do the same. Citing

146 Ibid at 644.
previous jurisprudence of the Court, he stresses that international law represented "a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights."148

Chief Justice Brennan focuses in particular on The Universal Declaration of Human Rights. Recognizing that the Declaration was not, properly speaking, a treaty, he nonetheless emphasizes that it "expresses an essential idea which is both basic and virtually uniform in civilized legal systems."149 He traces the origin of the norms back to The Magna Carta and The French Declaration on the Rights and Duties of Man and of the Citizen. The message implicit in the reference to the Magna Carta and The French Declaration in association with The Universal Declaration of Human Rights is that the right to hold property exists across space and time. Its universal appeal thus lays testament to its status as natural law. Significantly, Chief Justice Brennan’s dissent references a host of decisions from other national and international courts to reinforce that the right to hold property represents a universal value.150

In addition to emphasizing a widespread commitment to the norm as evidence of its universal status, judges also draw analogies between the right in question and those already regarded as universal. For example, Justice Aguda of Botswana’s Court of Appeal equated gender discrimination with slavery to buttress his conclusion that courts cannot uphold laws that discriminate against women. Justice Aguda writes,

147 Ibid, at 643.
149 Ibid at 659.
150 See in particular footnotes 489 to 506 which reference decisions and legal commentary from New Zealand, Canada, India, The United States of America, South Africa, and Malaysia.
it appears to me now that, now more than ever before, the whole world has realized that discrimination on grounds of sex, like that institution which was in times gone by permissible both by most religions and the conscience of men of those times, namely, slavery, can no longer be permitted or even tolerated, more so by the law.\footnote{Unity Dow, supra, note 119 at 671.}

The Court then identified the relevant provisions of the Women’s Convention that applied in this case, focusing on the wide definition of discrimination contained in article 1, the right to an effective remedy set out in article 2, the specific mention of legal remedy contained in article 3 and the requirement to take steps to eliminate gender discrimination in economic and social life contained in article 13.

Ensuring realization of the right is the main objective of courts operating under this rationale. Accordingly, they fail to consider rules of international law that render the right under consideration non-justiciable. For example, the Indian Supreme Court dismissed the significance of India’s reservations to the Women’s Convention. The Court declared that “they bear little consequence” in light of the fundamental rights at issue.\footnote{Basu, supra, note 129 at 438.} A more positivistic approach to the Convention, reflective of the rule of law rationale, would have found significance in these reservations: international law recognizes that they exempted India from particular provisions of the Women’s Convention to the point that they do not defeat the Convention’s object and purpose.\footnote{\textsuperscript{153}}

Having determined that the issues at stake were those involving “the dignity and worth inherent in the human person,” however, the Court set the stage for dismissing the reservations. Moreover, various national courts have come closer than international treaty bodies in applying international norms in adjudicating disputes between private
Consequently, the international law requirement that human rights norms apply only to state actors is not relevant in domestic courts.

Like the rule of law imperative, the universalist impulse rationale links to the binding authority school because the conclusion that the norm in question defines the essence of humanity drives away any notion that the judge has a choice in whether or not to vindicate it. The norm is necessary, universal and natural. It does not need to argue for its application. In the parlance of international law, the norm is non-derogable. Once it has been anointed with the “natural law” label, the norm need not persuade a judge of its efficacy in the circumstance. It need only present itself. Its application is necessary in all contexts. However, the duty to apply the norm is not grounded in the fact of ratification. It arises out of the conviction that international human rights law embodies universal norms expressive of natural law and inherent within the concept of humanity.

Yet, the universalist impulse also shares characteristics of the persuasion model because judges retain the authority to define a given norm as universal and non-derogable. Judges across jurisdictions have labeled a host of rights ranging from the right to inherit and hold property, to the prohibition on torture and women’s rights to participate in civil society as incidences of natural law.

154 See for example Muojekwu, supra, note 115. While the general rule that international law mediates the conduct of states remains largely in tact, international human rights law has evolved over the years to provide greater protection in the private sphere. For example, the Committee that oversees the implementation of the Convention on the Elimination of All Forms of Racial Discrimination Against Women has indicated in its General Comment No. 19 that it considers states responsible for violence against women even though the Convention does not explicitly provide such protections. The Committee has found that women cannot enjoy the rights contained in the Convention if they are subject to violence; thus the eradication of violence against women is a prerequisite to the full enjoyment of women’s human
IV. International Law As Introspection

International law also operates like a rhetorical literary device, such as satire or simile, by forcing national values out in the open. It offers judges a powerful tool to stimulate self-reflection and introspection. According to this rationale, the judge’s role is to find the values inherent within the national order. International law thus facilitates a process of introspection and self-discovery. International law does not bring new values into the domestic legal order when it operates under this rationale. Rather, it acts as a mirror that helps “show the values” already inherent though not altogether obvious in the domestic order.

Madam Justice L’Heureaux-Dube of the Supreme Court of Canada appeals to international law’s capacity to uncover a “golden nugget” within national laws when she applies the Convention on the Rights of the Child to limit the seemingly wide discretion granted to the Minister of Citizenship and Immigration under Canada’s immigration laws. She observes,

The principles of the Convention [on the Rights of the Child] and other international instruments place special importance on protection for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power.  

Similarly, Justice Kirby of Australia argues that international law, because of its contemporary status, proves more valuable to judges in developing the common law than recognized national precedents. In Jago v. District Court of New South Wales, Kirby wrote

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rights as provided under international law. Domestic courts do not seem concerned with the public-private distinction in the same way as international tribunals.

155 Baker, supra, note 14 at 231.
156 Ibid at 231.
I do not find it useful...to attempt to find and declare the common law of this State in 1988 by raking over the coals of English legal procedure of hundreds of years ago.

A more relevant source of guidance in the statement of the common law of this State may be the modern statement of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law.157

Britain’s House of Lords saga in *Pinochet* also illustrates that international law can assist judges in the task of sorting through and prioritizing existing national laws. The question before England’s House of Lords was whether England could extradite Senator Augusto Pinochet to Spain to face charges relating to torture and other violations of international law committed while he was President of Chile. A majority of the Lords ruled that Spain could seek Senator Pinochet’s extradition. But, the decision had to be abandoned and the case reheard because connections between one of the presiding judges and an intervenor group raised an apprehension of bias. Another caste of judges reaffirmed the decision that Senator Pinochet could be extradited. However, the second caste of judges relied almost exclusively on English common law principles to make its determination. Although they were not explicit on this point, it is arguable that the House of Lords did not refer to international law at the rehearing because international law had fulfilled its function before the first panel of judges by helping them identify the relevant national norms at stake. The second caste therefore could revert to national legal principles to resolve the matter.158

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158 Of course it might just be that the House of Lords was simply exhausted and wary of international law at this point.
As with the naturalist impulse rationale, courts offer very little by way of analysis to support the conclusion that the international norm under consideration merely reflects national values. Rather, they assume that the conclusion is self-evident. For example, Justice Gaudron of the Australian High Court asks the government's legal representative at the hearing of the *Teoh* case, "[a]re we not dealing in essence with something which is so obvious really that you just go the treaty to confirm your first suspicion, namely that a statutory discretion would not likely be exercised to the disadvantage of Australian children?"^{159}

Courts who invoke the introspection rationale generally refrain from a close reading of the texts of international treaties. They do not look for specific provisions or rules of international law that dictate a particular result. Rather, they adopt a purposive approach to interpretation with the aim of identifying the principles that animate the treaty and then establish a correspondence between the national and international level based on a mutual recognition of these principles.^{160} For example, the majority of the Supreme Court of Canada in *Baker v. Canada* did not undertake an analysis of whether the *Convention on the Rights of the Child* specifically covered situations where the state sought to deport the parent of a child citizen.^{161} Instead, the court emphasized that the convention, in general terms, promoted the best interest of the child and that Canada also accepted the importance of such a principle. The correspondence between the

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^{159} *Teoh Transcripts, supra*, note 43 at page 29.

^{160} Justice Kirby of Australia notes for example that in cases of ambiguity, "a judge may seek guidance in the general principles of international law." Kirby, Hon. Mr. Justice Michael, "The Australian Use of International Human Rights Norms from Bangalore to Balliol – A View From Antipodes" *Commonwealth Law Bulletin* (October 1992) 1306 at 1312. Justice Kirby of Australia notes for example that in cases of ambiguity, "a judge may seek guidance in the general principles of international law"
convention's underlying philosophy and Canadian values thus justified reliance on the convention.

South Africa's Constitutional Court also adopted a purposive approach to interpretation in *Khalfan Khamis Mohamed and Abdurahman Dalvie vs. President of the Republic of South Africa*. This case raised the question of whether the removal from South Africa of Khalfan Khamis Mohamed and Abdurahman Dalvie, two men who were suspected in executing the bombings of the United States embassies in Nairobi and Dar es Salaam, constituted cruel and unusual treatment. South Africa authorities arrested the two men and handed them over to FBI agents to stand trial in the United States of America. If found guilty in the United States, the two appellants faced the death penalty. South Africa, however, did not have the death penalty. The South African authorities argued that the applicants were deported to the United States; thus they could not claim the procedural rights that would otherwise be available under an extradition regime.

In dismissing the South African government's argument, the Constitutional Court noted that article 3 of the Convention Against Torture prohibited a state from sending an individual to torture both in extradition and deportation cases. The Court's reliance on article 3 of the Torture Convention proves curious because this provision prohibits states from drawing distinctions between extradition and deportation in cases of torture. The provision does not speak to cruel and unusual treatment. However, such textual details

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161 The interpretive approach of the majority stands in sharp contrast to that of the Federal Court of Appeal which adopted a more formalistic approach to interpretation, arguably reflective of its general unwillingness to engage international law. Baker, supra, note 14.
162 *Khalfan Khamis Mohamed and Abdurahman Dalvie and President of the Republic of South Africa and Six Others and The Society for the Abolition of the Death Penalty and the Human Rights Committee Trust*, (Constitutional Court of South Africa Court Case No. 8355/2000) at 45.
do not trouble the court because it seeks guidance from the convention on the level of
general principles only.

South African courts have adopted this purposive approach to interpretation in
other decisions as well. In S. v. Williams and Others, the court looked to international
instruments to identify whether juvenile whipping was consistent with South Africa’s
values of decency and desire to promote human dignity. The court did not require that
international law speak directly on the question of judicial whipping before determining
that international law was relevant to its decision-making.164 This reliance on
international law to help reveal national values allows the court to side step one of the
most troubling questions concerning obligations and interpretation at the international
level. In the Lotus case, the International Court of Justice stressed that “restrictions upon
the independence of States cannot be presumed” and that international law leaves to
States “a wide measure of discretion which is only limited in certain cases by prohibitive
rules.”165 International bodies including the International Court of Justice166 and the
various treaty bodies have been struggling with the positivistic dictum of the Lotus case
for decades. The National courts working under the introspection rationale, however,
avoid the dilemma of the Lotus rule because they conceive of themselves as working
under the dictates of national laws. Hence, the precise rules and requirements of
international law do not prove directly relevant.

164 The Court focused on the prohibition of cruel and unusual treatment.
165 Cited in Daniel Bodansky, “Non Liet and the Incompleteness of International Law” in International
Law, The International Court of Justice, and Nuclear Weapons edited by Laurence Boisson de Chazournes
166 See generally Ibid. Of course, one’s attitude towards the positivistic dictates of the Lotus case reveals a
significant amount about one’s philosophy of international human rights law in particular and law more
generally.
Unlike the rule of law imperative, the introspection rationale adopts an ambiguous attitude towards ratification. On the one hand, the state’s ratification of a treaty might suggest that the norms contained in the treaty reflect national values. Ratification thus serves as evidence that the values contained in international treaties also animate the internal legal order. However, the introspection rationale also attaches significance to unratiﬁed treaties: they can also reﬂect values that garner approval at the national level. For example, Botswana’s Court of Appeal has indicated that it will look to those treaties ratified by Botswana as well as unratiﬁed treaties in its decision-making. The Botswana Court indicated that it was following the lead of Justice Barker of New Zealand in Bird’s Galore Ltd. v. A.G. where he held that

an international treaty, even one not acceded to by New Zealand, can be looked at by this court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty.

As with comparative law, the differences between international law and domestic law can be just as instructive as the commonalities in helping deﬁne the values inherent within the domestic order. Thus the introspection rationale does not require that national law be brought into line with international law. Writing with the concurrence of Mason C.J. and McHugh J., Brennan J. of the Australian High Court recognized in Mabo v. Queensland that international law does not necessarily bind the court. “The common law does not necessarily conform with international law.” According to Mason C.J., the doctrine of terra nullius which refused recognition to Aboriginal title to land at common law is no longer binding in Australian law. Justice Brennan went on to observe that “international law is a legitimate and important inﬂuence on the development of the common law especially when international law declares the existence of universal human rights.”

167 Unity Dow, supra, note 119 at 673.
168 Loc. Cit.
169 Mabo v. Queensland (1992) 175 Commonwealth Law Reports 1 at 42. Mabo reversed the long-held doctrine of terra nullius which refused recognition to Aboriginal title to land at common law. Justice Brennan went on to observe that “international law is a legitimate and important inﬂuence on the development of the common law especially when international law declares the existence of universal human rights.”
have declined to interpret national laws in conformity with international norms on the claim that the national and international were irreconcilably different.\textsuperscript{170}

For example, despite international law, Nepal's Supreme Court refused to overturn a law which provides that a daughter may inherit part of her father's estate on condition that she reach 35 years of age and remain unmarried.\textsuperscript{171} The court observes that several international instruments proscribe that men and women are equal before the law and are to be accorded the same legal capacity.\textsuperscript{172} However, the Court determines that the international convention was out of step with Nepal's "patriarchal society." It refuses to strike down the legislation in question even though the Nepali Treaties Act rendered international instruments tantamount to the national laws of Nepal. The Court instead ordered consultations to take place to consider the impact of the impugned legislation on the equality rights of both men and women.

Australia's Federal Court has also pointed to differences between international and national norms as a reason to ignore international law. In \textit{Nulyarimma v. Thompson}, the Federal Court refuses to recognize genocide as a common law crime even though it acknowledges that the prohibition on genocide constituted a \textit{jus cogens} international norm. The applicants in this case argued that Australia's Aboriginal laws and policies promoted genocide. They contended that the courts could take jurisdiction over the matter even in the absence of relevant national legislation because the prohibition on genocide constitutes \textit{jus cogens}, and therefore forms part of the common law in Australia.

\textsuperscript{170}See also \textit{Kausesa v. Minister of Home Affairs and Others} (1995) 1 South African Law Reports 51 [hereinafter \textit{Kausesa}] where the Namibian High Court interprets the meaning of equality under various international instruments as requiring equality of treatment (as opposed to equality of result). The Court reached this conclusion because it reasoned that it can only escape from the shadow of apartheid by ensuring strict equality of treatment.

\textsuperscript{171}See also \textit{Meera Kumari Dhungana vs. His Majesty's Government} (1993) Supreme Court. Unofficial translation.
While the High Court endorses the claim that the Aboriginal people of Australia had been subject to genocidal policies, the Court refused to take jurisdiction over the issues because they could not reconcile this with various entrenched aspects of Australian law. Justice Wilcox, for example, points to the "the strong presumption nullum crimen sine lege ("there is no crime unless expressly created by law)." Justice Wilcox notes that international and national laws differ because international law lacks the details of national legislation. Thus, it is impossible for courts to translate international law to the domestic context in the absence of legislation.

In the case of criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide." 173

Justice Whitlam, for his part, determines that the claim runs up against "formidable statutory obstacles" as the Criminal Code abolished common law criminal offences. 174

Where national and international law prove complimentary, judges adopt what can be called a "self-referential interpretive technique." Not only is international human rights law used to interpret national laws, but national perspectives are brought to bear in the interpretation of the same international norms that are invoked to resolve the meaning of the national laws. Thus, international law operates as both the vehicle and object of interpretation: as a vehicle of interpretation, it lends meaning and scope to national law; as an object of interpretation, it is itself understood in light of national legal principles. 175

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172 Ibid at 3.
174 Ibid at 21.
175 See also Muojekwu, supra, note 115 where Justice Tobi of the Nigerian Court of Appeal interprets the prohibition on exploitation of prostitution contained in Article 6 of the Women’s Convention as prohibiting promiscuity.
For example, in *Baker v. Canada* the Supreme Court of Canada used international law to reinforce the conclusion that immigration officers must have regard for the best interest of the child principle when deciding on whether to deport a non-citizen parent. International law has an obvious role in the court’s approach to statutory interpretation. *The Convention on the Rights of the Child* does not clearly extend to include situations where a deportation order is directed at a parent rather than the child herself. Article 3 of the Convention dictates that the best interest of the child shall be a primary consideration in all matters concerning the child. However, the Canadian Federal Court of Appeal had determined that the term “concerning” restricted the application of article 3 to cases where the child was the subject of a deportation order, not the parent. The Court reached this conclusion by noting that article 9 which explicitly dealt with the separation of parent and a child “affecting.” Moreover, the court noted that article 10 dealt with separation upon deportation and simply provided that the child should be told of the parent’s whereabouts – there was no indication that the state owed any other duty to the child.  

The majority of the Supreme Court of Canada dismisses the Federal Court’s formalistic interpretative approach because such an approach did not reflect the primacy placed on children’s rights and interests in the Canadian context. Unlike the Federal Court, the Supreme Court interprets the *Convention on the Rights of the Child* as extending to the deportation of a parent. Significantly, the Court does not rely on any particular provision of the Convention. Rather, it focuses on the treaty’s overarching concern for promoting children’s rights. In rejecting a narrow, formalistic reading of the

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Convention, the Court confirmed — some would claim, created — that children have a right under international law to be considered when a parent is subject to deportation.177

The introspection rationale ignores the question of whether international law should be binding because a state has freely ratified an international convention or because it encapsulates natural law. Indeed, this model tends to do away with the notion of international law as binding in the first place. The judge refers to international norms because they are reflective of domestic norms and not because they are binding. This rationale links to the persuasion theory because it requires decision-makers to focus on the substance of the norm and consider its significance for national laws rather than inquire into its formal status as binding law. Accordingly, the judge remains free to accept or reject an international norm depending on its ability to promote coherence within the domestic legal regime.

V. Judicial World Traveling

Judges also look to the decisions of other national courts to lend weight to their own use of international norms. This rationale can be termed “judicial world-traveling.” It mirrors the feminist world-traveling technique. Some feminists promote world-traveling as an analytical tool. They argue that a heightened understanding of how other cultures approach a given issue can only lead to more informed, sensitive and hence effective advocacy or decision-making in all arenas. Judicial world-traveling operates in two ways.

First, judges look to the decisions of others to emphasize that international law represents a legitimate decision-making source. The reliance on international law by

177See for example the Department of Justice Factum in Baker, supra, note 98.
courts in other jurisdictions adds weight to the domestic court’s own decision to employ international law. For example, the Indian Court noted in Vishaka that

the High Court of Australia in Minister of Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.178

Similarly, in Newcrest Mining, Chief Justice Brennan of the High Court of Australia writing in dissent, refers to the recognition “by this Court and by other courts of high authority [that] the inter-relationship of national and international law, including in relation to fundamental rights, is undergoing evolution.”179

In Unity Dow, Botswana’s Court of Appeal cites speeches delivered at the judicial colloquium in Bangalore, India by Justice Michael Kirby of Australia and Chief Justice Muhammad Heleen of Pakistan. The Botswana court also cites decisions by courts in England and New Zealand for confirmation that international law represents a legitimate interpretive aid in construing domestic legislation. Justice Aguda concludes,

I am prepared to accept and embrace the views of these two great judges and hold them as the light guiding my feet through the dark path to the ultimate construction of the provisions of our Constitution now in dispute.180

Finally, the Supreme Court of Canada cited the Australian and Indian Court’s growing reliance on international law to support its own reference to the Convention on the Rights of the Child in analyzing the limits of a decision-maker’s discretion in the immigration context.181

Judges also look to decisions from other jurisdictions to buttress their particular reading of an international treaty and not simply to support their reliance on international

178Vishaka, supra, note 118 at 266.
179Newcrest Mining, supra, note 142 at 657.
180Unity Dow, supra, note 119 at 671.
law as a general matter. In such instances, judges invoke international and comparative legal sources together: they bundle together legally binding sources such as ratified treaties with sources that cannot give rise to legal obligations such as the national constitutions of other states and instruments from regional systems that do not apply to the state in question. For example, in S. v. Williams, South Africa’s Constitutional Court looks to various jurisdictions to identify a common thread or theme in the definition of “cruel and unusual punishment.”

Whether one speaks of “cruel and unusual punishment” as in the Eighth Amendment of the United States Constitution and in art 12 of the Canadian Charter, or “inhuman and degrading punishment,” as in the European Convention and the Constitution of Zimbabwe, or “cruel, inhuman or degrading punishment,” as in the Universal Declaration of Human Rights, the ICCPR or the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society’s concept of decency and human dignity.182

In Kauesa v. Minister of Home Affairs and Others, Namibia’s High Court considered whether comments made to the media by Elvis Kauesa, a black police officer, constituted hate speech. The Officer stated, “on behalf of the majority of black police officers,” that the white command structure of the Namibian Police Force wanted to undermine the government’s policy of national reconciliation through corruption and other improper acts. The High Court refers to provisions of various international and regional instruments to reinforce its conclusion that Officer Kauesa’s comments constituted hate speech. The Court cites treaties to which Namibia was a party alongside various sources that clearly did not bind Namibia. These sources included the American

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182 Williams, supra, note 139 at 643.
Convention on Human Rights, decisions of several higher level courts in other jurisdictions with emphasis on the decisions of the Supreme Court of Canada.183

Similarly, the Court of Appeal for New Zealand references ten provisions of international and regional treaties as well as constitutions of other jurisdictions to illustrate that retrospective legislation is condemned internationally. The Court makes no distinction between national constitutions and international treaties, collectively referring to documents such as the Canadian Charter of Rights and Freedoms, the Constitution of India, the French Declaration on the Rights of Man and of the Citizen and the Universal Declaration of Human Rights as “international instruments or treaties.”184

South Africa’s Constitutional Court also looks to international opinion in determining whether whipping should be permitted as punishment for juveniles. It concludes that

there is unmistakenly a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through Courts and Legislatures of various countries and through international instruments. It is a clear trend which has been established (emphasis in original).185

The failure to distinguish between international and comparative law stems from the fact judges look to these sources for their persuasive value and not out of a misguided conviction that the norms in question are binding. In short, the norm’s authority derives from its popularity, not its pedigree.

Judicial world-traveling holds an obvious appeal in countries emerging from turbulent race relations. The individual histories of Commonwealth countries like Fiji,

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183 Kauresa, supra, note 164 at 93.
184 Tavita, supra, note 113 at 75.
185 Williams, supra, note 139 at 644.
South Africa and Namibia "have driven these states to look at 'neutral' sources beyond the nation state to provide guidance in resolving internal divisions."186 Cases from these countries link the use of international law to the national project of moving beyond the iniquities of the past. In this context, reliance on international law and participation in the norms of the international community signals a movement towards better judgment that is untainted by the politics of the past.187 South African and Namibian judges openly argue that law can move their society away from its tainted past towards a more egalitarian future. The South African Constitutional Court declared in Grootboom,

the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity & respect...achievement of such a society within which the context of our deeply inegalitarian past will not be easy but that this is the goal of the Constitution should not be forgotten (emphasis added).188

Similarly, the High Court of Nambia stresses that it operates in the shadow of Namibia’s colonial and apartheid past. It thus looks to international law to lay the foundation of a new legal order.189

Judicial world traveling occasionally overlaps with the naturalist impulse rationale in that judges seek support for their own conclusions by identifying where other courts have reached similar conclusions. In particular, they emphasize decisions of other jurisdictions to buttress their conclusion that a particular claim involves universal rights.

188 Grootboom, supra, note 127 at
189 Kausesa, supra, note 164.
However, communitarian considerations rather than the strictures of natural law animate the judicial world traveling rationale. The popularity of the norm, not its internal logic, renders the norm judicially desirable because, in the words of Botswana’s Court of Appeal, courts “cannot afford to be immuned from the progressive movements going on” around them.190

Like the introspection rationale, judicial world-traveling recognizes that judges have the freedom to accept or reject international norms. On occasion, judges reject the approach of other members of the international community out of a conviction that the approach does not sit well with the legal or political climate of their own country.191 Judicial world-traveling links to the persuasion school because it reflects a judicial desire to reflect on and participate in a larger global community of judgment.192 Judges who look to other jurisdictions to discern the meaning assigned to international conventions recognize that they can learn from the struggles of other judges who are increasingly confronted with the same issues. “As social debates and discussions around the world become more and more similar, so, of course, do the equivalent legal debates” 193

VI. Globalized Self-Awareness

Judges across jurisdictions also invoke what can be termed the “globalized self-awareness” rationale in support of their reliance on international legal norms. Like the

190Unity Dow, supra, note 119 at 671.
191See for example Kausea, supra, note 164 where the Namibian High Court interprets the meaning of equality under various international instruments as requiring equality of treatment (as opposed to equality of result). The Court reached this conclusion because it reasoned that it can only escape from the shadow of apartheid by ensuring strict equality of treatment.
192Craig Scott and Philip Alston conclude that “it is probably true to say that growing number of national judges see themselves as juridical citizens of the world.” Craig Scott and Philip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Groothoom's Promise” (2000) 15 South African Journal of Human Rights at 6 of manuscript on file with author.
judicial world traveling rationale, communitarian considerations motivate globalized self-awareness. However, a self-conscious realization that the world is watching animates the globalized self-awareness rationale rather than the quest to seek inspiration from the logic of others. The overriding concern is to avoid feeling ashamed before members of the international community. For example, in *Tavita v. Minister of Immigration*, the New Zealand Court of Appeal observes that individuals in New Zealand had the right to appeal to the Human Rights Committee when national courts fail to provide an effective remedy for violations of the International Covenant on Civil and Political Rights. The Court concludes that

[a] failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.¹⁹⁴

Significantly, the court proves anxious to avoid international criticism directed at the judiciary of New Zealand and not at the state in general terms. The court, through its judgment, has an international legal personality onto itself.

Similarly, in *Van Gorken v. Attorney-General*, New Zealand’s Supreme Court notes that the international community had expectations of its members and that these expectations were relevant to the determination of individual rights at the national level even in relation to seemingly insignificant matters. *Van Gorken* raised the question of whether a regulation which granted more generous moving expenses to male teachers over female teachers constituted discrimination on the basis of gender. Observing that various international instruments prohibit such discriminatory treatment, the Court notes

that international treaties do not concern themselves with relatively minor details such as moving expenses. Nonetheless, these treaties remain relevant to all aspects of life because they "represent goals towards which members of the United Nations are expected to work."\footnote{195}

Globalized self-awareness reflects a judicial desire to be accepted by an international community. This desire for acceptance betrays itself most clearly when judges invoke the notion of "civilization." Judgments across jurisdictions proclaim the desire to be part of a "civilized" world of judgment. Of course, the concept of civilized is inherently value laden and relational – one is not "civilized" in isolation of others. Rather, the notion of "civilized" requires one to live up to certain standards that are external to one's self; it signals a desire for participation in and acceptance by a community that has the power to define the standards of acceptance. It involves judgment of others in relation to self, and judgment of self in relation to others. In \textit{Newcrest Mining}, Chief Justice Brennan of the Australian Court of Appeal, explicitly ties the notion of civilization to the gaze of the international community. He observes that the \textit{Universal Declaration of Human Rights} protects the right to property which "is both basic and virtually uniform in civilized legal systems." He notes that

\begin{quote}
the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.\
\end{quote}

This passage conveys the message that it is entirely legitimate, appropriate and acceptable for the international community to pass judgment on Australia's constitution

\begin{itemize}
\item \textit{Tavita, supra}, note 113 at 266.
\item Van Gorken at 544.
\item \textit{Newcrest Mining, supra}, note 142 at
\end{itemize}
and the court's interpretation of that document. Australia runs the risk of being deemed “uncivilized” by the international community if it repudiates international norms.

South Africa's constitutional court also displays the same anxiety to be regarded as civilized by participating in international norms. In S. v. Williams, for example, the Constitutional Court emphasizes that the values of the civilized world should inform the South African Constitution.

In common with many of the rights entrenched in the Constitution, the wording of this section conforms to a large extent with most international human rights instruments [note re. s.11(2) of Constitution – cruel & unusual etc. prohibited]...The interpretation of the concepts contained in s. 11(2) of the Constitution involves the making of a value judgment [which has regard for the expectations] of the...people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilized international community. Similary, the High Court of Tanzania expresses its intent to enforce “standards below which any civilized nation will be ashamed to fall.” Justice Amissah of Botswana, writing for the majority in Unity Dow, maintained

Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.

Botswana's Court of Appeal explicitly links respect for international human rights treaties with the development of liberal democracy in Botswana, and contrasted this with the lack of such positive movements in other parts of Africa. The court begins a relatively lengthy analysis of international law's place in national courts by taking

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197 Williams, supra, note 139 at 640 (emphasis in original).
199 Unity Dow, supra, note 119 at 54.
judicial notice of Botswana’s democratic tradition. It notes that “Botswana’s reputation as a liberal democracy is known the world over.”

Other courts betray a similar self-consciousness and awareness of being watched – and hence judged – by the international community without explicitly invoking the concept of civilization. In Vishaka, the Supreme Court of India turns to international standards about the quality of judging and stresses that judges are part of a larger global community to justify relying on international conventions in its drafting of sexual harassment legislation. The Vishaka decision thus illustrates a rising judicial desire not to disappoint international expectations and a willingness to submit themselves to international judgment.

Globalized self-awareness represents the apex of tranjudicialism. It suggests that some national court judges have become “juridical citizens of the world.” It is difficult to determine the factors that must exist before globalized self-awareness makes its way into the judicial culture of a nation or even into a given case. As Ann Marie Slaughter suggests, factors like the nature of the norm under consideration and the level of interaction between the national level judges with his or her peers must play a role. However, these factors may not be sufficient to give rise to the globalized self-awareness rationale. Judges remain aware that members of their own domestic judicial community may be critical of references to international law and may regard it as an illegitimate form of judicial activism. Concern for the opinions of the international community may thus

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200 Ibid at 671
202 Scott and Alston, supra, note 186.
203 Slaughter, supra, note 72.
be trumped by domestic legal opinion. The extra-legal history of *Baker v. Canada* illustrates this point.

A few months before the Baker case was heard by the Supreme Court of Canada, Madam Justice L'Heureux-Dube and Justice Beverly McLaughlin (as she was then) attended a colloquia of the International Women Judges Association. At that gathering, Sally Brown, a judge of the Family Court of Australia presented a speech in defence of the Australian High Court’s decision in *Teoh v. Minister of State for Immigration and Ethnic Affairs*. The Proceedings to that colloquia indicate that the speech was given with the specific knowledge that the Supreme Court of Canada was seized of two similar cases. Judge Brown explained the controversy that the *Teoh* case engendered particularly with respect to the finding that Australia’s ratification of the *Convention on the Rights of the Child* gave rise to a legitimate expectation that the convention would be considered by the administrative decision-maker when determining whether Mr. Teoh should be deported.

The two Supreme Court of Canada Justices must have been aware that at least some members of the global judicial community would be anticipating its decision in *Baker*, nonetheless, globalized self-awareness did not arise in the *Baker* judgment. How

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205Brown, Sally, “Minister of State For Immigration and Ethnic Affairs v. Ah Hin Teoh (1994-95), 183 CLR 273: The Convention, the Case, the Controversy and the Consequences” *Ibid* at 81. “Having been informed of the fact that the Supreme Court of Canada is presently seized with two cases in which the principles of Canadian immigration law could come into conflict with the *Convention on the Rights of the Child*, the speaker gave an example of a case that came before the High Court of Australia in which an immigrant married to an Australian and the father of 7 children, was refused permanent resident status following a prison sentence and was ordered deported from the country.
206See Morgan, *In the Penal Colony, supra*, note 27 for a discussion of the Supreme Court’s willingness to participate in international communitarianism on other occasions.
can one explain its absence? It is difficult to know for certain. Significantly, two of the seven Supreme Court judges who heard the *Baker* case dissented from the majority judgment because of its reliance on international law. The dissenting judges regarded international law as a threat to legislative sovereignty. This suggests that judges will not invoke the globalized self-awareness in a legal culture that regards non-legislative sources in decision-making as suspect. Globalized self-awareness, after all, acknowledges the role of non-national forces in the shaping of judicial opinion. The extra-legal history of *Baker v. Canada* indicates that the Supreme Court of Canada, despite its links to other national courts and even to international bodies, was unwilling to adopt transjudicialism to the extent suggested by globalized self-awareness.

Globalized self-awareness recognizes that transjudicialism involves more than persuasion and exposes judges to more than alternative modes of reasoning. It maintains an existence between binding authority and persuasion. Like the binding authority school, globalized self-awareness recognizes that international law can function as a form of legal constraint on those judges who are concerned about international juridical opinion. Various observers of the national legal scene have noted that judges, as an empirical matter, are constrained by the reactions they anticipate from their audiences. “What a given judge will do in a case depends on what she thinks will ‘fly’ as ‘good legal argument’ in the minds of others, as well as on what she herself thinks about the matter.” Globalized self-awareness differs from various versions of the binding authority model, however, because the proponents of that model tend to locate constraining authority in the norm itself and not in any particular community.

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207 Bastarache, *supra*, note 54
208 See above.
Like the persuasion theory, the globalized self-awareness rationale recognizes that transjudicialism extends judicial concern for the opinion of others beyond national borders. Increasingly, judges want to belong not simply to a domestic community of judges but also to an international juridical community. Greater interaction between judges in both real and virtual space both reflects and promotes this judicial desire to belong to a transnational community of their peers. Unlike the persuasion theory, however, globalized self-awareness recognizes that the desire to belong does not necessarily bring freedom from constraint 210 but is itself potentially constraining. Judges may accept the logic of others not because they are persuaded by their logic, but because they are influenced by judicial peer pressure.

IV. Conclusion

A careful reading of cases across jurisdictions involving the domestic use of international law reveals that although the references to international law tend to be brief, they shed significant light on the motivations and rationales invoked by judges who rely on international law. These rationales can be divided into five inter-related but potentially contradictory categories. The rationales reveal that judges have a partial and shifting reliance on both the binding authority model and the persuasion theory but not a deep-seated commitment to either. This does not mean that judges are sadly confused and their judgments are hopelessly confusing, however. Rather, it suggests the need for an alternative approach to the domestic effect of international law. The ambivalence reflected in the case law reinforces that neither the binding authority nor the persuasion schools provides a complete analysis of international law’s relationship to domestic

210 Tremblay, supra, note 112.
courts. The following chapter builds on the observations drawn from the case law to develop an approach to international human rights law's relationship to domestic decision-making. This approach draws on the various strands of the binding authority and persuasion models but seeks ultimately to meld the two approaches.

\footnote{See Moran, \textit{supra}, note 22 for the claim that judges seek freedom when they invoke international law in their decision-making.}
Chapter III: Bringing Together The Elements

...we simply do not know which rule will prevail until we get there. One can make an appointment with the doctrinal future, but one can never quell the anxiety over that future.\textsuperscript{211}

There is just too much diversity out there to conclude on any given single answer or theory.\textsuperscript{212}

I. Introduction

When national courts judges invoke international human rights law, they rely in part on the dictates of the binding authority model and in part on the logic of persuasion theory. Yet, the legal literature presents these two models as incommensurable alternatives. Commentators engaged in the debate over international law's relationship to domestic law have occupied themselves with determining the efficacy of one model over the other. Ultimately, however, neither binding authority nor persuasion provide a full account of international law's relationship to domestic courts. Various bids at "hardwiring" international law to domestic law under the binding authority model either run up against: the dictates of dualism; justify references to only a small number of international norms; degenerate into normative imperialism; or cannot explain why all norms of international law should not be recognized and enforced by national courts to the detriment of human rights claims. The persuasion theory, in its bid to overcome the weaknesses of the binding authority model, dilutes international law's claim to governance and risks limiting international law's potential to change the domestic legal landscape.

\textsuperscript{211} Morgan, Discovery, supra, note 220 at 603.
The answer, however, is not to abandon either binding authority or persuasion altogether. On the contrary, the judicial refusal to adopt the dictate of binding authority over persuasion or vice versa suggests that each model holds parts of the puzzle that is international law's life in domestic courts. This chapter undertakes to construct a theory of international law's relationship to domestic law. It aims to break the binding authority-persuasion debate by offering an alternative method of understanding international law's relationship to domestic law. This alternative method begins from the premise that binding authority and persuasion do not represent incommensurable alternatives.

II. The Conceptual Shift

1. Contradiction as Strength

Some might object to this venture from the outset. After all, binding authority insists that judges must apply international law when the right conditions arise. Persuasion indicates that judges always have a choice whether to apply international standards in all circumstances. One cannot reconcile the concept of obligation and choice. Binding authority and persuasion suggest two different conceptions of judging; hence, one must choose between them.

Such criticism assumes a bivalent model of legal reasoning which insists on the law of the excluded middle. The law of the excluded middle holds that one must choose between "[A] or [not A]." "[A] and [not A]" would be asserting inconsistency. Instead of proceeding along bivalent lines, the conceptual approach to the domestic effect of international law proposed in this chapter assumes that legal reasoning is multivalent or rhetorical in nature. Multivalent or rhetorical reasoning embraces contradiction and
recognizes vagueness as valuable. Legal reasoning involves a complex and often complicated assessment of various factors that dictate a given result. 213 John Wisdom has observed that legal argument does not consist of a chain of demonstrative reasoning. Rather,

\[ \text{[it] is a presenting and re-presenting of those features of the case which severally co-operate in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain.} \text{214} \]

This is not to suggest that all contradictions are created equal or that vagueness rules supreme. On the contrary, multivalent reasoning recognizes that arguments must still meet the test of coherence; they must still “hang together” well. The point is that theories which incorporate contradictory elements can persuade an audience. Indeed, H. Patrick Glenn has demonstrated that the most compelling and enduring legal traditions prove able to accommodate seemingly diverse and incommensurable elements. Multivalent reasoning then transforms contradiction from a legal liability into a source of potential strength.215

Multivalent thinking proves particularly relevant to the domestic application of international law given that international law is ambivalent at its core. Denying contradiction in the domestic application of international law proves not only futile but absurd. It is more fruitful to recognize and harness international law’s contradictory impulses in the domestic context. As Edward Morgan puts it,

\[ \text{213 “Fuzzy thinking” as multivalence logic has come to be termed – with respect – in some circles, has even made its way into mathematics where the concepts of “true,” “false,” and “somewhere in between” are being taken seriously.} \]

\[ \text{214 Cited in Ilmar Tammelo, “The Law of Nations and the Rhetorical Tradition of Legal Reasoning” (1964) Indian Yearbook of International Affairs 227 at 229.} \]
[p]ossible solutions and, therefore properly constructed arguments, are based on sheer functionality and not on conceptual coherence. The lesson for the advocate is, simply speaking, stop trying for the latter. The relationship between concepts of sovereign authority and trans-sovereign law is a pliable one, and the practitioner's dexterity increases markedly with familiarity and with liberation from any driving need to make sense of it.216

Morgan's conclusion requires qualification however: advocates and scholars should "stop trying to make sense of it all" within a bivalent framework. Instead, advocates and scholars should recognize the conceptual coherence suggested by the multivalent approach to international law. The central claim of this chapter is that conceptual coherence can be secured within a multivalent framework by reconfiguring the dominant elements of the binding authority and persuasion debate.

2. Reconfiguring Binding Authority and Persuasion

Beginning with the premise that legal reasoning represents a rhetorical undertaking and that contradiction need not prove fatal to legal reasoning, one can reconcile the binding authority and persuasion models by approaching them as points along a spectrum rather than conceiving of them as discrete and mutually exclusive categories of explanation. Several key features define the binding authority-persuasion spectrum. First, its various points correspond to the varying degrees of influence or weight that attaches to a given international norm in the domestic context. One end of the spectrum houses incorporated treaties. These command the highest weight in national courts and can be considered binding: a judge must strive to give effect to its provisions regardless of whether she is persuaded by them. As one moves along the spectrum, the weight that attaches to international norms drop.

216 Bivalent reasoning "is very logical, in the way western people have been trained to think." For a fascinating discussion of multivarent logic and its application to law, see H. Patrick Glenn, supra, note 205 at 325-327.
Where incorporated treaties are not at issue, weight becomes the function of a matrix of considerations. This matrix of considerations consists of the five rationales considered by judges who have invoked international norms in their decision-making: the rule of law imperative; the universalist impulse; the introspection rationale; judicial world-traveling and globalized self-awareness. The more rationales that arise and pull in the same direction, the more weight that attaches to international legal norms. In such circumstances, the international norm will be close to binding. Conversely, less weight attaches to international norms that lay claim to less than five rationales: the weight drops with the number of rationales claimed. The distinction made on the spectrum between incorporated and unincorporated treaties reinforces that, absent an act of incorporation, one cannot go to national courts armed simply with an international treaty and seek enforcement of its provisions. International claims need to be funneled through domestic channels. That is, the international norm must be anchored to a domestic provision, principle or constitution as defined by the state's particular legal tradition.

II. Two Stages of Decision-Making

1. The Definitional Stage

Decision-making with reference to international norms involves two stages: a definitional stage and an analytical stage. At the definitional stage, the decision-maker must identify the relevant norms, both national and international. Of course, this will be defined in part by the constitutional norms of the state, the available doctrinal options, and the litigation strategy adopted by the parties. For example, in some case, the decision-maker will be faced with interpreting the scope and content of a bill of rights; hence, the nation's constitutional laws come into play. In other cases, the decision-maker

216 Morgan, International Law and The Canadian Courts, supra, note 103 at 144.
will be required to interpret a statutory provision; this might mandate a review of administrative law principles.

Having identified the various national and international norms at play, the decision-maker must next ascertain whether the international norm is relevant to the decision-making exercise in that particular instance. An international norm will be considered irrelevant only where the legislature has expressly forbidden its application through clear language. Assume, for example, that a court is asked to interpret the meaning of a provision in immigration legislation governing deportation. If the legislature clearly indicates that the interests of children are not to be considered by immigration officials where a parent is ordered deported, then *The Convention on the Rights of the Child* will not be relevant to the determination of the meaning or application of that provision. However, legislative silence does not render a norm irrelevant. If the legislature wishes to violate international law, it must do so explicitly.

2. **The Analytical Stage**

At the analytical stage, the decision-maker must determine the weight to be attached to the various international and national norms. As indicated above, the weight attached to an *international* norm is the function of the matrix of considerations. The weight that attaches to the relevant *national* norms depends upon the particular legal context in which the decision is being made. Having gauged the weight that attaches to

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217 Several qualifications need to be noted here. First, other international law provisions may be relevant. Moreover, the conclusion that international law is not relevant to the determination of the meaning of the provision does not preclude a constitutional challenge in some jurisdictions. In such circumstances, the *Convention on the Rights of the Child* can be used to give meaning and scope to constitutional laws which would in turn be used to scrutinize the legislation that excludes children's interests. Finally, the fact that the Convention is not relevant to the meaning of the provision does not preclude the Court from noting the discrepancy between international law and national provisions. Such an observation goes a long way to enforcing the rule of law as defined below.

218 Hunt, *supra*, note 29. I am adopting Hunt's notion of an "unambiguity requirement."
the international and national norms, the decision-maker must then fold them into the decision-making mix. The exact relationship of national norms and international norms will vary with each case. For example, all national and international law sources might point unequivocally in the same direction. In such cases, the international norm can reinforce the efficacy of the national norms. In other cases, international law lends its weight to a particular national norm to assist the judge in deciding between two irreconcilable and competing national norms. It is possible, however, for international law and national law to point in opposite directions: in such cases the national norm must be weighed against the relevant national norm such that the weightiest norm prevails.

Where a particular international norm attracts all five rationales, it is theoretically possible though highly unlikely that a countervailing national norm will trump its application. If all five rationales are invoked, the judge will have already determined that international law reflects national values under the introspection rationale and perhaps under universalist impulse. The judge would therefore be contradicting herself if she were to determine that a national norm outweighs the international one in the later stages of the analysis.

Some might object that an international norm should never be allowed to trump a national one. However, it has already been determined at the definitional stage that international law is not irreconcilable with national law. Hence, the decision to proceed with a weighty international norm over a less significant national one does not represent the triumph of the international order over the national. The fact that the analysis has

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219 For example, in Nuyarimma v. Thompson [1999] Federal Court of Australia 1192. Justice Wilcox of the Australian High Court refused to recognize genocide as a common law crime in the absence of enabling legislation because "in the realm of criminal law "the strong presumption nullum crimen sine lege there is
progressed beyond the definitional stage indicates that there is room within the national legal order for international law. National law has not covered the field. The challenge at this point is to justify international law’s reception into the domestic legal order. This challenge can be addressed by turning to the five rationales that determine international law’s weight. If an international norm conforms to the rule of law imperative, then the justification for invoking it lies in the desire to avoid hypocrisy by recognizing the legal significance of treaty ratification. If the norm’s invocation can also be justified under the universalist impulse, it can be explained as a rational expression of the general will. If it satisfies the introspection rationale, then it can be justified on the basis that it reflects national values. Correspondence with the judicial world-traveling or the globalized self-awareness can either reinforce the universal nature of the norm under consideration, reinforce a determination under the introspection rationale or both.

It is important to note that the exercise of weighing international and national norms involves something more than allowing international law to help decision-makers choose between pre-existing national values. The weighing exercise has the potential to add a new, hitherto unrecognized value to the domestic legal order. Consider, for example, a jurisdiction such as Canada that considers social and economic rights as non-justiciable but that has ratified the *International Covenant on Economic, Social and Cultural Rights.* Depending on the circumstances, the rule of law imperative, standing on its own or operating in conjunction with other rationales, can be invoked to justify infusing international norms into the domestic realm. Thus, international human rights

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not crime unless expressly created by law) applies.” Justice Wilcox noted that the absence of legislation gave rise to serious procedural and jurisdictional difficulties” at 12 (on-line version)

220 Scott, supra, note 101 and *Tom Dunmore v. Attorney General For Province of Ontario* Leave to Appeal to Supreme Court of Canada granted (Case No. 27216)
law can ground arguments in favour of expanding the scope of domestic rights to include social and economic rights. The ultimate success of such an argument will depend not only on the weight that attaches to social and economic rights as determined by the five rationales, it also depends on the nature and significance of the relevant national norms. If, for example, human rights legislation can provide some interpretive space for the injection of social and economic rights into the domestic field, and if no national norms with significant weight pull in the opposite direction, then international law can be used to expand the domestic legal landscape. Murray Hunt has demonstrated how international law has already helped expand the legal horizon of decision-makers in the immigration context.221

Abstract analysis cannot determine whether an international norm prevails in domestic courts. International law’s influence on domestic law under the matrix of considerations approach proceeds on a case by case basis.

“The objective essence, or prefabricated purpose that lawyers crave is elusive.”222

No substantive norm maintains an absolute hold on judicial decision-making within the matrix of considerations. The particular place that any norm occupies along the spectrum changes with each case, depending on its level of compliance with the five rationales identified in the previous chapter. Thus, for example, the prohibition on torture might sit near the binding end of the spectrum when it meets all five rationales; however, in another case it might be found near the other end of the spectrum where it meets only the universalist impulse. Ultimately, whether a national court endorses the prohibition on

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221Karen Knop appears to want to expand their mental horizons while Hunt seeks to expand their legal horizons.

torture depends not only on the weight of the international norm but also on the textual wording and weight of relevant divergent and parallel national norms. A judge in a state that has ratified *The Convention Against Torture* can determine that the prohibition on torture meets all five rationales and that it thus carries great weight but still conclude that clear legislative language permits torture. In such a scenario, international law cannot override the express dictates of the legislature. On the other hand, a judge in a state that has not ratified the Torture Convention can determine that the prohibition on torture satisfies only the universalist impulse and the judicial world-traveling rationale; yet, she can still conclude that torture is prohibited in her state. The norm prohibiting torture attracted less weight in the non-ratifying state than in the ratifying state. However, the weight assigned to the international prohibition on torture proved sufficient to influence the domestic realm in the absence of conflicting laws to the contrary.

As these scenarios suggest, decision-making under the matrix of consideration can be a messy affair. Numerous permeations are possible as the various rationales can work together or against each other as well as with or against national law in various combinations. Moreover, the matrix admits contradiction. It brings together a set of justifications that are themselves animated by contradictory rationales. It does not seek to privilege one justification over another, root out those features of the rationales that do not fit into a neat, static, polished package, or lament the contradictions. Rather, it recognizes the "multiple poles in a complex field of forces, among which judges navigate and negotiate."223 As the analysis of the binding authority-persuasion debate advanced in chapter I illustrates, no single explanation can ground the use of international law in

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national courts. The universalist impulse, for example, cannot explain why those norms that have not attained the status of customary international law can be referenced by national courts. However, the rule of law rationale can explain such a result. Under the matrix of considerations, the various elements work together to compensate for each other's inadequacies, "the one lighting what the other darkens." The matrix of considerations thus transforms contradiction from a legal liability into a source of strength.

IV. Significance of the Matrix of Considerations

Several consequences flow from adopting a matrix of considerations approach to international law's use in domestic courts. These consequences cover a range of subject matter from the relationship of the various branches of government to each other, the nature of judicial reasoning, and the changing nature of sovereignty in both its national and international manifestations. They also concern international law's desire to govern, the primacy of human rights norms over other international sources, and the various doctrinal channels that have been adopted in different national jurisdictions to give domestic effect to international law. A detailed analysis of any of these items in and of themselves has consumed legal scholars for decades. This chapter does not claim to resolve some of the deep-seated questions that arise in relation to any of these subjects. Its goal is more modest. It seeks to identify the consequences that the matrix of considerations approach has on each of these subjects as part of the process of reconfiguring the debate between the binding authority and persuasion schools.

224 Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (1983) at 233.
1. Development of Transnational Norms

Both international human rights law enthusiasts and its critics juxta-oppose the national and international as two discrete and watertight compartments. The enthusiasts seek to impose the international on the national order. By contrast, international law's detractors deplore any attempt to bring international law to the national level. As the cases discussed in Chapter II illustrate, however, national and international norms interact with each other in complex and multi-faceted ways. Any theory of international law's relationship to domestic law must be able to explain their complex interaction at the level of doctrine, interpretation and norm building.

Various commentators have observed that judicial reliance on international norms reflects a melding between the national and international. Mayo Moran has demonstrated how the melding between national and international law manifests itself in the United States in the context of torture as tort case law. For example, Mayo Moran concludes that "it is simply inaccurate to describe domestic law and supranational law as unrelated and mutually-exclusive spheres of normativity. In fact, the relationship between domestic law of various sorts and supranational law has been, and continues to be, characterized by complicated interactions and borrowings." Similarly, Murray Hunt demonstrates that the jurisprudence of the European Court of Human Rights has borrowed heavily from the

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225 Baker, supra, note 14, dissenting judgment of Justice Cory and Iaccubucci: "It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: Capital Cities Communications Inc., v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system...The primacy accorded to the rights of the children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant
English common law. This trend does not represent "the progressive subordination of national legal systems to a superior international order, but rather herald the arrival of a new interdependence of national and international legal orders, in which each presupposes the independent validity of the other." Craig Scott and Philip Alston observe that Constitutions and international treaties are related through an "interpretive circle" whereby national norms are interpreted in light of international ones and national interpretations of domestic norms are shared with other courts "both in terms of persuasive reasoning that international bodies see fit to embrace, and more formally, in terms of general principles of law with their own status as international law."

Consistent with this rising scholarly consensus, the matrix of considerations approach recognizes the manner in which national and international considerations weave themselves into a national court's analysis. The matrix of considerations approach reinforces that the categories of "national" and "international are not water-tight and that any bright line which may have delineated them in the past has faded. For example, factors internal to the national realm such as the introspection rationale are united with factors that are external to it such as the judicial world-traveling rationale in determining the weight that is to be assigned to an international norm. In the end, the application of an international norm in domestic courts depends less on its pedigree and more on its

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provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

226 Moran, supra, note 22.
227 Hunt, supra, note 29.
229 Scott and Alston, supra, note 186 at 7.
230 Hunt, supra, note 29 at 42-43.
substantive content. Moreover, the matrix of considerations approach recognizes that judges employ a multi-dimensional interpretive technique that melds national and international norms. Interdependence extends beyond the reception of international norms into the domestic realm and the influence of national courts on international tribunals. It permeates the interpretive exercise itself.

Finally, the matrix of considerations approach does not lament the different modes for giving effect to international human rights law adopted within different jurisdictions. Some commentators have condemned the diversity. Most ignore it altogether. The matrix of considerations, by contrast, permits doctrinal diversity. The matrix does not dictate the precise doctrinal relationship between the national and international law. National courts can continue to develop their own particular doctrinal approaches that draw on their local legal traditions. The important question under the matrix of considerations is not how international law is received into the national legal order – doctrines vary with jurisdictions -- but how it ultimately influences the overall decision-making process.

2. Ambiguity and Conflict Reconfigured

Unlike some variants of the binding authority model, the matrix of considerations approach does not require ambiguity as a trigger. International law comes into play regardless of whether an ambiguity can be found. However, ambiguity is not lost in the analysis. Thus, for example, international law can help decision-makers choose

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\item This is in keeping with the philosophy of the persuasion theory which regards the norm’s efficacy as being more important than its origins. See for example Moran, supra, note 22.
\item See above.
\item See for example Hunt’s criticism of the Australian legitimate expectations approach in Hunt, supra, note 29 at 251.
\item The ability to ignore doctrinal diversity is in part the by-product of the fact that most studies focus on a single jurisdiction.
\end{enumerate}
between competing values at the national level under the introspection rationale where national law does not clearly dictate a certain result. If this rationale is not invoked or satisfied, international law remains relevant to the analysis but with diminished weight. Hence, a finding of ambiguity in the national law helps determine the weight to be assigned to an international norm but does not dictate its relevance. Moreover, a finding of non-ambiguity in national law does not render international law irrelevant to the issues at hand. On the contrary, a finding that national law clearly dictates a certain result can actually strengthen international law’s relevance to the domestic law. In such circumstances, the international norm can reinforce the efficacy of the national norm.235

Similarly, the matrix of considerations approach requires a different approach to conflict between national and international norms than that proposed by some versions of the binding authority model. The matrix of considerations approach requires decision-makers to weigh the various sources against each other rather than determine if they are in conflict. This shifts the analysis away from an examination of a given norm’s pedigree and more towards its substantive force as advocated by proponents of the persuasion theory. Hence, a decision-maker can still choose a norm found in an international treaty over one found in a domestic law even where the two conflict. Thus, for example, a weighty international norm such as the best interest of the child principle can override a line of precedent in national law even when the precedents conflict with the best interest principle.236 Such an approach recognizes that one can always find norms that conflict237 and that legal decision-making, at its heart, mandates choices between conflicting norms.

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235 L’Heureux-Dube, supra, note 8 and Moran, supra, note 22.
236 See for example the federal court decisions as compared with the Supreme Court of Canada decision in Baker, supra, note 14. A long line of precedent held that the best interest of the child was not relevant to
As with ambiguity, conflict remains part of the matrix of considerations analysis; however, it is recast as a question of relevance. As noted above, international law proves irrelevant to decision-making where the legislature has expressly prevented its application. Posing the threshold requirement in terms of relevance rather than conflict proves beneficial because the question “is this relevant?” mandates a relatively straightforward determination of whether there is any clear textual indication that international law cannot be invoked.\(^{238}\) It does not require the decision-maker to move beyond a purely textual analysis into the kind of substantive and normative analysis necessitated by a conflict analysis. Thus, decision-makers can side-step the confusing and contradictory line of reasoning that has developed around the concept of conflict between national and international law.

3. **Giving Priority to Human Rights Norms**

Since it recognizes that international norms can be assigned varying weight in different contexts, the matrix of considerations remedies a defect of some versions of the binding authority model, namely its inability to privilege rights enhancing norms over rights detracting ones.\(^{239}\) This can occur at several points in the analysis. First, international norms that are rights detracting tend to attract less weight under the matrix of considerations because they will not satisfy the universalist impulse and because they

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\(^{237}\) As discussed below, the legal enterprise involves prioritizing and not quests for doctrinal purity unmarred by conflict.

\(^{238}\) For example, to render article 3 of the *Convention on the Rights of the Child* irrelevant, the national law would have to indicate that a decision must be made notwithstanding the best interest of the child principle.

\(^{239}\) Although some versions of binding authority can explain why priority should be given to rights enhancing norms. See Roberto Mangabeira Unger, *What Should Legal Analysis Become* (London: Verso, 1996) for the argument that law cannot pretend to be a neutral, value-free enterprise and his challenge to all those interested in and involved in the law to use law as a basis of imagining and attaining alternative societies.
might contradict entrenched national values. For example, some have argued that international terrorism treaties permit guilt by association and that these treaties should govern interpretation of statutes within the domestic realm.\textsuperscript{240} The matrix of considerations, however, requires any international provision that permits guilt by association\textsuperscript{241} to be measured against the well established principle of freedom of association that exists at both the international and national levels.\textsuperscript{242}

Other rationales can also operate to filter out rights detracting norms. For example, the judicial world-traveling and globalized self-awareness may help lend weight to universal norms where a significant number of jurisdictions have acted in accordance with a universal norm. Thus, the observation that customary international law prohibits torture can be enhanced by the judicial world-traveling and globalized self-awareness rationales given that other jurisdictions have strongly condemned torture.

In cases where the judge determines that retrogressive national norms must trump more worthy international human rights norms,\textsuperscript{243} the matrix of considerations nonetheless permits the judge to point to the shortcomings of the national law. For example, judges can uphold a law that discriminates against same-sex partners while still pointing out that such a law violates international treaties ratified by the state (the rule of law imperative) and the norm of non-discrimination as recognized under customary international law (the universalist impulse). Even where international human rights law

\textsuperscript{240}Department of Justice Factum in \textit{Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)} Supreme Court of Canada File No. 27790 [hereinafter \textit{Suresh}].

\textsuperscript{241}Assuming for the sake of argument that international treaties contemplate such a result.

\textsuperscript{242}See for example Canadian Arab Federation’s factum in \textit{Suresh, supra}, note 234. Canada’s immigration laws permits individuals to be deported simply on the basis of their association with groups that have been deemed to be terrorist.

\textsuperscript{243}This can happen either at the definitional stage where an international norm is determined to be irreconcilable or at the latter part of the analytical stage where it is determined that a national norm carries greater weight.
cannot override national norms to the contrary, it still has a role to play in the development of a human rights agenda through its ability to force a political debate. As David Dyzenhaus and Evans Fox-Decent have concluded, “the rule of law depends in the first instance on the ability of the legal order to bring the excesses of politics to the surface, and force those who wish to violate fundamental democratic values to be explicit about it.” International law can thus trigger a crisis in an unsatisfactory national order even where it cannot, as a legal proposition, trump that order.

4. Legislative Sovereignty

The matrix of consideration approach preserves a space for the legislature throughout the analysis. First, the matrix of considerations maintains the distinction between incorporated and unincorporated treaties. The fact that unincorporated treaties are given less weight than incorporated ones responds to the concern that judges who refer to unincorporated international treaties collapse the distinction between incorporated and unincorporated treaties. The distinction is maintained without positing international law’s relationship to domestic law as an all or nothing affair that deems incorporated treaties as binding and unincorporated ones as irrelevant. Second, in considering the five possible rationales that can justify recourse to international law, the

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decision-maker is required to consider whether the international norms under consideration correspond to the internal values of the state. If so, international law does not add anything new to the internal order but simply helps judges define and evaluate what already exists. Moreover, the matrix of considerations approach requires that international norms be balanced against national laws at the analytical stage of decision-making. At this stage, a well-established national norm may override an international norm. Finally, legislative sovereignty is preserved because a clear textual indication from the legislature that an international norm can, at the definitional stage, prevent judicial reliance on an international norm regardless of its weight. Hence, the matrix of considerations approach does not permit international law to always prevail over national law or to trump the clear dictates of the legislature.

5. The Treaty-Making Function

In addition, the matrix of considerations approach acknowledges the executive’s treaty making function. This is factored into the matrix under the rule of law rationale. Consequently, the matrix of considerations approach respects the constitutional role of the executive which is sacrificed by the persuasion theory approach. At the same time, the matrix of considerations approach understands the limits of executive power; a point that is not altogether appreciated by various strains of the binding authority model.

6. The Judiciary: Choice, Constraints and Transjudicialism

Finally, the matrix of consideration approach recognizes the judiciary’s interpretive and creative function. This model does not pretend that the judiciary simply uncovers the intention of the legislature. It acknowledges that judges have a role to play

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246 This is different from the presumption of legislative intent which posits that the legislature intends to promote international law. The point here is that the legislature intends to promote certain values,
in developing laws; hence, the matrix of considerations does not pretend that reliance on international norms does not add anything new to the legal landscape. As a related proposition, the matrix of considerations approach recognizes that judicial choice permeates virtually every level of the analysis. For example, judges determine which rationales are present, they assign weight to the various rationales, and they balance the national and international norms.

Yet, the matrix of considerations approach also recognizes the limits of the judiciary’s creative function. Express directions from the legislature can limit judicial reliance on an international norm, no matter how persuasive. Even in the absence of express directions from the legislature, the matrix of considerations recognizes that decision-making is not an unfettered exercise. It strikes a balance between the persuasion theory’s emphasis on judicial choice and binding authority’s quest to articulate objective criteria that structure such choice. The matrix of considerations sets out the relevant factors that judges must consider in the decision-making process. Judicial choice is not necessarily free-wheeling but is structured by criteria that is external to the judge’s personal preferences. Judicial choice and objective criteria thus co-exist under the matrix of considerations. It recognizes a paradox of judicial decision-making: judicial choice can give rise to judicial obligation. For example, judges can decide whether any of the five international law rationales exist within a given scenario. However, once they choose between alternatives, they are bound by the consequences of their choices

regardless of their pedigree.

247 See Mahoney, Paul "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 Human Rights Law Journal at 57 for the argument that continuity and creativity work together to maintain the court’s ongoing interpretive authority by seeking to balance the judiciary’s role with that of the legislature and executive.

248 Kratchowil at 205-211: “enables the respective actors to back their choices by means of acceptable beliefs, rules of preference, or general classification schemes.”
Thus, if they determine that all five – the rule of law imperative, the universalist impulse, international law as rhetoric, judicial world-traveling and globalized self-awareness – exist, then they must give the relevant international norm significant weight in their decision-making.

While decision-making involves a significant amount of choice, it also imposes constraints. 249 The matrix of considerations accepts that judges sometimes adopt a decision because they are convinced by the efficacy of the norm. At other times, however, persuasion must give way to binding authority. 250 For example, clear statutory language may force a judge to decide against a particular norm no matter how much normative appeal it holds. 251 At other times, the weight of the particular norm dictates its application in a given context. The point is that choice permeates but does not altogether exhaust the judicial function. “[O]ften there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.” 252

Finally, the matrix of considerations acknowledges transjudicialism as a descriptive and normative fact. As the various proponents of persuasion recognize, judges are indeed speaking to each other more frequently in both real and virtual space as

249 Repeated acceptance gives rise to the concept of precedent. Immediate acceptance is rooted in the idea that a norm reflects universal values.
250 Owen Fiss, for example, recognizes that all adjudication is a form of interpretation. Nevertheless, he recognizes that the interpretive process is constrained by a set of norms or standards (“disciplining rules”) that “specify the relevance and weight to be assigned to the material (e.g. Words, history, intention, consequence)...define basic concepts and the procedural circumstances under which the interpretation must occur.” Owen Fiss, “Objectivity and Interpretation” 34 (1982) Stanford Law Review 739. See Tremblay, supra, note 112 at 48-51 for a discussion.
251 Even those who doubt that language contains meaning because meaning is always mediated by the interpreter nonetheless agree that language can convey meaning because interpreters within a given community share interpretive assumptions. See Tremblay, supra, note 112 at 43-59 for an overview of the various “deconstructionis” “reception theory” and “pragmatism” in relation to legal interpretation. If language did not provide some constraint on decision-making, there would be no “hard cases.”
they increasingly meet at judicial colloquia and share their legal wisdom by citing each other in legal decisions. The matrix of considerations recognizes that transjudicial interpretive communities exert an increasing – though hardly widespread -- influence on judicial decision-making in national courts. Building on Karen Knop’s thesis, the matrix of consideration recognizes the role that transjudicialism can play in national self-analysis and introspection. However, the matrix of considerations acknowledges that transjudicialism involves more than introspection and extends to concern for the rule of law and universal values while simultaneously engaging the judge in an international community of judgment.

7. Harnessing Apology and Utopia

The matrix of considerations recognizes that the contradictory impulses at the core of international law cannot be sublimated or denied. It does not direct judges to stress international law’s utopian vision at the expense of its more apologetic impulses in the pursuit of a human rights agenda. On the contrary, it combines international law’s positivistic and utopian impulses. For example, the rule of law rationale requires

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253 See Chapter IV below.
254 On the one hand, international law rests upon the twin concepts of state sovereignty and consent. The classic articulation of this position was provided by the International Court of Justice in the Lotus case when the Court stressed that “restrictions upon the independence of States cannot be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules.” Cited in Daniel Bodansky, “Non Liqet and the Incompleteness of International Law” in International Law, The International Court of Justice, and Nuclear Weapons edited by Laurence Boisson de Chazournes and Philippe Sands (Cambridge University Press, 1999) (hereinafter International Law). On the other hand, it gives expression to higher humanist values based on the inherent dignity and worth of the individual that purportedly precede and circumscribe state consent. International law has always taken a highly ambivalent stance towards these two impulses, never being able to fully reconcile them or ameliorate one over the other. Recently, for example, the International Court of Justice was required to rule on whether the threat or use of nuclear weapons was prohibited under international human rights, environmental and humanitarian law. At the end of the day, the Court determined that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake.” By 7 votes to 7, by the President’s casting vote. “Legality of the Threat or Use of Nuclear Weapons” (Request by the United Nations General Assembly) ICJ Advisory Opinion (hereinafter Nuclear Weapons) in International Law at 520-560.
decision-makers to give effect to expressions of state consent while the universalist impulse requires decision-makers to focus on the more utopian task of recognizing universal values. The matrix of considerations does not stress the utopian over the positivistic or vice versa. Rather, it

necessitates a two-dimensional (or dialectical, if you prefer) programme in which falling into utopianism is checked by the acknowledged need to understand the present constantly better while the lapse into apologism is countered by a viewpoint which looks at the present from a conception of its ideal purpose.255

The matrix of considerations thereby “avoids the charge of apologism as a result of the openness of the process and as it implies that in another context a different solution might be arrived at.”256 Conversely, the matrix of considerations approach avoids utopianism because it does not rely purely on abstract claims of general principles but requires judges to engage in judicial world-traveling and national introspection both of which reinforce that alternatives to the present are “available here and now.”257

V. Is the Matrix of Considerations Supported By the Case Law?

It would be misleading to suggest that the case law unequivocally supports the matrix of consideration approach to international law. However, it is nascent in the case law. A comparison of recent decisions by courts in India, Canada, England and Nepal indicates that international law does command varying weight in domestic courts and that the weight it commands is the function of the five rationales identified under the matrix of considerations.

Of all the cases examined in Chapter II, the Supreme Court of India’s decision in Vishaka assigns the greatest weight to international law. Indeed, all five of the factors are

255 Koskenniemi, supra, note 125 at 482.
256 Ibid at 487.
257 Loc. Cit.
present. The Court notes that India has ratified the Women’s Convention with no reservations and made commitments to protect women against harassment and discrimination (rule of law imperative). It also observes that the right to be free of harassment is central to human dignity (universalist impulse) and that the Constitution of India is broad enough to encompass gender equality as defined under international law (introspection). It points out that the High Court of Australia has acknowledged that international law can give rise to a legitimate expectation claim, even in the absence of a bill of rights (judicial world-traveling). Finally, it emphasizes that The Beijing Statement of Principles of the Independence of the Judiciary indicates that the international community expects judges to ensure, within the proper limits of the judicial function, that all persons live securely under the law with full recognition of their human rights (globalized self-awareness). Recognizing that the norm against gender discrimination attracted considerable weight across jurisdictions, within India and at the international level, the Supreme Court thus does not hesitate to draft a law prohibiting such discrimination.

Compared to Vishaka, the Supreme Court of Canada assigns less weight to international law in Baker v. Canada. Although international law helped support the Court’s decision in Baker, it did not represent an overriding factor. Only three of the five rationales available in the matrix were present in the Court’s analysis of international law. The court recognizes the rule of law rationale when it noted that Canada had ratified The Convention on the Rights of the Child. It concludes that “[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional” (rule of law imperative). It also recognizes the “important role of
international human rights law as an aid in interpreting domestic law has been emphasized in other common law countries.” The New Zealand Court of Appeal decision in *Tavita v. The Minister of Immigration* and the Indian Supreme Court’s decision in *Vishaka v. Rajasthan* are cited as specific examples (judicial world-travelling). Finally, Baker holds that international law helps “show the values” that are central in determining whether the immigration department’s decision to deport Mavis Baker was a reasonable exercise of its discretion under the humanitarian and compassionate provisions of the Immigration Act (introspection). Significantly, the Court does not posit the principle of the best interest of the child as a norm of customary international law or seek to elevate the principle to a universal norm. As discussed in the previous chapter, globalized self-awareness was not a factor in the Baker decision, presumably because the Supreme Court of Canada was more comfortable with positing international law as an internal force rather than a source of something new.

England’s House of Lords’ decision in *Pinochet* also demonstrates that the more factors that can be mustered in support of a particular international legal principle under the matrix of considerations, the more weight that will ultimately be attached to that principle in national courts. Lord Slynn wrote a dissenting judgment in which he frames his analysis of the facts before the House of Lords within the state sovereignty paradigm. The rule of law rationale permeates Lord Slynn’s analysis at the expense of the four remaining rationales. The main question in his eyes is whether there is sufficient evidence to show that the rules regarding head of state immunity have changed. He finds that there is no rule to show that crimes against international law should be justiciable in

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258 *Baker, supra*, note 14 at par.70.
national courts. The question for him is not whether Pinochet violated the Torture Convention, but whether the rules of international or national law expressly permit British courts to take jurisdiction over the matter.

By contrast, Lord Steyn, writing in the majority, adopts a purposive approach to treaty interpretation. He focuses on the human rights dimensions of the case rather than on the doctrines of immunity. While Lord Steyn does not deny the legitimacy of the doctrine of immunity, he nonetheless shows a greater willingness to review its scope and content in light of the Torture Convention. Accordingly, the fundamental question in his eyes is whether acts such as torture can be considered "official acts" which can ground a claim for immunity. Several rationales animate Lord Steyn's analysis: he considers it significant that England is a party to the Torture Convention and has agreed to uphold its terms (rule of law imperative); he notes that torture is universally prohibited and that it represents an affront to human dignity and morality (naturalist impulse); he also has regard for the fact that torture is prohibited in jurisdictions around the world (judicial world-traveling). Ultimately, the House of Lords ruled that England could extradite Senator Pinochet to Spain to face charges for acts of torture and related violations of international law. The weight of the international norm under the matrix of considerations calculation served to override domestic norms pointing in the opposite direction.

By contrast, Nepal's Supreme Court's decision in Dhungana demonstrates that an international norm may not be able to persuade decision-makers in the face of deep-

259 Pinochet #1, supra, note 2 at 913.
260 Ibid at 945.
261 Regina v. Bartle and the Commissioner for Police for the Metropolis and Others (Appellants) Ex Part Pinochet (Respondent) [House of Lords, March 24, 1999].
seated national values that pull in the other direction, no matter how constitutionally committed a jurisdiction is to respecting international laws. The Supreme Court refused to overturn a law which provides that a daughter may inherit part of her father’s estate on condition that she reach 35 years of age and remain unmarried. The Court did not accept that women’s rights to inherit property constituted a right fundamental to dignity or a universal norm of natural law. On the contrary, it observed that granting women the right to inherit property in light of other laws might produce discrimination against men. Moreover the Court determined that international conventions were out of step with Nepal’s patriarchal society. The rule of law imperative could not overtake the absence of the universalist impulse, judicial world traveling, globalized self awareness or national self-reflection rationales. Ultimately then, the international norms were not sufficiently robust to tip the scale in favour of women’s unqualified rights to inherit property.

VI. Problems and Potential Solutions

1. Regressive Transjudicialism?

Unlike the persuasion theory which emphasizes international law as unequivocally choice enhancing, the matrix of considerations approach recognizes that international law occupies a more complex relationship with judicial choice. A survey of judicial decision-making under the globalized self-awareness rationale reveals that judges sometimes want to belong to an international legal community and that this desire to belong can permate their decision-making. The desire to belong does not

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263 Ibid.
264 Ibid at 3.
necessarily bring freedom from constraint but generates its own form of constraint. Thus, transjudicialism can promote a human rights culture or deflate it, particularly where highly contested rights claims are at stake. The rights of same sex couples represents an obvious example.

Imagine a court confronted with the question of whether to recognize the rights of lesbian couples to marry. The deciding judges turn to decisions of courts in other jurisdictions for guidance. The matrix of considerations approach opens up the possibility that the hostility of some countries and international institutions to the rights of same sex couples may be allowed to pervade the decisions of other national courts though the rule of law, judicial world traveling and globalized self-awareness rationales. How can the matrix of considerations guard against such a result? How can it defend against a retrogressive application of international human rights law based on a generalized international bias?

One response is that these rationales do not stand on their own under the matrix of considerations. They must be factored into a determination of international law’s weight along with other values including considerations of natural law and the laws of the state. Yet, this response proves unsatisfying. One can imagine a scenario where a judge determines that both national laws and natural law prohibit same sex rights. Thus, wide

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265 See for example Moran, supra, note 22 and Knop, supra, note 21.
266 Moran, In The Penal Colony, supra, note 27 for an example of transjudicialism’s regressive application in the extradition context.
267 See for example Dianne Otto, Wayne Morgan and Kristen Walker, “Law and Change: Rejecting (In)Tolerance: Critical Perspectives on the United Nations Year For Tolerance” 20 Melbourne University Law Review 190 and Wayne Morgan and Kristin Walker, “Tolerance and Homosex: A Policy of Control and Containment” 20 Melbourne University Law Review 201. The authors identify and critically evaluate the definition of “tolerance” employed at the international level and point to examples such as the expulsion of the International Lesbian and Gay Association from ECOSOC following pressure by the United States as examples of homophobia at the national and international levels.
spread international discrimination can reinforce existing discrimination at the national level. Indeed, all aspects of the matrix of considerations can be used to justify a retrogressive application of international human rights law. International law thus can help a nation feel comfortable with its deeply held prejudices rather than invoking critical self-awareness.

Paradoxically, one way to guard against the retrogressive impact of communitarian approach is to aim for a wider survey of opinions. This approach would require courts to traverse comparative legal terrains that they have not yet explored. To date, comparative analysis has tended to focus on countries and legal systems with the same legal traditions.\textsuperscript{268} "Presumably the comparison of legal systems is viewed as exciting and intellectually stimulating because we can understand and identify with the ‘reasoning and results’ generated in countries that appear legally and culturally alike."\textsuperscript{269} A finding of diversity in national opinions would generate more sophisticated analysis under the judicial world-traveling and globalized self-awareness rationale. For example, a national court in Romania might look to the fact that countries like Canada has recognized the rights of same sex couples even though a good number of other jurisdictions have not. A finding of diversity can thus serve to neutralize the conclusion that courts across jurisdictions have rejected the rights of same sex couples.\textsuperscript{270}

Of course there are very real practical barriers to this expanded dialogue. How, for example, is the Canadian Supreme Court supposed to take into considerations legal

\textsuperscript{268} Exceptions include Brenda Cossman and Ratna Kapur, \textit{Subversive Sites: Feminist Engagements with Law in India} (New Delhi: Sage, 1998).
\textsuperscript{269} Demleiter, \textit{supra.} note 92 at 743.
\textsuperscript{270} Note also that the court can look to the logic of Canadian decisions and find them persuasive even in the face of majority judgments to the contrary. The logic of Canadian decisions can be relevant under the rule of law rationale in interpreting the meaning of international norms, the universalist impulse as evidence of
developments in Egypt when courts in that country publish their decisions in Arabic and when Canadian library collections include few if any reporters from non-Western countries? Language differences and difficulties in obtaining the legal decisions of courts in some jurisdictions may impede the quest to adopt a more expansive approach to transjudicialism. Nonetheless, viable avenues remain unpursued.

Courts across the Commonwealth publish their decisions in English. Thus, while the decisions of Egyptian courts may not be available to Canadian courts in English, decisions from diverse jurisdictions like Nigeria and Botswana are available. Moreover, these decisions are increasingly available across the Internet. Even in jurisdictions that work in languages other than English, various commentators have published summaries and analysis in English. These too are increasingly available through the Internet. While there are barriers to an expanded analysis, there are also unexplored avenues.

2. Expanded Imperialism?

The matrix of consideration approach might prove troubling for commentators in jurisdictions that have rejected international law and foreign values as a form of imperialism. The matrix of considerations approach suggests not only that international treaties and norms that have a universal status should play a role in judicial decision-making, but that the weight attached to international norms can be influenced by the interpretations and approaches of other countries. The matrix of consideration approach

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272 See for example “Roundtable Discussion on CEDAW-Shari’a” UNIFEM, Amman, Western Asia Regional Office (October 1999) available on-line at www.arabwomenconnect.western_asia/round_report.htm
thus appears to impose foreign influences in two ways. External values make their way into national law through the claims of international human rights treaties and norms of customary international law to governance. These express themselves under the matrix of considerations under the rule of law imperative and the universalist impulse rationales. Moreover, what other courts say about international law is also supposed to influence national courts as expressed under the judicial world-traveling and globalized self-awareness rationales.

The persuasion theory attempts to address charges of imperialism by granting greater recognition to the role of judicial choice and interpretation in decision-making. The persuasion theory assumes that simply giving the judge, as the embodiment of the local, the option to apply international law renders that law more palatable to others within the domestic legal order. Moreover, the persuasion theorists note that international norms are always filtered through the judge’s interpretive lens; hence, they are altered and rendered local by the interpretive exercise itself. Consequently, international law will be regarded as “home grown” and less threatening as a tool of normative imperialism.

Experiences of women’s rights advocates reveal, however, that acceptance of the international does not follow from the establishment of local representatives or advocates for the norm. Indigenous women’s rights groups do not necessarily gain acceptance in a local culture when they invoke international law simply because they are local. On the contrary, critics of foreign influences sometimes reject the local representatives and condemn them for becoming tainted by foreign values. For example, Lama Abu Odeh
has observed that women’s rights advocates in Egypt have been placed in a position of
defending themselves against charges that their goals are un-Islamic.

The claim of the un-Islamicity of these feminists demands was typically, neatly
and conveniently packaged by the same religious adversary with another equally
powerful claim, namely that they were agents of the “West.” The frequency and
consistency of this twin package of critique suggests that the two charges are
often experienced by the proponents of the critique as implicit in each other.
Feminists may be charged with advocacy of Western culture, or of sexual
promiscuity that is uniquely Western, or of a Western style of feminist male
hating; or charged with intent to destroy the Muslim family just as happened in
the West, or a blindness to the actual difference of the religious East from the
materialist West, or, paradoxically, an attempt to impose the norms of the
Christian West on those of the Muslim East.273

Others have made similar observations in different contexts.274

Rejection of the “other” plays an important identity building role for those
communities with an imperialist past and those who perceive their cultural survival as
being threatened, particularly where the “other” has a history of colonialism or
imperialism. Rejection thus becomes intimately linked with the task of decolonization
and the purging of self from an imposed identity.275 In this context, even human rights
advocates may regard international human rights law, with its purported Western origins,
as an instrument of imperialism. Women engaged in family law reform in Egypt over the
last century have found themselves engaged on two fronts, simultaneously criticizing
Islam and defending it against its Western detractors. “Western detractors of Islam often

273 Lama Abu-Odeh, Modernizing Muslim Family Law: The Case of Egypt, Work in progress presented at
Feminism and the Law Workshop, Faculty of Law, University of Toronto Friday March 8, 2001] at 65
(mscript on file with the author).
274 Radhika Coomaraswamy, “To Bellow Like A Cow: Women, Ethnicity, and the Discourse of Human
Rights” in Human Rights of Women: National and International Perspectives edited by Rebecca J. Cook

275 Some argue that colonialism is not dead but simply transformed from a political system to an economic
one that is supported by a liberal emphasis on civil and political rights over social and economic rights.
“As a result, under the rubric of globalization non-Western nations are pressured to accept neoliberal
principles of free trade and open markets and the universalist concept of human rights.” Peter Schwab and
appeared to these feminists to be in 'bad faith'...using such critique to assert cultural superiority and to rationalize projects of unwanted intervention in the Islamic world.\textsuperscript{276}

Some might argue that rejection of the "other" represents a convenient excuse to avoid human rights obligations rather than an authentic attempt at identity building. This is no doubt true in some cases. Interestingly, however, the process of asserting self through rejection of other was also undertaken by colonizing nations who defined themselves through a process of "ostensive self-definition by negation." Colonizing nations claimed cultural superiority by pointing to other nations and concluding "we are most certainly not like that!"\textsuperscript{277} To deny the role of rejection in identity building, is to deny colonialization as a historical fact and to ignore that at least some advocates and scholars engage international human rights law with the express purpose of transforming the other into their own image. At the very least, one must understand the psychological and emotional appeal of rejection even if one does not agree with the rejectionist's campaign to secure the local against the influence of "other." If one takes the history and psychology seriously, is it possible to bridge the divide between "self" and "other" without requiring that they be collapsed into each other?

Commentators in the West tend to fixate the changes that must be made by "the other" "over there" before the divide can be bridged. Fixation with the "other" however, impedes solutions and reinforces convictions that international law represents a form of imperialism. At the same time that they comment on developments over there, commentators must exhibit a willingness to learn lessons from the other. In this way, the

\textsuperscript{276}Adamantia Pollis, "Globalization’s Impact on Human Rights" \textit{Human Rights: New Perspectives, New Realities, supra, note 12.}

\textsuperscript{277}Lama Abu-Odeh, \textit{supra, note 267 at 65.}
domestic application of international law can help promote the conviction that international human rights law belongs to everyone. All countries not only bear the burden that comes with giving effect to international law, but can also claim ownership in the norms.

National courts interpreting the same international provisions have the opportunity to consider and accept the legal reasons and conclusions of courts from various legal traditions. For example, courts in the West might consider the decisions of courts from non-Western cultures. This sends the message that international human rights law constitutes a shared enterprise. It counters the objection that international human rights law represents Western values and Western history. As Charles Taylor has noted, "due recognition is not just a courtesy we owe people."

Of course, courts in the West should not accept the wisdom of courts from other jurisdictions simply because they are different or simply to encourage dialogue. Rather, national courts should seek out decisions of other courts where they reflect decisions and

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278At least part of the reluctance to consider other traditions can be traced back to legal education. Di Otto has argues that the way international law is taught in Australia (and beyond) encourages students to accept pre-existing international hierarchies and does not encourage them to think critically or challenge prevailing paradigms. Dianne Otto, “Handmaidens, Hierarchies, and Crossing of the Public-Private Divide in the Teaching of International Law” (2000) 1 Melbourne Journal of International Law 35.
279Indeed, at least some who object to the imperialism of the West object to the fact that the West fails to understand that the “East” and/or “South” has something to offer the international human rights movement. For example, Bunmi Fatoye-Matory has points out that the “1939 Aba demonstrations by women against colonial taxation in eastern Nigeria came decades before the tide of Western feminism” Christian Science Monitor archive, July 1, 1996, cited in “Strategic Action Issue Area: African Women’s Rights” (September 1998) at http://www.africapolicy.org/action/women.htm. Last visited October 2000. Brenda Cossman, “Returning the Gaze? Comparative Law, Feminist Legal Studies and the Postcolonial Project” Utah Law Review 525 refers to “scattering of feminist legal theory” in the context of comparative law. The problem with Cossman’s theory is that she fails to acknowledge — indeed explicitly denies — that the scattering of feminist legal theory represents anything other than a political undertaking. I argue in Chapter IV that the undertaking is a moral one in so far as it is rooted in the apolitical claim that both self and other lay claim to equal dignity and worth.
reasons that are valuable.\textsuperscript{281} Value can come from diversity. For example, Canadian courts might look to the decision of the Botswana Court of Appeal in \textit{Unity Dow} for its approach to children’s rights that recognizes the interdependence between the rights of the child and the rights of parents. While the \textit{Unity Dow} case involved discriminatory laws directed at children’s citizen rights, the court was not blind to the link between the violation of the children’s rights and their mother’s rights. Accordingly, Unity Dow herself remained front and center of the judicial gaze in Botswana. By contrast, the Supreme Court of Canada in \textit{Baker v. Canada} all but ignored Mavis Baker in assessing the actions of Canada’s immigration officials. The Supreme Court instead focused on the violations of her children’s rights even though evidence of prejudice against Mavis Baker abounded.

Indeed, some high level judges have come to the realization that it is “[n]o longer is it appropriate to speak of the impact or influence of certain courts in other countries, but rather of the place of all courts in the global dialogue on human rights and other common legal questions.” \textsuperscript{282} To date, however, court decisions involving international human rights appear more as soliloquy than dialogue. Judges tend to refer only to a few other jurisdictions and tend to limit themselves to those that are familiar. Moreover, even those judges and commentators who are committed to both human rights and a diversity of perspective tend to assume that international human rights law will largely serve to help export their values to other nations. There is little if any recognition that they can

\textsuperscript{281}For example, Vita Muntarbhorn, “Asia and Human Rights At the Crossroads of the New Millennium: Between the Universalist and the Particularist” \textit{Human Rights: The Asian Perspective} argues that the West may learn more about caring communities, sharing of wealth, and the right to cultural identity from Asia and Africa. I am not convinced that the contrasts are as stark as the author suggests, however, there is something to the observation.

\textsuperscript{282}L’Heureux-Dube, \textit{supra}, note 8 at “Introduction”
learn something from other cultures.\textsuperscript{283} The fear is that "in gazing at other jurisdictions and their process, the courts will fall into a debilitating cycle from which there is no exist."\textsuperscript{284} This lack of recognition of the other is unfortunate in part because it reinforces divides between the so called West and other nations. It serves to entrench "spheres of judicial dialogue" rather than promote true judicial dialogue. Moreover, judicial failure to speak across difference deprives participants in the dialogue of the perspective of dissimilar legal traditions that can serve as a critical lens through which familiar legal traditions and cultures can be examined and evaluated.

VI. Conclusion

International law seeks to dictate behaviour while recognizing the efficacy of culture. The binding authority model emphasizes the former enterprise at the expense of the later while the persuasion theory aims at the reverse. The matrix of considerations approach breaks the divide between binding authority and persuasion so that international law can maintain its quest to govern while simultaneously recognizing the efficacy of local contexts and legal cultures.

The next section of this paper takes up questions concerning language, culture, meaning and the interpretation of international norms in domestic courts. Can international law's quest for relevance in national courts satisfy its ambition to govern, or

\textsuperscript{283}Commentators who address this question almost always focus their energies on delineating the changes that the other needs to make. Even feminist scholars and critical race feminists who turn their lens on analyzing Western analysis of the other adopt this problematique: they accept the premise that the other is the locus of change. Thus, their debates with feminists in the West focus on whether or not the other should change. To the extent that they advocate change in the West, their prescriptions tend to be limited to demanding changes in attitude: feminists in the West must be less patronizing, less essentialist, less imperialist. Their criticism is that we do not properly understand what happens over there. We need to better understand so as to properly criticize, not that we can actually change and benefit from interaction with the other. Though the critics may be right about the need for more understanding on the part of the legal establishment, rarely do they contemplate that the West legal norms may themselves change for the better by interaction with the other. Their criticism of the West does not go far enough.
will it inevitably lead to the dissolution of international norms as they become increasingly subject to fragmentation by local interpretation dictated by cultural difference? Or, it is possible to reconcile notions of binding law with notions of judicial choice and culturally determined interpretation?

284 Morgan, Discovery, supra, note 220 at 586.
Chapter IV: Hermeneutics and The Domestic Effect of International Law

Therefore the Other penetrates me to the heart. I cannot doubt him without doubting myself since 'self-consciousness' is real only in so far as it recognizes the echo (and its resolution) in another.\(^{285}\)

So toleration doesn't seem to be the right word, or right concept, in describing the complexity of major legal traditions. They are complex not because they are tolerant, but because they build real bridges. They don't just tolerate, they accept in spite of difference.\(^{286}\)

I. Introduction

Franz Kafka's *In the Penal Colony* presents the reader with an exploration of crime and punishment through the narrative of an executioner, an officer responsible for punishing those guilty of breaking the law. The executioner carries out his task through the execution machine, a device that inscribes the text of the broken law on the body of the broken criminal. The machine literally impresses the law upon the individual. Throughout his story, Kafka contrasts the executioner's almost loving description of the machine and its work against the horror experienced by the explorer, a visitor to the penal colony, who endures a demonstration of the machine's imposition of text onto being.

Ed Morgan draws on Kafka to expose international law's complex and complicated relationship with Canadian constitutional law. Morgan employs Kafka's penal colony to demonstrate that the imposition of international law on the domestic realm without consideration of context or consequences ultimately leads to absurdity. This absurdity is brought to a macabre life in Kafka's tale of the battle between text and being. This chapter takes up the analysis between text and being in the domestic

\(^{285}\) Sartre, *supra*, note 328 at 321.
\(^{286}\) Glenn, *supra*, note 205 at 328.
application of international law as suggested by Ed Morgan’s work and takes up several themes introduced in his application of Kafka to domestic courts. In particular, this chapter explores the relationship of international law to the domestic realm by exploring the relationship of text, metamorphosis of meaning and context. This chapter also explores the significance of the external gaze, personified by Kafka’s explorer, in the determination of meaning.

Philosophies of language that underline variants of the binding authority model and persuasion theory pit international law against the local context in the same way that the executioner’s machine pits law against being. In response, this chapter presents Hans-Georg Gadamer’s hermeneutic method as an alternative framework within which to consider the meaning of international texts in the domestic context. Gadamer offers those concerned with the domestic effect of international law a theory of language that recognizes language as a mode of authority while simultaneously recognizing its local character. Much as Kafka’s explorer’s presence suggests the importance of external perspectives, Gadamer’s philosophy demonstrates how the meaning of the “other” can impel both self-reflection and change with both self and other. His philosophy is particularly apt for the domestic effect of international human rights law and its struggle to justify the internalization of international values without collapsing one realm into the other. In the process, hermeneutics points to the efficacy of the matrix of considerations approach to international law.

This chapter is divided into three parts. Part I sets out the issues. It identifies theories of language inherent within binding authority and Ann Marie Slaughter’s version of persuasion theory and demonstrates that both linguistic theories aim at normative
imperialism. Part II proposes a theory of language based on the hermeneutic philosophy of Hans-Georg Gadamer's *Truth and Method*. Gadamer's ideas about language reveal and reinforce an approach to international law's use in domestic courts that takes seriously international law's quest to govern while respecting cultural difference.

II. Meaning Resides Within the Text

Proponents of the binding authority model assume that when judges apply international human rights norms, they all have the same substantive understanding of what is required by the norm. They fail to consider that judicial interpretation of international human rights norms take place within a particular cultural context which has an impact on the ultimate meaning assigned to the norm. Culture represents a threat to the binding authority model because accepting the influence of culture in the understanding of a norm makes it more difficult to hold judges accountable to international standards. The threat takes the following form: Culture is difference. If one admits that differences in interpretation are possible and legitimate, then one must give up the notion that there is one correct understanding of international norms. If one gives up the notion that international law can be correctly applied, then one must also give up the notion that it can bind judges. If meaning is up for grabs, then there are no standards against which a given judicial interpretation can be assessed: judicial decision-making veers into the subjective abyss and international law loses its binding capacity.287

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287Farrokh Jhabvala, “Domestic Implementation of the Covenant on Civil and Political Rights” (1985) XXXII Netherlands International Law Review 461: “No amount of rationalization will dispel the fundamental contradictions that exist between pluralistic, liberal and individualistic approach of the Covenant and Marxist-Leninist philosophy as manifested in the constitutions and laws of Soviet-bloc countries or the fundamentalist Shi'ite Islamic belief of Iran today...In a fragmented world of nationalist sovereign States such an approach may be the only practical approach to a global human rights treaty. Nonetheless, it clearly leaves the Covenant vulnerable to fragmentation through disparate, even contradictory, domestic implementation.”
The binding authority model assumes a particular vision of language. International law can only produce homogeneity across contexts if one assumes that meaning is inherent within the text. Much as the concept of “1+1” conveys the idea of “2,” words also convey a message to the reader who, if she is interpreting properly, will understand the exact meaning conveyed. Consequently, if one examines the phrase “no violence against women” one should be able to arrive at an understanding of its meaning simply through our understanding of the individual words and the way they are positioned in relation to each other. Indeed, one should be able to accept or reject whether a certain practice falls within the definition of “violence” simply by examining the practice and comparing it against the meaning inherent within the word. 1+1 requires us only to examine the concept of “1” and “+” and “1,” and nothing else before arriving at the concept of “2.” Context and culture has no place in the picture. If you understand that “no violence against women” requires the end of female genital cuttings and breast implants, while I reach the opposite conclusion, then one of us must be right and the other must be wrong. There is no room for compromise. 1+1=2, not 3 or 4 or anything else.

The notion that words convey meaning relies on the correspondence theory of truth. A proposition is true or false depending on whether it corresponds to a given reality out there in the world. There is a mapping between our understanding of words and the way things really are. Words convey an objective reality. If “violence” means “the unjustified infliction of physical and mental harm,” we need merely examine the facts that exist out there in the world to arrive at a determination of whether women who undergo genital or breast surgeries are being subjected to violence. The correspondence theory holds that truth can be revealed through a proper understanding of reality. Again,
there is no room for culture or compromise. Truth constitutes an absolute, yes or no affair.

The belief that language can convey an objective truth that is knowable across contexts holds serious implications for international law's use in domestic courts. The judge represents the interpreter of the international treaty or text. According to the theory of language assumed by the binding authority model, there is a single proper interpretation of a treaty. If two courts interpret the same provision differently, then one is right while the other is wrong. Consider Justice Tobi's reasons in the *Muojekwu v. Ejikeme* decision of the Nigerian Court of Appeal.

As set out in chapter II, this case involved a custom called "Nrachi" which entitles a man who has no male heirs to keep one of his daughters at home so that she can bear sons and raise them for him. The daughter is thus prevented from marrying. As compensation, she symbolically adopts the status of a son and thus stands to inherit her father's estate, something that she would otherwise have been denied because of her sex. Justice Tobi concludes that women should be allowed to inherit their father's estates without having to undergo Nrachi. He denounces the custom in no uncertain terms. His reasons in part rely on the conclusion that Nrachi violates article 6 of the Women's Convention. Article 6 reads

> State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Justice Tobi characterized Nrachi as a practice "repugnant to natural justice, equity and good conscience." But, he writes,

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289 *Muojekwu, supra*, note 115 at 436.
This is not all. The Nrachi ceremony encourages promiscuity and prostitution, the latter condemned in Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). A woman who has no husband generally has more freedom to involve in sexual practices than one who is married. In such a situation indiscriminate sexual practices would result in promiscuity and prostitution. While I should not be understood as saying that a married woman is entirely free from such sexual practice, it is much more pronounced in cases of unmarried women.

Justice Tobi indicates concern for the potential effects of the Nrachi custom on Virginia Muojekwu’s behaviour. He wants to eliminate any incentives that Virginia might have to seek out more than one sexual partner. He assumes that if she remains unmarried, she will be more likely to seek out several sexual partners. This, according to Justice Tobi, offends the Women’s Convention, which he interprets as prohibiting promiscuity.

Without a doubt, Justice Tobi’s conclusion that Virginia Muojekwu should be permitted to inherit her father’s estate without having to undergo the Nrachi custom would be welcome by at least some women’s rights advocates. But, the analytic theory of language inherent within the binding authority model requires us to inquire whether he correctly interpreted Article 6 of the Women’s Convention and not simply whether he reached the right result. Does the Convention’s prohibition of prostitution include non-marital relations between a woman and her freely chosen partners? Or is Justice Tobi wrong in his interpretation of the Convention?

Some might argue that Justice Tobi interprets article 6 incorrectly. In particular, they might criticize the desire to control Virginia’s sexuality which so clearly animates the judgment. They might view Justice Tobi’s concern with preventing Virginia from engaging in non-marital relations as reflective of a larger pattern of sexual control that serves to subordinate women world-wide. They might conclude that although Justice Tobi reached the right result, he remedied one oppression with another. They might
argue that Article 6 does not aim at controlling women’s sexuality altogether, it aims at preventing others from appropriating and using women’s sexuality for their gain at the women’s expense. Justice Tobi’s interpretation, according to these critics, would most certainly wrong.

How would one resolve this conflict over interpretation? The binding authority model and the correspondence theory of truth would pit Justice Tobi’s interpretation against that of his critics. Each would claim with confidence that they have the right interpretation of article 6 of the Women’s Convention. According to this model, the conflict can be resolved simply by peering into the words and seeing the meaning contained therein. The problem with such a claim, however, is that it does not tell us what to do when two meanings present themselves. In reality, the conflict cannot simply be resolved by reference to a given fact or to social reality. Justice Tobi’s critics would clearly not be placated if he were able to prove without a shadow of a doubt that women who do not marry do have more sexual partners than married women. The debate is not about whether single women are more or less “promiscuous” than married women. Rather, it is about the propriety of interpreting prostitution with reference to promiscuity. The conflict between Justice Tobi and his critics revolves around the question of whether the term “promiscuous” is contained within the term “prostitute”? This cannot be resolved with reference to any set of facts. It relies on an understanding of words and meaning.

Some might suggest that the debate between Justice Tobi and his critics can be resolved by uncovering the intent of the drafters of the Women’s Convention: the interpretation that best corresponds to the drafter’s intention wins. However, this does
not resolve the dispute either. In the first place, international law recognizes that treaty interpretation can move beyond the intention of the drafters. More fundamentally, however, both Justice Tobi and his critics can claim to have captured the intent of the drafters since intent is expressed through the text. There is no way to divine intent independent of interpretation. Inquiring into intent raises the same problems as inquiring into inherent meaning: there is no way to be sure.

III. The Interpretive Community Defines Meaning

Not surprisingly, the notion that there is a single correct meaning inherent within language that can be uniformly transmitted to readers across contexts has come under heavy assault across disciplines, and law is no exception. Like their counterparts in other disciplines, legal commentators have come to the conclusion meaning does not reside in the text. One commentator expresses the skepticism of some theorists in the following way,

It would obviously be nice to believe that my Constitution is the true one and, therefore, that my opponents versions are fraudulent, but that is precisely the belief that becomes steadily harder to maintain. They are simply different Constitutions. There are as many plausible readings of the United States Constitution as there are versions of Hamlet.

Law begins to look more like fiction than a legitimate, authoritative and fair way of resolving disputes. Yet, law, unlike literature or art, cannot afford the conclusion that one interpretation is as good as another, shared meaning is impossible and truth can never be discerned. Brian Langille neatly describes the problem.

If the law is to constrain judges, then language as law’s universal medium must be capable of doing so. But language is indeterminate, unstable, subject to manipulation and incapable of expressing rules and principles which constrain
judges. Thus the law is a failure on its own terms and the virtues of the rule of law are impossible to secure.291

1. Containment Through Community

In a bid to circumvent the radical skepticism and the inherent theory of meaning with its related correspondence theory of truth, some legal scholars propose the idea of interpretive communities. Their aim is to explain why, if meaning does not reside in the text, individuals nonetheless maintain shared interpretations and how law can insist on its authority in the face of the realization that language is indeterminate. Stanley Fish represents the leading legal scholar who argues in favour of an interpretive community. Fish accepts the radical skeptical claim that all language is indeterminate and that words do not have an inherent meaning. Yet, this fact does not lead to nihilism or deny the possibility of communication between author and reader through a text.

Interpretive communities assign meaning, according to Fish.292 Communication thus becomes possible where author and reader both belong to the same interpretative community. Interpretive communities are “made up of those who share interpretive strategies.”293 Interpretive communities explain why some interpretations can be regarded as false or objectively invalid. In Fish’s theory, although the text totally ‘disappears,’ communication remains possible.294 Individuals within an interpretive community can debate the proper meaning of a legal text and can decide that one interpretation is better than another. However, their debate involves the efficacy of their interpretive strategies

292 Stanley Fish, Is There A Text in this Class? cited in Tremblay, supra, note 118 at 43-44.
293 Loc. Cit.
294 Tremblay, supra, note 118 at 43-44.
Attacks on the possibility of shared meaning have gone hand in hand with skepticism about the possibility of knowing truth objectively. One cannot ask whether a given interpretation is correct because it reflects the true state of affairs. Rather, one must ask whether an interpretation adheres to the belief systems of a given community as reflected in its shared interpretive conventions. In short, is it persuasive to its audience? Instead of a correspondence theory of truth, interpretive communities rely on a coherence theory of truth.

Because knowledge is a matter internal to a given practice and tradition, the truth criterion cannot be a correspondence one. It is a coherence criterion: a given interpretive proposition is true (valid or justified) if it maximizes the internal coherence (understood as fitness, consonance, or congruence as opposed to a logical consistency) of the total body of propositions held to be true at any given time.

Ian Johnstone applies Stanley Fish’s interpretive community thesis to treaty interpretation in the international context. He points out international law, because it must rely on auto-interpretation or the interpretation by states of their own international obligations, and it places high stakes on the possibility of shared meaning. If shared meaning cannot be distilled purely from the text, then how is international law to prevent states from interpreting treaties as they please, thereby circumventing international law’s bid to control meaning and hence behaviour?

Like Fish, Johnstone argues that not all interpretations of international human rights treaties are equally valid. He points out that while different interpretations are possible, the meaning assigned by the international interpretive community is the proper

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295 Tremblay, supra, note 112 at 43-44.


297 Tremblay, supra, note 112 at 6.
one. The international interpretive community must persuade individual states of the
efficacy of a given interpretation. If the individual accepts that interpretation, then she is
a member of the interpretive community. If she does not, then she is not a member.
According to this model, one cannot simultaneously have difference and community. As
Johnstone puts it “divergence from the conventions and practices of the relevant
interpretive community signifies that the interpreter has taken himself or herself out of it
altogether.”298

The interpretive community model holds two main implications for the national
court judge who invokes international law. First, it is impossible for the national court
dejudge to hold a different interpretation of an international treaty than her international
counterparts while simultaneously claiming membership in the international interpretive
community. The judge can choose a different interpretation from her international peers,
but if she does so, she has chosen to exit the international community. The interpretive
community model thus requires a judge to choose between transjudicialism and culture
where differences in interpretation arise.

Consequently, the national court judge who hold a different interpretation than her
international peers cannot be judged by them. The national court judge can claim that
her interpretation is valid, but its validity is limited to the internal structure of her
particular national community. Culture is the key. Outsiders cannot begin to understand.
Differences between interpretations based on culture thus represent a barrier to

Stanford Journal of International Law 271 for an overview and critique of the postmodern approach to
international law. The author rejects the analysis of postmodernists like Richard Rorty as a “might makes
right” approach and argues instead that Thomistic natural law balances a healthy pluralism about the human
good with a realistic acknowledgment of the universal features of human existence.
understanding and communication at the international level. The judge cannot engage both communities at the same time. Comparisons across difference are either impossible or dangerous. There is no unmediated, transcendental gaze. Examinations of one culture by another always operate through the traditions and value assumptions of the culture from which the gaze originated; thus, preventing knowledge or understanding of the other. In short, comparison across difference is doomed to failure.

Meaning is trapped behind culturally specific barriers to understanding that simultaneously prevent it from escaping while sustaining its very being. Culture creates meaning for those who operate within it while preventing those from the outside from gaining access or understanding. Interpretive communities thus appear as isolated atoms, they cannot understand each other as long as differences between them remain. They can only communicate at points of agreement.

This understanding of interpretive communities thus forces interpreters to choose between cultural relativism or imperialism. Either the judge must defend her interpretation as a manifestation of local culture that cannot be understood by outsiders or she must betray local conventions in favour of the international community. The former threatens to fragment the meaning of international treaties into as many pieces as there are possible cultural interpretations, the latter threatens to swallow up culture in the name of transjudicial coherence.

Ann Marie Slaughter's homogenizing vision of transjudicialism mirrors Fish's interpretive communities thesis and Ian Johnstone's application of it in the international context. Like Fish and Johnstone, Slaughter requires a judge to sign on to a particular

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300 See for example David Nelken, "Disclosing/Invoking Legal Culture" (1995) 4 Social and Legal Studies 435 concludes that those who write about legal culture do not altogether succeed in transcending their own
vision of international law as a precondition of membership in the international community. Slaughter’s version of transjudicialism appears to deny the possibility of different interpretations. It envisions dialogue as a tool for exporting American style democracy and notions of liberalism in the guise of persuasion. Slaughter assumes that American values will be persuasive because they represent the correct way of ordering the world.  

Any right thinking judge will therefore be persuaded and participate in transjudicialism.

The interpretive community thesis and its persuasion theory counterpart thus require judges to choose between two competing communities. It does not contemplate that the process of moving from the international to the local might produce alternative norms that blend both the national and international. Justice Tobi of the Nigerian Court of Appeal is therefore presented with a choice where his interpretation of the Women’s Convention differs from that of his peers. He can seek to justify his interpretation of article 6 of the Women’s Convention as a manifestation of Nigerian interpretive norms, or he can give up the Nigerian community in favour of an international one. He cannot, however, do both. He might claim that his interpretation of article 6 is persuasive because it appeals to Nigerian cultural norms. This claim, however, effectively cuts off communication at the international level. The implication is that judges who do not share the same cultural norms as Justice Tobi cannot begin to understand his analysis of article 6 of the Women’s Convention and cannot comment on the propriety of equating “prostitution” with “promiscuity.”

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301 Knop, supra, note 21 at 524.
2. **Community of Difference?**

Karen Knop suggests an analogy between the domestic application of international law and the idea of translation. Knop wants to preserve the possibility that judges can reach different interpretations of international treaties without requiring the judge to exit from either the local or international interpretive community to which she belongs. In short, she does not want difference to amount to an incommensurable divide across which the parties cannot speak.

Speaking across difference remains crucial under Knop’s theory for several key reasons. First, she regards the judge as someone who sits at the intersection between national and international law and is thus able to translate between the two domains. The judge, according to Knop, must be able to translate differently than her counterpart in other jurisdictions without necessitating the conclusion that she has removed herself from the international interpretive community. Moreover, Knop wants the judge to do the same at the national level. Knop wants to permit the judge to interpret differently from her national counterparts because she has the added, different perspective offered by international law. Knop does not suggest a theory of language in support of her thesis, although at times she appears to lean towards Stanley Fish’s and Ian Johnstone’s interpretive communities model. Yet, the Fish-Johnstone model does not support Knop’s position. Hans-Georg Gadamer’s philosophy as expounded in his book *Truth and Method* offers a better linguistic fit with Knop’s theory.
IV. Gadamer: Truth and Method

Hans-Georg Gadamer maintains that "the possibility that the other person may be right is the soul of hermeneutics." As this definition suggests, Gadamer eschews claims that language conveys meaning unmediated by the experiences and assumptions of the reader. For Gadamer, there is no pure, transcendental gaze. A reader does not approach a text as *tabula rasa* but as "historically affected consciousness" situated in a particular time and place, shaped by personal and collective experiences. The reader-interpreter-judge brings her own pre-conceptions or "tradition" to the interpretive task. As Gadamer puts it:

"Trying to escape one's own concepts in interpretation is not only impossible but manifestly absurd. To interpret means precisely to use one's own preconceptions so that the meaning of a text can really be made to speak for us... An interpretation that was correct 'in itself' would be a foolish ideal that failed to take account the nature of tradition."

Interpretive acts pull the past into the future in an ever growing concentric expanse of circles. But, the circles are not vicious – we are not, in other words, trapped in a perpetual re-invention of the past. The text moves us forward. As time passes, one's understanding can change not only because one's historical context and experiences have changed, but also because one has been changed by the text at the same time that one is changing the text. Consequently, one is ready to engage and understand the text from a

305 Roy J. Howard, *Three Faces of Hermeneutics: An Introduction To Current Theories of Understanding* (Berkley: University of California Press, 1982) at 147: "Interpretation, then, institutes a circular movement between the interpreter's expectations and the meaning residing within the text."
new perspective at every new reading and with every new experience. “Every interpretation has to adopt itself to the hermeneutical situation to which it belongs.”

Interpretation commits the reader to a dialogical or interactive exercise in which she “projects possible interpretations.” Interpretations inherent within the text are projected or made available through engagement with the text; our experiences and our willingness to consider other perspectives determine which interpretation will impress itself upon us. Tradition informs the text and the text informs tradition. Hence, interpretation allows us to put our assumptions into play while simultaneously exposing them to risk. Of course, the text does not compel us to a new state of understanding. We can approach a text with a closed mind. In such circumstances, however, we are depriving ourselves of “experience.”

Experience entails a textual encounter with the unexpected, something that awakens us out of a dogmatic slumber. Experience makes authentic interpretation possible. This requires us to “understand before the essential conditions under which it can be performed.” Awareness of the contingencies of one’s past and thoughts represents the most important condition essential to interpretation. This awareness of our “historically affected consciousness,” according to Gadamer, creates “openness to the other.” Simply stated, “openness to the other” entails a willingness to learn from and be changed by the other.

Thus we hold that the connection with language belongs to our experience of the world does not involve an exclusiveness of perspectives. If, by entering into foreign linguistic worlds, we overcome the prejudices and limitations of our previous experience of the world, this does not mean that we leave and negate our

306 Truth and Method, supra, note 297 at 358.
307 “Real experience is that in which man become aware of his finiteness. In it are discovered the limits of power and the self-knowledge of his planning reason...Thus, true experience is of one’s own historicality.” Truth and Method, supra, note 297 at 320-321.
own world. As travelers, we return home with new experiences...we are fundamentally aware of the historical contingency of all human thought concerning the world, and thus of our own contingency.308

Hence, meaning is unstable and constantly open to risk. It is the product of openness to the other that results in a “fusion of horizons” between self and other. A horizon constitutes “a range of vision that includes everything that can be seen from a particular vantage point.”309

...one intends to understand the text itself. But this means that the interpreter’s own thoughts too have gone into re-awakening the text’s meaning. In this the interpreter’s own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one’s own what the text says. I have described this above as a “fusion of horizons.” We can see that this is the full realization of conversation, in which something is expressed that is not only mine or my author’s, but common.310

Gadamer contemplates that one can enter into a dialogue not simply with the text but also with other readers. Indeed, the purpose of engaging the text may be to engage the opinion of others. The text provides a common medium or channel of communication between readers. It structures their dialogue and creates the possibility of shared understanding.311 Gadamer suggests that successive encounters with a text and conversations with other readers may eventually lead readers to agreement. In successful conversation,

something comes into being that had not existed before and that exists from now on...as in a genuine conversation, something emerges that is contained in neither of the partners by himself.312

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308 Ibid at 406.
309 Ibid at 302.
310 Ibid at 350.
311 Similarly, “in every view of the world, the existence of the world-in-itself is implied.” Truth and Method, supra, note 297 at 406.
312 Ibid at 419.
Hermeneutics implies that agreement does not represent the stripping away of culture. Rather, individuals can attach different content to a particular concept while agreeing that they are speaking about the same concept. Accordingly, Gadamer agrees with Aristotle, or a particular reading of Aristotle, that natural law can change. This conclusion does not appear shocking to Gadamer precisely because he envisions that abstract notions like "justice" or "dignity" can have varying content while still retaining their normative coherence. Words not only can but must have both flexibility and meaning for Gadamer because all meaning takes place in context but is not thereby reduced to its context.

Gadamer's theory parallels that of Stanley Fish in that neither accepts that the reader can have a pure, unmediated relationship to a text that dictates ahistorical meaning in defiance of the reader's lived reality. Gadamer's notion of tradition and historically affected consciousness mirror Fish's interpretive community concept in so far as both capture the idea that the reader or interpreter brings something to the interpretive exercise. The two theories also both deny that the text offers pure, polished meaning that can be possessed by a reader without reference to an interpretive context.

However, Gadamer's thesis distinguishes itself from Fish's in crucial ways. First, Gadamer's concept of tradition and his related concept of community operates differently than Fish's interpretive community concept. The text cannot change Fish's community. Rather, the interpretive community always acts upon the text. The meaning which the

313 For example, prohibitions on child labour might be set at a different age in different countries or contexts. The International Labour Organization takes such a contextual approach to the prohibition on child labour. For example, work in the context of the family farm is not regulated in the same way as work on a commercial farm.

314 Truth and Method, supra, note 297 at 471.
interpretive community assigns to a given text can change as the community’s conventions are altered. Such change, however, does not flow from the text even though it does alter the text’s meaning. The text, in Gadamer’s vision, however, both alters and is altered by the reader.

Gadamer’s text does not disappear altogether. The text has an ontological status independent of the interpreter. Language, he argues, “is not an object but is in relationship with us.”\(^{316}\) It is more appropriate to speak of “meanings” than “meaning” with respect to Gadamer for the simple reason that meaning is not ahistorical or eternal but is always mediated by the reader. Nonetheless, the reader does not entirely create meaning. “Language is more than the consciousness of the speaker; so it, too, is more than a subjective attitude.”\(^{317}\) Fish, by contrast, rejects the claim that the text generates meaning independent of an interpretive community. The problem for Fish is to define meaning if it does not reside in the text. The problem for Gadamer is not that the text has no meaning, but rather how can one come to know meaning(s) given that we always approach the text through a situated gaze.

Gadamer’s answer to the question concerning how we acquire meaning creates the second point of departure between his theory and Fish’s interpretive community. Unlike Fish, Gadamer embraces difference. Difference does not preclude community under Gadamer’s theory but creates the potential for meaningful understanding of both self and other and hence the creation of new communities of interpretation. He aims at explaining how shared understanding is possible while still permitting understanding to

\[^{315}\text{Truth and Method, supra, note 297 at 419: “This event means the coming into play, the working itself out, of the context of tradition in its constantly new possibilities or significance and resonance, newly extended by the other person receiving it.”}\]

\[^{316}\text{Truth and Method, supra, note 297 at 358.}\]
interact with difference. Difference does not dictate exit for Gadamer, rather it is the heart of meaningful interpretation. Interaction with difference produces new interpretations and an expanded understanding of the world within Gadamer’s hermeneutics. This expanded understanding cannot develop through abstract, metaphysical reasoning nor can it assume a transcendental perspective. Gadamer explains

The criterion for the continuing expansion of our world-picture is not given by the ‘world in itself’ that lies beyond all language. Rather, the infinite perfectibility of human experience of the world means that, whatever language we use, we never achieve anything but an ever more extended aspect, a “view” of the world. Those views of the world are not relative in the sense that one could set them against the ‘world in itself,’ as if the right view from some possible position outside the human, linguistic world, could discover it in its being-in-itself. Gadamer does not seek stability because stability represents anathema to true interpretation. Readers cultivate meaning within Gadamer’s framework while they assign it within Fish’s. Cultivation suggests the possibility of development, progress and working towards something while at the same time emphasizing contingency and fluidity.

Can readers ever cultivate truth that is good for all time? Gadamer’s theory is unclear on this point. He contemplates that different readers might share an interpretation and characterizes this as coming “under the influence of the truth of the object.” Does this coming together in a new community mean that the parties to the conversation have revealed an independently existing ontological truth, or does it signal their willingness to

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317 Ibid at xxiv.
319 Truth and Method, supra, note 297 at 405.
320 Ibid at 379.
create a shared truth? Does their agreement represent a contingent state of affairs or mark their passage into transcendental truth for all time? In part, it is difficult to decide this question because Gadamer’s theory refuses to contemplate meaning independent of a reader and yet also refuses to abandon the notion that the text binds the reader in some way even though it is not entirely determinative of meaning. One cannot prioritize text (transcendental, for all time) over reader (created, contingent, situated) as the source of meaning in Gadamer’s theory.

This refusal to prioritize suggests that questions like “is this truth for all time?” or “is this truth revealed and proscribed or created and contingent?” are not meaningful. On the contrary, they are to be avoided because such questions deny historically affected consciousness as a lived reality. They re-instate the quest to find truth in language independent of the reader, something that is clearly problematic from Gadamer’s perspective and that fundamentally denies the dialogical nature of his enterprise. Accordingly, Truth and Method betrays impatience with such an inquiry. Gadamer observes that the modern understanding of “theory” can be contrasted with its ancient meaning. In the modern framework, “theoretical knowledge is conceived in terms of the will to dominate what exists,” whereas theory in the ancient sense “means sharing in the total order itself.”

Gadamer indicates that philosophy must free itself of the quest to capture infinite and eternal knowledge. He wants to limit “the vision of the philosopher in the modern

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321 Whether what is handed down is a poetic work of art or tells us of a great event, in each case what is transmitted emerges newly into existence just as it presents itself. It is not being-in-itself that is increasingly revealed when Homer’s Iliad or Alexander’s Indian Campaign speaks to us in the new appropriation of tradition but, as in a genuine conversation, something emerges that is contained in neither of the partners by himself. Truth and Method, supra, note 297 at 419.

322 Ibid at 412.
world,” noting that the “role of prophet” or of “know-all” does not suit the philosopher. Yet, he also observes that the metaphysical enterprise has a tight and seemingly inevitable grip on our imaginations. Hence, Gadamer suggests that he does not want to give up the quest for truth altogether but wants to change its orientation.

"The tradition of metaphysics and especially of its last great creation remains close to us. The task, the ‘infinite relation,’ remains. But the mode of demonstrating it seeks to free itself from the embrace of the synthetic power of the Hegelian dialectic, and even from the ‘logic’ which developed from the dialectic of Plato, and to take its stand in the movement of that discourse in which word and idea first become what they are (emphasis added)."

Gadamer looks to the ancient philosophers, Aristotle in particular, to reorient modern thinking about the self-other divide. In an obvious reference to Descartes’ attempt to reconstruct his world while trapped inside his cogito, Gadamer observes that Aristotle’s thinking does not raise the “question of a self-conscious spirit without world then having to find its way to worldly being; both belong originally to one another. The relationship is primary.”

More truth, better understanding, and improved meaning remain possible. However, securing the truth, singular understanding or one meaning across contexts remains elusive. At the very least, it is questionable whether we can ever know that we have them even though, as an ontological fact, we might. Gadamer expresses skepticism about the possibility of pure knowledge and seeks to construct a state of knowing that does not depend on the acquisition of a transcendental perspective as a prerequisite to knowledge claims. One knows that one has adopted the proper method, according to Gadamer, when one recognizes the infinite “possibility that the other person may be

323 Ibid at xxv.
324 Ibid at xxiv.
325 Ibid at 416.
right."\textsuperscript{326} In other words, we have adopted the proper method when we begin always from the premise of that our knowledge is contingent and when we can imagine the self changing in light of the other.\textsuperscript{327}

Gadamer’s thesis proves frustrating at times. He speaks of a fusion of horizons, yet he concludes that “everything contained in historical consciousness is in fact embraced by a single horizontal horizon.” If this so, how can different horizons exist? Why do we have the notion of tradition if not to delineate horizons? And, as Gadamer’ himself asks, “If there is no such thing as distinct horizons, why do we speak of the fusion of horizons and not simply of the formation of one horizon?” His answer is that although the single horizontal horizon might exist as an ontological fact, individuals do not possess the transcendental gaze to know where or what it is. Gadamer points to the need to embark on “not only a persistent asking of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now.”\textsuperscript{328}

If his work is frustrating, it is also undeniably provocative. Ultimately, it represents an invitation to humility. It warns against both skepticism or cultural relativism and imperialism. Gadamer’s humility derives from an awareness of historicism. Both the notion that one can capture transcendental truth or that one can create it \textit{ex nihilo} seem arrogant within Gadamer’s framework. He invites readers instead to discover it together through engagement with the text. Gadamer does not espouse skepticism because he does not deny the possibility of working towards and arriving at

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\item\textsuperscript{327}Isabelle R. Gunning’s work lives up to the hermeneutic ideal. It reflects a willingness to engage and understand the other and an ability to learn from the other without resorting to agreement for the sake of agreement or “pretend acts of respect.” See for example Isabelle R. Gunning, “Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora’s ‘Bridges and Barricades’” (1997) 47 Case Western Law Review 445.
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truth. He does not promote cultural relativism because although meaning is always the product of a time and place, it can be shared across time and space. He is not imperialist because he does not seek to impose one side of the equation — self versus other — at the expense of the other but exposes them both as open to risk and change.

Of course, Gadamer's hermeneutics holds tremendous normative implications. His overarching claim is not that there are no objective truths, but that we cannot know those truths through abstract analysis or in isolation from others. Gadamer's theory does not demand that meaning be extracted from a text without context but assumes that meaning develops through engagements with different contexts. His work is a call to action, a warning for all those who believe that the human mind can devise a metaphysics that transcends this world. Such a vision, according to Gadamer, leads no where but to "the nihilism that Nietzsche prophesied."329

In this regard, Gadamer's interpretive exercise is reminiscent of Jean Paul Sartre's proof for the existence of self. Sartre denies the possibility of demonstrating the existence of the self through abstract analysis as pursued by Rene Descartes and others seeking metaphysical certainty. Instead, Sartre demonstrates the existence of self by affirming his relationship to the other. He uses the concept of shame and the example of one being caught peeping through a key hole at another to demonstrate his point. In the moment that one becomes aware of the gaze of the other, the moment that shame in one's self rises to the surface, one cannot doubt the existence of the other. Sartre's scenario demonstrates that individuals and communities do not simply agree that they exist. They

328 Truth and Method, supra, note 297 at xxv.
329 Ibid at xxv.
do exist. However, the existence of self cannot be confirmed in isolation of the other. Nonetheless, Sartre emphasizes that one “experiences the other as object. It is therefore not quite accurate to speak of perceiving oneself in the other’s eyes.”

Similarly, meaning for Gadamer is defined and confirmed through engagement with different interpretations. Gadamer’s theory of language has significant consequences for law in general and for the domestic application of international human rights law in particular. Some have cited him in support of a cultural and philosophical relativist stance in which all is “created,” “contingent,” and “political.” They have mistakenly emphasized Gadamer’s claim that transcendental knowledge cannot be achieved and his claim that we can never know if the other is right to support a cultural relativist stance. Such a conclusion, however, ignores other features of Gadamer’s philosophy. There are certain universal, non-negotiable elements in Gadamer’s theory that belies the cultural relativism claims.

First, Gadamer’s entire theory is built on the notion of equality between the self and other. Culture and context cannot negate this proposition. The necessary implication is that all individuals have equal moral worth and that culture cannot be used to deny this fact. Moreover, Gadamer’s philosophy represents an invitation to activity. His theory of meaning invites individuals to engage the text in a process of self-discovery and growth. Some might see nothing but meaninglessness in the lack of certainty

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330 Jean Paul Sartre, *Being and Nothingness* (New York: Washington Square Press, 1956) translated by Hazel E. Barnes at 350: “It is shame or pride which reveals to me the Other’s look and myself at the end of that look.”
332 Grondin, *supra*, note 297 at 140.
333 International instruments also protect culture while denying that it can be used as a pretext to subordinate or marginalize women. See Berta Esperanza Hernandez-Truyol, “Sex, Culture and Rights: A Re/Conceptualization of Violence in the Twenty-First Century” (1997) 60 *Albany Law Review* 607 for a
produced by the engagement between self and text. "That they may be meaningless from inception, however, is not to say that they are paralyzed, as they clearly are not."334 Meaning flows from engagement, not from certainty.

Of course, one is still left with the problem of particularizing the dignity and worth of individuals in a specific cultural context. If there is no certainty or uniformity across contexts, then how is difference to be judged? Hermeneutics reinforces that the practices that reinforce worth and dignity must be separated from those that detract from it. This raises the question of who decides in the absence of agreement what practices deviate from dignity?

Gadamer’s philosophy suggests that such decisions must be made from an internal perspective, that is, from within the culture in which the practice is rooted.335 This does not lead to cultural relativism because proponents of culture must arrive at their positions while remaining in conversation with and open to other perspectives.336 The corollary that flows from this proposition is that one culture can comment upon developments in another culture, provided that the commentators are themselves open to

discussion of how culture can be both recognized and rejected in the context of international law’s approach to violence against women.  
334 Morgan, Discovery, supra, note 220 at 589.  
335 This leaves open the question of whether criticism from within a culture can be made by those who have come to learn a culture but are not indigenous to it. I believe that this is possible but difficult. The opposite may thus also be true: those who are indigenous to a culture may not be operating ‘within’ it. For example, Mojubaolu Oiufunke Okome criticizes African women who “jump on the bandwagon of the anti-“FGM” brigade.” She argues that it may be more productive for them to be wary of the undue cosmopolitanism that such action entails, and for them to begin to study their societies in a manner that does not assume that Africans are savages. Only by doing so can the rationale for persistence of female genital surgeries be unearthed.” The negative connotation placed on the term “cosmopolitan” is curious and does not fit well within Gadamer’s framework though Okome’s conclusion that indigenous solutions are needed does coincide with Gadamer’s thoughts. See Mojubaolu Olufunke Okome, “African Women and Female Circumcision” paper presented at Lehman College, CUNY, April 26, 1998 available on-line at http://www.africaresource.com/scholar/okom/women1.html.  
336 Mullah Mohammed Omar, the leader of the Taliban in Afghanistan has reportedly stated that “the struggle against colonialist culture is the duty of every Moslem.” See the official website of the Taliban at http://www.ummah.net/taliban. This refusal to engage the other represents a cultural relativist rather than a hermeneutic approach.
change. Openness to change and the possibility that the other is right helps guard against both cultural relativism and imperialism according to Gadamer’s philosophy. Moreover, the decision about whether a particular practice violates the dignity and equality of individuals must be made from within the culture rather than outside of it because this is the only way that a culture can make the text its own.

Gadamer’s hermeneutics theory suggests that language (and hence law) can be binding under certain conditions. Words do have some controlling impact in Gadamer’s

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337 Commentators critical of the imperialism and essentializing approach of “Western feminists” often do not deny the efficacy of cross-cultural criticism but resent the all-knowing attitude and refusal to examine self that often pervades Western analysis of the other. For example Vasuki Nesiah, supra, note 60 at 47 argues that U.S. feminist legal scholarship approaches the “Third World” in a way that avoids critical self-reflection and change. In particular, she argues that U.S. feminists fail to interrogate how their decisions contribute to the oppression of women around the globe. She concludes that “this is not to say that we should not generalize but that generalization must always be hesitant and politically grounded...Even when feminists deconstruct the presupposed commonality of women’s experience, they must seek to hold on to the possibility of a strategic feminist internationality.”

338 Donald L. Horowitz, “The Qur’an and the Common Law: Islamic Law Reform and the Theory of Legal Change” (1994) 42 American Journal of Comparative Law 233 argues that the boundaries between different legal systems including those of the United States, the European Union, the former Soviet Union, as well as those of the Islamic world are not watertight. “Change in a legal system is rarely explicable by reference to dynamics internal to that system alone. In the process of innovation, legal systems are brought into contact with each other...[C]hange in one system can induce changes in others.”

339 International human rights treaties generally include the phrase “all appropriate measures.” This has been interpreted to mean that the treaties allow for variations based on social and cultural structures. For example, the Committee on Economic, Social and Cultural Rights has noted that “each state party must decide for itself which means are the most appropriate...[but country reports should indicate] the basis on which they are considered the most appropriate.” Committee on Economic, Social and Cultural Rights, General Comment No. 3: Nature of State Parties Obligation U.N. Doc. E/1991/23 at para. 4. See also Barbara Stark, “The ‘Other’ Half of the International Bill of Rights As A Postmodern Feminist Text” in Reconceiving Reality: Women and International Law, Dorinda Dallmeyer (ed.) (Washington: American Society of International Law, 1993) and Celestine Itumbi Nyamu “Rural Women in Kenya and the Legitimacy of Human Rights Discourse and Institutions” in Legitimate Governance in Africa: International and Domestic Legal Perspectives, Edward Kofi Quashigah and Obiara Chinedu Okafor (eds) (London: Kluwer Law International, 1999) for illustration of what it might mean to own an international text. Stark focuses on the International Covenant on Economic, Social and Cultural Rights and argues that “postmodern sensibilities permeate the Economic Covenant to a degree undreamed of in domestic law.” And that the Covenant’s text “is necessarily interactive.” She also argues that the Covenant “avoids rigid definitions which essentialize women, instead offering a flexible framework through which solutions to economic problems may be tailored to specific contexts in which needs arise.” Finally, she concludes that these features invite more participation from women who are experts in the kinds of “nurturing” rights envisioned by the Covenant. Nyamu notes that rural women in Kenya tend to regard rights talk as the language of elites who want even more political power. She suggests strategies for making the international system more accessible to rural women so that they can begin to feel ownership of both their concerns and the strategies needed to address those concerns. Anne Hellem, Women’s Human Rights and
theory – the problem for him is not so much the normative one that there is no meaning but the epistemological one of “how do we know?” We know through agreement that arises from our “fusion of horizons.” The possibility of a “fusion of horizons” suggests, in turn, neither a correspondence nor a coherence theory of truth. Rather it is built on what can be called a “considered theory of truth.” Words do convey meaning but this meaning cannot be known in the abstract but only uncovered through engagement with the perspective of the other. Truth is not that to which we mutually agree to label “truth” but that which we mutually discover across our differences and that we know through our agreement. Agreement, in other words, has both an epistemological and an ontological significance: it is the mark of truth.

Agreement represents the desired state of affairs. However, it should not be arrived at inauthentically. That is, parties should not agree simply for agreements’ sake, they must struggle towards agreement. Gadamer appears optimistic, however, that if we really put our assumptions at risk and expose ourselves the possibility of change, agreement with the other is possible. We can still act on our beliefs even in the absence of agreement because we can never be certain even when we have full agreement. Agreement may bring comfort but it will never bring certainty, at least not the transcendental, good-for-all-time variety. Always within the shadow of uncertainty, we must work with our assumptions because they represent the best we have under the

Legal Pluralism in Africa (Tano Aschehoug: Oslo, 1999) describes how international norms and customary norms have been grafted at the local level in Africa.

340 Ed Morgan illustrates with reference to civil litigation how American courts have acted inauthentically. Morgan frames his work in terms of Jean Paul Sartre’s existentialist philosophy and his concepts of “insincerity” and “bad faith.” Morgan, Discovery, supra, note 220 at 587.
circumstances, but we must also continually challenge ourselves through engagement with the other.\textsuperscript{341}

In the absence of agreement, the considered theory of truth treats the ability of a given proposition to promote coherence within a given order as the marker of truth. Like the coherence theory, it regards truth as something to be judged internally. However, it recognizes that judgment should look outwards beyond what exists within the internal order. Thus, the internal against which the proposition is judged is actually something that has already been altered by its interaction with the external. The internal and external represent interdependent, ever evolving and mutually defining spheres of being.

1. \textbf{Gadamer and Justice Tobi}

Gadamer's emphasis on the other, openness, horizons, community and interpretation has an obvious relation to the domestic application of international human rights law. It suggests a particular approach to the interpretation of treaties that is not contemplated by those who insist that meaning resides in the text or by those who argue that an interpretive community assigns meaning.\textsuperscript{342} An analysis of Justice Tobi's decision in \textit{Miuojekwu v. Ejikeme} helps illustrate the significance of Gadamer's hermeneutic philosophy for the domestic application of international human rights law.

How would a critic of Justice Tobi approach his interpretation of article 6 of the Women's Convention within a hermeneutic framework? First, the critic need not agree

\textsuperscript{341} See Lama Abu-Odeh "Post-Colonial Feminism and the Veil: Considering the Difference" [Summer, 1992] 26 \textit{New England Law Review} 1509 for a tangible illustration of how difference need not impede discussion and may give rise to mutual change. However, Abu-Odeh risks moving into the kind of disingenuous dialogue rejected by Gadamer when she suggests that feminists might have to engage in a rhetoric which they do not believe in order to convince veiled women that feminism is not threatening for the ultimate purpose of converting the veiled subject.

\textsuperscript{342} Perhaps Gadamer's theory aligns itself most closely with Critical Race Feminism which focuses on the particularity and intersectionality and takes the local as its starting point while also engaging the universal.
or pretend to agree with Justice Tobi's interpretation. However, she does have to be ready and willing to engage him in a conversation about why his analysis does not make sense from the outsider's perspective. The critic must also be open to learning from Justice Tobi and embrace possibility that she herself might change from the encounter with his text. What might the critic learn from Justice Tobi given their apparently deep-seated and incommensurable disagreement? Several possibilities present themselves with close examination of Justice Tobi's decision. First, Justice Tobi examines the consequences of the Nrachi custom and does not focus only on whether the custom itself violates the Women's Convention. Thus, he looks at the possible impact of the custom on Virginia's life in general and not simply on the question of whether she should be allowed to inherit property. Other national courts, by contrast, have been steadfast in their position that one need only examine an impugned act without looking at its effects. Moreover, Justice Tobi understands that "choice" can be negated by circumstances and that what might look like a purely private decision is in fact affected by the way society structures itself and its laws. Thus, he reasoned that if she were allowed to marry, Virginia may choose not to have several sexual partners – the Nrachi custom could lead her to a choice that she would not otherwise have made.

Hence, Justice Tobi's critics can appreciate aspects of his judgment and can learn how to better interpret international conventions while still criticizing his interpretation of article 6 of the Women's Convention. This commitment to better interpretation does not

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See Penelope E. Andrews, "Globalization, Human Rights and Critical Race Feminism: Voices From the Margins" (2000) 3 Journal of Gender, Race and Justice 373 for an example of such an approach in practice. Consider for example the manner in which the Federal Court of Appeal insisted that it would not be proper to consider the effects of deporting a parent. The Court's only task, according to its analysis, was to focus on the propriety of the deportation itself.
mean that one must give up one’s present view simply for the sake of change or to appease the other. At the same time, Justice Tobi’s can also learn from others. His interpretation of article 6 could have been better if he had considered other interpretations of Article 6 and the international debate about the meaning of “exploitation of prostitution.” He might have reached the same interpretation of the Women’s Convention, but an openness to other and a willingness to expose himself to risk would result in more thoughtful analysis and appreciation of the range of issues at stake. He would have been forced to examine his assumptions, recognize the contingency of his position but still articulate his reasons for arriving at that decision.

Ultimately, Justice Tobi and his critics do agree on a crucial point: the Women’s Convention aims at promoting the dignity and worth of all individuals. In Gadamer’s words, “they both come together under the influence of the truth of the object and are thus bound to one another in a new community.” Gadamer would require Justice Tobi and his critics to continue engaging with each other as hermeneutic interpreters of the Women’s Convention. In the end, they may agree on the meaning of article 6 without requiring that it must have the same content across contexts. Either way, both participants in the dialogue must be willing to change.

Gadamer’s hermeneutic approach has resonance for international law which struggles to affirm its authority while simultaneously recognizing culture. International law allows for diversity across contexts without giving up the notion that states have

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344 Again, contrast this to the Federal Court’s approach to the question of “choice” in Baker, supra, note 14. Following a long line of cases, the court held that Mavis Baker had a choice about whether or not to take her children with her to Jamaica and that no government action was therefore involved.

345 Some urge a reconceptualization of prostitution as sex work. The underlying premise is that women should be allowed to control their sexuality: simply having multiple partners is not a problem. The problems lie in the hazardous work conditions that accompany prostitution.

346 Truth and Method, supra, note 297.
international obligations. In the parlance of international law, states have an obligation of ends but not an obligation of means. Various commentators have sought to demonstrate how the "ends not means" doctrine translates in reality. For example, Abdullahi An-Na'im has illustrated this claim in relation to a broad range of rights including those of women and children. Similarly, Annie Bunting has argued that a universal age of marriage standard is not required under international law but that states remain under an obligation to ensure that early marriage does not threaten the physical, emotional or social development of the individual. Martha C. Nussbaum promotes the concept of "multiple realizability" which recognizes that universal aspirations "may be concretely realized in a variety of different ways, in accordance with individual tastes, local circumstances and traditions." Aihwa Ong argues for a cross-cultural strategic sisterhood that "makes sense of the imagined communities in which people live" and "does not exclude the variety of alternative visions of...citizenship framed within alternative political moralities."

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347 See for example The Committee on Economic, Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant E/C.12/1998/24.CESCR.
349 Annie Bunting, Particularity of Rights, Diversity of Contexts: Women, International Human Rights Law and the Case of Early Marriage SJD Thesis (Toronto: Faculty of Law, University of Toronto, 1999)
351 Aihwa Ong, "Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia" 4 (1996) Global Legal Studies Journal 107. Ong is an anthropologist who argues that "we need anthropologists as much as lawyers to the work of understanding and promoting women's rights."
2. **Gadamer and the Matrix of Considerations**

Gadamer’s theory corresponds with the overriding features of the matrix of considerations approach. First, the matrix of considerations recognizes that national court judges approach international treaties with their own particular legal traditions in tow. Thus, they will not necessarily interpret the same international provision in the same way. Interpretation represents a creative act. Yet, national court judges in different jurisdictions are still interpreting the same text and must justify their interpretations in light of that text. For example, a determination by a judge in one jurisdiction that the marriage of a 15 year old girl conforms with the Women’s Convention cannot be criticized simply because a judge in another jurisdiction determines that the marriage of a girl at 15 violates the Convention.\(^{352}\) At the same time, however, the matrix of considerations does not privilege culture above human rights claims as embodied in the authority of the text. Both judges must justify their decisions with reference to the Women’s Convention and not by claiming culture as an exception. The onus is on both judges in each jurisdiction to explain themselves in light of the Women’s Convention.\(^{353}\)

The matrix preserves the meaning (and hence the authority of the text) while allowing it to respond flexibly to divergent needs within divergent cultures.\(^{354}\)

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353 The view that equality under the law is incompatible with different treatment has been increasingly challenged by legal scholars. See for example Martha Minow, *Making All The Difference: Inclusion, Exclusion and American Law* (1990) Canadians should be very familiar with the notion that equality of treatment does not necessarily produce equality of results. On the contrary, substantive equality requires different treatment.
354 L Amede Obiora “Toward An Auspicious Reconciliation of International and Comparative Analyses” 46 (1998) *American Journal of Comparative Law* 669 at 679: “If universals are essences common across the universe...then the search for universals may be utopian. Conceivably, though, it is possible to ascertain cross-cultural constructs that mutually appeal in the name of justice to uniform ideals which rest on foundations that are autonomous from the rule of positive law.”
Second, the matrix of considerations approach values consideration of different interpretations and traditions. It does not merely tolerate them but requires judges to consider not only national values and international norms but also turns their minds to how those norms have been interpreted and applied in other national jurisdictions that differ from their own. It does not limit the judge to considering similar traditions but encourages her to canvass as wide a spectrum of decisions as possible. It thereby emphasizes that better judgments flow from a consideration of different perspectives. Difference does not create an incommensurable divide under the matrix of considerations.

Moreover, the matrix of considerations approach places both national and international texts or traditions at play and at risk. National norms are subject to interpretation and revision in light of international norms but the opposite is also true. As the interpretation of Convention on the Rights of the Child in the context of the deportation of a parent illustrates, courts also read international norms in light of their own national traditions. Thus, both national and international texts are available for

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355 See H. Patrick Glenn, supra, note 205 at 328-329 for a similar point in relation to major legal systems that have proven themselves able to accommodate, and not merely tolerate, complexity. "They are complex, not because they are tolerant, but because they build real bridges...The complex tradition tells you they are not irreconcilable; that they both have a claim to your loyalty; and that there are a large number of reasons (which you must consider as an adherent of the complex tradition) for deciding on a way which may favour one or the other over them, in the instances of your case."

356 Demleitner, supra, note 92, argues the importance of difference in understanding legal systems at 747: “Even an internationalized world and a global world society should not connote uniformity but rather equality in diversity and difference, since difference often drives creativity. The difference between men and women, for example, which leads to different perceptions and experiences is frequently portrayed as complementary and necessary to create a whole.”

357 This is not an easy task given the complexity of the legal order across cultures. See for example Janet E. Ainsworth, "Categories and Cultures: On the "Rectification of Names" in Comparative Law (1996) 82 Cornell Law Review 19 for a discussion of how understanding even the label that attaches to a given concept within another culture may require a broader socio-logical and philosophical understanding of the culture. However, international human rights law raises issues that are common among cultures and provides a common vocabulary with which to discuss those issues thereby making cross-cultural comparison easier.

358 See above.
revision and re-interpretation. In the process, the national and international norms may come together in a fusion of horizons thereby creating a new legal regime based on the melding of the national and the international.\textsuperscript{359}

The matrix also values agreement as a mark of certainty and universality. The existence of the five rationales signals agreement between members of the international community and the laws of the deciding states. Agreement between the rationales indicates that the executive has agreed on the efficacy of a given norm (the rule of law imperative), courts across diverse jurisdictions have done the same (judicial world-traveling and globalized self-awareness), that there is uniformity of opinion (universalist impulse), and the legal traditions of the state in which the deciding court is situated (introspection rationale). Agreement among the rationales enhances the weight that attaches to the norm under consideration. Given that there is no super-sign that the judges can point to validate their claim, agreement works to reinforce the efficacy of the norm under consideration.

The matrix of considerations approach also reflects the fact that hermeneutics does not mandate changes in tradition. It simply requires an open minded and authentic willingness to consider the views of the other. It may be that national legislation so clearly ousts the possibility of relying on international norms that the judge cannot invoke international law. No matter how persuaded she is by its norms, she must take the domestic text seriously. Yet, she must also take international law seriously. In such

\textsuperscript{359}This is another way of "making the text one's own." L. Amede Obiora, "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision" 47 (1997) \textit{Case Western Law Reserve} 275. Obiora criticizes Western feminists for their campaign against FMG. Her observations reinforce the importance of making the text one's own and stress that imposing meaning on a culture only leads to alienation and rejection. See also at Hope Lewis, "Between Irua and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide" 8 (1995) \textit{Harvard Human Rights}
circumstances, the matrix of considerations approach contemplates that change may come at a later date in another forum.

V. Conclusion

*Truth and Method* offers those concerned with the domestic effect of international law a theory of language that recognizes international law as a mode authority while simultaneously recognizing its local character. Gadamer’s hermeneutics offers an alternative course from those who regard international law as a source of salvation and ultimate authority and those who reject international law in favour of local solutions. Much as Kafka’s explorer’s suggests the importance of external perspectives, Gadamer’s philosophy demonstrates how the meaning of the “other” can impel both self-reflection and change with both self and other. His philosophy is particularly apt for an increasingly globalized and interdependent world in which interaction with the “other” is not an option but an unavoidable reality.

*Journal 1*: “A common theme runs through much of the African feminist literature: the survival and liberation of African women through their own activism.”
Conclusion

*I want the culture of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any...*

Advocates and legal analysts concerned with the domestic application of international human rights law have focused significant energy on identifying the doctrinal underpinnings that justify judicial reliance on international norms. In the process, however, they have tended to ignore developments in transjudicialism. Judges increasingly look not only out towards the international sphere for sources of obligation, but also across at other national jurisdictions for inspiration and guidance on the meaning and application of international norms.

This thesis has demonstrated that one cannot fully understand the domestic application of international human rights law without also considering the larger transnational context in which that application is taking place. Chapter I explored arguments related to both the binding authority and persuasion models for the purposes of outlining their weaknesses and identifying their respective strengths in relation to human rights advocacy. Its goal was to demonstrate that an alternative model of international human rights law's relationship to domestic law is needed. It also set out the criteria that this alternative model must meet and identified those elements of the arguments surveyed that can be enlisted in support of this alternative model.

Chapter II turned to cases from diverse jurisdictions across the Commonwealth to reveal that international law enjoys several relationships with domestic law. Judges

across jurisdictions invoke one of five rationales to justify their reliance on international law. While commentators tend to dismiss this diversity in the case law as judicial confusion or point to it as proof that international law cannot offer judicial coherence, this thesis has set out a framework that makes sense of international law's contradictory impulses as they manifest themselves in its domestic application. The claim is not that there is a deep structure and overall coherence in the case law, but that analysts to date have approached international law's use in domestic courts with limited vision. The case law cannot be understood if one seeks conceptual coherence defined in terms of a single theoretical approach to international law's relationship to domestic law.

Drawing on the observations made in Chapter II and taking up the challenge set out Chapter I, Chapter III set out a framework for understanding and applying international human rights law in domestic courts. This framework is termed the "matrix of considerations." The matrix of considerations reconfigures the debate between binding authority and persuasion models. Rather than consider them as incommensurable categories, the matrix of consideration regards them as points along a spectrum. Consequently, when international law commands the most weight in domestic decision-making, then it is binding upon judges, when it commands less weight, it is persuasive. The matrix of considerations illustrates how the five rationales identified in Chapter II are determinants of international human rights law's weight. This approach has the virtue of allowing judges, scholars, and advocates to use international law in a flexible manner that remains sensitive to local contexts and human rights agendas while remaining aware of international law's governance ambitions.
Chapter IV turned to Hans-Georg Gadamer's theory of language to underscore the efficacy of the matrix of considerations approach. Commentators have all but ignored the significance of theories of language for the domestic application of international law. While proponents of both the binding authority and persuasion assume a particular theory of language, none offer a sustained analysis of the theories of language implicit within their philosophies. Yet, theories of language represent the very core of law. One cannot understand law without understanding language because language is law's medium. Gadamer's theory of language affirms that international law's domestic application can preserve international law's governance ambition while simultaneously protecting local contexts from homogenizing universalism.

Ultimately, international law's life in domestic courts raises complex questions about state sovereignty, the nature of judicial reasoning, the proper scope of judicial choice, the efficacy of the executive branch of government, and the ability of international law to promote a progressive human rights agenda while respecting local cultures and self-determination. Given the range of issues invoked by international law's life in domestic courts, it is futile to impose a conceptual straight jacket on the issues. A case by case approach to international law's efficacy in human rights protection proves the only viable approach. The case by case dictates that international law will prevail in some but not all contexts. Although international law's most ardent enthusiasts and its most hardened critics will lament this result, it should be celebrated by human rights advocates and scholars alike who recognize international law's complex and complicated relationship with the domestic realm. Ultimately, neither national policies nor international law maintain an exclusive hold on progressive human rights norms. Human
rights will only progress through an approach that recognizes the potential and limits within both the national and international and within a framework that admits the interdependence between the two realms. The relationship between international and domestic law confirms that "the law’s creation, like their creators themselves, exist in a tormented state of continuous self-reflection and self-propulsion...One can make an appointment with the doctrinal future, but one can never quell the anxiety over that future."361