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The Art of Persuasion: International/Comparative Human Rights, The Supreme Court of Canada and the Reconstitution of the Canadian Security Certificate Regime

Graham Hudson

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**The Art of Persuasion: International/Comparative Human Rights, The
Supreme Court of Canada and the Reconstitution of the Canadian
Security Certificate Regime**

By: Graham Hudson

A Dissertation submitted to the Faculty of Graduate Studies in Partial Fulfillment of the
Requirements for the Degree of Doctor of Philosophy

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Abstract

In this dissertation, the author explores the jurisprudential foundations of the “relevant and persuasive” doctrine, which authorizes Canadian judges to rely on international and comparative human rights when interpreting the *Charter of Rights and Freedoms*. Viewed in its best light, this doctrine improves respect for human rights in two distinct ways: securing Canada’s compliance with its international human rights obligations and enhancing the responsiveness of state law to the global and multicultural context of Canadian society. However, actual jurisprudence suggests that the doctrine has helped undermine principles of respect for constitutional supremacy and respect for international law, in part because it does not contain clear, objective criteria governing what counts as a relevant and persuasive norm. In the absence of such criteria, “result-oriented” judges are free to instrumentally pick norms that help rationalize decisions made entirely on the basis of political and ideological factors. Some would go so far as to argue that the doctrine enables judges to use the rhetoric of human rights to constitutionally entrench relations of domination; there is some empirical evidence to support this claim.

Given the increasingly global context of contemporary judicial decision-making, it is surprising that judges have not yet offered a convincing justification for the relevant and persuasive doctrine. This dissertation attempts to offer such a justification. Weaving together a wide range of legal and moral philosophy, argumentation theory and international law/international relations theory, the author hypothesizes that judicial decisions about the relevance and persuasiveness of international and comparative human rights follow the contours of rhetorical and dialogical processes distinctive to law. With a view to testing this hypothesis, he develops analytical frameworks that help observers rationally identify, construct and evaluate “persuasive” international and comparative human rights arguments. Using the court-led reconstitution of the Canadian security certificate regime as a case study, he then attempts to demonstrate how the relevant and persuasive doctrine operates, how it coheres with principles of respect for constitutional supremacy and international law, and how it can improve respect for human rights among a wide range of globally-situated discursive communities.

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The Art of Persuasion: International/Comparative Human Rights, The Supreme Court of Canada and the Reconstitution of the Canadian Security Certificate Regime

Chapter 1

A. Introduction

Anyone interested in whether, how, and why international law influences legal decision making in Canada would do well to examine the post-9/11 transformation of our security certificate regime. First established in 1976, security certificate legislation authorizes the executive to arrest, detain, and ultimately deport non-citizens who are believed on reasonable grounds to pose a threat to, among other things, Canadian national security.¹ Traditionally, executive decisions about whether to issue a certificate were preceded by extended, adversarial proceedings in which security-cleared lawyers would challenge the evidentiary bases for allegations.² In 2001, parliament amended the regime to better contend with a range of growing security threats, including international terrorism and crime.³ Borrowing heavily from similar legislation in the United Kingdom,⁴ as well as partial reforms it had made in the 1990's, parliament truncated traditional checks on decisions about certificates in 2001, replacing them with a regime characterized by extreme secrecy, executive discretion, and expeditiousness. Certificates began to be issued without any prior independent review, while significant portions of proceedings concerning the reasonableness of certificates and conditions of detentions were

¹ *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, Division 9.

² Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990) 3 C.J.A.L.P. 173. Although, in the 1990s, Parliament bifurcated this system, diverting cases involving foreign nationals directly to the Federal Court of Canada, with significantly fewer protections.

³ Among relevant international laws addressing these threats are: United Nations Security Council, 4385th Meeting, "Resolution 1373 (2001)" (S/RES/1373), 28 September 2001; United Nations Security Council, 4956th Meeting, "Resolution 1540 (2004)" (S/RES/1540), 28 April 2004; United Nations Security Council, 5261st Meeting, "Resolution 1624 (2005)" (S/RES/1624), 14 September 2005.

⁴ *Prevention of Terrorism Act* (UK), 1989 (repealed), c. 4; *Anti-Terrorism, Crime and Security Act* (UK), 2001, c. 24,

held in the absence of anyone but a reviewing judge and government officials.

Although legislative alterations to the security certificate regime capture in some ways the extent to which international (and foreign) law can influence domestic law and policy, subsequent judicial reviews of this regime are far more interesting in this regard. In 2007 and 2008, the Supreme Court issued two landmark judgments on the constitutionality of the new certificate provisions and associated security intelligence practices. In *Charkaoui I*,⁵ it found that some of the new provisions infringed s. 7 of the *Charter of Rights and Freedoms*, primarily for failing to meet weighty criminal law standards of procedural fairness. Prior to this point, lower courts and the Supreme Court itself had consistently ruled that criminal law standards were inapplicable to this context because certificate proceedings were formally administrative in nature, and, because Canada's duty to protect citizens from security threats outweighed its duty to respect the human rights of non-citizens.⁶ Displaying a significant shift in attitude, the Supreme Court recognized that the indefinite detention and the human rights abuses to which named persons would be exposed if deported to select countries rendered certificate proceedings analogous to criminal proceedings and, accordingly, were subject to basic criminal law principles concerning procedural fairness, disclosure, and adversarial challenge.⁷ Relying on these principles, the court held that named persons are entitled to a fair hearing, which includes the rights to know the case against them, to respond to that case, and to have decisions about the reasonableness of certificates made on the basis of facts and law.⁸ It concluded that excluding named persons from significant portions of proceedings and denying them access to all but

Part 4.

⁵ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 ("*Charkaoui I*").

⁶ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

⁷ *Charkaoui I*, *supra* at para. 25. The principled basis for this application was first established in *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077. For academic commentary on this point, see Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005) 54 U.N.B.L.J. 235.

summaries of evidence used against them unjustifiably infringed their rights.

Although relevant to context, international law was not referenced until the court began considering whether the government's legislative objectives could be effectively pursued through less restrictive measures. But even here, the story really began with domestic law and policy. The most obvious alternative to the impugned provisions was the pre-9/11 certificate regime, through which the Security Intelligence Review Committee (SIRC) -- a body that oversees and reviews the activities of the Canadian Security Intelligence Service -- vigorously tested the reliability, sufficiency, and weight of the government's allegations. Another alternative was a similar regime used in the United Kingdom -- a regime that the UK modeled after the SIRC system in the 1990's. The UK's version, however, omitted many of the procedural safeguards characteristic of the SIRC system.⁹ It was clear that Canada's post-9/11 certificate regime bore more similarities to the UK model than its predecessor. Relevantly, foreign and international courts had declared the UK model incompatible with international human rights in two landmark cases: *Chahal v. United Kingdom*¹⁰ and *Re A and Others*.¹¹

It would have been reasonable to suppose that the Supreme Court of Canada might take these decisions as reason to force a return to the SIRC system. However, the court commented favourably on the UK model, noting that it had been improved in response to *Chahal* and *A and Others*, largely through a "special advocate" system. Again modeled after the SIRC regime, the special advocate system authorized security-cleared counsel to challenge the UK's claims for national security confidentiality as well as the weight, credibility, and sufficiency of undisclosed evidence. However, even with these improvements, many argued that the new regime simply

⁸ *Ibid.* at para. 29.

⁹ Relevant legislation includes: *Immigration Act* (U.K.), 1971 c. 77; *Anti-terrorism, Crime and Security Act*, *supra* note 4; *The Prevention of Terrorism Act*, *supra* note 4.

¹⁰ [1996] ECHR 54.

spread a veneer of legality over a deeply flawed set of extraordinary measures.¹² Nonetheless, the Supreme Court of Canada in *Charkaoui I* held that parliament's use of a special advocate system would make the impugned certificate provisions constitutional.¹³

As everyone expected, parliament chose to amend certificate provisions in the image of the UK special advocate system in its 2008 amendment to the *Immigration and Refugee Protection Act* (IRPA). On the one hand, named persons are now entitled to be represented by security-cleared advocates authorized to challenge the government's applications for non-disclosure of classified information and to challenge the relevance, reliability, and weight to be accorded to evidence submitted during secret hearings.¹⁴ On the other hand, the amended provisions deny special advocates express authorization to access all information on the government's file relevant to a named person, to subpoena documents and witnesses, to communicate with named persons once classified information has been accessed, and to communicate with each other about procedural and substantive issues that arise in their respective proceedings.¹⁵ Only the bare minimum of changes had been made.

Within months of this amendment, the Supreme Court did a surprising thing in *Charkaoui II*,¹⁶ it chose to refine the amended certificate regime in order to give effect to those international human rights standards it flat-out refused to enforce a year earlier. It did so by imposing upon the government a general duty to retain and disclose all information on file

¹¹ *A and others v Secretary of State for the Home Department*, [2004] UKHL 56.

¹² Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (Ottawa: Faculty of Law [Common Law Section], University of Ottawa, 2007). For criticisms of the United Kingdom model, upon which the Canadian model was premised, see: United Kingdom, House of Commons and House of Lords, Joint Committee on Human Rights, "Review of Counter-terrorism Powers, Eighteenth Report of Session 2003-2004" HL 158, HC 173 (4 August 2004) at para 40; United Kingdom, House of Commons, Constitutional Affairs Committee, "The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates-Seven Report of Session 2004-2005" Vol. I, HC 323-1 (3 April 2005).

¹³ *Charkaoui I*, *supra* note 5 at para. 87.

¹⁴ IRPA, *supra* note 1, ss. 85.1 (1)(2), 85.2.

¹⁵ *Ibid.*, ss. 85.4(2)(3), 85.5.

relevant to a named person to special advocates and reviewing judges, and by authorizing reviewing judges to forward such information as can be safely disclosed directly to named persons.¹⁷ This decision was again predicated on an analogy between certificate proceedings and criminal law proceedings, as well as a further analogy between the post-9/11 activities of civilian intelligence agencies and the work of law-enforcement agencies. On the basis of these analogies, civilian intelligence agencies and all other relevant executive bodies were required to obey *Charter*-based disclosure obligations normally applicable only to the police and Crown prosecutors.¹⁸

In both principle and practice, *Charkaoui II* compensates for the absence of legislative provisions granting special advocates the power to access all information in the government's possession and to subpoena documents and witnesses, two core features of the SIRC model that were deliberately excluded from both the UK model and post-9/11 certificate provisions.

Charkaoui II disclosure obligations have also since been interpreted by lower courts to enable special advocates to communicate with each other about confidential information, again compensating for restrictive legislative language in this respect.¹⁹ While the Supreme Court did not strike down or rewrite legislative provisions, it encouraged lower court judges to exercise their legislatively-mandated discretion to bring certificate provisions closer into step with international human rights standards.

What is particularly interesting about *Charkaoui II* is that the court's reasoning was not expressly structured by international law nor was it formally concerned with the constitutionality of the amended provisions. The court did not cite international law or the new provisions even

¹⁶ *Charkaoui v. Canada (Citizenship and Immigration)* (2008), 294 D.L.R. (4th) 478 ("*Charkaoui I*").

¹⁷ *Ibid.* at para. 2.

¹⁸ *R. v. Stinchcombe* [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. La*, [1997] 2 S.C.R. 680.

once, relying exclusively on the application of hornbook criminal law principles and standards to the exercise of executive discretion over matters of disclosure. Yet, viewed within the broader, post-9/11 transformation of the security certificate regime, and Canadian national security law and policy most generally, this decision was arguably steeped in international perspectives. The court was, for instance, careful to outline how Canadian national security agencies have been sharing intelligence with foreign and international national security agencies in flagrant disregard of the principles of privacy, fairness, and public review.²⁰ The consequent high profile rights abuses inflicted upon Maher Arar, Abdullah Almalki, Ahmad El-Maati, and others stood as one of the reasons why the court chose to impose exacting disclosure obligations upon Canadian security intelligence agencies.

Given this context, one could argue that the Supreme Court's decision was intended to retroactively compensate for amended certificate provisions that were formally consistent with the *Charter*, but which fell below international human rights standards. Precisely how and why international human rights shaped this decision is, however, hard to explain. Why would a court interested in enforcing international human rights not just state that this is what it was doing? Why would such a court have signaled to Parliament just a year earlier that the further adoption of a deeply flawed UK-style regime would have made certificate provisions consistent with the *Charter*? How did it decide upon the appropriate balance between international human rights and international counter-terrorism law in *Charkaoui I*? What caused the court to alter this balance in *Charkaoui II*? Were these decisions even influenced by international law, or was international law simply used to rationalize decisions made on the basis of Canadian constitutional values,

¹⁹ *Harkat (Re)* 2009 F.C. 59.

²⁰ *Charkaoui II*, *supra* note 16 at para. 29. See also, Canada, Parliament, *Report of the Events Relating to Maher Arar: Analysis and Recommendations by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Queen's Printer, 2006; International Commission of Jurists, "Assessing Damage, Urging

norms, and expectations or, indeed, political expedience? Viewed in context, one gets the sense that international law factored into the court's reasoning in the *Charkaoui* decisions. Yet, the nature of this influence is, by all outward appearances, untraceable.

This dissertation will explore whether, how and why international and comparative human rights played a distinctive role in the court-led reconstitution of the Canadian certificate regime. More precisely, I will sketch a rough analytical framework through which the subtle and often modest impacts of international and comparative human rights on judicial decision-making in *any* given context can be glimpsed more clearly. In this way, I will argue that the insights we acquire by examining the reconstitution of the security certificate regime enable us to make general normative and theoretical claims about the processes by which international and comparative human rights can, under the right conditions, exert persuasive influence on Canadian judges and other authoritative decision-makers.

In a manner of speaking, this would not be the first study of this kind.²¹ Many attempts have been made to relate the concepts and categories that form what I shall call the “law of reception” (i.e. the law governing the judicial application of international and foreign law to domestic and/or transnational legal problems) to a variety of maps. Legal maps are supposed to accurately depict doctrinal landscapes, highlighting relationships among relevant categories (organizing divisions) and concepts (recurring ideas), explaining why decisions are made one

Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights” (Geneva. 2009) at 67-73.

²¹ For a small sampling, see: Gibran Van Ert, *Using International Law in Canadian Courts* (The Hague, London, New York: Kluwer Law International, 2002); Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 *New York University Journal of International Law and Politics* 501; Irit Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation”, in *The Impact of International Law on the Practice of Law in Canada*. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998 (The Hague: Kluwer Law International, 1999); William Schabas, *International Human Rights Law and The Canadian Charter of Rights and Freedoms*, 2nd edition (Carswell, 1996); Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto and Vancouver: Butterworths, 1992); Ed Morgan, *International Law and the Canadian Courts* (Toronto: Carswell, 1990); Ronald St. J. MacDonald, “International Treaty Law and the Domestic Law of Canada” (1975) 2

way and not another. As we will see, though, the categories and concepts that comprise the law of reception are not adequately depicted by existing maps, especially those which are advertised to exhaustively enumerate the materials out of which sound decisions in this field are to be made. This is not to say that there are no accurate or useful maps, for there are. It is to say that no single map can accurately describe the totality of the law of reception and, what is more, attempts to simplify what is an enormously complex, fluctuating juridical field distort the landscape in contradictory ways, namely, by reducing our ability to understand and interact with unfamiliar environments.

Exploring the multiple dimensions of private law, Stephen Waddams made similar points, noting that judges, lawyers, scholars, and other legal cartographers change the very landscape they map by privileging some facts, values, and principles over others.²² Equally accurate maps may differ only in that they emphasize different dimensions of the same landscape; maps have a “rhetorical component, in that they are calculated not only to describe, but to persuade readers of the merits of the view favoured by the writer”.²³ One can readily see similarities among legal cartography, advocacy and judicial decision-making, underscoring the importance of attaining a critical perspective on the maps we use to guide ourselves through an increasingly important field of law.

In the remainder of this introduction, I will survey the nature and limitations of the various maps we use to understand the law of reception. In the next section, I will sketch the doctrinal landscapes that comprise this law. This will involve the juxtaposition of a traditional “presumption of conformity” doctrine and a more recent, “relevant and persuasive” doctrine. I

Dalhousie Law Journal 307.

²² Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press.2003).

²³ *Ibid.* at 21.

will argue that cases such as *Charkaoui I* and *II* are best understood as flowing from the relevant and persuasive doctrine, but that we lack a convincing explanation of how this doctrine works. In the second section of this introduction, I will explore theoretical perspectives on the relevant and persuasive doctrine, focusing on nascent “transnational” maps sketched out by a small selection of Canadian scholars. I will outline the strengths and weaknesses of these maps, from a descriptive as well as a normative standpoint. In the third section, I will outline the core research questions to be addressed and the methods by which I will answer them. Finally, I will provide a general outline of the remainder of the dissertation.

B. Law or Not Law? Doctrine, Jurisprudence, and the Place of International Law in Canadian Courts.

In contrast to some other common law jurisdictions, nowhere in Canadian constitutional or statutory law will one find clear rules governing when and how our judges are to receive international law.²⁴ Lacking external direction, judges have derived guiding concepts and categories from various sources, including international law, English common law, Canadian constitutional law, and the facts and issues of individual cases. Historically, there have been two basic concepts that have organized divisions between international law and domestic law: monism and dualism.²⁵ Monism allows one to conceive of international law and domestic law as belonging to an holistic legal order, within which valid norms of one legal order stand as valid norms within the other. Each legal order contains its own fundamental rules and principles regarding how ordinary norms are to be created, interpreted, applied, and enforced. However,

²⁴ The United Kingdom and South Africa, for instance, have respectively used statutory and constitutional provisions to clarify their laws of reception. See: *The Human Rights Act* (UK), 1998, c. 42; *Constitution of the Republic of South Africa Act 108 of 1996* (hereinafter, the *South African Final Constitution*), ss. 39, 233.

²⁵ Benedetto Conforti, *International Law and the Role of Domestic Legal Systems*, (Kluwer Academic Publishers.

once in existence, norms of international law are automatically a part of domestic law, meaning that judges are free to use them in any given dispute to alter domestic rights and obligations.

Dualism, by contrast, requires one to conceive of international law and domestic law as closed systems. Norms of international law cannot alter domestic rights and obligations unless they are transformed into domestic legal norms by the legislatures. Judges may only use international law to alter domestic rights and obligations if they are so permitted by statutory or constitutional provisions.

Dichotomous in nature, monism and dualism support a wide range of additional binaries that have characterized the Canadian law of reception. To begin, there are distinctions made between different sources of international law, of which two are immediately relevant: customary international law and international treaty law.²⁶ Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law requires them to act that way. Generally speaking, it is discerned through the widespread repetition by states of similar international acts over time (state practice), where the acts occur out of a sense of obligation (*opinio juris*).²⁷ Given the slow processes by which it is normally formed, customary international norms are comparatively stable, few in number, and concerned with very broad issues that affect virtually all states equally. International treaty law, by contrast, arises through the express agreement of two or more states to bind themselves to any given state

1993); Leslie C. Green, "International Law: A Canadian Perspective" in *The Canadian Encyclopedic Digest (Ontario)*, 2nd ed., vol. 17, Title 81, (Carswell, 1988) at 32.

²⁶ *Statute of the International Court of Justice*, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), art. 38.

²⁷ *The Case of the S.S. Lotus (France v. Turkey)* (1927), P.C.I.J. Ser. A., No. 10 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Reports 4. There is considerable debate about what constitutes state practice and *opinio juris*; see, Myers. S. McDougal "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49 AM. J. INT. L. 356; Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95:4 The American Journal of International Law 757; Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca, New York: Cornell University Press. 1971); H.W.A. Thirlway, *International Customary Law and its Codification* (Leiden: A. W. Sijthoff. 1972).

of affairs and tends to require significant alteration of domestic law and policy. The contractual nature of treaties permits greater levels of specificity, variation, and enforcement, as they may be designed and redesigned to account for any and all matters of social life that concern two or more states. For this reason, the number of international treaty norms vastly exceeds the number of customary international norms and, especially when supplemented with international monitoring, reporting, and adjudicative bodies, have far greater effects on domestic law and policy.²⁸

Canadian courts have tended to view customary international law through a monist lens,²⁹ whereas they have tended to view international treaty law through a dualist lens.³⁰ This means that judges have traditionally felt free to apply international customs without legislative pre-approval, but have tended to apply only those treaties that the legislatures have chosen to implement through statute. The reason for this distinction is that the two types of international law interfere with the functions and authority of domestic legislatures in different ways and to different degrees. Given the steadily increasing numbers of treaties covering all aspects of social life, the direct judicial application of international treaties can significantly interfere with both federal and provincial legislative authority and lend itself to considerable uncertainty as to what are one's domestic rights and obligations at any one time.

The law of reception also accounts for broader normative and functional distinctions among the powers and responsibilities of the executive, the legislative, and the judicial branches of government. Classically, the federal executive alone possesses the authority to assume (and

²⁸ Some have gone so far as to predict the collapse of international customary law as a source of international law: Patrick Kelly, "The Twilight of Customary International Law" (2000) 40 *Virginia Journal of International Law* 449.

²⁹ MacDonald, *supra* note 21. Some argue that this is not clearly the case; see, Stepehn J. Toope, "Keynote Address: Canada and International Law" in *The Impact of International Law on the Practice of Law in Canada*. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998 (The Hague: Kluwer Law International, 1999) 33 at 37.

³⁰ *Canada (AG) v. Ontario (AG) [Labour Conventions Case]*, [1937] 1 D.L.R. 673 (J.C.P.C.) at 678.

discharge a limited class of) international legal obligations and the legislatures alone possess the authority to implement most international treaty law. The judiciary possesses authority to give direct effect to international customary law and the legislation that implements international treaty law. As recognized by the Judicial Committee of the Privy Council in the seminal *Labour Conventions Case*, these traditional divisions are informed by a host of constitutional values pertaining to representative democracy, including federalism and Parliamentary sovereignty.³¹

Relatively recent changes to Canadian constitutionalism as well as to the international legal and political order have destabilized the delicate balance among these concepts and categories. The *Charter of Rights and Freedoms*, for example, has introduced human dignity as a constitutional value deserving of eminent respect, while it has significantly altered the relationships among the three branches of government. Obviously, the *Charter* has enabled the judiciary to review the merits of validly enacted law for consistency with constitutional rights. This is relevant to the law of reception since many of the *Charter's* provisions were drafted in consideration of international and comparative human rights,³² suggesting that the judiciary have some authority to use international law (and international human rights in particular) as interpretive aids independently of legislative pre-approval.³³

Taken as a whole, the above elements of the law of reception point to a final organizing division -- that which distinguishes between principles of respect for international law and principles of respect for constitutional democracy. But what does it mean to "respect" international law and constitutional democracy? Does respect for international law mean that the judiciary is obligated to ensure substantive harmony between domestic and international legal

³¹ Federalism was the more dominant concern in this case, although parliamentary sovereignty was also a defining principle: MacDonald, *supra* note 21.

³² Bayefsky, *supra* note 21 at 62-63.

³³ Debates over the precise contours of this authority will be examined in Chapter 2.

norms or, in a word, secure “compliance” with international law?³⁴ Or does it mean the judiciary should engage with international legal values and institutions in good faith, but it need not replicate precise norms within domestic law? Does respect for constitutional democracy require the judiciary to ensure that all its decisions be traceable to basic norms of the Canadian constitution with little to no reliance on extra-legal materials? Or does a “constitution” describe a set of autonomous legal values that structure any and all political associations and which accordingly transcend the constitutional texts of any one state? If so, can we argue for a set of global constitutional values which may take priority over domestic laws in cases of conflict?

Traditionally, divisions between respect for international law and respect for constitutional democracy have been informed by a number of ideas, including the idea that there is always at least a latent tension between the two sets of principles, and, that the latter ought to take primacy over the former in cases of conflict. The “presumption of conformity” doctrine, as the earliest doctrine governing choices about the reception of international law, represents this perspective. This doctrine states that judges may presume that parliament intends to comply with Canada’s international legal obligations, and should interpret common and ambiguous statutory law to that effect.³⁵ As the title of the doctrine implies, “conformity” describes substantive identity between domestic legal norms and obligatory international legal norms; the content of the former must conform to the content of the latter.

However, the doctrine also states that legislatures possess the exclusive authority to

³⁴ The concept of “compliance” will be deliberately left vague for the moment, to be clarified slightly later in this Chapter and more fully in Chapters 2 and 3.

³⁵ *Re Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*, [1932] 2 D.L.R. 250 (S.C.C.); *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioner's Residences*, [1943] S.C.R. 208; *Daniels v. R.*, [1968] S.C.R. 517; *R. v. Zingre*, [1981] 2 S.C. R. 392; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Gordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1988), 160 D.L.R. (4th) 193 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *114957 Canada Ltee*

implement international treaty law and, what is more, they may legislate contrary to international treaty and customary law if they so desire. Adopted in the pre-*Charter* era, the presumption of conformity doctrine is concerned entirely with preserving values of representative government from undue judicial and executive interference. In the words of Iacobucci J. courts must proceed “with caution...lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch”.³⁶ And so respect for international law means conformity of behavior to rules whereas respect for constitutional democracy means respect for the primacy of representative government.

Although the presumption of conformity doctrine provides a range of highly specific criteria regarding when, how, and why judges may receive international law, these criteria have been unevenly interpreted and applied, so much so that Stephen Toope has referred to the jurisprudence as an “appalling mess”.³⁷ While useful as a starting point, doctrine quickly gets lost amidst a wide range of inconsistent decisions that seem to be shaped as much by judges’ subjective attitudes towards international law and constitutional democracy as by the doctrine itself. Some judges may be described as committed internationalists, who have welcomed international law with open arms. They consider international treaty law to be useful as an interpretive aid irrespective of whether or not it has been legislatively implemented or whether or not it is even binding on Canada. Dickson C.J., for example, stated that the *Charter* “should generally be presumed” to provide protection which does not fall below that provided by similar international human rights provisions,³⁸ that “various sources of international human rights law”

(*Spraytech, Societe d'arrosage*) v. *Town of Hudson* [2001]2 S.C.R. 241; *R. V. Hape*, [2007] 2 S.C.R. 292.

³⁶ *Baker*, *supra* note 35 at para. 80.

³⁷ Toope, *supra* note 29 at 34.

³⁸ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 349.

may be “relevant and persuasive sources of interpretation of the Charter’s provisions”³⁹ and, that “Canada’s international human rights obligations should inform not only the interpretation of the content of the rights guaranteed in the Charter but also the interpretation of what can constitute pressing and substantial s.1 objectives”.⁴⁰

This passage suggests at least two things. First, it suggests that the *Charter* should provide protections that are at least as great as those provided by binding international human rights. Demonstrating an infringement of the latter, in other words, should create a rebuttable presumption that a remedy is justified, much as courts remedy unjustifiable infringements of *Charter* rights. Second, it suggests that international and comparative human rights should serve as interpretive aids in determining the content, scope, and application of *Charter* rights. This second position treats international and comparative human rights alike as contextual resources or sources of information and insight rather than as free-standing, enforceable rights. The Supreme Court has since conflated these two readings. In *Baker v. Canada (Minister of Employment and Immigration)*, it states that the “values” of international human rights “may help inform the contextual approach to statutory interpretation”, thereby adopting the international-human-rights-as-interpretive-aids approach.⁴¹ In *R. Hape*, by contrast, it suggested that binding international human rights have been implemented into domestic law through the *Charter* and that courts might be justified in providing remedies when these international human rights are violated.⁴² However, it then went on to say that binding international human rights might also function as interpretive aids, thereby making it difficult to determine how we ought to conceptualize the specific intersection of international human rights and the *Charter*.

³⁹ *Ibid.* at 348.

⁴⁰ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057.

⁴¹ [1999] 2 S.C.R. 817 at 861. This principle has been used to justify the use of international law generally; see *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Town of Hudson* [2001] 2 S.C.R. 241.

We are accordingly left with a wide spectrum of possible positions. Judges such as Iacobucci J., view international law as a source of confusion and, worse still, as potentially corrosive to the coherence and integrity of Canadian law. Others view international law as binding on and enforceable in Canada or, at the very least, useful as an interpretive aid. Between these two poles reside the majority of judges who cannot seem to make up their minds about whether, how, and why they will receive international law. In one case, they will work assiduously to find a place for international law in their judgments. Then, seemingly without rhyme or reason, these same judges display indifference, impatience, or outright hostility towards international legal arguments. We have already glimpsed features of this approach in the *Charkaoui* cases, in which international law was used in a highly ambivalent fashion and was left out of the final judgment altogether in *Charkaoui II*.

Any credible map of the law of reception must account for such inconsistent reasoning. One way to do this would be to simply acknowledge divergences, but insist that only those decisions that satisfy the criteria laid out within the presumption of conformity doctrine qualify as valid or justifiable components of the law of reception. This approach --which I will term the "traditional" approach -- possesses numerous merits beyond that of simplicity.⁴³ On the one hand, it can enhance judicial respect for international law *qua* law, traditionally understood, since international law is regarded as something to be obeyed, rather than as something that can be occasionally turned to for interpretive assistance. On the other hand, it maintains respect for representative government, limiting as it does the capacity of judges and the executive to use international law to alter domestic rights and obligations independently of legislative will.

Yet, the traditionalist's stringently doctrinal map conceals the inherent complexity within

⁴² *Hape*, *supra* note 35.

⁴³ I will provide a more nuanced account of traditional perspectives in Chapter 2. Good examples of traditionalist

this field, the true nature of judicial reasoning, and basic changes to the forms and functions of Canadian law -- changes that cannot be attributed just to the *Charter*. Judges had already adopted “modern” or “contextual” approaches to statutory construction prior to and following the entrenchment of the *Charter*, situating the public interest and values of human dignity alongside legislative will as important indicia of legal meaning.⁴⁴ These approaches unsettled the strict criteria established by the presumption of conformity doctrine, with judges such as Pigeon and Gonthier J.J. using international treaties to redefine unambiguous legislative objectives and provisions, even provisions that had not strictly performed an implementing function.⁴⁵

Of course, the *Charter* itself reflects and reinforces more fundamental changes to the ways in which Canadian law is created, interpreted, and applied. It is not easy imagine how the presumption of conformity doctrine can account for the domestic legal effect of binding international law in settings where there is no implementing legislation or where the will of the legislatures is not paramount. While we might turn to cases like *Hape* and treat binding international human rights as enforceable in Canada, this raises questions about whether such rights are separate sources of constitutional law, how the scope and content of these rights might be proven and limitations justified, and what would happen in the event of a conflict between binding international human rights and formal constitutional provisions. Finally, the traditionalist cannot account for the fact that the presumption of conformity doctrine obviously has not been adequate to the problems judges face; if it did, jurisprudence would display uniform elegance. Because doctrine alone has failed to determine choices, some account must be given of what

scholars include: Bayefsky, *supra* note 21; van Ert, *supra* note 21; Weiser, *supra* note 21.

⁴⁴ Stephan Beaulac, “International Treaty Norms and Driedger’s ‘Modern’ Principal [sic] of Statutory Interpretation” in *Legitimacy and Accountability*. Proceedings of the 33rd Annual Conference of the Canadian Council on International Law, Ottawa, October 14-16, 2004 (Ottawa, On: Allegra Print & Imaging, 2005) 141; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed., (Butterworths, 1994) at 330.

⁴⁵ *National Corn Growers Assn. v. Canada*, *supra* note 35; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141 at paras. 188-189.

extraneous factors have played a role. Insisting on doctrinal order when it is patently absent risks decoupling our maps from the reality they are supposed to depict.

An alternative would be to identify a parallel doctrine that can explain divergences within the jurisprudence and, beyond this, to suggest that decision-making generally is influenced by a host of factors that operate well outside of the ambits of any one doctrine, if not law itself. An attractive candidate is the “relevant and persuasive” doctrine, which emerged out of Dickson C.J.s injunction to use international law as an interpretive aid during *Charter* review. Whereas the presumption of conformity doctrine is limited to the intersection of general international law and ordinary domestic law (e.g. common law, legislation), the relevant and persuasive doctrine is directly concerned with the relationship between international and comparative human rights and the *Charter*. Within this new setting, judges are authorized to use any and all forms of international and comparative human rights norms as a resource for interpreting the content and scope of *Charter* rights.

The relevant and persuasive doctrine is potentially useful for grounding a more modern map of the law of reception. To begin, the destabilizing effects of variances in the use and non-use of international law may be reduced by distinguishing between doctrine that applies in ordinary cases and doctrine that applies in *Charter* cases. Variances within the latter may be explained on the grounds that international law was or was not considered to be relevant or persuasive in any given case, as was done in the *Charakaoui* decisions. But this raises more questions than it answers. First, cases like *Hape* suggest that the presumption of conformity doctrine has been applied, albeit in a woefully inadequate way, to *Charter* review; the relevant and persuasive doctrine is just one candidate for explaining intersections between international human rights and the *Charter*. Second, what, if anything, accounts for variances within non-

Charter cases, where the presumption of conformity doctrine has quite simply failed to determine choices about whether, how, and why to receive international law? Quite independently of the *Charter*, judges have contradicted the presumption of conformity doctrine by using international treaties to refine the meaning of unambiguous or non-implementing legislation or, alternatively, by refusing to use international law when it was clearly relevant. Given the contemporary judicial adoption of contextual approaches to statutory construction, the presumption of conformity doctrine is unlikely to become any more accurate in the future. Just the reverse is likely to be true.

Third, and considering only the relevant and persuasive doctrine, there are no objective criteria for determining when international law is “relevant” and “persuasive”. The presumption of conformity doctrine sets out a fairly comprehensive set of objective criteria, so that observers can at least identify deviant decisions. Reducing the law of reception to judges’ subjective attitudes towards international law allows judges to pick and choose international law on the basis of instrumental utility, in flagrant disregard for principles of respect for international law *qua* law and principles of respect for representative government, traditionally conceived.⁴⁶ The latter is especially harmful in the context of *Charter* review, where the use of international law during judicial review can result in the invalidation of legislation.⁴⁷ This is not to say that the relevant and persuasive doctrine cannot be justified on its merits or, alternatively, that traditional concepts and categories are no longer meaningful. It is to say that serious work needs to be done to map the relationships between doctrine and actual decision-making in terms of long-standing concepts and categories that remain vital frames of reference within changing environments.

⁴⁶ Bayefsky, *supra* note 21 at 89, 95; Van Ert, *supra* note 21 at 255-264.

⁴⁷ Weiser, *supra* note 21.

C. Theoretical Perspectives on the Relevant and Persuasive Doctrine

Some of this work was begun by a number of scholars who share an affinity for transnational legal perspectives. Transnational legal perspectives generally blur or break down conceptual, functional, and hierarchical distinctions between international law and domestic law as well as other binaries, such as law/non-law, public/private and state/non-state.⁴⁸ Historically related to critical or “anti-formalist” perspectives on state law, the transnational legal perspectives in which I am interested recognize that the formation, operation, and effectiveness of state law depend in large part upon its intersections with non-state normative orders, either through overt institutional relationships or through the influences of legal actors’ socially and historically situated perspectives.⁴⁹ In keeping with the core claims of some American legal realists, this judicially-oriented approach to transnational law emphasizes: the *indeterminacy*⁵⁰ of legal (and non-legal) rules; the causal or motivational impact of social structures and institutions on judicial decision-making;⁵¹ the possibility and practical importance of accurately describing and predicting decision-making in terms of these broader social forces; and, a normative endorsement of “policy-oriented”⁵² decision-making as a basis for enhancing law’s

⁴⁸ Phillip Jessup, *Transnational Law* (Yale University Press, 1956); Craig Scott, “Transnational Law” as Proto-Concept: Three Conceptions” (2009) 10:7 *German Law Journal*, 859; Peer Zumbansan, “Transnational Law” in *Encyclopedia of Comparative Law*, J. Smits ed., (Edward Elger Publishing 2006) 738.

⁴⁹ Influential, *classic* legal realist works (largely of the sociological variety) include: Oliver Wendell Holmes, “The Path of the Law” (1897) 10 *Harvard Law Review* 457; Herman Oliphant, “A Return to Stare Decisis” (1928) 14 *American Bar Association Journal* 71; Underhill Moore & Theodore Hope, “An Institutional Approach to the Law of Commercial Banking” (1929) 38 *Yale Law Journal*; Karl Llewellyn, “A Realistic Jurisprudence: The Next Step” (1930) 30 *Columbia Law Review* 431; Karl Llewellyn, “Some Realism about Realism: Responding to Dean Pound” (1931) 44 *Harvard Law Review* 1222; Edward S. Robinson, “Law: An Unscientific Discipline” (1934) 44 *Yale Law Journal* 235.

⁵⁰ This is to say that the class of valid or legitimate legal reasons applicable to a case cannot justify one and only one decision. Even if legal reasons could be arranged to produce multiple justified decisions, non-legal reasons will be necessary to select one rather than an alternative; Brian Leiter, “American Legal Realism” *The University of Texas School of Law: Public Law and Legal Theory Research Paper No. 042* (October 2002) at 3-6.

⁵¹ Not all realists adopted this “sociological” approach; Leiter, *supra* note 50 at 9-14.

⁵² By “policy-oriented” I mean decisions that are consciously directed towards the (re-)distribution of values that are found, not within precedent, statutory or constitutional rules, or even the facts of an individual case, but broader social, economic, and political institutions and perhaps even universal moral principles; see, Harold D. Lasswell & Myres S. McDougal, “Legal Education and Public Policy” (1943) 52:2 *Yale Law Journal* 203 at 207.

responsiveness to ambient social values, customs, and expectations in accordance with some conception of justice.

Transnational legal perspectives also share many core claims made by legal pluralists,⁵³ who situate legal decision-making within social fields occupied by a multiplicity of legal and other normative orders (hereafter simply “normative” orders). In addition to the diverse array of normative orders that operate within a nation’s jurisdiction, there are a wide variety of international and global normative orders that compete with state authority and seek to impose demands directly on domestic individuals, communities, and organizations. Although some see the co-existence of multiple, overlapping, and centrally uncoordinated normative orders as a serious problem,⁵⁴ transnationalists tend to see legal pluralism as a potentially desirable state of affairs. Appreciating the challenges that “global legal pluralism”⁵⁵ poses to the effectiveness and authority of state law, transnational legal perspectives may extend so far as to call us to break faith with state law altogether, focusing instead on the capacities of non-state normative orders to govern local or discursive communities,⁵⁶ or, it may extend only so far as to reconfigure state law in the hopes of enhancing its capacity to interact with transitioning environments.⁵⁷

Karen Knop is a prominent example of someone who takes the latter approach. Knop

⁵³ Classic legal pluralists works include: Sir Henry Sumner Main, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, 16th edn. (London: John Murray, 1897); Karl Llewellyn, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, (Norman: University of Oklahoma Press, 1941); Kwamena Bentsi-Enschil, “The Colonial Heritage of Legal Pluralism” (1969) 1 *Zambia Law Journal* 1; Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper and Row, 1971); Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *Law & Society Review* 719; M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975); H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

⁵⁴ Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Society Review* 869 at 871.

⁵⁵ Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 *Southern California Review* 1155.

⁵⁶ *Global Law Without the State*, Gunther Teubner, ed., (Dartmouth: 1997); Gunther Teubner “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo Law Review* 1443; Niklas Luhmann, “Law as a Social System” (1988-1989) 83 *Nw. U. L. Rev.* 136; Gunther Teubner, “Substantive and Reflexive Elements in Law” (1983) 17 *Law and Society Review* 239.

⁵⁷ Scott, *supra* note 48 at 852.

sees the Canadian law of reception as a setting within which judges may reflect upon the full range of normative orders that intersect with the facts, issues, and official state laws that are connected to a dispute and, in so doing, produce more informed, critical, socially responsive, and better justified decisions.⁵⁸ Of course, judgments of this kind can be exceedingly difficult when interested parties are located in distinct ethnic, cultural, and geographic settings, when parties to a dispute may well reject the authority of state law, and when the facts and issues of a case fall across multiple legal fields and jurisdictions. Judges (and lawyers) must be prepared to consciously traverse unfamiliar social settings, adequately understand the ethical and cultural dimensions of a dispute, decide which norms are applicable and how, forecast how alternative decisions will affect (hypothetical) others, and envision creative ways of resolving conflicts among seemingly incommensurable positions. This dedication to recognizing and wrestling with the full complexity of a legal problem contributes to higher quality judgment while at the same time improving levels of legitimacy and effectiveness.

Knop argues that many of the concepts and categories that comprise traditional approaches to the law of reception have failed to determine decisions, and, that unwavering fidelity to doctrine can both obscure what is actually going on and hinder innovation. Rather than being concerned with what categories a legal norm falls into, judges should be concerned with using any and all materials that would help them identify and respond to underlying values and interests; doctrine should guide but not rigidify reasoning. Likening this process to translation, the reception of international law may be viewed as a loose communicative process whereby

⁵⁸ Knop *supra* 21; Hugh Kindred "Making International Agreements and Making Them Work Within a Multicultural Federal State: The Experience of Canada" in Stephen Tierney, ed., *Multiculturalism and the Canadian Constitution* (UBC Press, 2007); Reem Bahdi "Gloablization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts" (2006) 34:3 *The George Washington International Law Review* 555; Mayo Moran, "Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method", in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004); Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed,

terminology is borrowed from “external” social and cultural contexts and then encoded in terms more familiar to those operating in domestic contexts. This interaction destabilizes internal structures of meaning and exposes decision-makers to alternative ways of seeing and doing things. Through repeated interaction, decision-makers may come to adopt expanded or alternative social roles and identities that permit them to better appreciate the needs, interests, and expectations of interested parties who have been historically excluded from channels of authoritative decision-making.

This general transnational narrative underlines the importance of debates about the law of reception. To begin, those debates might be useful to those of us interested in more accurately describing jurisprudence as well as to human rights advocates practically concerned with the conditions under which international and comparative human rights are most likely to be considered relevant and persuasive. Consider again the *Charkaoui* decisions. Here, international and foreign law was clearly important in establishing the context and the nature of the problems posed by the post-SIRC certificate regime. International counter-terrorism law was one of the vehicles through which the legislative and executive branches of government forged, or at least legitimized, institutional linkages with foreign governments, including the UK and the United States. Described as “transgovernmentalism”,⁵⁹ these kinds of relationships are characterized by the formation of direct interactions between the component institutions (e.g. legislative bodies, executive departments and agencies, the judiciary etc.) of two or more states, typically with little input or oversight by non-participating institutions and actors. When encoded into law, the policies and practices of these institutions can become enormously resistant to change.

The Unity of Public Law (Oxford: Hart Publishing, 2004) 357 at 357-36.

⁵⁹ Kal Raustiala “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law” (2002) 43 *Virginia Journal of International Law* 1; Anne-Marie Slaughter, “The Real New World Order” (1997) *Foreign Affairs* 183; Robert Keohane & Joseph Nye, “Transgovernmental Relations and International

Transgovernmentalism highlights yet again the growing disconnect between the concepts and categories emphasized by traditionalists and the changing forms and functions of Canadian law. Although useful in coordinating responses to common problems, transgovernmental networks respond to both domestic and foreign policy preferences and tend to escape the pull of constitutional norms that are, conventionally, more or less territorially-bounded. This is a particularly attractive consequence in the field of national security, where governments may conceal the extent of their participation in questionable activities, such as foreign intelligence gathering or extraordinary rendition. Can the Canadian government, for example, be held responsible for the human rights abuses inflicted upon a named person subsequent to their deportation? How direct must Canada's involvement or foreknowledge of potential abuse be to activate *Charter* scrutiny? Should the government be prohibited from using foreign intelligence it has acquired from a state known to engage in torture? Should the rights afforded to named persons be limited due to the fact that they are non-citizens? Alternatively, does their status as refugees require enhanced protections? The answers to these questions are not to be found exclusively within doctrine, as in many instances they have not yet been seriously addressed. Courts have to be creative in finding solutions to these problems and, when problems transcend national borders, so too must their solutions.

In the *Charkaoui* decisions, we can see just this sort of dynamic. International and comparative human rights helped construct possible solutions to the problems posed by international counter-terrorism law and global intelligence agency cooperation. Both the government and human rights advocates incorporated international and comparative human rights into their submissions regarding the content and scope of relevant *Charter* provisions. The

government stressed its obligations under inter-national counter-terrorism law as well as its strong opposition to the reinstatement of the SIRC regime, suggesting that the UK's special advocate model would be a preferable alternative. Critics of course see here a shared learning process, in which Canadian officials turned to the UK for insight into how a veneer of legality could be spread over an essentially abusive regime. Cognizant of this, human rights advocates stressed the insufficiency of the UK model relative to international human rights standards and domestic alternatives.

At first glance, the *Charkaoui* decisions demonstrate that international and comparative human rights performed a kind of informational function, helping the court decide which among a range of possible decisions to make. That being so, it may be that the relevance and persuasiveness of international and comparative human rights is linked to how well they enable judges to appraise the practical and normative consequences of alternative decisions that could, in theory, be made on the basis of domestic normative materials alone e.g. *Charter* principles, legislative provisions, precedent, domestic policy preferences. International and comparative human rights perform the distinctive function of indicating how recurring transnational problems have been addressed within other jurisdictions and with what effects.

But what determines the ends towards which a judge will put this knowledge? What are the pathways through which extrinsic normative and empirical information enter judicial contexts and how direct are they or should they be? Must courtroom proceedings be designed to accommodate extensive inter-personal interactions so that judges and parties to a dispute can literally see and feel how their actions impact affected persons and groups? Or must we rely on judges' willingness to contemplate how their decisions might impact upon (hypothetical) others? What is the ethical "stuff" that enables choices to be made amongst equally valid or legitimate

alternatives?

Knop insists that decision-making that is consciously oriented along the lines of the relevant and persuasive doctrine is conducive to more ethically responsive judgment, but reasonable interpretations of the *Charkaoui* cases suggest just the reverse. Clearly, abstract values of human dignity alone cannot explain the influence of international and comparative human rights law, since the use of such law can facilitate the realization of ends that are inconsistent with those values. More concrete values that comprise ambient social policy hardly fare any better, especially in the context of national security where political communities tend to view “outsiders” with suspicion, if not outright hostility. Perhaps in the absence of a strong doctrinal framework, we are again left with judges’ *prior* attitudes, values, and idiosyncrasies, just as traditionalists contend. Until we can explain how international and comparative human rights can exert a measurable and predictable influence on judicial reasoning, the endorsement of the relevant and persuasive doctrine and associated maps comes at the greater price of normative uncertainty.

D. Research Questions and Methodology

There are three basic questions now before us. First, what does it mean to say that international and comparative human rights exert a *persuasive* influence on judges? This question directs our attention to whether such law alters the content and path of judicial reasoning or whether it simply serves as a means of rationalizing decisions made on the basis of other factors altogether. Second, how does persuasive influence fit with principles of respect of international law *qua* law and principles of respect for constitutional democracy? This question forces us to account for the place which traditional concepts and categories occupy in changing socio-legal environments. Finally, how do we go about appraising the domestic legal

effectiveness of international and comparative human rights? The question of effectiveness forces us to contend with whether, how, and why international and comparative human rights influence the choices, commitments, and behaviour of broader discursive communities that help to construct, and are affected by, judicial decisions.

One of the core arguments of this dissertation is that the relevant and persuasive doctrine can be justified on the basis of traditional juristic principles, including principles of respect for international law and constitutional democracy. My claim is that, from a transnational perspective, these two sets of principles need not exist in a state of tension with each other nor need they be disregarded as altogether out of step with the contextual realities of contemporary decision-making. In the next section, I will outline the methods by which I will defend this claim.

D. I. Compliance, Persuasive Influence, and Respect for International Law

As we have noted, securing compliance with international law is one of the traditional functions of the law of reception. From a traditionalist perspective, compliance is understood to consist in substantive conformity between domestic and international legal rules. Domestic courts do very little by way of producing or even modifying international law. No matter what kind of international law they use, the content of this law will already have been established by international actors. A judge's job is to take this law as she finds it, to use it to fill out gaps in pertinent legislative provisions and, in a small selection of cases, to modify common law rights and obligations in like fashion. So basic is this function that the presumption of conformity doctrine was so styled because of it.

But this is hardly the only tenable conception of compliance. Benedict Kingsbury has aptly noted that "the concept of 'compliance' with law does not have, and cannot have, any

meaning except as a function of prior theories of the nature and function of the law to which it pertains”.⁶⁰ Harkening back to our first organizing divisions, we see that traditionalists generally hold a dualist view, in which domestic law and international law are conceived to be separate bodies of rules. In positivist fashion, their concern is to separate law from non-law, and to correlate the effectiveness of international law with its vertical integration into similarly pre-configured domestic legal rules. But alongside this positivist, rule-based approach stands a *process*-based approach, in which law is distinguished from non-law on the basis of how it organizes argumentative interactions towards the realization of public values or ends, rather than on the basis of a legal rule’s content, pedigree, or general place within a more or less static institutional framework.⁶¹ From such a perspective, compliance is a matter of degree, in which participation in legal process exposes legal actors to diverse perspectives and, if the conditions are right, alters their pre-existing values, interests, and identities. The spectrum of compliance captures the relative degrees to which this participation and subsequent identity/interest-alteration occurs.

According to Harold Koh and some of his intellectual forebears, including Myres McDougal and Harold Lasswell, persuasion is one of the primary casual mechanisms by which law operates and through which compliance is secured.⁶² Developing a transnational perspective very similar in orientation to Knop’s, Koh argues that international law improves judgment by

⁶⁰ Benedict Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 *Michigan Journal of International Law* 345 at 346.

⁶¹ One core claim common to all process-based approaches is that law is best distinguished from non-law in terms of its functional orientation towards certain ends or purposes, rather than in terms of concepts drawn from language-use or conventional social practices; Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford & Portland: Hart Publishing, 2009) at 40-42.

⁶² Harold Koh, “Why Do Nations Obey International Law?” (1997) 106 *Yale L.J.* 2599; Harold Koh, “Transnational Legal Process” (1996) 75 *Nebraska Law Review* 181; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, “World Constitutive Process Authoritative Decision” (1967) 19:3 *Journal of Legal Education* 253 at 257, 279; Harold D. Lasswell & Myres S. McDougal, “Jurisprudence in Policy-Oriented Perspective” (1966-1967) 19:3 *Florida Law Review* 486 at 503; Myres S. McDougal, Harold D. Lasswell & James C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven: Yale University Press,

exposing judges and other decision-makers to alternative ways of seeing and doing things. This occurs in three distinct stages that comprise what he calls “Transnational Legal Process” (TLP).⁶³ First, both state and non-state actors operating in different social environments *interact*, usually by identifying collective problems, desires, interests or goals that emerge through the course of longer-term transnational social interactions. Second, they share in the argumentative enunciation, *interpretation*, and/or application of a rule in order to collectively address a common problem or to collectively pursue a common goal. Finally, state actors *internalize* the rule, making it a part of their own value set.

This entire process may be described as “norm-internalization”, and stands as one of Koh’s most important contributions to compliance theory. Norm-internalization captures the transformation of an international legal rule from an inert logical proposition which wafts down from higher authorities to something that regularly guides behaviour through means independent of coercion. Norms may be, and often are, expressed in terms of rules, but they are at root something inseparable from the *attitudes* that their subjects hold towards them. The very existence of norms depends on the fact that people observe them; they are in a sense descriptions of or explanations for human behaviour. Rules, by contrast, may be analytically separated from the social context within which they operate, viewed simply in terms of their logical or semantic components. Norm-internalization in Koh’s sense of the term describes the generation of lasting ethical bonds amongst participants in the legal process, in which they make the values, interests, and needs of others reasons for behaving one way rather than another.⁶⁴

1967).

⁶³ Koh, “Transnational Legal Process”, *supra* note 62 at 203-205.

⁶⁴ These bonds are probably strongest when formed through inter-personal communication, but such communication is not strictly necessary, so long as decision-makers and other participants consciously direct their minds to how their reasoning, positions, and actions *might* impact upon (hypothetical) others; Craig Scott, “Diverse Persuasion(s): From Rhetoric to Representation (and Back Again to Rhetoric) in International Human Rights Interpretation” (2008) 4:1 *Comparative Research in Law & Political Economy* 1 at 61-63. Koh seems to assume the former, inter-personal

Adding detail to this rough framework, Jutta Brunnée and Stephen Toope, two leading experts on the Canadian law of reception, describe persuasion as “rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors”.⁶⁵ Shared understandings are both generated by interaction and serve “as a basis for further mutually constructed identities and institutions”.⁶⁶ Enmeshed in repeated interactions such as, for example, courtroom proceedings, actors assert *positions* that are constructed in large part out of the values, identities, knowledge, and culture of the communities to which they belong. In this way, positions in law cannot be purely idiosyncratic, unwavering, or expressive of one’s egoistic self-interests. What is more, a host of procedural and substantive rules constrain the content, timing, and general form of legal positions as well as who is authorized to express them; not just anyone can address the court and not just any sort of argument will do. Through the course of legal interaction, parties are forced to adapt or reformulate their personal positions to fit the expectations of the broader public concerning what counts as a valid or justified argument. The moulding of positions around these system-wide shared understandings or common starting points is a precondition of sensible dialogue in any argumentative context and, in law, is a hallmark of persuasive arguments.⁶⁷ Ultimately, it establishes the best chance for disputants to identify points of compromise and mutual respect.

Recalling the first question looming over Knop’s transnational narrative, Koh, Toope,

communication in his theory, but as I will detail in Chapters 2 and 3, it is possible (and desirable) to adopt the broader approach forwarded by Scott.

⁶⁵ It must be noted that Brunnée & Toope do not share Knop’s “comparative law” conception of the Canadian law of reception. Unlike Knop, they argue that we should retain formal distinctions between binding international human rights and non-binding international and comparative human rights. Jutta Brunnée & Stephen J. Toope “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Columbia Journal of Transnational Law* 19 at 65; Jutta Brunnée & Stephen J. Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

⁶⁶ Brunnée & Toope, “Interactional Theory”, *supra* note 65 at 66.

⁶⁷ Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991).

and Brunnée's process-based conception of compliance seems well-positioned to explain how international and comparative human rights might exert a meaningful, persuasive influence on judicial reasoning. International and comparative human rights can serve as a shared standard against which diverse legal arguments can be constructed and appraised, perhaps helping to counter the distorting influence that political and ideological power has on rational argumentation. In so doing, they can guide decision-makers towards judgments that more fully actualize system-wide values associated with human dignity. What is more, they can serve as repositories of more diverse community values, identities, knowledge, and culture, expanding the normative horizons available to judges and other decision-makers beyond those offered by the communities to which they personally belong. In these respects, international and comparative human rights facilitate the generation understanding by promoting and protecting equal, critical and fair dialogue among disputants.

Of course, it remains to be seen whether TLP accurately describes how Canadian judges used international and comparative human rights in the *Charkaoui* cases. Did they internalize international and comparative human rights norms, as Koh would predict, or did they remain unaffected by ethics, using international and comparative human rights in order to rationalize relations of domination? What are the precise ways in which the argumentative interactions among diverse participants and perspectives were ordered and what were the effects of the judgments on these actors? We also need to clarify what it means to say that decisions have given "effect" to international and comparative human rights. Does this mean that judges have internalized values of human dignity or, more fully, that their decisions have projected these values outwards, facilitating norm-internalization within other (non-)participating discursive communities? Hopefully, a review of the certificate regime through the lens of TLP will help

answer these questions, and in turn help us to appreciate the full extent to which the reconstitution of the certificate regime has or has not altered the policies and practices of national security agencies.

D. II. Constitutional Perspectives on the Law of Reception

A transnational map of the law of reception should also provide an account of the second pillar of the law of reception: principles of respect for constitutional democracy. Just as with compliance, the concept of respect for constitutions does not have, and cannot have, any meaning except as a function of prior theories of the nature and function of the constitutions to which it pertains. A large part of this dissertation will be concerned with examining how different conceptions of constitutionalism influence the perceived legitimacy of the relevant and persuasive doctrine. Borrowing from the insights of Mattias Kumm, I shall describe two very general paradigms of constitutionalism: one statist and the other cosmopolitan.⁶⁸

Statist constitutionalism describes a paradigm in which a constitution is the supreme law of a state. In democratic states, constitutions both constitute and are authorized by the will of a territorially-bounded population, establishing the basic rules upon which all legal and political authority within a state rests as well as legitimizing the coercive power of state institutions. The statist paradigm “establishes an analytical link among the constitution as a legal document, democracy as a foundational value, and the sovereign state as an institution”.⁶⁹ It stresses the importance of linking the creation, amendment, interpretation, application and enforcement of ordinary legal rules to foundational and publicly-accessible sources of authority, the content of which has been determined outside the realm of contested politics. Although particular legal norms and institutional arrangements may change within a state, what does not change are fundamental rules governing what counts as “valid” law, what institutions are authorized to

⁶⁸ Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State” in Jeffrey L. Dunoff & Joel P. Trachtman, eds., *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 258.

⁶⁹ *Ibid.* at 265

create and change law (and how), and what institutions are authorized to apply law and to adjudicate disputes arising within the system. The institutional character of law may be said to be among the most widely accepted descriptive (and normative) elements of a legal system, understood in terms of positivist ambitions, assumptions, and values.⁷⁰

Statist paradigms are resistant to the application of constitutional vocabulary to non-state or global settings. This causes tension between those invested in this paradigm and those who seek to locate elements of state authority within international law and other “external” normative frameworks. Cosmopolitan paradigms of constitutionalism, by contrast, provide an “integrative basic conceptual framework for a general theory of public law that integrates national and international law”.⁷¹ Here, state constitutions are but one manifestation of a more fundamental concept of constitutionalism which encompasses the organization, operation, and interactions of a plurality of public legal orders. There are, in other words, various overlapping constitutions that cut across national boundaries, limiting, transforming and sometimes undermining the authority of the state. A cosmopolitan paradigm helps us construct, understand, justify and criticize the exercise of increasingly fragmented and shared public authority.⁷² In this way, it seeks to resolve tensions produced by the collision of various state, international, transnational, and global regimes.⁷³

For Kumm, a cosmopolitan paradigm links authority to a complex standard of public reason, jurisdictional and procedural principles, as well as the legitimate concerns of outsiders.⁷⁴ Broadening the sources of authority beyond those located within state constitutions, cosmopolitan constitutionalism legitimizes judicial recourse to international law as authoritative within certain circumstances. Depending on the institution that has produced a norm and that institution’s recognized authority over a given issue, a domestic court conceivably could be

⁷⁰ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) at 43; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

⁷¹ Kumm, *supra* note 68 at 264.

⁷² *Ibid.* at 267.

⁷³ For a skeptical view, see Andreas Fischer-Lescano & Gunther Teubner, “Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law” (2004) 25 *Michigan Journal of International Law* 999.

⁷⁴ Kumm, *supra* note 68 at 268.

authorized to prioritize an international legal norm over their home state's constitution.

As with conceptions of compliance, statist and cosmopolitan conceptions of constitutionalism appear at first glance to connect respectively with traditional and transnational perspectives on the law of reception. The presumption of conformity doctrine clearly maps onto statist paradigms, insofar as the judicial reception of international law is strictly constrained by the supreme authority of constitutional rules and principles linked (in Canada) to federalism and parliamentary sovereignty. In the event of conflict between international and domestic law, the latter always wins out. By contrast, the relevant and persuasive doctrine seems to resonate with cosmopolitan paradigms, insofar as it potentially recognizes international and comparative human rights as bases upon which ordinary law may be invalidated. This is likely the view of many traditionalists, who worry that the relevant and persuasive doctrine will enable judges to ignore traditional constitutional limits on their authority, using international and comparative human rights law as a pretext to either illegitimately override legislative will or abdicate their responsibilities to give meaningful protection to *Charter* rights.

Despite appearances, however, the presumption of conformity doctrine could actually draw support from cosmopolitan conceptions of constitutionalism, insofar as it supports the judicial enforcement of international human rights during the course of *Charter* review. In such a situation, binding international human rights may operate as separate sources of constitutional law on a par with *Charter* rights and, pushed to the limits, may be triumphant in conflicts with formal constitutional provisions. In other words, state law, policy and practices are reviewable against international human rights and not just the *Charter*.

The relevant and persuasive doctrine, meanwhile, may be explained in ways that are wholly consistent with, or at least comprehensible within, the statist paradigm. To begin, justifying the assertion of public authority by reference to public reason and recognizing the global and multicultural contexts of law are hardly practices inimical to state constitutionalism. To the contrary, the former practice at least is part and parcel of what it means to engage in rights

discourse.⁷⁵ Even if no rights infringements are found or no remedies are offered when rights are infringed, rights by their nature force governments to *justify* the exertion of public power in relation to such standards as fairness, equality, proportionality, and human dignity. By the same token, it is incumbent on rights-holders to assert the interest or values served by a right and to persuade decision-makers that these stand as conclusive reasons for deciding one way and not another i.e. for imposing correlative duties on the state.⁷⁶ When the interests and values that inform rights are global and multicultural in scope, it follows that justifications will have to be sensitive to the perspectives of territorial, social, and/or political outsiders. This does not require that a judge give effect either to domestic law or to international law or that somehow decision-making is bereft of constitutional authority. International and comparative human rights instead serve as sources of information and insight that inform the scope, content, and applicability of *Charter* rights.

Further, critical perspectives on law that underpin TLP convincingly illustrate that judicial decision-making does not consist in the deductive or inductive application of pre-existing legal rules to new fact scenarios.⁷⁷ So far as I am aware, no complete account of judicial reasoning explains, convincingly, how decisions are made without recourse to extra-legal materials, such as morality, ideology or social science data. This is not to say pre-existing law makes no difference whatsoever or that judges regularly decide solely on the basis of whimsy and caprice. It is to say that logic alone cannot *determine* a decision and, moreover, that greater determinacy is achieved when judges make explicit and reflectively articulate what extrinsic materials play a role in their reasoning.⁷⁸ Even when logic provides a range of equally valid or justifiable conclusions, the selection of one over the others will be influenced in no small way by concrete values or desired ends. All things being equal, international and comparative human rights are just as good (and possibly better than) any other normative material that helps judges

⁷⁵ Scott, *supra* note 64 at 4-12; Joseph Raz, "On the Nature of Rights" (1984) 93 *Mind* 194 at 208.

⁷⁶ Scott, *supra* note 64 at 7-8; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988) at 262, 297.

⁷⁷ Holmes, *supra* note 49; Oliphant, *supra* note 49; Llewellyn, *supra* note 50.

⁷⁸ John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case" (1996) 16:1 *Oxford Journal of Legal Studies* 85 at 104; Karl Llewellyn, *The Common Law Tradition: Deciding Appeals*

meet the needs of a community but whose pedigree cannot be linked to Canadian constitutional rules and principles.

There is nothing that should be surprising or unfamiliar about this, if one has paid attention to important critical debates in jurisprudence. One might even go so far as to say that the law of reception is in many ways part of the common law tradition of viewing the constitution as a “living tree” that is rooted in social context and that must be tended in order to remain vital.⁷⁹ Far from serving as an independent source or “root” of Canadian law, international and comparative human rights nonetheless contain many rules and principles that are embedded as well within the *Charter*. The values and interests that inform the content of all of these rights (international, comparative and domestic) are similar and, in some cases, may even be identical. Juridical engagement with these interests and values, mediated through international and comparative human rights, can expand the *environment* within which Canadian law operates, providing room for it to grow in step with shifting social realities. The practice of relying on contextual values and interests during the course of judicial review has been accepted as a legitimate practice by prominent positivist scholars.⁸⁰ International and comparative human rights are among the various resources that judges may use to perform this long-standing role.

To give greater weight and clarity to this claim, I will argue that international and comparative human rights influence judicial reasoning primarily through analogy. Unlike metaphors, analogies describe similarities in the relationships that inhere between two sets of phenomenon; they do not focus on similarities in the phenomenon themselves, although some level of similarity is important. Analogical reasoning in the context of the law of reception means that one analyzes the ways in which recurring transnational legal problems are *separately* addressed by domestic law and in international or foreign jurisdictions, all of which start from the same or similar basic principles e.g. equality, due process, fairness etc.. Careful reviews of how international or foreign decisions and broader rule formulations have or have not succeeded

(Boston: Little Brown, 1960) at 35-45.

⁷⁹ *Edwards v. Canada (Attorney General)*, [1930] A.C. 124.

⁸⁰ Will J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press,

in actualizing certain principles can help Canadian judges identify the comparative desirability and feasibility of possible decisions. But the ends desired as well as the legal mechanisms through which they are actualized remain in large part domestically constituted; they remain linked to *Charter* provisions and other constitutional sources of authority.

This kind of reasoning quite simply does not require that external law replace or overbear domestic law. It requires only that external law help decision-makers appraise the comparative merits of alternative decisions that could, in theory, be made on the basis of domestic normative materials alone but which would otherwise be inattentive to the global and multicultural nature of pertinent values, interests, and problems. As scholars, we have to face the fact that reliance on extra-legal reasons happens, and must happen, anyway. To do otherwise is to provide a descriptively inaccurate, normatively bare, and theoretically dissatisfying map of the law of reception and of legal decision-making in general.

E. International Law, Domestic Courts, and Transnational Legal Process

Throughout the remainder of this dissertation, I will build upon these observations and claims, providing a more detailed account of 1) what it means to say that international and comparative human rights exert a persuasive influence on judicial reasoning; 2) how the relevant and persuasive doctrine coheres with principles of respect of international law *qua* law and principles of respect for constitutional democracy; and, 3) how we may appraise the effectiveness of international and comparative human rights law on domestic law. Hopefully, answering these questions will allow me to sketch a rough analytical framework useful for identifying whether, how, and why international and comparative human rights arguments played a distinctive role in the court-led reconstitution of the Canadian security certificate regime. Depending on the results of this analysis, we may be able to draw descriptive and normative conclusions about one of the processes by which international law influences judicial

reasoning in Canada.

The dissertation is in this way best understood as an exercise in inductive reasoning. Ultimately, I hope to use a review of the certificate regime to make general normative and theoretical claims about the persuasive influence of international and comparative human rights on judicial reasoning in Canada. I will certainly not be advancing a new theory. Instead, I will be explaining and, where necessary, refining existing analytical frameworks offered by scholars such as Knop, Koh, Toope and Brunnée. This approach should produce the dual result of highlighting the strengths and weaknesses of these theoretical frameworks and enhancing our understanding of how international and comparative human rights contributed to the reconstitution of the certificate regime.

In the second chapter, I will detail the interrelationships among the basic elements that comprise the law of reception. This will include depictions of doctrinal landscapes as well as maps that emphasize different dimensions of this landscape. I will critically reflect on the comparative descriptive and normative merits of traditional and transnational maps, arguing that a transnational map better reflects contemporary juridical environments and is particularly well-suited for explaining and justifying the relevant and persuasive doctrine. However, I will also detail serious deficiencies with transnational perspectives, such as doubts about their ability to explain how international and comparative human rights exert a persuasive influence on judicial reasoning, how the relevant and persuasive doctrine links up with indispensable legal concepts and categories, and how we might resolve questions about impact.

In the third chapter, I will begin shoring up these deficiencies by more rigorously unearthing the juristic bases for the relevant and persuasive doctrine and by constructing a more stable analytical framework. This latter task will involve the presentation of Koh's TLP as the

perspective most suitable to the former task. Once the framework has been put in place, I will use it to resolve lingering tensions regarding the content of, and relationship between, principles of respect of international law and principles of respect for constitutional democracy. In addition to providing an abstract account of why the relevant and persuasive doctrine is normatively tenable, this work will produce a set of hypotheses concerning how international and comparative human rights exert persuasive influence.

In the fourth chapter, I will apply this framework to the case of the security certificate regime in an effort to test these hypotheses. It should be obvious by now that the precise role played by international and comparative human rights in the reconstitution of the certificate regime is unclear. With this in mind, I will focus on how and why international and comparative human rights helped improve the quality of judicial reasoning in this context. This will involve the reconstruction of key arguments, careful attention to which actors made them and with what materials, what factors rendered them persuasive, and how resulting judgments contributed to improvements in the material wellbeing of named persons and affected communities. The concluding chapter will review how this case study has, or has not, supported hypotheses about the persuasive influence of international and comparative human rights.

The Place of International and Comparative Human Rights in Canadian Courts

Chapter 2

A. Introduction

The purpose of this chapter is to chart the doctrinal landscapes within which international and comparative human rights acquire domestic legal effect in Canada, and, to analyze contending attempts to explain and justify the associated jurisprudence. I will be especially concerned with weaving together descriptive, normative, and theoretical claims. Descriptively, I will survey the legal categories and concepts that have structured the Canadian law of reception as well as problematic disconnects between classical doctrine and developing judicial practices. This descriptive account will begin with the presumption of conformity doctrine and move to the relevant and persuasive doctrine. Normatively, I will reflect on the comparative merits of traditional and transnational maps of the law of reception in terms of descriptive accuracy, explanatory power, and justificatory potential. Theoretically, I will survey the core claims and weaknesses of transnational legal perspectives on the law of reception, including: what it means to say that international and comparative human rights exert a persuasive influence on judges and other authoritative decision-makers; how this influence can be understood in fairly conventional jurisprudential terms; and, how international and comparative human rights affect interactions among various discursive communities.

B. International Human Rights and Domestic Courts

Before moving to the Canadian law of reception, it would be useful to briefly review some preliminary matters, including: what are international human rights; what it means to say they are “binding”; and, what is their conceptual, functional, and juridical relationship to

domestic courts. This will clarify the meaning of recurring terms and ease us into some of the thorny normative issues that will arise later on.

B. I What are International Human Rights?

International human rights are a species of human rights, which may be defined as “norms inhering in the human condition that constitute the basis for the mutual recognition of the dignity of all individuals, no matter what their circumstances”.¹ The term “rights” is important, implying both conceptual and functional connections to morality and positive law.² There are many historical and contemporary perspectives on the ontological status of human rights and their relationships to morality and positive law.³ Historically, human rights have been thought to exist: by virtue of divine decree; as objective matters of fact about the moral universe; as objective matters of fact about universally practiced customs and norms; and, as a discursive mechanism that supports the identification and endorsement of moral reasons for behaving one way rather than another. In any of these instances, positive law performs the distinctive function of giving free-standing moral norms greater clarity, force or effect.⁴

Alternatively, the existence of human rights may be reduced to their status as positive domestic or international laws. A human right may thus be said to exist internationally if -- and only if-- it is created through a treaty, customary international law or another recognized source of international law, while it may be said to exist domestically if -- and only if-- it is created

¹ David Kinley, “Human Rights Fundamentalisms” (2007) 29 Sydney Law Review 545 at 550; see also, the Preamble to the *Universal Declaration of Human Rights*, GA res. 217A (III), UN Doc A/810 at 71 (1948).

² Amartya Sen, “Elements of a Theory of Human Rights” (2004) 32:4 Philosophy and Public Affairs 315.

³ For comprehensive histories of the idea of human rights, see: Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts: Harvard University Press, 2010); Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2008); Christopher Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn. (Oxford University Press, 2008).

⁴ Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996).

through statute, constitutional act, or judicial decree. In this strict sense, rights are a class of determinate legal *rules* that are recognized by political institutions authorized and able to enforce them through the effective deployment of sanctions and other (dis)incentives. For those who adopt this view, our use of the legal language of rights to describe purported moral phenomena is a conceptual mistake. In the words of Jeremy Bentham, “from real laws come real rights; but from imaginary laws, from laws of nature, come imaginary rights”.⁵

It is well beyond the scope of this dissertation to dwell on debates about the ontology of human rights. For reasons that will become clear shortly, I will adopt a discursive approach to human rights, from which we may identify (at least) three functional characteristics.⁶ First, and most obviously, human rights are used by advocates to secure the recognition of rights-holders’ high priority values and interests. In particular, human rights facilitate the recognition of freedom and autonomy, which in turn describe rights-holders’ capacity both to choose personal and public life projects, and to access and make use of material, normative, and symbolic resources sufficient to realize those ends.⁷ Insofar as each person has freedom and autonomy, there is a need to resolve coordination problems that arise when the legitimate ends, values, and interests of two or more rights-holders conflict e.g. as a result of resource scarcities. The values and interests that underpin human rights are accordingly both collective and individual in nature. Human rights simultaneously protect individual freedom and autonomy, and, strengthen political

⁵ As quoted in Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (McGill-Queens University Press, 2003) at 7.

⁶ This tenets of this discursive approach are outlined in: Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988); Joseph Raz, “On the Nature of Rights” (1984) 93 *Mind* 194. For a similar view, see Craig Scott, “Diverse Persuasion(s): From Rhetoric to Representation (and Back Again to Rhetoric) in International Human Rights Interpretation” (2008) 4:1 *Comparative Research in Law & Political Economy* 1.

⁷ Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford & Portland: Hart Publishing, 2009) at 112-114; Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996); Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978); Jurgen Habermas, “Struggles for Recognition in the Democratic Constitutional State” in Amy Gutmann, ed., *Multiculturalism* (Princeton: Princeton

communities by creating conditions conducive to social stability, cooperation, and progress. Some would go so far as to say that human rights are constitutive of democratic societies insofar as they both guarantee the individual the capacity and resources to act within the body politic, and form the very rationale for the (legitimate) existence of a political community in the first place.⁸

Second, human rights have addressees or prospective duty-holders. Broadly speaking, they address all human beings and/or rational agents capable of influencing distributions of resources through their acts and omissions. That said, they tend to be directed towards governments, partly because of governments' role in framing collective values and partly because governments are capable of doing comparatively large amounts of good or harm. Governments may be directly obligated to protect and promote human rights (as potential rights-violators), or they may be indirectly obligated to prevent or remedy the violation of human rights by private actors (as rights-protectors).

Third, due to their nature as high-priority rights and as coordination mechanisms, human rights require robust justifications for the imposition of duties on addressees. They need not be viewed as pre-determined "trumps" that an individual may wield against any given policy preference on the basis of logical necessity.⁹ Rather, they may be viewed as a resource for structuring ongoing discursive practices among various individuals and groups about how to resolve recurring conflicts over the distribution of value.¹⁰ Joseph Raz explains the point in the following way: "'x has a right' if and only if x can have rights, and, other things being equal, an

University Press, 1994).

⁸ Capps, *supra* note 7, Chapter 7; David Kinley, *Civilizing Globalization: Human Rights and the Global Economy* (Cambridge University Press, 2009) at 9-12.

⁹ Ronald Dworkin, "Rights as Trumps" in, Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 153.

aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty".¹¹ Notice that he is careful to state that rights provide a "sufficient" rather than an "exclusive" or "complete" reason for holding another under a duty, meaning that rights stand as presumptive but refutable reasons for supposing one has to act one way and not another. The existence of a right does not entail the existence of a duty; it merely orients discussion around shared "intermediate conclusions" that may be revised as new values, facts, and arguments are considered.¹² Yet another way of making this point is that human rights correlate to a multiplicity of potential duties;¹³ human rights imply, but do not necessarily entail, correlative legal obligations that the state may justifiably impose on private parties.

Applying these general claims to discourse in adjudicative contexts, we should begin by noting that there are at least two classes of duty-bearers: parties who have allegedly wronged a rights-holder, and authoritative decision-makers who may be justified in imposing legal obligations on others. In court, for example, a judge must be persuaded to identify the existence of a specific human right, decide upon its content, scope and applicability in light of the facts of a dispute, and then to oblige third parties to act in accordance with this right. These three, analytically separate, steps unfold over the course of legal proceedings and, in keeping with our claims about legal indeterminacy in the last chapter, we must admit that the content of human rights norms is insufficient to provide one unique and valid decision. What is the content of a right to adequate housing, for instance, will vary in non-arbitrary ways when recognized in different historical, cultural, and economic settings. The same holds true of duties; one's

¹⁰ This is not to say rights cannot conflict. It is only to say that rights can be correlative with a multiplicity of duties; see Jeremy Waldron, "Rights in Conflict" (1989) 99:3 Ethics 503.

¹¹ Raz, "On the Nature", *supra* note 6 at 195.

¹² Scott, *supra* note 6.

¹³ Waldron, *supra* note 10.

recognized right to adequate housing may not entail that a particular government agency is obligated to furnish housing, especially if there is a lack of resources and/or competing, high priority values and interests at stake.

By viewing human rights as discursive mechanisms, we see that they frame, but do not determine, decisions about the imposition of legal obligation. This raises questions of jurisdiction and authority: who is authorized to issue legal decisions about human rights and within what jurisdictions (e.g. domestic, international, public, private) do discursive practices take place? If discourses unfold in multiple jurisdictions, does the purportedly universal nature of human rights require uniform reasoning, or, may different interpretive communities legitimately produce separate and possibly conflicting obligations? If we can have multiple, inconsistent interpretations about the imposition of legal obligation, are the decisions of some communities more authoritative than others and, if so, for whom and on the basis of what criteria? These questions highlight the importance of reflecting on the comparative roles and responsibilities of domestic and international legal institutions in determining human rights and obligations.

B. II. How do International Human Rights Relate to Domestic Courts?

Human rights have traditionally been matters of domestic jurisdiction. The American *Declaration of Independence* and the French *Declaration of the Rights of Man*, for instance, both state that individuals possess inherent and inalienable rights simply by virtue of being human. However, constitutional rights documents only apply domestically, limiting the spectrum of possible rights-holders, addressees, and contexts to which they are applicable. This produces a number of infelicitous consequences. To begin, only a subsection of persons physically resident within a jurisdiction enjoy the full protection of legal rights. American and French human rights documents, for instance, specified that rights applied to “men” and, practically speaking, did not

protect most minorities. Reliance on domestic legislation also reduces the geographic scope of human rights, undercutting the hypothesis that human rights apply to all human beings or rational agents.

International law stands as an attractive alternative since it is global in scope and can provide an outside perspective from which one may criticize a government's failure to respect the human rights of those within its jurisdiction. However, as the law governing inter-state relations, international law traditionally had little to say about human rights or the manner in which states could or should treat those within their jurisdiction.¹⁴ Starting with the *Universal Declaration of Human Rights* (UDHR)¹⁵ in 1948, the international community has made a concerted effort to concretize and give effect to a growing range of human rights. As part of this international legalization of human rights, we have witnessed: the *positivization* of norms through their location in recognized sources of international law, the *specification* of rights and obligations through their reasoned application to diverse fact scenarios by interpretive communities (e.g. treaty-monitoring bodies, international, regional, and domestic adjudicative bodies, etc.), and the *enforcement* of rights through a variety of persuasive and coercive means, including the issuance of authoritative judgments at the international and regional level, reviews of state compliance by treaty bodies, and the mandatory cooperation of domestic legal institutions in the implementation of rights.

Cumulatively, these functions produce "binding" international human rights norms, which is to say that states are obligated not to act contrary to the principles and purposes of a

¹⁴ Trevor Farrow, "Globalization, International Human Rights, and Civil Procedure"(2003) 41:3 Alberta Law Review 671 at 678.

¹⁵ UDHR, *supra* note 1.

norm (and its host treaty more generally), and to implement it into domestic law.¹⁶ Every international human rights treaty for this reason requires that persons whose rights have been violated be provided with an “effective remedy”.¹⁷ If domestic courts or tribunals fail to discharge this obligation, victims may then file complaints with specified international courts or tribunals.

Relying on analogies between international law and domestic law, critics assert that the effectiveness of international human rights has been obstructed by our lack of a centralized institution authorized to enunciate, interpret, and apply international legal norms. Without this institutionalization, international law remains a “primitive” or capricious legal order lacking in the qualities necessary for it to evolve into a pithy, coherent, and well-orchestrated legal *system*.¹⁸ International relations theorists have long argued that the decentralized nature of international law renders it dependant on the vicissitudes of international politics. Political realists, for example, argue that international law is nothing but an instrument of domination which powerful states use to rationalize the imposition of their will upon weaker states.¹⁹ Absent coercion of this type, states will voluntarily commit themselves only to those obligations that serve, or at least do not interfere with, the pursuit of their own power. Some argue that this may result in the production of vague treaties which afford states the interpretive latitude they need to

¹⁶ *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), arts. 18, 27, 29

¹⁷ For example, see: *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), art 2(3).

¹⁸ H.L.A. Hart, *The Concept of Law* (Clarendon Press) at 87-90.

¹⁹ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 2nd edn., (Alfred A. Knopf, 1954); Hans Morgenthau, “Positivism, Functionalism and International Law” (1940) 32:2 *The American Journal of International Law* 260; Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (New York: Harper & Row, 1964); Georg Schwarzenberger, *Power Politics: A Study of International Society* (London: Stevens, 1951); Georg Schwarzenberger, *The League of Nations and World Order: A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations* (London: Constable, 1936).

avoid being found in non-compliance.²⁰ This might explain why international human rights treaties, hardly ideal mechanisms for enhancing state power, are composed largely of abstract principles with few specific rules or standards.

Nonetheless, a significant measure of specificity is added through the common practice of attaching to treaties a standing committee to monitor the performance of member states, and to which those states are required to submit periodic reports on compliance. The International Covenant on Civil and Political Rights (ICCPR) exemplifies this approach. The ICCPR created the Human Rights Committee (HRC), to promote compliance with its norms.²¹ The eighteen members of the HRC serve as independent experts rather than as state representatives. This potentially gives them some independence from the positions of their governments. The HRC regularly expresses its views as to whether a particular practice is a human rights violation, but it is not authorized to issue legally binding decisions. This is to say that states are not required to treat the HRC's views as authoritative pronouncements of their international legal obligations and so may act contrary to them and refuse to give them domestic effect.

B. III Summary

In sum, international human rights are discursive mechanisms that frame debates about the imposition of legal obligation. Viewed in this way, they are functionally identical to domestic human rights, such as those found in some constitutional documents. They differ insofar as they are global in scope, whereas domestic human rights are applicable only to matters within the jurisdiction of a particular state. International human rights are also distinctive in that their

²⁰George W. Downs *et al.*, "Is the good news about compliance good news about cooperation?"(1996) 50:3 *International Organization* 379; for a different view on international human rights treaties and compliance, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* (2002) 111:8 *Yale Law Journal* 1935.

²¹ Sarah Joseph, *et al.*, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary*,

content is constructed through the interpretations of multiple, informal discursive communities operating in various international fora without coercive power. By contrast, domestic human rights are produced by authoritative political institutions which often have the capacity to enforce their will through coercive measures.

Domestic courts are an important part of the international human rights enterprise. They can help secure compliance with binding international human rights by offering remedies to persons whose rights have been violated, a function that is not adequately performed by treaty bodies lacking in authority or influence. They can also contribute to the specification of international human rights by applying them to changing factual contexts. However, the production of workable rules and standards ultimately depends on the reasoning of interpretive communities that are not authorized to promulgate binding law. Domestic courts may be reluctant to use the views of such communities as reasons for their decisions or, at least, as reasons sufficient to outweigh domestic laws and policy preferences. From the international perspective, there is also concern that increased juridical reliance on the opinions of specialized interpretive communities can lead to a patchwork of law, where the content of international human rights varies from context to context;²² a problem the internationalization of human rights was originally supposed to remedy.

C. International (Human Rights) Law in Canadian Courts: The Presumption of Conformity Doctrine

As noted in the introductory chapter, scholars have described the Canadian law of reception by reference to “monist” and “dualist” perspectives. From a “monist” perspective,

second edition (Oxford University Press, 2005); Dominic McGoldrick, *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1994).

²² Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International,

international law and domestic law form a unified system, whereby international laws, once established, are at one and the same time domestic laws. A monist approach reduces, but does not eliminate, the tensions raised by pluralistic approaches to the interpretation of international human rights, since there can be no conflict between international law and constitutional law; the two are part of an holistic legal order. In the English common law tradition, upon which Canadian courts have steadily relied, monism has notionally governed the reception of customary international law.²³ As suggested in the introductory chapter, this is a mixed blessing for human rights advocates since there are comparatively fewer customary human rights norms in international law and, unlike international treaty law, such norms develop slowly and quite independently of the work of broader, non-state interpretive communities.

From a “dualist” perspective, by contrast, international law and domestic law are separate legal systems or orders.²⁴ While international legal norms may be valid in international contexts, they cannot alter domestic rights and duties unless they are transformed into domestic legal norms through positive acts performed by designated legal authorities. A dualist approach thus raises hierarchical distinctions, both between domestic law and international law, and between binding and non-binding international law. It is here that the formally non-binding status of norms produced by non-state interpretive communities becomes especially relevant to domestic

2001).

²³ *R. v. Hape*, [2007] 2 S.C.R. 292 at paras. 35-39; see also Ronald St. J. MacDonald, “International Treaty Law and the Domestic Law of Canada” (1975) 2 *Dalhousie Law Journal* 307. Some argue that this is not clearly the case; see Stephen J. Toope, “Keynote Address: Canada and International Law”, in *The Impact of International Law on the Practice of Law in Canada. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998* (The Hague: Kluwer Law International, 1999) 33 at 37; Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 *Canadian Bar Review* 534 at 539.

²⁴ Some would dispute the claim that international law constitutes a “system”; see H. Patrick Glenn, “Doin' the Transsystemic: Legal Systems and Legal Traditions” (2005) 50:4 *McGill L.J.*, 863. Since I do not want to engage with this debate right now, I will refer to international law as a legal/normative order or framework unless referencing someone else.

courts concerned with stringently channeling the flow of international human rights into domestic law. To such judges, the views of interpretive communities are relatively unlikely to be considered valid norms of international law and, hence, appropriate for domestic implementation through the law of reception. Indeed, the *Vienna Convention on the Law of Treaties* specifies that, in interpreting a treaty, adjudicators are to have regard to the “ordinary meaning” of terminology in its “context and in light of its object and purpose”.²⁵ It is generally agreed that this provision directs interpreters of the intentions of states parties at the signing of the treaty as opposed to subsequent interpretations made by treaty bodies that are neither states nor parties to the treaty.

Dualism is the approach which Canadian courts have traditionally taken with respect to international treaties. *Canada (AG) v. Ontario (AG)* (the *Labour Conventions* case) is the first case in which a dualist law of reception was authoritatively established. In this case, Lord Atkin of the Judicial Committee of the Privy Council made a distinction between the formation and the implementation of a treaty. He stated that, while “the making of a treaty is an executive act, ... the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action”.²⁶ As to the scope of the executive's power to negotiate and conclude treaties, Lord Atkin stated “that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone”.²⁷ While the Privy Council was silent on the matter, the Supreme Court of Canada's ruling in this case, delivered by Duff C.J., was that the federal executive possesses the exclusive constitutional jurisdiction to negotiate and

²⁵ *Vienna Convention*, *supra* note 16, art. 31.

²⁶ *AG (Canada) v. AG (Ontario)*, [1937] 1 D.L.R. 673 (J.C.P.C) at 679; for English precedent, see also *Reg. v. Keyn* (1876) 2 Ex. D. 63.

²⁷ *Ibid.* at 679-683.

conclude international treaties.²⁸

These two judgments signified that respect for representative government (i.e. federalism and Parliamentary sovereignty) is a controlling principle in the Canadian law of reception.²⁹ This is evident in the rule that legislation is the exclusive means by which international treaty law is to be given domestic legal effect. The judiciary's role is to police constitutional boundaries, ensuring that the federal executive does not use its exclusive authority to negotiate and conclude treaties that encroach upon provincial or federal legislative jurisdiction. Judges are likewise to restrain themselves from giving domestic legal effect to even binding international law without legislative pre-approval. However, several years prior to the *Labour Conventions* case, Canadian courts had articulated a second controlling principle: that of respect for international law. This principle is expressed within the "presumption of conformity" doctrine, which holds that judges will, absent clear evidence to the contrary, presume that legislatures intend for statutes to conform to Canada's international legal obligations and will interpret legislation accordingly.³⁰

²⁸ *AG (Canada) v. AG (Ontario)*, [1936] 3 D.L.R. 673 (S.C.C.) at 697.

²⁹ For other cases in which this principle has been recognized, see: *Francis v. The Queen*, [1956] S.C.R. 617; *R. v. Wedge*, [1939] 4 D.L.R. 323 (B.C.S.C.); *Spitz v. Secretary of State of Canada* (1939), 2 D.L.R. 546; *R v. Sikyea* (1964), 46 W.W.R. 65; *Schavernoch v. Foreign Claims Commission* [1982] 1 S.C.R. 1092; *R v. Videoflicks Ltd* (1984), 48 O.R. (2d) 395, 15 C.C.C. (3d) 353; *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107, 208 D.L.R. (4th) 66; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 78-81.

³⁰ Commentators often cite *Re Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*, [1932] 2 D.L.R. 250 (S.C.C.) as the first case in which this rule was affirmed in Canada. However, no judge in this case explicitly stated this rule. Smith J. did appear to accept the Ontario Supreme Court's invocation of it during appeal: see *Re River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*, [1931] 2 D.L.R. 216 (O.S.C.) at 217-218. In any event, the presumption of conformity rule has been invoked, although not always applied, in many subsequent cases, including: *Hape*, *supra* note 23; *Baker*, *supra* note 29 (mentioned but arguably not applied); *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioner's Residences*, [1943] S.C.R. 208; *Daniels v. White.*, [1968] S.C.R. 517; *R. v. Zingre*, [1981] 2 S.C. R. 392; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Gordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1988), 160 D.L.R. (4th) 193 (S.C.C.); *R. v. Sharpe*, [2001] 1 S.C.R. 45; *114957 Canada Tee (Spraytech, Societe d'arrosage) v. Town of Hudson* [2001] 2 S.C.R. 241. Finally, the doctrine has earlier roots in English common law, see *Buvot v. Barbut* (1763) 3 Burr. 1481; 4 Burr. 2016; *Triquet v. Bath* (1764) 3 Burr. 1478; *Heathfield v. Chilton* (1767) 4 Burr. 2015; Sir George Cornwall Lewis, *On Foreign Jurisdictions and*

The presumption of conformity doctrine attempts to harmonize principles of respect for constitutionality with principles of respect for international law, although the former wins out in cases of conflict. As the jurisprudence has evolved, doctrine became characterized by four operational elements. These elements are: that there exist ambiguities in legislation or regulations the clarification of which requires international legal perspectives;³¹ that the legislation or regulations in question implement or in some way touch upon the international legal norms used;³² that the international legal norms used are binding on Canada; and, that the purpose of using the doctrine is to secure consistency between the substance of a particular domestic legal norm and the substance of a particular international legal norm. Despite the fact that these conditions had been clearly laid out in early case law, they have since been routinely altered or altogether disregarded.

C. I. Ambiguity, Canons of Statutory Interpretation, and the Value of International Law

The requirement that legislative provisions be ambiguous before judges may have recourse to international law was perhaps most famously articulated by Pigeon J. in *Daniels v. White*.³³ Here, Pigeon J. stated that the presumption of conformity doctrine is “not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law”.³⁴ Citing English authorities,³⁵ he went on to say that, if the intent of parliament is “clear and unmistakable then the plain words of a statute...(can) not be disregarded in order to observe the comity of nations and the established rules of international law”.³⁶ This ruling reflects a powerful tradition in statutory (and treaty) interpretation in which the textual

the Extradition of Criminals (London: J.W. Parker & Sons, 1859) at 66-67.

³¹ For a famous iteration of this element, see Pigeon J.’s ruling in *Daniels v. White*, *supra* note 30 at 541.

³² There are a number of exceptions to this element which I will detail below.

³³ Citation located *supra*, note 30.

³⁴ *Ibid.* at 20.

qualities of a statute are accorded near-exclusive priority over other, substantive or contextual sources of meaning in the clarification of ambiguities.

Ambiguities in legislative provisions may arise for a number of reasons, including the inherent limitations of language or the emergence of unforeseen situations that cast doubt on legislative intent. The law of reception was traditionally structured around “textual” and “intentionalist” canons of interpretation that respectively require judges to have recourse to the plain meaning of the text itself and to consider other documented indicia of parliamentary intent e.g. the meaning of neighbouring provisions, the objectives and purposes of the statute itself, the meaning of cognate or previous statutes, parliamentary debates, and so on.³⁷ This approach might be connected to a formalist approach to constitutional supremacy, in which the judiciary’s role is restricted to the interpretation of law that may only be validly created by the legislatures. It is only when judges cannot infer clear meaning or intent from official texts that recourse may be had to the terminology of implemented treaties. But, even here, recourse is had to the plain meaning of states party to the treaty as expressed in the language of treaty provisions, consistently with equally traditional international legal methodologies.³⁸

Textual and intentionalist approaches to statutory interpretation reflect a confusing attitude towards implemented international treaties as extraneous, contextual materials rather

³⁵ *Inland Revenue Commissioners v. Collico Dealings Ltd.* [[1962] A.C. 1, 39 Tax Cas. 526].

³⁶ *Daniels v. White*, *supra* note 30 at 20.

³⁷ For some somewhat recent Supreme Court judgments textual approaches, see: *Ontario v. C.P. Ltd.*, [1995] 2 S.C.R. 1028 at 1049-50; *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 705. For academic (and largely critical) commentary, see: Geoff R. Hall, “Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology” (1998) 40 *Advocates Quarterly* 38; Paul Perell “Plain Meaning for Judges, Scholars and Practitioners” (1998) 20 *Advocates Quarterly* 24; Barbara Child, “What Does ‘Plain Meaning’ Mean These Days?” (1992) 3 *Scribes Journal of Legal Writing* 1; William Eskridge and Philip Frickey, “Statutory Interpretation as Practical Reasoning” (1990) 42 *Stanford Law Rev.* 321; Frederick Schauer, “Statutory Construction and the Coordinating Function of Plain Meaning” (1990), *Supreme Court Review* 231.

³⁸ *Vienna Convention*, *supra* note 16, art. 31.

than as materials directly relevant to the identification of parliamentary intent.³⁹ In contrast to textual and intentionalist canons of interpretation, more modern “contextual” canons of interpretation encourage judges to favour interpretations of law that promote the realization of public values, needs, and expectations.⁴⁰ Morality, the needs and interests of affected parties, and the broader public interest here stand alongside parliamentary intent as legitimate sources of meaning and, perhaps, of legality. Although arguably the current, dominant mode of statutory interpretation, contextual interpretation contradicts the assumption that statutes and other indicia of parliamentary intent are the only valid bases upon which judgment may rest and so was not often employed in the law of reception’s early years.

Whatever may be the (de)merits of relying on values as the basis of adjudication, it is not immediately clear why many judges considered international law to fall within the contextual, rather than textual or intentionalist, approaches to interpretation. After all, the ambiguity of an *implementing* legislative provision does not negate the fact that it expresses parliament’s intent to give effect to an international treaty that was in all likelihood closely scrutinized before the federal executive issued its consent to be bound. Surely international treaty provisions, and perhaps even records of treaty negotiations, would be as useful for inferring parliamentary intent as other documented sources, such as parliamentary debates or contiguous legislative provisions. The inherent interpretive utility of legislatively implemented international treaty documents nonetheless has often been overshadowed by the needless assumption that any use of such texts must be oriented towards the separate and constitutionally suspect end of securing compliance

³⁹ It also fails to appreciate the full extent of legal indeterminacy and gives undue force to the separation of power thesis, as I will discuss shortly.

⁴⁰ Stephane Beaulac, “International Treaty Norms and Driedger’s ‘Modern’ Principal of Statutory Interpretation”, in *Legitimacy and Accountability. Proceedings of the 33rd Annual Conference of the Canadian Council on International Law, Ottawa, October 14-16, 2004* (Ottawa: Allegra Print & Imaging, 2005) 141; Ruth Sullivan,

with international law.

The interplay of textual/intentionalist and contextual canons of interpretation has been such that judges have often been unwilling to use the presumption of conformity doctrine even if there exist *bona fide* ambiguities in legislative provisions. For instance, in *R v. Sikyea*,⁴¹ the court was asked to use the *1916 Migratory Birds Convention* to interpret the term “scoter” in the *Migratory Birds Convention Act*. Sikyea was charged under the Act for shooting and killing a protected bird. Sikyea argued that he had an Aboriginal treaty right to hunt the bird and that the convention explicitly stated that it did not interfere with Aboriginals’ rights to hunt migratory birds for subsistence. Although the term “scoter” was, by virtue of these arguments, rendered ambiguous, the court nonetheless adopted a strict, textual approach, deriving its definition of “scoter”, not from parliamentary records or debates, but from Murray’s *New English Dictionary*.⁴² The court was concerned that excessive reliance on international documents would create rather than resolve a pre-existing ambiguity, stating that it was not “concerned with interpreting the Convention, but only the legislation by which it is implemented”.⁴³ It did not explain, however, why a definition found in a dictionary should be granted greater weight than the very international law the legislation in question implemented (or, for that matter, Aboriginal treaty rights).

A textual/intentionalist approach to statutory interpretation was also used to preclude the application of international law in *Schavernoch v. Foreign Claims Commission*.⁴⁴ In this case, Estey J. overturned the decisions of the Federal Court of Appeal and the Foreign Claims

Driedger on the Construction of Statutes, 3rd edn. (Butterworths. 1994).

⁴¹ Citation located *supra* note 29.

⁴² *Ibid.* at 79.

⁴³ *Ibid.* at 80.

⁴⁴ Citation located *supra* note 29.

Commission, both of which used international legal sources to define the meaning of the term “Canadian Citizen”, as it appeared in regulations that were intended to implement an agreement between Canada and Czechoslovakia. The purpose of these regulations was to enable Canadian citizens resident in Czechoslovakia to claim compensation for assets that the latter had nationalized. Based on representations made by the Canadian Ambassador involved in negotiations with Czechoslovakia, the Court of Appeal and Commission both held that the respondent to be ineligible to make a claim because she was a dual citizen whose “dominant” nationality was Czechoslovakian and not Canadian.

In overturning this decision, Estey J. argued that recourse to the international agreement and treaty negotiations were unauthorized because the meaning of the term “Canadian Citizen” was plainly defined within the *Canadian Citizenship Act*. In issuing this ruling, Estey J. relaxed the ambiguity requirement, holding that the use of international legal sources as interpretive aids is authorized if one can show that legislative or regulatory provisions are either patently or *latently* ambiguous -- a rule that would have been tremendously useful in *Sikyea*.⁴⁵ Projecting domestic canons of statutory interpretation into the international domain, Estey J. went on to say that use of evidence of intention must be restricted to the interpretation of formal treaty provisions. Judges were directed to not rely on background or contextual materials that may be of use in constructing the intentions of states party to a treaty, such as treaty negotiations, as these could unravel the plain or literal meaning of international treaties that in most cases should be adequate for the purposes of adjudication. In Estey J’s words: “the simple fact that the Regulations were an implementation of the Agreement does not entitle a court to take the next

⁴⁵ *Ibid.* at 1098.

step to ascertain what the parties intended to but did not embody in the Agreement”⁴⁶

In short, the intentions of the Canadian executive in negotiating and signing a treaty matter little when the treaty itself is used as an interpretive aid to construct legislative intent. But again, the intentions of the executive are likely to factor into parliament’s decision to implement international treaties (most especially in a Westminster-style government), and so it is hard to imagine why judicial consideration of this fact should be a problem. The explanation may well involve the Supreme Court’s persistent position that the separation of powers stands as an essential feature of Canadian constitutionalism, despite the credible claim Canada’s retention of the British system of parliamentary government is “utterly inconsistent with any separation of the executive and legislative functions”⁴⁷.

In addition to being hard to defend on its own terms, judicial formalism has failed to obscure the pervasiveness of value or equity-driven analysis in many cases. In *Shavernoch*, for instance, the court used the ambiguity element to exclude the consideration of international law that prohibited a Canadian Citizen from claiming compensation for material losses, despite the fact that the international nature of the dispute suggested that binding and implemented international treaties were directly relevant. Similarly, *Sikyea* involved a dispute over a term that had no legal meaning whatsoever, and still the court chose to rely on a dictionary rather than an implemented international treaty, adding to the judiciary’s long history of obstructing indigenous persons’ access to justice. Notwithstanding the purported purpose of textual and intentionalist canons of interpretation, decisions such as these suggest that international law’s use or non-use has often been driven, not by its inherent interpretive utility, but by the values and policy concerns of judges. As the legal realist would insist, textual and intentionalist canons of

⁴⁶ *Ibid.* at 1099.

interpretation not only fail to exclude policy as a basis of judgment, but can help mask and even legitimize result-orientation.

Predictably, Estey J.'s distinction between patent and latent ambiguities paved the way for greater informality and confusion in the law of reception. Gonthier J., for instance, made use of this distinction in *National Corn Growers Assn. v. Canada (Import Tribunal)*,⁴⁸ affirming that international treaties may be used, not only *when* there are latent ambiguities in legislation, but in order to *identify* ambiguities. In other words, judges may use international law to destabilize what might otherwise be fairly settled terminology, justifying its retrospective use as an interpretive aid.

C. II Implementation: Direct and "Passive"

As mentioned, international treaties are supposed to have no domestic legal effect unless implemented through statute.⁴⁹ There have nonetheless been numerous examples where judges have interpreted domestic laws in light of unimplemented (though binding) treaties. In *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*, for instance, the Supreme Court of Canada was asked to decide if a piece of ordinary, non-implementing provincial legislation conflicted with the terms of an international treaty. Smith J. seemed to have recognized that the presumption of conformity holds unless legislators clearly and explicitly express their intention to violate international treaty law.⁵⁰ However, he avoided using the doctrine by construing the terms of the treaty so narrowly that it did not apply to the areas regulated under the impugned legislation. Lamont J., on the other hand, truncated the rule, arguing that the legislatures have the sovereign right to violate international law and that the courts should not enforce a treaty unless the

⁴⁷ Peter W. Hogg, *Constitutional Law of Canada*, student ed., (Carswell, 1999) at 321.

⁴⁸ Citation located *supra* note 30.

⁴⁹ One exception to this rule are treaties which are self-executing and/or which fall within the royal prerogative.

legislatures clearly specify that statutes be read consistently with Canada's international legal obligations.⁵¹

In *Capital Cities Communication v. C.R.T.C.*,⁵² the majority upheld the requirement that treaties be implemented before they can be used even as interpretive aids. The dissent, led by Pigeon J., argued that it "is an oversimplification to say that treaties are of no legal effect unless implemented by legislation".⁵³ Citing English authorities,⁵⁴ Pigeon J. argued that the presumption of conformity doctrine applies notwithstanding the fact that a particular treaty has not been legislatively implemented and that parliament must clearly state its intention to violate international treaty obligations. Failing this, judicial notice ought to be taken of the expectations of parties to, and beneficiaries of, international treaties irrespective of whether such treaties have been incorporated into domestic law.⁵⁵ It should also be noted that Pigeon J., formerly a champion of textual and intentionalist canons of interpretation, in this case used a contextual approach to give greater effect to the changing values, objectives and expectations associated with the treaty in question.⁵⁶

More recently, the court in *Baker v. Canada (Minister of Citizenship and Immigration)* used the *Convention on the Rights of the Child*⁵⁷ to inform its interpretation of the content of a claimant's rights to procedural fairness and the appropriate standard of judicial review to be applied to the Minister's exercise of her discretionary decision-making authority. Although L'Heureux-Dube J., speaking for the majority, recognized the principle that international

⁵⁰ *Arrow River*, supra note 30 at 263-265.

⁵¹ *Ibid.* at 259-260.

⁵² [1978] 2 S.C.R. 141

⁵³ *Ibid.* at 188.

⁵⁴ *Post Office v. Estuary Radio Ltd* [1968] 2 Q.B. 740

⁵⁵ *Capital Cities Communication*, supra note 52 at 189.

⁵⁶ *Ibid.* at 190.

⁵⁷ 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

“treaties and conventions are not part of Canadian law unless they have been implemented by statute”, she subsequently stated that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.⁵⁸

L’Heureux-Dube cited paragraphs in *Sullivan and Driedger on the Construction of Statutes* that justified the use of contextual cannons of interpretation but ignored paragraphs that dealt with the presumption of conformity doctrine.⁵⁹ As others have observed, this clearly indicated the court’s preference for a contextual, comparative law approach over classic doctrine.⁶⁰ In the subsequent case of *R. v. Hape*, however, the Supreme Court ruled that judges should “avoid a (statutory) construction that would place Canada in breach of those obligations” when judges are “deciding between possible interpretations” each of which is supported by the values and principles that inform the context of a legislative provision.⁶¹ But does this apply to constitutional provisions? If the Court was applying this principle to the interpretation of *Charter* provisions, then we may infer that the presumption of conformity doctrine not only has survived: it authorizes the use of binding international law to interpret the scope and applicability of the *Charter*. It also suggests that judges’ use of a contextual approach to statutory interpretation should be constrained by the value of compliance with binding international law, which is more in keeping with classic iterations of the presumption of conformity doctrine; binding international law should be preferred over other normative and “contextual” resources.

Importantly, the majority’s use of international law in *Baker* was sharply criticized by Iacobucci J. on the grounds that the contextual approach is inconsistent with precedent, which

⁵⁸ *Baker*, *supra* note 29 at paras 69-70.

⁵⁹ *Sullivan*, *supra* note 40 at 330.

⁶⁰ Beaulac, *supra* note 40; William Schabas & Stephane Beaulac, *International Human Rights and Canadian Law*, (Thomson Canada Limited. 2007) at 98-99.

⁶¹ *Hape*, *supra* note 23 at para. 53.

has contributed to confusion about the full scope of the doctrine in contemporary jurisprudence.

It is worth quoting Iacobucci J. in full:

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... 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.⁶²

How is one to make sense of both *Baker* and *Hape* in light of these comments? Some lawyers and academics have hypothesized that international law can be “passively” incorporated, which is to say that its domestic legal status does not depend on Parliament expressly encoding it into legislation.⁶³ Now, some legislative acts clearly and formally implement international treaties. Examples include: the *Migratory Birds Convention Act*,⁶⁴ the *Immigration and Refugee Protection Act*,⁶⁵ Part II of the *Criminal Code*,⁶⁶ and the *Crimes Against Humanity and War Crimes Act*.⁶⁷ However, some pieces of legislation only imply implementation. Most often, these implications come in the form of preambular statements, such as those that appear in the *Emergencies Act*⁶⁸ and Part V of *An Act to amend the Canada Labour Code*.⁶⁹ Finally, some argue that any statute or regulation which existed before an international treaty obligation was assumed and which secures compliance with such obligations can be considered implementing

⁶² *Baker*, *supra* note 29 at para 79.

⁶³ Beaulac, *supra* note 40; Irit Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation”, in *The Impact of International Law on the Practice of Law in Canada. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998* (The Hague: Kluwer Law International, 1999) 132; Gibran Van Ert, *Using International Law in Canadian Courts*, (The Hague, London, New York: Kluwer Law International, 2002) at 185, 207-214, 227-229.

⁶⁴ R.S.C 1994, c. 22.

⁶⁵ R.S.C. 2001, c. 27

⁶⁶ R.S.C. 1985, c. C-46.

⁶⁷ R.S.C. 2000, c. 24.

⁶⁸ R.S.C. 1985, c. 22 (4th Supp.).

⁶⁹ R.S.C. 2008, c. 15.

legislation, insofar as its provisions may be interpreted in light of relevant treaties.⁷⁰

Passive incorporation has often been invoked with respect to the *Charter*, as was arguably the case in *Hape*. In this case the Court seemed to say that the presumption of conformity doctrine justified its use of customary and conventional international law to interpret provisions of the *Charter*. Among the most forceful, academic proponents of this view is Anne Bayefsky, who argues that the *Charter* implemented international human rights by virtue of the fact that international human rights norms were extensively relied upon during the drafting of the content of particular *Charter* provisions and that numerous Canadian officials have represented the *Charter* to various international human rights bodies as having implementing Canada's international human rights obligations.⁷¹ While some see the "special" nature of international human rights as justifying this view of the domestic legal status of international human rights, others argue that passive incorporation either is fundamentally flawed in principle,⁷² or that it should not be extended to the *Charter* since this would be to constitutionalize legal norms sourced in the activities of the federal executive in concert with foreign political authorities – a practice that runs counter to values of parliamentary sovereignty, federalism, and arguably constitutional supremacy.⁷³ In any case, it is not clear that this was the position of the Supreme Court in *Hape*, since it justified its use of international law by reference both to the presumption of conformity doctrine and to a parallel, "relevant and persuasive" doctrine, the latter of which, we will see, tends to conflate or at least blur distinctions between binding and non-binding international law and, indeed, international and comparative human rights. It is unclear upon

⁷⁰ Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto and Vancouver: Butterworths, 1992) at 62-63; Maxwell Cohen & Anne Bayefsky, "The Canadian Charter of Rights and Freedoms and International Law", (1983) 61 Canadian Bar Review 265.

⁷¹ Bayefsky, *supra* note 70 at 62-63; Cohen & Bayefsky, *supra* note 70; Weiser, *supra* note 63.

⁷² Stephane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003)

which of these doctrines, if either, the Court's judgment rested.

C. III. Bindingness and Compliance

The final two operational elements of the presumption of conformity doctrine -- bindingness and compliance -- fare no better than the first two in terms of internal and jurisprudential consistency. As mentioned, bindingness refers to Canada's obligation to not defeat the objects or purposes of a treaty or custom in its international affairs and to implement into or otherwise give effect to an international norm within domestic law. Also as noted, one's conception of law drives one's understanding of compliance. It is reasonable to argue that the presumption of conformity doctrine relies, expressly or implicitly, on a rule-based conception of law, in which the meaning of particular rules either is manifestly clear or is discernable by reference to the "core" meaning of more fundamental rules. As Iacobucci J. stated in *Baker*, the judiciary's job is not to create rules or to destabilize well-settled meanings with extraneous normative materials. The judiciary's job is to resolve any ambiguities that arise when parliament attempts to transplant international legal rules directly into domestic law.

This approach explains historical and contemporary resistance to contextual canons of interpretation in which *principles*, rather than positive rules, underpin judicial decision-making. There are international parallels to this kind of debate. Historically, textual or plain meaning cannons of treaty interpretation required courts and other bodies to consider only the intentions of states parties at the moment they signed and ratified a treaty; recourse to contextual materials was forbidden on the grounds that it violated the sovereign right of states to decide precisely when and how to obligate themselves under international law. However, contemporary canons of treaty interpretation recognize the importance of contextual factors in determining the intent of

41 *Canadian Yearbook of International Law* 225, at 237-241.

states parties and, more broadly, in realizing autonomous values of international law⁷⁴. For instance, treaties may not be constructed or interpreted in such a way as to contravene peremptory norms of international law, which include laws against torture, slavery, apartheid, genocide, war crimes, crimes against humanity, and so on. This is to say that ascertaining the intent of states parties is not the only object of treaty interpretation and that even clear intent may in fact be overridden by the legal and moral principles that underpin international human rights.

This more recent approach has a bearing on what we have to include in our conceptions of bindingness and compliance. To say an international legal norm is binding means that Canada must respect not only the rules and standards attendant to the norm, but also its spirit, purposes and objectives. Compliance must therefore mean more than conformity to rules. This is not just because the content of those rules is often unclear, but because judges may be obligated to alter the meaning and/or application of even clear rules in consideration of higher order rules and principles, whether or not parliament or the executive have turned their minds to the issue when producing domestic or international law respectively. This expanded conception of compliance causes tension with the basic concepts and categories used in the presumption of conformity doctrine, since indicia of the unfolding spirit of international law and, indeed, of autonomous international legal values are to be found in the formally non-binding views of monitoring, reporting, and standard-setting bodies, international courts whose judgments may not be binding on Canada, and perhaps even foreign law; the meaning of international law changes long after treaties or customs are created. Assuming that Iacobucci J. is right that courts can only engage

⁷³ Weiser, *supra* note 63 at 138-139.

⁷⁴ Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008); Duncan French, "Treaty Interpretation And The Incorporation Of Extraneous Legal Rules" (2006) 55:2 *International and Comparative Law Quarterly* 281; Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities" (1990-1992) 12 *Mich. J. Int'l L.*

with implemented international law, judges will still have to employ the very kind of contextual interpretation he is concerned about to identify the full meaning of the international law being implemented and, more fundamentally, to ensure compliance as it is normally understood within the international human rights community e.g. consistency with both the objective qualities and the dynamic, unfolding spirit of a treaty or custom. Judicial reliance on sources of law outside of parliamentary and executive intent cannot be avoided if we are to comply with contemporary international law in a meaningful sense.

The Supreme Court has done little to guide lower courts through this dilemma and has arguably made matters more complicated by changing the conditions under which specifically international human rights in particular may be judicially received. In *Baker*, for example, the Court expressly recognized that international treaty law is of no force or effect unless implemented by statute, but also ruled that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.⁷⁵ Obviously, “values reflected in international human rights law” are quite different from those norms that are *codified* in the terms of binding and implemented international treaties or concretized through customary international law. The former describe at least principles, interests, and objectives that transcend the text of particular treaties or customs, capturing a wide range of legal, quasi-legal, and moral perspectives -- sources of insight classically irrelevant to treaty, customary, and statutory interpretation. Lower court judges and lawyers are left wondering which set of directives to follow and whether exceptions to the presumption of conformity doctrine are reserved for international human rights or extend to other fields.

371; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

⁷⁵ *Baker*, *supra* note 29 at paras 69-70.

D. International Law in Canadian Courts: The Relevant and Persuasive Doctrine

The judiciary's growing willingness to operate outside the ambits of the presumption of conformity doctrine has created a body of jurisprudence which one highly respected commentator has described as "an appalling mess".⁷⁶ At the heart of the matter is the question of what, if anything, determines decision-making. Revisiting legal realist perspectives canvassed in Chapter 1, there are at least two possibilities. The first, radical view is that decision-making is driven by judicial idiosyncrasies and ideology.⁷⁷ As in any field of adjudication, judges' use or non-use of international law depends on their personal orientation towards the facts and issues of a case and not on pre-existing law. This explanation denies the possibility of imposing some level of order on decision-making such that practitioners and observers may predict with some level of accuracy what a decision will be. In this sense, "law" is rendered conceptually meaningless other than as an instrument of politics.

A second, moderate or "sociological" realist perspective suggests that decision-making is systematically or at least predictably influenced by informal normative frameworks which help judicial reasoning.⁷⁸ The idea here is that adjudication involves the use of social science data

⁷⁶ Toope, "Keynote Address", *supra* note 14 at 33

⁷⁷ Brian Leiter, "American Legal Realism" The University of Texas School of Law: Public Law and Legal Theory Research Paper No. 042 (October 2002) at 9-10. This version has more recent incarnations, including the Critical Legal Studies movement: see, Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1997); David Kairys, "Law and Politics" (1984) 52 *George Washington Law Review* 243; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983); Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard Law Review* 1685.

⁷⁸ Leiter, *supra* note 77 at 9; Oliver Wendell Holmes, Jr., "The Path of the Law" (1897) 10 *Harvard Law Review* 457; Herman Oliphant, "A Return to Stare Decisis" (1928) 14 *American Bar Association Journal* 71; Underhill Moore & Theodore Hope, "An Institutional Approach to the Law of Commercial Banking" (1929) 38 *Yale Law Journal*; Karl Llewellyn, "A Realistic Jurisprudence: The Next Step" (1930) 30 *Columbia Law Review* 431; Karl Llewellyn, "Some Realism about Realism: Responding to Dean Pound" (1931) 44 *Harvard Law Review* 1222; Edward S. Robinson, "Law: An Unscientific Discipline" (1934) 44 *Yale Law Journal* 235

(loosely defined) and informal norms to enhance the responsiveness of state law to, and its capacity to shape, the values, needs, interests, and customs of non-state actors. *Baker* provides a convenient illustration of this view. The Court in this case used the *Convention on the Rights of the Child* (CRC) -- an unimplemented international treaty-- to support its decision, not about the meaning of ambiguous statutory provisions, but about the scope of Ministerial discretion. For these two reasons, among others, the decision was not, strictly speaking, justified by the presumption of conformity doctrine. Yet, it chose to engage with unimplemented treaties on migration and the rights of children, which helped it to construct the ethical dimensions of discretionary decisions to separate a parent from his or her children through the act of deportation. As a treaty with its own monitoring and reporting body, the CRC has produced a relatively stable body of publicly accessible, albeit formally non-binding norms. Judicial reasoning about these norms was, accordingly, at least somewhat constrained by clusters of relatively stable interpretations collaboratively constructed by a diverse discursive community. The *Baker* decision can be read as an attempt to use these informal norms to enhance the state's responsiveness to the high priority values and interests of affected parties under conditions, and through methods, not recognized by the presumption of conformity doctrine.

This rough account falls well short of explaining precisely how decisions to use international human rights in this sort of way might be defended as non-arbitrary and legitimate. However, it suggests that the reception of international human rights need not be reduced to whimsy and caprice, and that international human rights can help to contextualize a legal problem and support the identification of alternative approaches to its resolution. That said, judges' failure to articulate a justification for this kind of use of international human rights over the course of many decisions makes it difficult to avoid suspecting that their judgments are

largely result-oriented. Fortunately, they have not failed completely in this task. Elements of a new doctrine may be found in jurisprudence concerned with the more narrow intersection between international human rights and the *Charter of Rights and Freedoms*. This parallel doctrine might help to explain seemingly deviant decisions, such as *Baker*.

D. I. The Relevant and Persuasive Doctrine: Nature and Origins

The first principled engagement with international human rights/*Charter* intersections occurred in Dickson C.J.'s dissenting judgment in *Re Public Service Employee Relations Act (PSERA)*.⁷⁹ Dickson C.J. stated that:

The various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions... In particular, the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive...

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation...

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.⁸⁰

Gibran Van Ert argues that there are two distinct sets of rules and principles in this passage.⁸¹ The first set falls under what he calls the "presumption of minimal protection" approach, in which judicial consideration of international human rights somewhat resembles that mandated by the presumption of conformity doctrine. If counsel establishes the existence of a

⁷⁹ [1987] 1 S.C.R. 313.

⁸⁰ *Ibid.* at paras 57-60.

right at international law, then the presumption protects that right and can support the imposition of a correlative duty upon the government, which must rebut the presumption in order to justify limitations of the right.⁸² While judges are not obligated to proactively consider international law, they are obligated to protect binding international human rights once they are shown to be *prima facie* relevant. Dickson C.J.'s expressed concern with binding and ratified treaties suggests that compliance is a core animating principle within this approach.

The second set of rules falls under what I will call the relevant and persuasive doctrine. This doctrine authorizes judges to use both binding and non-binding international human rights law as an interpretive aid when deciding upon the content and scope of *Charter* provisions. Unlike the presumption of conformity doctrine, this doctrine is not directed towards ensuring substantive harmony between domestic law and international law. Rather, it is concerned with using international human rights as comparative law, namely, to attain a deeper knowledge of the *Charter's* potentialities, to improve Canadian law and adjudication, and, if possible, to enhance unity or interactions among Canadian, international, and other foreign legal orders. By blurring distinctions between binding/non-binding, implemented/unimplemented, and international/comparative law, the relevant and persuasive doctrine is somewhat anti-formalist; judges are encouraged to immerse themselves in the customs, traditions, and values of non-state normative orders in an effort to make formal law more responsive to an increasingly global and pluralistic society. This enhances the sense of communities that law works in their interest, that it is in some sense "their" law, while also allowing decision-makers to identify previously undetected flaws in state law and to learn how to correct them.

Of course, simply describing the relevant and persuasive doctrine does nothing to

⁸¹ Van Ert, *supra* note 63 at 253-254.

demonstrate that judicial decision-making in fact operates in this way. First, it is exceedingly difficult to predict *when* and *why* judges will choose to receive international human rights, chiefly because it is unclear whether decision-making will be influenced by the presumption of conformity doctrine or the relevant and persuasive doctrine, or either. In *R.v. Morgentaller*,⁸³ for instance, the Supreme Court refused to consider international human rights on the grounds that the right in question had not been legislatively implemented although, as noted, Dickson C.J. stated in *PSERA* that courts may have regard to non-binding, unimplemented international human rights law if it has interpretive value. Invoking the presumption of conformity doctrine, Jacques J. of the Quebec Court of Appeal refused to consider international human rights in *Irwin Toy Ltd v. AG (Quebec)*, stating that it is not necessary to refer international, regional and foreign law when the “text of our constitution is clear”.⁸⁴ Even when it is clear that the relevant and persuasive doctrine governs, judges may legitimately refuse to apply international human rights because, in their opinion, such law is not relevant, persuasive, or authoritative, or because the existence of an international legal norm is not adequately proven.⁸⁵

Second, there is considerable uncertainty concerning *how* international human rights will be used. In fact, judicial references to international human rights pursuant to the relevant and persuasive doctrine have been largely cursory. After reviewing ten years of international human rights/*Charter* jurisprudence, Anne Bayefsky concluded that the impact of international human rights on Canadian law depends “on the proclivities of a result-oriented decision-maker rather than their inherent usefulness to the interpretive problem at hand” and that the Supreme Court

⁸² *Ibid.* at 269.

⁸³ [1988] 1 S.C.R. 30.

⁸⁴ *Irwin Toy Ltd., v. AG (Quebec)*, 32 D.L.R. (4th) 641 at 662.

⁸⁵ William Schabas, *International Human Rights Law and The Canadian Charter of Rights and Freedoms*, 2nd edition (Carswell. 1996) at 47.

considers “international law where it is supportive of a predetermined conclusion but ignores it when it is not”.⁸⁶ William Schabas has similarly argued that there are few examples where international human rights have played a significant role in the determination of a *Charter* case and that its application is “often quite perfunctory”.⁸⁷

Finally, the relevant and persuasive doctrine might undermine essential legal and political values even if it is applied consistently. Important normative questions include: does the doctrine apply only to international human rights, or, should judges have recourse to any and all international law? Should it be expanded to include all kinds of human rights, including those sourced in foreign legal orders? Should it be extended to include all kinds of foreign law or, more radically, all kinds of law (state and non-state)? How might we conceptualize compliance or bindingness if judges treat international law, comparative law, and non-state law as being similar in kind? In the interest of compliance, should judges begin with the presumption of minimal protection approach, using the relevant and persuasive doctrine only when dealing with non-binding international human rights and comparative law? If so, how do we account for the lingering problem of determining the content and scope of binding international human rights without relying extensively on non-binding, contextual factors sourced in normative frameworks to which Canada is not bound? If we do rely on some or all of these sources, in the context of *Charter* review, do international human rights and the views of (some) interpretive communities then stand as separate sources of Canadian constitutional law i.e. free-standing rights similar or equivalent to *Charter* rights? What would happen in the event of a conflict between Canada’s international human rights obligations and the Canadian constitution? What implications does this possibility have for principles of constitutional supremacy?

⁸⁶ Bayefsky, *supra* note 70 at 89, 95.

D. II The Vices of Relevant and Persuasive Doctrine

Generally speaking, academic commentators have been highly critical of the judiciary's approach to the reception of international law. Stephen Toope has argued that, despite elements of academic consensus concerning the law of reception, "courts have typically refused to address the question of international law within Canada" and, "when they have spoken....the resulting hash has proven to be indigestible".⁸⁸ Anne Bayefsky, Irit Weiser, Ed Morgan, and Audrey Macklin also levy serious criticisms against the judiciary's handling of this field of law. Bayefsky and Weiser argue that jurisprudence is capricious and uncertain, largely because courts have never outlined a principled justification for their use of international law.⁸⁹ Morgan and Macklin similarly argue that the authority of international legal norms depends upon a range of contextual factors that include instrumental utility, the surrounding political environment, and the rhetorical skill of individual lawyers.⁹⁰

Some of these criticisms share affinities with radical legal realism, insofar as they express concern that judicial decision-making seems to be a product of judicial idiosyncrasies or ideologies. However, most scholars retain hope that a return to formal doctrine can remedy uncertainty and capriciousness. William Schabas, for instance, suspects that international human rights have had such a miniscule impact on judicial reasoning because it is not considered to be "real" law, impliedly the way domestic law is.⁹¹ Jutta Brunnée and Stephen Toope similarly argue that the treatment of international law as though it were no more authoritative than foreign

⁸⁷ Schabas, *supra* note 85 at 47, 233.

⁸⁸ Toope, "Keynote Address", *supra* note 23 at 34-35.

⁸⁹ Bayefsky, *supra* note 70 at 95; Weiser, *supra* note 63.

⁹⁰ Ed Morgan, *International Law and the Canadian Courts* (Toronto: Carswell, 1990); Audrey Macklin, "The State of Law's Borders and the Law of State's Borders" in David Dyzenhaus ed., *The Unity of Public Law* (Oxford: Hart

law has vastly reduced its ability to influence judicial reasoning.⁹² The problem seems to be with judges' unfamiliarity with or undervaluing of international law and the absence of a firm, coherent doctrinal footing, rather than with the nature of judicial decision-making itself. For these scholars, the value of international law would be significantly improved if domestic law were used to encourage judges to make a lasting methodological distinction between binding and non-binding international law, treating the former with greater respect and commitment.⁹³

This suggests that we need to change course and return to the formalism offered by the presumption of conformity doctrine. Gibrán van Ert has advanced perhaps the most thorough argument for revitalizing formalist doctrine.⁹⁴ He recognizes that, historically, many judges have used principles of respect for constitutional supremacy as a justification for conservatism in the reception of international law. For good or ill, they have disputed the validity of international legal norms in Canada, prioritized parliamentary intent over changing international and domestic contexts, values, and expectations, have used international law only following legislative implementation, and have routinely ignored formal criteria when the (non-) use of international law suited their purposes. However, van Ert believes that principles of respect for constitutional supremacy are, in today's day and age, inextricably linked to principles of respect for international law *qua* law and accordingly less likely to justify judicial conservatism. More precisely, he thinks judges have steadily abandoned formalist conceptions of the separation of powers, federalism, and parliamentary sovereignty, using autonomous legal values as resources

Publishing, 2004) 173.

⁹¹ Schabas, *supra* note 85 at 233.

⁹² Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 357 at 357-361.

⁹³ Brunnée & Toope do not reject the judicial use of non-binding international law as an interpretive aid. They simply suggest that judges should *also* work towards securing compliance with binding international law.

⁹⁴ Van Ert, *supra* note 63 at 7-9.

for holding legislatures and the executive accountable for violations of human dignity and the rule of law. Courts' regular use of contextual canons of statutory interpretation might illustrate this point, as may the *Charter*. Van Ert believes that judges' attitudes towards international law and its place in our courtrooms is likely to be equally more progressive.

To better reflect the global and multicultural context of Canadian law, van Ert proposes that principles of respect for constitutional supremacy should preclude the judicial reception of international law only when "the particular virtues of democratic assemblies- representation, public deliberation, participation, consent- are so great as to justify departures from international norms".⁹⁵ It should, in other words, recognize human dignity as a pillar of Canadian constitutionalism that justifies robust judicial review, whereby the demands of human dignity are to be found in various legal orders. He argues that the legislature's "brute political power to violate international law" must be counter-balanced by the courts in their role as vindicators of the principle of respect for international (human rights) law, as part of their mandate to protect and promote *Charter* rights.⁹⁶ While principles of respect for constitutional supremacy further the values of federalism and parliamentary sovereignty, legitimate law and policy must be consistent with human dignity and the rule of law.⁹⁷

Van Ert's proposal helps us respond to changing frameworks of domestic and international law and the expectation that courts will assume a role greater than simply applying legislation and policing formal constitutional boundaries underpinning the division and separation (*sic*) of powers. Insofar as his refurbished principles of respect for international law

⁹⁵ Van Ert, *supra* note 63 at 11.

⁹⁶ *Ibid.* at 11; although van Ert refers most often to international law in general, his theory is best described as oriented towards enhancing judicial respect for international human rights as part of the package of legal values that underpin the rule of law.

⁹⁷ *Ibid.* at 11.

and for constitutional supremacy suffice to restate our law of reception in desirable ways, the relevant and persuasive doctrine is an unnecessary and confusing addition to the law of reception; we are better off staying with the presumption of minimal protection as a modified version of the presumption of conformity doctrine applicable to the special case of *Charter* review. But we have already seen that formal legal categories and concepts germane to the latter have failed to influence judicial decisions about the reception of international law. From where does van Ert derive his faith in judges' supposed openness to international law or commitment to securing compliance (understood as conformity to rules), if he has already acknowledged that they regularly disrespect it under cover of the relevant and persuasive doctrine? Will judges' respect for international human rights improve simply because doctrine so directs, even though similar doctrine has failed to engender coherence and respect for international law *qua* international thus far? Perhaps van Ert believes this respect is nascent or dormant, and must be nourished to become fully effective. But, given the history of the law of reception, it is problematic to claim that revitalized formalism will produce different results this time around. Either judges have a new-found respect for international law by virtue of some newly envisioned global role, in which case there is no problem for formalism to fix, or they have as little respect for international law now as they did when they were operating under formalist doctrine, in which case the presumption of minimal protection will fail for the same reasons the presumption of conformity doctrine has failed.

Added to this, we must again question precisely how will litigants demonstrate the existence of a right to be presumptively protected, if not by resorting to non-binding normative frameworks to structure meaning. It is not the case that we can have one doctrine for binding international human rights and one for non-binding international and comparative human rights,

since engagement with the latter are necessary to give workable meaning to the former; any theory of the former has to justify the use of non-binding international human rights norms. What is more, if human dignity serves as a foundation of Canadian law, thereby justifying treating binding international human rights as sufficient to impose constitutional obligations on Canadian actors and institutions, why not allow judicial recourse to any and all normative frameworks that help actualize human dignity? Is it compliance with binding international human rights or the protection and promotion of human dignity that is important? The presumption of minimal protection seems to be internally inconsistent in these respects, simultaneously blurring and defending boundaries between binding/non-binding and content/context; attention to the juristic bases of the relevant and persuasive doctrine, or the practices it encourages, is to a significant extent necessary even if we try and follow van Ert's suggested approach.

D. III The Virtues of the Relevant and Persuasive Doctrine

While sharing many of van Ert's descriptive and normative claims, a number of scholars argue -- contrary to his position-- that the indeterminacy laid bare in the relevant and persuasive doctrine should be embraced.⁹⁸ Karen Knop helps us make sense of the contours of this debate by drawing a sharp distinction between traditional and transnational approaches to the reception of international law. The presumption of conformity doctrine falls within the traditional approach, or a caricature thereof. The judiciary's job here is to serve as a "conveyor belt that delivers international law to the people" by simply enforcing international legal norms the

⁹⁸ Glenn, *supra* note 24; Reem Bahdi "Gloablization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts" (2006) 34:3 *The George Washington International Law Review* 555; Mayo Moran, "Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method", in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004); Craig Scott, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, (Oxford: Hart. 2001); Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *New York University Journal of International Law and Politics* 501; Craig Scott & Phillip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise", (2000) *South African*

content of which has already been established internationally by the executive and domestically by the legislatures.⁹⁹ In stark positivist fashion, traditionalists consciously or unconsciously conceive of law in good part as a system of rules. While rules may be ambiguous from time to time, there is generally enough certainty to enable judges to determine when and how to decide an issue without resorting to extra-legal norms. Legislatures and judges collectively make international law effective when they ensure that domestic actors behave in accordance with its rules, with judges performing the distinctive role of resolving disputes about the content and applicability of implementing legislation.¹⁰⁰

Transnational approaches, by contrast, are concerned first and foremost with improving the quality of adjudication, measured by such factors as openness to criticism, personal reflection and transformation, equality and freedom, and responsiveness to diverse social values, identities, and expectations.¹⁰¹ From this perspective, the judge's primary obligation is to ensure that decisions serve the high priority values and interests of parties to a dispute, the public, and ideals of justice, rather than the dictates of international legal rules or formal doctrine alone. This view is part of the legacy of legal realism, in which law is dissociated from rules and instead identified with the (hopefully principled) social processes through which legal rules are created, interpreted, and applied. These legal processes are especially complicated in global and multicultural contexts where the genesis of legal rules is connected to the interactions of many domestic and international actors (legislators, administrative tribunals, local communities,

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⁹⁹ Knop, *supra* note 98 at 505.

¹⁰⁰ M. Shah Ilam, "Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study" (2006) 53:3 *Netherlands International Law Review* 399; *Enforcing International Human Rights in Domestic Courts*, Benedetto Conforti & Francesco Francioni, eds., (Martinus Nijhoff Publishers, 1997); Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Kluwer Academic Publishers, 1993);

¹⁰¹ Glenn, *supra* note 24; Knop, *supra* note 98; Bahdi, *supra* note 98; Moran, *supra* note 98; Scott, *supra* note 98; Brunnée & Toope, *supra* note 92.

international tribunals and courts, etc.), where parties to a dispute are members of culturally and geographically diverse communities, and where there are manifold “publics” whose stake in a decision warrants recognition. In such situations, it may be hard to decide which norms, identities, and expectations to respect, what are the relevant barriers to access to justice, and how one’s own biases aggravate marginalization and inequality.¹⁰²

The commitment to immerse oneself in this kind of legal process is not something that can be commanded through doctrine. Neither can doctrine insulate judges from the influences of ambient social processes. What doctrine can do is to help normalize the practice, illustrating that decision-making of this nature is neither unprecedented nor undesirable. This is why Dickson C.J.C. used American *Bill of Rights* case law as an analogy for judicial recourse to international human rights; it renders the strange more familiar, the innovative more traditional. Picking up on this point, Knop rightly describes the relevant and persuasive doctrine as an exercise in comparative law or translation.¹⁰³ The informal reception of international law is a communicative process whereby terminology is borrowed from “external” social and cultural contexts and then encoded in terms more familiar to those operating in domestic contexts. The purpose of this translation is to better unearth hidden meanings within domestic texts, to improve practical and normative deficiencies in Canadian law as illuminated by comparisons with other legal orders, and to integrate domestic law into international and global legal orders that are collectively immersed within a wide range of social settings. These tasks can help improve the ability of domestic law to respond to and redirect Canadian social interactions that are already in

¹⁰² Roderick A. MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass *et al.*, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005); Hon. Chief Justice Beverley McLachlin, P.C., “Judges in a Multicultural Society” (paper presented at the Chief Justice of Ontario’s Advisory Committee on Professionalism, First Colloquium on the Legal Profession, October 2003), online: <http://www.lsuc.on.ca/media/mclachlin_judges_multicultural_society.pdf>.

fairly advanced stages of global integration.

As judges engage with outside perspectives, institutions, and normative orders, they may be more willing to alter traditional legal rules and practices. Depending on the frequency, magnitude, and temporal length of these engagements, judges may become part of international and transnational social networks, taking on new social roles and identities and even producing entirely new bodies of law based on their mutually reconstituting interactions. Anne-Marie Slaughter uses the term “transjudicialism” to describe the process by which domestic, regional, and international courts create cross-jurisdictional linkages through the mutual referencing of decisions.¹⁰⁴ Craig Scott adds a normative appraisal of this process, arguing that the principles that are embedded within transjudicial case law can constitute an autonomous body of law that cannot be reduced to the legal order of any one jurisdiction. It is a “new common law” that collects and reconfigures the principles that are sourced in separate legal orders but which hold new meanings as they are interpreted and applied in different situations; the meaning of these legal principles in turn imposes itself on ambient social values, facts, and events. Although nascent, this body of law might one day facilitate the emergence of a “pan-constitutional law of human rights” that furthers respect for democratic self-government and international law as mutually re-constituting principles;¹⁰⁵ a vision shared by traditionalists, such as van Ert.

What is exciting about this narrative is that it makes use of the basic principles that organize thought about the law of reception. On the one hand, and contrary to common complaints, transnational legal theorists place a high premium on respect for international law. True, the legacies of legal realism do not permit one to regard international law as a body of

¹⁰³ I will have much more to say about this in the next Chapter.

¹⁰⁴ Anne-Marie Slaughter, “A Typology of Transjudicial Communication”, in, Thomas Franck & Gregory H. Fox eds., *International Law Decisions in National Courts* (Transnational Publishers, Inc., 1996) 37.

rules that can and should be faithfully applied over and above countervailing policy concerns. But it is recognized that international law serves a distinctive role in encouraging and maintaining social bonds among courts from various jurisdictions as well as in collecting and disseminating the values, beliefs, identities, and interests of social actors from around the world. What is often overlooked is that transnationalists go even further than traditionalists by encouraging judges to use the full range of normative materials that constitute and legitimate international human rights. By virtue of their obsession with hierarchically ordering binding and non-binding international law, traditionalist judges limit themselves to reliance on the few positive rules found in treaty provisions. But this is an embarrassingly slim set of norms, since international human rights treaties are aspirational and since specific rules tend to be encoded in the non-binding “views” or “recommendations” of poly-centric interpretive communities. Insistence on formalism means fewer international human rights enter Canadian courts, not more. Transnationalist judges, by contrast, may rely on any and all normative materials that give expression to values of human dignity. These materials include: customary international law; treaty provisions; the non-binding views of treaty bodies; United Nations resolutions; non-binding decisions of regional courts such as the European Court of Human Rights; and, the discourse of comparative human rights.

A skeptic might see here an opportunity for courts to ignore binding and non-binding norms alike, but the transnationalist sees an opportunity for Canadian courts to forge links with human rights institutions across the world in order to share ideas, experiences and wisdom. Pushed to its limits, this process-based vision of decision-making means that judicial openness to international law should include openness to any and all normative resources that improve the

¹⁰⁵ Scott & Alston, *supra* note 98 at 207.

quality of judgment in particular cases. This is not to disrespect international law, but to equally respect the merits of any and all sources of wisdom and insight. It should also be noted that this narrative dove-tails nicely with our review of the functional characteristics of rights.

Transnationalists reject conceptions of international human rights as determinate rules. Instead, they see such rights as a distinctive means of framing sustained interactions among globally-diffuse discursive communities who are concerned with the appropriate distribution of high-priority values. Viewed in this way, the relevant and persuasive doctrine facilitates the full functioning of international human rights and of human rights most generally.

Similarly, transnational legal theorists respect constitutional democracy, but add that human dignity and the rule of law require that judges accord less weight to federalism and parliamentary sovereignty than they historically have-- at least in *Charter* cases. Most traditionalists do not dispute the reality or importance of changes to Canadian constitutionalism. What they fail to appreciate is that the presumption of conformity doctrine in its present form cannot incorporate these changes because it has long (and unjustifiably) demanded a strict separation of powers in Canada (sic), leaving judges the residual role of policing constitutional boundaries and applying pre-formed rules. This rigid formalism is most certainly not in keeping with the belief that the judiciary can and should use autonomous legal values to constrain parliamentary will, which is an essential precondition of *Charter* review. Nor is it reflective of the pervasive belief that constitutionalism should include a firm commitment to human dignity and the rule of law, a change that has followed the slow but steady recognition that majoritarianism is a seriously flawed political philosophy.¹⁰⁶ Finally, it was never designed to govern the intersection of international human rights and the *Charter* or legal problems

¹⁰⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press,

characteristic of a globalized society and legal system. It is quite simply out of touch with the nature, purposes, and functions of *Charter* review.

Traditionalists such as van Ert have made admirable efforts to save the presumption of conformity doctrine, most notably through the presumption of minimal protection. Van Ert's most innovative idea here is that principles of respect for international law and for constitutional supremacy are mutually constitutive and not, as traditional doctrine would have it, mutually antagonistic. But this commitment finds no real traction in the operative elements of traditional doctrine that linger in his modern approach. The presumption of minimal protection continues to depend on a strict separation between categories such as law/non-law, binding/non-binding, and content/context. Even though accompanying categorical distinctions among legislative, executive, and judicial authority are relaxed, we are still left with unrealistic limits to judicial discretion regarding whether, how, and why to use international law.

First, according to traditional doctrine, judges can only use international law to resolve ambiguities in ordinary legislation and, what is more, Parliament can breach Canada's international obligations simply by clearly expressing its intention to do so. The *Charter* is not, strictly speaking, implementing legislation and, moreover, it is used to restrict Parliamentary authority to pursue certain objectives or utilize certain legislative measures. The presumption of minimal protection might serve to augment the presumption of conformity doctrine by relaxing the implementation and judicial deference requirements, which are altogether inconsistent with the nature of *Charter* review. Jurisprudential support for this novel approach might be found in the Court's reliance on the presumption of conformity doctrine when interpreting the *Charter* in *Hape*. However, the Court also expressly cited *PERSA* in this case and, by extension, the

relevant and persuasive doctrine.¹⁰⁷ Just as Dickson C.J. did in *PERSA*, the Court conflated the two doctrines to the point that it is simply not clear what was the principled basis for its judgment. And of course normative issues remain, not the least of which is whether binding international human rights are to be considered as distinct sources of Canadian constitutional law that can override validly-enacted legislation (as van Ert suggests) or whether Parliament can break Canada's international commitments by clearly expressing its intention to do so, as is the case pursuant to the presumption of conformity doctrine. How would a court resolve conflicts between a binding international human right and a constitutional provision, such as might be the case with respect to equality rights and s. 93 of the *Constitution Act, 1982*, which provides Protestants and Catholics, but not other religious groups, the right to separate schooling? In other words, are binding international human rights free-standing constitutional rights similar or equivalent to *Charter* rights for the purposes of imposing legal obligations on public actors and institutions, or, do they simply inform the interpretation of ambiguous *Charter* provisions and jurisprudence? The former suggests they stand as separate sources of Canadian constitutional law, while the latter suggests more modestly that they aid in the interpretation of *Charter* rights. Case law does not support the former proposition, although this does not on its own rule it out as a sound approach. It does require, though, a more robust justification than has hitherto been offered by academics.

Second, and more seriously, judges must prefer binding to non-binding law when interpreting implementing legislation and the *Charter*. This requirement drastically reduces the stock of norms available to judges because specifications of the content, scope, and applicability of international human rights are largely attributable to the work of non-state interpretive

¹⁰⁷ *Hape*, *supra* note 23 at para. 55.

communities, not sovereigns; these norms are quite simply not binding under international law, standing at best as “soft” law. This, of course, only aggravates democratic concerns about the constitutionalization of international law at the same time as it constructs untenable conceptions of compliance as conformity to rules. But, if boundaries between binding/non-binding and content/context are blurred, as they must be, are we not really dealing with the sorts of practices envisioned by proponents of the relevant and persuasive doctrine after all? Why retain the trappings of the presumption of conformity doctrine if what we want judges to do cannot be justified on the basis of its operative principles? Simply put, if we wish judges to more freely use those normative frameworks necessary to give formally binding international human rights practical meaning (i.e. to protect and promote human dignity), then we have to find or construct principles and standards that justify the practice.

For the same reasons, classic conceptions of compliance and bindingness must also fall to the wayside. In many ways, these conditions express the importance of respecting the decision of the federal executive to incur international obligations. Only once this is done are courts under a strict duty to give them domestic legal effect. But we have seen that van Ert wants judges to use international law to review the merits of valid law, policy, and practices on the grounds that it helps actualize autonomous legal values; compliance with binding international human rights is the means of achieving the end of actualizing these values rather than the more modest end of respecting the intent of the federal executive. But these same values are present within all human rights frameworks, whether or not they are formally binding or concretized and specified in international treaties or customs or, indeed, foreign legal orders. Again, international human rights norms, often expressed in the highly vague and abstract language of principles rather than rules, are given their fullest and most concrete meaning when applied to fact-situations by non-

state interpretive communities and foreign legal institutions whose views are not formally binding on Canada. Why should the application of these values depend on executive action, most especially if van Ert has already stated that judges may use international law, in conjunction with core Canadian legal values, to constrain questionable parliamentary action? Should judges grant the executive, in its capacity as an international actor, greater deference than it grants to parliament? Should it prize respect for executive commitments more highly than parliamentary intent or even the protection and promotion of human dignity? This seems a strange position to take.

Neither the presumption of conformity doctrine nor the presumption of minimal protection contains the resources needed to account for these kinds of problems. They each impose hierarchical distinctions among classes of norms when, practically speaking, the realization of the spirit of international human rights requires that these distinctions be broken down. At the same time, they fail to address normative concerns about principles of constitutional supremacy or, more precisely, whether binding international human rights stand as separate sources of constitutional law simply because they have been produced by the federal executive in concert with foreign political authorities. Attempts to get around the inherent limitations of formalism transform the presumption of conformity doctrine into something it is not, cannot, and perhaps should not be. It would be, in my view, far easier to simply work towards a better understanding of, and justification for, the relevant and persuasive doctrine.

E. Conclusion

The desire to attain order and coherence drives the attempt to revitalize formal legal categories and concepts. However, formalism can easily inhibit one's appreciation of the inherent complexity of law and life. Worse still, categories and concepts that fail to reflect

experience can generate disillusionment, skepticism, cynicism, and judicial resistance.¹⁰⁸ This seems to be the case with our law of reception, where doctrine that was, perhaps, suitable for another time has fallen out of step with the contemporary frameworks of international and domestic law. The Supreme Court's failure to clearly reconfigure the doctrinal basis of reception has exacerbated the pre-existing disarray, with jurisprudence bearing less and less resemblance to traditional doctrine. In *PERSA*, Dickson C.J. iterated and then conflated at least two separate doctrines; an action repeated by the Supreme Court in *Baker* and in *Hape*. In *Hape*, the Court declined to justify its apparent conceptualization of the constitution as the functional equivalent of ordinary implementing legislation or whether and how the operative principles of the presumption of conformity doctrine should be modified to better reflect significant differences between statutory interpretation and judicial review; it raised more questions than it answered.

To be fair, judges have been inundated with unmanageably high volumes of unfamiliar norms, values and expectations. The increasingly global nature of legal issues, the sheer scale of norms relevant to the resolution of legal problems and the increased number and diversity of participants in legal proceedings have stretched judges' capacity to abide by formal doctrine well beyond its already modest limits. Although there are grounds to be critical of judges' approach to international law, a natural reaction to being exposed to high volumes of external stimuli is to disengage from one's environment. Indeed, the filtration of irritants may be said to be one of primary functions of a formalist law of reception.

An obvious concern with the tendency to insist on formalism is that judges may end up receiving less international law, not more, while remaining exposed to a host of other extra-legal influences, such as political ideology. This is not to say that legal categories and concepts are

¹⁰⁸ Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning*

baseless or dysfunctional. To the contrary, they help organize the mess of reality into cognizable form. But about this, in relation to the law of reception, three distinct claims must be made. First, it is simply not the case that judges have, at any time, based their decisions on pre-existing categories and concepts alone. Instead, when deciding issues touching on global and international affairs, they have relied on a great mixture of materials, some legal and others non-legal, some expressly identified and others hidden from view. There is little merit in pretending that things are otherwise.

Second, there are few compelling reasons to think that this kind of order and coherence are goals for which we should be striving. Indeed, judges' willingness to use materials other than those embedded in pre-existing legal categories and concepts can be a good thing, bearing in mind that this may in the end depend on whether one endorses the decision. Finally, knowledge of the conditions under which judges are receptive to international law can help one predict when international legal arguments are likely to be well-received, to engender appropriate underlying conditions if they are otherwise lacking, and generally to launch more effective advocacy campaigns. There is, in other words, practical merit in attaining a more complete understanding of all the factors that influence the judicial reception of international law. This is an advantage lost to those who would focus only upon formal doctrine.

Still, traditional ways of thinking are enormously hard to revise. Transnationalists offer a compelling alternative that is, as I have shown, largely consistent with the base descriptive and normative ambitions of many traditionalists. Not to underestimate the importance of theoretical differences between the two camps, transnationalists are able to work with the core principles that structure the law of reception in order to chart relatively new territory. These principles look

much the same in the hands of Knop and other transnationalists as in the hands of van Ert and like-minded traditionalists. Differences lie more in confusion as to what it means to say that a judge “respects” or “complies” with international human rights and constitutional supremacy than in his or her core normative commitments.

It has to be said that Knop has not adequately explained or justified the relevant and persuasive doctrine, although this was not her ambition. In particular, she has not explained what structures transjudicialism or what factors influence judges’ perceptions of the relevance and persuasiveness of international and comparative human rights. Knop admits this, noting that “transjudicialism’s account of persuasion neither responds to critics who equate persuasion with politics nor differentiates it from the spreading of the word, where the word is a liberal legal regime”.¹⁰⁹ She also recognizes that persuasion’s “authority-creating role in the domestic interpretation of international law is thus left largely unexamined”.¹¹⁰ What this means is that we need to understand more precisely how transnational perspectives on law can support tenable conceptions of compliance with international law and constitutional law. For this, we must turn away from the descriptive and normative dimensions of the Canadian law of reception and delve more deeply into the theoretical optics that we may use to better appraise the processes through which international and comparative human rights acquire domestic legal effect.

¹⁰⁹ Knop, *supra* 98 at 535.

¹¹⁰ *Ibid.* at 535.

Doctrine and Judicial Decision-Making in Transnational Context

Chapter 3

A. Introduction

We have seen that we lack a compelling jurisprudential account of the relevant and persuasive doctrine. Although celebrated in some quarters, judges and theorists have done very little to justify its use.¹ The purpose of this chapter is to take up this challenge by engaging with the following three questions: 1) what it means to say that international and comparative human rights exert “persuasive influence” 2) how the relevant and persuasive doctrine affects interactions among various discursive communities, and 3) how the doctrine may be defended in terms of traditional juristic principles, namely, principles of respect for international law and constitutional supremacy.

This chapter will not be descriptive in orientation, which is to say I will largely ignore case law. Instead, I will outline the theoretical bases for two hypotheses about the relevant and persuasive doctrine, which are: 1) specific rhetorical practices and dialogical structures constrain judicial decision-making about the relevance and persuasiveness of international and comparative human rights;² and, 2) knowledge of argumentative

¹ Stephen J. Toope, “Keynote Address: Canada and International Law” in *The Impact of International Law on the Practice of Law in Canada*. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998 (The Hague: Kluwar Law International, 1998) 33 at 34.

² This hypothesis will be informed by the work of Canadian legal theorists, Stephen J. Toope and Jutta Brunnée; see, Jutta Brunnée & Stephen J. Toope “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:19 *Columbia Journal of Transnational Law* 19 at 49. It will also be informed by broader perspectives on argumentation theory, which is an interdisciplinary approach to the study of how conclusions are validly or justifiably reached through logical reasoning, how rhetorical practices influence the persuasiveness of arguments to others, and how arguments arise and are structured by various dialectical processes. For good overviews of the nature and history of argumentation theory (in legal and non-legal contexts), see Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, (Kluwar Academic Publishers, 1999); *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary*

processes distinctive to law can enhance the effectiveness of transnational human rights advocacy.³ I will use two theoretical perspectives to gradually construct and then synthesize these hypotheses. The latter hypothesis will be derived from the core assumptions, values, and conceptual framework associated with Transnational Legal Process (TLP); an interdisciplinary perspective on the social processes by which international human rights are collaboratively produced, interpreted, and applied by diffuse discursive communities.⁴ In Harold Koh's words, TLP "provides the key... to understanding the critical issue of compliance with international law", by providing knowledge of the conditions under which authoritative decision-makers are most likely to receive international (and comparative) human rights.⁵ One of Koh's key insights is that immersion in structured argumentative interactions about how to resolve problems leads to the cultivation of shared understandings among disputants. These understandings, in turn, lead to the collaborative production of legal rules, the "internalization" of these rules into participants' internal value sets, and their subsequent diffusion throughout various social, political, and legal communities. Koh asserts that norm-internalization is most likely to occur under a narrow set of social conditions and that the cultivation and/or strategic exploitation of these conditions enhances judges' (and other state officials')

Developments, F. H. van Eemeren, R. Grootendorst, & Francisca Snoeck Henkemans Eds., (Routledge, 1996).

³ This hypothesis is informed explicitly by Harold Koh's "Transnational Legal Process" scholarship; Harold Hongju Koh, "Is There a "New" New Haven School of International Law?" (2007) 32 *Yale Law Journal* 559; Harold Hongju Koh, "Internalization Through Socialization" (2005) 54 *Duke L.J.* 975; Harold Hongju Koh, "Transnational Legal Process" (1996) 75 *Nebraska Law Review* 181. It is also indirectly informed by human-rights based scholarship that employs "law and society" methods and that have affinities with sociological legal realism; see generally : *International Law and Society: Empirical Approaches to Human Rights*, Laura A. Dickinson Ed., (Aldershot, England: Ashgate, 2007); Martha Finnimore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *International Organization* 887; *The Power of Human Rights: International Norms and Domestic Change*, Thomas Risse, Steve C. Ropp & Kathryn Sikkink, eds., (Cambridge: Cambridge University Press, 1999).

⁴ Koh, "Transnational Legal Process", *supra* note 3.

⁵ *Ibid.* at 183.

receptivity to international and comparative human rights arguments.⁶ As we will see, this perspective shares many affinities with sociological legal realism and the supposition that even indeterminate judicial decision-making is predictable and (hopefully) principled.

The hypothesis concerning the existence of normative constraints on judicial discretion will be derived from the “interactional theory of law” advanced by Canadian scholars Stephen Toope and Jutta Brunnée. Although similar to TLP, Toope and Brunnée’s interactional theory of law is more concerned with distinguishing persuasion from political and ideological power.⁷ They hypothesize that the projection of such power is constrained by formal and informal institutions of interpretation that ensure that disputes are resolved on their merits and in such a way as to generate shared understanding among disputants. From these claims they construct an ideal model against which the reasonableness of legal arguments may be appraised.⁸ I will argue that this theoretical perspective is useful for understanding the criteria judges might use when deciding about the relevance and persuasiveness of international and comparative human rights. In combination with TLP, it will help us to begin investigating how judges might decide about international and comparative human rights and how these decisions influence broader social and political interactions.

⁶ This commitment is characteristic of much “socialization” or “strategic social construction” literature; see, Dickinson, *supra* note 3; Koh, “Internalization Through Socialization” *supra* note 3; Ryan Goodman & Derek Jinks, “International Law and State Socialization: Conceptual, Empirical, and Normative Challenges,” (2005) 54 *Duke Law Journal* 983; Ryan Goodman & Derek Jinks, “How to Influence States: Socialization and International Human Rights Law” (2004) 54 *Duke Law Journal* 621.

⁷ Brunnée & Toope, *supra* note 2 at 25.

⁸ Models of this sort are characteristic of idealized, “dialectical” approaches to argumentation that are often applied to the study of legal interaction; see, *Advances in Pragma-Dialectics*, Franz H. van Eemeren, Ed., (Amsterdam: Vale Press, 2002); Franz H. Eemeren & Rob Grootendorst, *Speech Acts in Argumentative Discussions: A Theoretical Model for the Analysis of Discussions Directed Towards Solving Conflicts of Opinion*, (Dordrecht: Floris Publications, 1984).

To repeat, I will most certainly not attempt to describe all the factors and meanings that construct decisions about the relevance and persuasiveness of international and comparative human rights.⁹ The objectives of this chapter are more modest. I am interested only in identifying the core purposes and functions of the relevant and persuasive doctrine and, from these, a *prima facie* rationale for its form.¹⁰ I will insist that the relevant and persuasive doctrine performs a function quite distinct from classical doctrine and that the performance of this function requires that it be fairly informal in nature.

The chapter will begin with a brief account of the purposes and functions of the relevant and persuasive doctrine. I will relate these to a recurring concept associated with the law of reception in general: compliance, with both binding international law and the Canadian constitution. I will argue that we must replace classical, rule-based conceptions of compliance with a process-based conception of compliance if we are to make sense of the relevant and persuasive doctrine in terms of its distinctive purposes and functions. The second section will propose TLP as a strong candidate for just such a conception of law and compliance. This section will outline the analytical frameworks, methods, and programs of action associated with TLP. It will also suggest that TLP can, with some modifications, advance our understanding of how dynamic interactions among multiple

⁹ I recognized this to be an impossible and anyway unfruitful endeavor in earlier chapters.

¹⁰ Patrick Capps calls this kind of approach “focal analysis”, which “describes the tradition by which various social practices are conceived of as purposive phenomena”. This kind of approach allows us to infer law’s essential, distinctive features (its form, content, etc.) from the ends towards which it works. Focal analysis is to be distinguished from “conceptual analysis”, whereby law is defined by reference to official “language-use as well as the conventional conceptual distinctions which are embodied in our social practices”; Patrick Capps, *Human Dignity and the Foundations of International Law*, (Oxford & Portland: Hart Publishing, 2009) at 39-40. In like kind, I will argue that the relevant and persuasive doctrine ought to be conceived of in terms of social processes, given its fundamental purposes and functions.

discursive communities facilitate the persuasive influence of international and comparative human rights across a range of domestic settings, including courts.

Third, I will outline Brunnée and Toope's model for rational argumentation that will help us to distinguish "material capabilities and interests" from "normativity" and, more precisely, to identify the "constraining and facilitating (formal and informal) institutions of legal interpretation" that minimize the occurrence of judicial instrumentalism in the reception of international law.¹¹ This will help us build upon Knop's nascent theoretical work, filling in gaps concerning how persuasion differs from (normative) coercion. Finally, then, I will reflect on how these theoretical reflections advance our understanding of the relevant and persuasive doctrine. I will also address some unresolved normative and methodological problems.

B. The Relevant and Persuasive Doctrine: Purposes and Functions

In the last chapter, we observed that the place of international law in Canadian courts has been profoundly influenced by judges' consideration of informal criteria that percolate from multiple dynamic, interconnected social processes. This was observed clearly in judges' practice of ignoring aspects of formal doctrine in order to interpret indeterminate statutory provisions in instrumental ways, a practice Ann Bayefsky pejoratively termed "result-orientation".¹² Despite the fact that judicial decision-making has never wholly conformed to doctrine, the relevant and persuasive doctrine has been singled out for especially pointed criticism; largely on the grounds that it leads to the constitutionalization of judges' personal political or ideological values and to insulating

¹¹ Brunnée & Toope, *supra* note 2 at 25.

¹² Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto and Vancouver: Butterworths, 1992) at 89, 95.

their decisions against democratic debate and change.¹³ This is a problem that traditionalists manage to convince themselves arises less frequently in case law associated with the presumption of conformity doctrine.

A recurring theme running through this debate is whether and how we may ensure that judicial decision-making enhances compliance with international law, within the bounds of constitutional rules, principles, and conventions. The issue of compliance is central, capturing judges' dual role of giving domestic legal effect to binding international law and policing constitutional boundaries separating executive and legislative functions as well as federal and provincial powers. Only if we conceive of compliance as conformity to rules, or insist on doctrinal distinctions between binding/non-binding, can we appreciate the poor fit between the form and the function of the relevant and persuasive doctrine. But these are, I think, unwarranted assumptions. The relevant and persuasive doctrine is directed towards other ends entirely and should not be expected to perform the same functions as the presumption of conformity doctrine nor should it be revised to assume the same or similar form.

Recalling Dickson C.J.'s statements in *PERSA*, we can identify three functions associated with the relevant and persuasive doctrine. First, the doctrine helps protect and promote human rights. That much should be uncontroversial, considering that the doctrine informs reviews of laws, policies, and practices for consistency with constitutional rights. Insofar as we define human rights as discursive mechanisms that

¹³ For critical perspectives on the dangers of constitutionalism in the era of globalization, see Harry Arthurs, "Governing the Canadian State: The Constitution in an Era of Globalization, Neo-Liberalism, Populism, Decentralization and Judicial Activism" (2003) 13:1 Constitutional Forum 16. For broader criticisms of links between constitutionalism and democracy, see Allan Hutchinson & Joel Colon-Rios, 'What's Democracy Got to Do With It? A Critique of Liberal Constitutionalism' (September 2007) CLPE Research Paper No. 29. These criticisms can equally be applied to the presumption of conformity doctrine, as was noted last chapter.

structure communication around the distribution of high priority values and interests, the relevant and persuasive doctrine is concerned with enhancing communicative interactions among rights-holders and duty-bearers so that state law may better respond to and redirect background social values, interests, and expectations. Since all human rights discourse facilitates the performance of this function, the relevant and persuasive doctrine wisely relaxes rigid, hierarchical distinctions between binding/non-binding international human rights as well as between international/comparative human rights, although of course priority is given to *Charter* rights should there be an irreconcilable conflict.¹⁴

Secondly, the relevant and persuasive doctrine is supposed to enhance judges' ability to establish some level of congruence between state law/policy and ambient social values, beliefs, and expectations that have global and multicultural dimensions.¹⁵

Whether or not it achieves material change, constitutional rights adjudication offers rights-holders who have been excluded from processes of law- and policy-formation and implementation the promise of securing the political recognition of their identities and interests.¹⁶ The politics of recognition is considerably challenging in general, but it is

¹⁴ I will address this issue in the last chapter, when I consolidate the observations of this dissertation and address how the relevant and persuasive doctrine can be construed as consistent with certain conceptions of constitutional supremacy.

¹⁵ On the importance of this sort of congruence to the "legitimacy" of law, see Brunnée & Toope, *supra* note 2 at 49; Gerald J. Postema, "Implicit Law" (1994) 13 *Law and Philosophy* 361; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989).

¹⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Indianapolis: Bobbs-Merrill, 1962). For critical views of this position in the Canadian context, see Arthurs, *supra* note 9; Gavin Anderson, "Social Democracy and the Limits of Rights Constitutionalism" (2004) 17 *Canadian Journal of Law and Jurisprudence* 31; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, (Toronto: University of Toronto Press, 1997); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, (Toronto: Thompson Educational Publishing, 1994).

complicated further when situated in global and multicultural contexts.¹⁷ As societies intersect and collide, individuals accumulate multiple identities and interests, some of which challenge the authority, appropriateness, and effectiveness of centralized, state law. In place of or alongside state law are pre-existing or newly-created normative frameworks that help constitute semi-autonomous social, political, and economic communities. State law must recognize the inherent limitations of its power to regulate behaviour and find new, more creative ways of working with poly-centric foreign, international, and/or non-state political communities in the protection and promotion of public values.¹⁸ This requires a partial or full breakdown of hierarchical distinctions between international and domestic law and, more broadly, between state law and non-state normative orders.¹⁹ Breakdowns of this nature can encourage judges to make use of all the normative resources at their disposal to craft sustainable solutions to novel and complex problems.²⁰ In the context of constitutional adjudication, they can use their

¹⁷ *Multiculturalism and the Canadian Constitution*, Stephen Tierney, ed., (Vancouver, Toronto: UBC Press, 2007); Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, (Cambridge University Press, 2001); Will Kymlicka & Wayne Norman, *Citizenship in Diverse Societies*, (Oxford University Press, 2001); Richard J.F. Day, *Multiculturalism and the History of Canadian Diversity* (Toronto: University of Toronto Press, 2000); Charles Taylor, "The Politics of Multiculturalism", in *Multiculturalism*, Amy Gutman, ed., (Princeton University Press, 1994) 25; K. Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" in *Multiculturalism*, Amy Gutman, ed., (Princeton University Press, 1994) 149.

¹⁸ Paul Schiff Berman, "Global Legal Pluralism" (2007) 80 *Southern California Review* 1155; A. Fischer-Lescano & Gunther Teubner, 'Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 *Cardozo Law Review* 1443; Gunther Teubner, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law" in *Dilemmas of Law in the Welfare State* Gunther Teubner, ed., (DeGruyter, 1985).

¹⁹ Craig Scott outlines a spectrum of options available here, ranging from slight modifications to state law that retains exclusive authority to alter rights and obligations, to breaking faith entirely with state-centered conceptions of law; see, Craig Scott "'Transnational Law' as Proto-Concept: Three Conceptions" (2009) 10 *German Law Journal* 859, 862.

²⁰ For one of the earliest calls for enhanced judicial flexibility in using diverse normative resources in the construction and resolution of legal problems, see; Philip Jessup, *Transnational Law*, (New Haven: Yale University Press, 1956)

power to force the state to refrain from exercising its power, or, to exercise it in ways that protect and promote the autonomy of individuals and non-state communities.

At the same time, our collective integration in multiple international and transnational social, economic, and political networks requires us to be more conscious of how our (in)actions can impact the rights of persons living abroad. Security intelligence and police officers' involvement in the joint investigation of international and transnational crime, for example, might raise questions about the content, scope, and extra-territorial application of *Charter* provisions.²¹ This occurred in *Canada (Justice) v. Khadr*,²² where the Supreme Court of Canada ruled that Canada violated international human rights by interviewing a Canadian citizen detained in Guantanamo Bay. This finding was supported by its interpretation of the four *Geneva Conventions of 1949*²³ as well as recent U.S. Supreme Court decisions whereby military commissions established to try detainees at Guantanamo Bay were expressly held to be inconsistent with international human rights.²⁴ The Supreme Court of Canada found that Canadian officials' participation in processes associated with these military commissions violated Canada's international legal obligations, and that this violation in turn activated the extra-territorial application of s. 7 of the *Charter*.²⁵

²¹ *R. v. Hape*, [2007] 2 S.C.R. 292; Graham Hudson, "Transnational Human Rights Advocacy and the Judicial Review of Global Intelligence Agency Cooperation in Canada", in *Terrorism, Law and Democracy: 10 Years After 9/11* (Canadian Institute for the Administration of Justice, 2012).

²² [2008] 2 S.C.R. 125

²³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20, p. 25; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20, p. 55; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, p. 163; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20, p. 84.

²⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁵ *Khadr*, *supra* note 22 at paras. 19, 27.

Third, the relevant and persuasive doctrine is designed to operate in conjunction with similar doctrines and practices in other countries, such that domestic and international courts and administrative tribunals can collaboratively cultivate a “pan-constitutional law of human rights”.²⁶ Globalized social, political and economic interactions raise serious regulatory challenges in such areas as anti-terrorism,²⁷ transnational corporate activity,²⁸ and environmental protection.²⁹ Even if Canadian courts do their part by placing Canadian law in its global context, there may be serious jurisdictional gaps that arise when state and non-state actors interact in transnational spaces. The effective regulation of transnational activities requires, among other things, the collaborative efforts of legal institutions from multiple jurisdictions.³⁰

²⁶ Craig Scott & Phillip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom Promise” (2000) 16 South African Journal of Human Rights 206 at 213.

²⁷ Hudson, *supra* note 21; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011); Richard J. Aldrich, “Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem.” (2009) 24:1 Intelligence and National Security 26; Stéphane Lefebvre, “The Difficulties and Dilemmas of International Intelligence Cooperation” (2003) 16:4 International Journal of Intelligence and Counterintelligence 527

²⁸ David Kinley, *Civilizing Globalization: Human Rights and the Global Economy*, (Cambridge and New York: Cambridge University Press, 2009); John Ruggie, *Embedding Global Markets: An Enduring Challenge*, (Aldershot, Burlington: Ashgate, 2008); Harry Arthurs, “Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law” in Brian Bercusson & Cynthia Estlund, eds., *Regulating Labour in the Wake of Globalisation—New Challenges, New Institutions* (Hart Publishing, 2008) 19; John Ruggie, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts” U.N. Doc. A/HRC/4/35 (19 February 2007); Peer Zumbansen, “Transnational Law” in *Encyclopedia of Comparative Law*, J. Smits Ed., (Edward Elger Publishing, 2006) 738 at 740-743.

²⁹ *Climate Change Liability: Transnational Law and Practice*, Jutta Brunnée et al., eds., (Cambridge: Cambridge University Press, 2012); Jutta Brunnée, “From Bali to Copenhagen: Towards a Shared Vision for a Post-2012 Climate Regime?” (2010) 25 *Maryland Journal of International Law* 86.

³⁰ Some advocate breaking faith with state-centric conceptions of law and the embrace of law that is coupled with poly-centric, non-state social, economic, and cultural structures; see, Graff Peter Callies & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, (Hart, 2010); Hans-Joachim Mertens, “Lex Mercatoria: A Self-Applying System Beyond National Law?”, in *Global Law Without the State*, Gunther Teubner, ed., (Dartmouth: 1997) 31; Gunther Teubner, “Global Bukovina’: Legal Pluralism in the World Society”, in *Global Law Without the State*, Gunther Teubner, ed., (Dartmouth: 1997) 3; Gunther Teubner, “Breaking Frames: The Global Interplay of Legal and Social Systems”, (1997) 45:1 *American Journal of Comparative Law* 145. Others insist on maintaining and even strengthening the control of centralized state institutions; see Capps, *supra* note 10 at 227-228.

We may conclude that the relevant and persuasive doctrine is primarily concerned with engendering congruence between state law and background social values, beliefs, and practices that have strong global and multicultural dimensions.³¹ It reflects the view that state law is, or should be, produced, interpreted, and applied by both state and non-state actors who interact in relative autonomy from political and ideological power. Canadian courts are just one of these fora, but they remain an institution distinctively well-suited to securing the recognition of rights and the protection of high priority values when groups have been excluded from state political processes.³²

With these basic normative goals in mind, we can now reflect on what conception of compliance is most appropriate for the relevant and persuasive doctrine. As discussed, traditionalists believe that compliance arises when the content of domestic legal rules conforms to the content of international legal rules. On this view, judges are expected to neutrally identify, interpret, and apply the rules produced by parliament (statutes) and the federal executive (international treaties) and strive to harmonize the two, subject to parliament's authority to legislate contrary to international law, if it so desires.³³ Compliance therefore speaks at once to Canadian legal and political institutions' conformity to our international legal obligations, and, to judges' conformity to constitutional rules that limit their authority to alter domestic rights and obligations.

Such a conception of compliance cannot be harmonized with the purposes and functions of the relevant and persuasive doctrine or with the nature of human rights.

³¹ Brunnée & Toope, *supra* note 2 at 49; Gerald J. Postema, "Implicit Law" (1994) 13 *Law and Philosophy* 361; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (Cambridge University Press, 1989).

³² Ely, *supra* note 16; Dworkin, *supra* note 16; Bickel, *supra* note 16.

³³ For a similar view in the American context, see Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges*, (Washington, D.C.: American Enterprise Institute Press, 2003).

Binding international human rights documents and the *Charter* are highly abstract and do not convey precise rules that may be mechanically identified and neutrally applied by domestic courts. As a result, various formal and informal interpretive communities participate in the specification and concretization of both domestic and international human rights. Further, human rights are supposed to enhance the congruence of law with background social values, beliefs, and practices. *Charter* enthusiasts argue that it, along with the Canadian constitution in general, is a “living tree”³⁴ that grows in response to shifting normative environments, principally by facilitating and constraining discursive interactions among state and non-state communities about the just distribution of value, a practice that arguably is a part of the theory and practice of the common law.³⁵ The same is true of international human rights. Excessive reliance on the exclusivity of positive law and a suspicion of non-state normative frameworks is anathema to human rights and, indeed, to sober appraisals of state law’s inherent functional and normative limitations.

Finally, even if human rights documents presented judges with a robust body of legal rules, there are few coercive mechanisms of enforcement that could be applied to domestic courts. We clearly lack international institutions of coercive enforcement, while the law of reception, as a common law doctrine, has to be self-enforced. As we learned in the last chapter, judges have not been consistent in their interpretation and application of criteria about whether, how, and why international law may be used. It is hard to imagine

³⁴ *Edwards v. Canada (Attorney General)*, [1930] A.C. 124 (P.C.) at 136; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 22.

³⁵ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Inc., 2001) at 12, 253-288. Of course, many would object to this romantic narrative, arguing that judges’ use their constitutional and common law power to rationalize relations of domination; see, David Kairys, “Law and Politics” (1984) 52 *George Washington Law Review* 243; Allan Hutchinson & Patrick J. Monahan, “Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 *Stanford Law Review* 199; Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, (Harvard University Press, 1983); Duncan Kennedy, “Form and Substance in Private Law Adjudication,” (1976) 89 *Harvard Law Review* 1685.

how greater uniformity can be achieved absent a surprising and fundamental change in judicial conventions.

An alternative conception of compliance is clearly needed. Such a conception should have the following features. First, it should explain the wisdom behind reducing, if not altogether disregarding, hierarchical distinctions between binding/non-binding international human rights as well as between international/comparative human rights. Again, this is because all classes of human rights perform the same essential function and because the relevant and persuasive doctrine is designed to, *inter alia*, protect and promote values of human dignity. It does not matter what is the pedigree of a legal rule or principle, so long as decisions enhance rights-holders' wellbeing.

Second, it should explain how the relevant and persuasive doctrine facilitates interactions among multiple discursive communities and how this enhances the protection and promotion of human rights. This is important partly because authoritative interpretive communities are a necessary part of the international human rights enterprise and so should be included in efforts to give treaty or customary norms meaning and practical effect. But it is also important because human rights are designed to foster communicative interactions between rights-holders and duty-bearers, in many instances forcing the latter to bear witness to the suffering they cause or fail to end.³⁶ In the context of constitutional adjudication, interactions of this sort can cultivate congruence between state law and background social values, beliefs, and expectations. At the very least, it contributes to gradual recognition of the problems raised by state (in)activity and can bolster pressure for change.

³⁶ For an interesting stance on human rights' discursive functions, see, Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" (2006) 69 *Modern Law Review* 327.

Third, an alternative conception of compliance should help us better understand the juristic bases of the relevant and persuasive doctrine. Ironically, moving away from a rule-based approach can help us respond to concern about instrumentalism. If the relevant and persuasive doctrine is concerned with promoting structured discourses about the distribution of high priority values and interests, and not with transplanting international legal rules into domestic law, it may be viewed as similar in kind to contextual approaches to statutory interpretation. The values and interests associated with international, domestic, and foreign human rights are used simply to help judges frame the nature and context of a legal problem and to identify and appraise the values that should inform solutions. Given the vague and aspirational language used in *Charter* provisions, the widely recognized legitimacy of contextual approaches to statutory interpretation, and the long-standing maxim that any constitutional provision ought to be interpreted in light of shifting social values and contexts, the judicial consideration of extra-constitutional materials as heuristic devices is neither avoidable nor should it be particularly controversial.

C. Toward a New Understanding of Compliance: Transnational Legal Process

Harold Koh is one of the most well known advocates of process-based conceptions of law and compliance. His theory of TLP has roots in international and domestic legal scholarship that utilizes social science methods to study and advocate for human rights.³⁷ Koh and other scholars³⁸ offer a set of analytical frameworks,

³⁷ Harold Hongju Koh, "Why Do Nations Obey International Law?", (1997) 106 Yale Law J 2599.

³⁸ Koh identifies "two schools of legal process theory" that merit special attention; Koh, "Why Do Nations Obey International Law?", *supra* note 38 at 2618. The first is "international legal process", which originated with the works of Abram Chayes, Thomas Ehrlich, and Andreas F. Lowenfeld; see, Abram

methodologies, and recommended juristic tasks that can help us make sense of law's intersections with various normative orders. They assert that TLP provides "the key" to compliance by outlining the processes by which states are socialized into observing their international human rights obligations.³⁹ In the right hands, this knowledge can be used to improve the effectiveness of "transnational human rights advocacy".⁴⁰

Given that one of the most significant criticisms of the relevant and persuasive doctrine is that it leads to capricious decision-making, TLP can be useful in demonstrating that there is order to the processes by which international and comparative human rights influence domestic law and life. This section will survey the means by which this order may be glimpsed and the extent to which TLP advances the challenging objective of discerning institutional, in contrast to material or instrumental, constraints on judicial discretion. We are, after all, looking for order of a specific kind i.e. a doctrinal order distinctively well suited to the protection and promotion of human rights.

C. I. What is Transnational Legal Process?

TLP may be defined as the process by which state and non-state actors "interact in a variety of public and private, domestic and international fora to make, interpret,

Chayes, Thomas Ehrlich, & Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course, Vol. I & II*, (Boston: Little Brown, 1968). The second was the "New Haven School" on international law, which was founded by Myres S. McDougal and Harold D. Lasswell (and, later, W. Michael Reisman); see Michael Reisman, Siegfried Wiessner & Andrew R. Willard, "The New Haven School: A Brief Introduction" (2007) 32:2 *Yale Journal of International Law* 575; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, "World Constitutive Process Authoritative Decision" (1967) 19:3 *Journal of Legal Education* 253; Harold D. Lasswell & Myres S. McDougal, "Legal Education and Public Policy" (1943) 52:2 *Yale Law Journal* 203

³⁹ Koh, "Transnational Legal Process", *supra* note 3 at 183; Goodman & Jinks, *supra* note 3.

⁴⁰ I borrow the term "transnational human rights advocacy" from Hans Peter Schmitz; see Hans Peter Schmitz, "Transnational Human Rights Networks: Significance and Challenges" (2010) 11 *The International Studies Encyclopedia* 7189.

enforce, and ultimately, internalize” international norms.⁴¹ Functionally, TLP may be divided into the following three stages: interaction; interpretation; and internalization.⁴² During the interaction stage, state and non-state actors from different jurisdictions engage in argumentative interactions about how best to resolve commonly experienced problems. These interactions may occur in any number of fora, some of which are exclusive to state officials. Examples of relatively exclusive fora include cabinet committees, parliament, and some international and regional organizations. Other fora are more inclusive, such as human rights tribunals, educational institutions, civil society, some courts, some parliamentary committees, and international and regional human rights monitoring bodies.

Interactions are structured by a host of dialectical rules governing such matters as: who may participate, who is authorized to decide an issue and on what basis, when arguments may be made and with what normative and empirical support, whether and how participants may employ social, economic, and political power to influence interactions to their advantage, and whether interactions will include interested but non-participating individuals and groups. The form, functions, and results of TLP will accordingly vary with the institutional contexts within which arguments take place. Arguments in the context of litigation, for instance, will be highly formal, adversarial, structured by pre-existing rules of general application, presided over by a judge, and typically reproduced in public reports. Depending on the facts and issues of the case, proceedings may be open to the public as well as *amicus curae*. Arbitration, by contrast, is typically more informal, presided over by experts on the social or economic issues at

⁴¹ Koh, “Transnational Legal Process”, *supra* note 3 at 184.

⁴² Harold Hongju Koh, “Bringing International Law Home” (1998) 35 *Houston Law Review* 623 at 626

hand, concerned more with evolving customs and informal normative frameworks than state law, and governed by different rules of standing, precedent, and evidence (if there are any rules of evidence).⁴³ Standing is particularly important from the perspective of inclusiveness, as non-state actors lack full international legal personality and would have to pursue claims in the national courts of defendant states to secure justice. Relative gains in accessibility are somewhat offset by the fact that arbitration is considerably less transparent to, and inclusive of, non-parties than curial adjudication.⁴⁴ Finally, international disputes may be approached by way of negotiation or mediation. Interactions of this sort are typically structured by *ad hoc* rules that may tend more towards compromise and the identification of common values and interests than securing compliance with formal law.⁴⁵ States are under a general obligation to conduct negotiations in good faith, and certain treaties may require the use of mediation.⁴⁶ However, negotiation and mediation can be quite ineffective at constraining struggles for power.⁴⁷

All interactions, arguably excepting negotiation and mediation, are oriented towards the interpretation of substantive legal rules in relation to the background goals, expectations, interests, and understandings held by participants to legal processes. Participants will use a wide range of rhetorical techniques to recommend or discredit

⁴³ Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions"(2005) 73 Fordham Law Review 1521.

⁴⁴ Arbitration is typically highly confidential and resolutions are typically not publicized; see, Olivier Oakley-White, "Confidentiality Revisited: Is International Arbitration Losing One of Its Major Benefits?" (2003) 6 International Arbitration Law Review 29.

⁴⁵ Nadja Alexander, *International Comparative Mediation: Legal Perspectives*, (New York: Kluwer Law, 2009); Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, (New York: Routledge, 1997) at 275-277.

⁴⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, International Court of Justice (ICJ), 20 February 1969

⁴⁷ Malanczuk, *supra* note 45 at 277.

proposed solutions to a problem. These techniques may be both normative and oratorical in nature. In law and other social contexts involving disputes about facts and values, persuasive arguments require far more than the simple logical deduction of valid or justified conclusions from stipulated premises.⁴⁸ One must carefully select, interpret, arrange, and present premises with a targeted audience's subjective values, attitudes and beliefs in mind.⁴⁹ This involves creativity in the interpretation of pre-existing legal rules, the construction of narratives through the careful selection and description of facts, and the strategic use of procedural rules germane to a given institutional setting. Reliance on non-rational tools, such as emotions, oration, and aesthetics is also important.⁵⁰

Participants may also enhance the rhetorical appeal of their position by mobilizing outside social and political pressure for a desired outcome. Overall, persuasive arguments should possess internal, logical soundness (i.e. reasoning that is valid or justified) and an external or empirical component, whereby one interprets, arranges, and presents arguments in consideration of what is most likely to be accepted by an audience.

Participants in TLP include "norm entrepreneurs",⁵¹ governmental norm sponsors, and various interpretive communities. Norm entrepreneurs are non-governmental actors who mobilize domestic and global political support for particular standards of appropriateness, participate in the establishment of issue-specific institutions, proliferate

⁴⁸ Although this seems obvious, classical argumentation theory eschewed consideration of factors external to formal logic in an effort to maintain scientific objectivity. This changed with Chaim Perelman's revival of Greco-Latin philosophies of rhetoric in the 1950's and 1960's; see, Chaim Perelman & L. Olbrechts-Tyteca *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Press, 1969). See also, Stephen Toulmin, *The Uses of Argument* (Cambridge University Press, 1958).

⁴⁹ Perelman, *supra* note 48 at 23-26; Douglas N. Walton, *Informal Logic: A Handbook for Critical Argumentation* (Cambridge University Press, 1989) at 5-6.

⁵⁰ Aaron Ben-Ze'ev, "Emotions and Argumentation" (1995) 17:2 *Informal Logic* 189; Michael A. Gilbert, "Multi-Modal Argumentation" (1994) 24:2 *Philosophy of the Social Sciences* 159; Douglas Walton, *The Place of Emotion in Argument*, (Pennsylvania University Press, 1992).

⁵¹ Finnemore & Sikkink, *supra* note 3; Cass Sunstein, *Social Norms and Social Roles* (1996) 96 *Columbia Law Review* 903 at 929.

base values beyond national boundaries so that standards of appropriateness become shared by a wide array of actors and institutions, and use a host of social, political, and legal techniques to persuade recalcitrant states to adopt these standards.⁵² Governmental norm sponsors serve as gatekeepers of channels of authoritative decision-making, and help to transform background norms, values, and expectations generated by norm entrepreneurs into state law. They include courts, administrative tribunals, parliamentary committees, and various executive agencies. Interpretive communities assist in processes of norm-production, interpretation, and diffusion, in some cases serving to connect norm entrepreneurs and governmental sponsors by hosting interactions between the two. International human rights treaty bodies, for example, receive submissions from both governments and NGOs when reviewing levels of compliance, structuring the public exchange of information, ideas, and expectations about the human rights dimensions of specific laws and policies.⁵³ When engaged in repeatedly, these sorts of interactions produce bodies of social science data and issue-specific law that offer guidance to decision-makers facing novel and complex legal problems.

The activities of these actors may be usefully sub-divided into the following four functions:

1) Intelligence: The acquisition, processing, and distribution of information, including social science data and case law. This information helps form the body of recognized law and facts upon which decisions are made.

2) Promotion: The generation of general awareness of a given issue or problem. This typically occurs prior to or in concert with the invocation stage, whereby

⁵² Ethan A. Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society", (1990) 44 *International Organization* 479 at 482; Christine Ingebritsen "Norm Entrepreneurs: Scandinavia's Role in World Politics" (2002) 37 *Conflict and Cooperation* 11.

⁵³ Jack Donnelly, "International Human Rights: A Regime Analysis" (1986) 40:3 *International Organization* 599.

participants attempt to mobilize broad-based social, political, and economic support for a given perspective.

3) Prescription: The promulgation of general norms. Domestically, this occurs through legislative and constitutional provisions as well as judicial decisions. Internationally, prescriptions flow from such sources as treaties, customary law, and judicial decisions. Prescription also describes the crystallization of informal norms by interpretive communities, such as international treaty bodies. Cumulatively, these norms may be used to promote a range of possible, alternative decisions.

4) Invocation: Preliminary appeals to prescribed norms in order to influence decisions about how to resolve a problem. Participants here use various rhetorical techniques to persuade others to endorse a favoured norm or position.⁵⁴

The third and final stage of TLP is that of norm-internalization. Norm-internalization describes the transformation of a legal rule from an inert logical proposition that wafts down from higher authorities and is promoted or invoked by norm-entrepreneurs, to something that forms part of participants' internal value sets. It is important to distinguish norms from rules.⁵⁵ Norms may be, and often are, expressed in terms of rules, but they cannot be described without also describing the *attitudes* that their subjects hold towards them. The very existence of a norm depends on the fact that people obey or observe them. Rules, by contrast, may be analytically separated from social context and viewed simply in terms of their logical or semantic components.

Norm-internalization describes a transition across three continua.⁵⁶ First, there is a shift from external pressure or constraints to internal self-enforcement. Legal subjects' behaviour changes independently of even the threat of external enforcement, becoming a matter of habit. Second, there is a shift from the instrumental to the normative, whereby

⁵⁴ McDougal, Lasswell & Reisman outline 7 functional phases of TLP, but I have selected the four that are most directly relevant to the tasks at hand; see, McDougal, Lasswell, & Reisman, *supra* note 38 at 192; Harold D. Lasswell & Myres S. McDougal, "Jurisprudence in Policy-Oriented Perspective" (1966-1967) 19:3 Florida Law Review 486.

⁵⁵ For an extended analysis of rules and norms, see Kratochwil, *supra* note 15.

⁵⁶ Koh, *supra* note 42 at 628-629.

compliant behaviour arises because a legal subject endorses the reasons for a rule as in keeping with her internal value set; compliance does not arise because a legal subject wishes to avoid punishment or gain rewards. Finally, there is a shift from the coercive to the constitutive, whereby one's engagement with the reasons for a rule transforms her "personal identity from lawless to law-abiding".⁵⁷ In many situations, compliant behaviour arises unconsciously or reflexively. In sum, norm-internalization results in legal subjects taking the reason for a rule to be consistent with their moral identity, which would, in cases of conflict, override whatever alternative, self-interested reasons they may have for complying or not complying with the rule. After this initial, conscious act, future behaviour gradually becomes habitual, erasing the need to apply external enforcement mechanisms.

In the context of the relevant and persuasive doctrine, norm-internalization would occur when a judge makes the high priority values and interests of identified or even hypothetical persons a moral reason for interpreting the *Charter* in a recommended way. This is because the reason for any human right would be to ensure that rights-holders' high priority values or interests are protected and promoted. So, for example, international human rights impose an explicit and absolute prohibition on the deportation of non-citizens to face the substantial risk of torture or similar abuse.⁵⁸ The text of the *Charter* does not explicitly impose such an obligation (although it does protect life, liberty, and security of the person, among other rights) while Canadian immigration and refugee law has long restricted the protection of this human right to persons who are

⁵⁷ *Ibid.* at 629.

⁵⁸ *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969/6 (entered into force 22 April 1954, accession by Canada 2 September 1969), arts. 1(F), 33; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, arts. 2,3,16; United Nations. Committee against Torture. Conclusions and Recommendations of the Committee against Torture: Canada, UN Doc. CAT/C/XXV/Concl.4 (2000) at para. 6(a).

deemed to be threats to national security.⁵⁹ Norm-internalization would describe a situation where the values underpinning the international human right against torture influenced a judge to interpret the *Charter* in such a way as to prevent the government absolutely from deporting persons to face torture.

Ideally, this judgment would motivate immigration officials and other human rights duty-bearers to subsequently internalize the human rights norm in question. This is to say that norm entrepreneurs are looking for more than superficial recognition of international and comparative human rights in formal law. Their priority is to alter the very values and beliefs of duty-bearers such that the wellbeing of rights-holders stands as a moral and not just a legal reason for altering a harmful policy or practice. Persuading a judge to internalize international and comparative human rights is just an initial step in the more complete internalization of a variety of norms across a range of social, political, and legal institutions.

C. II. Transnational Legal Process and Human Rights Advocacy

In addition to being an empirical phenomenon, TLP is a theoretical perspective that helps jurists predict and explain the conditions under which norm-internalization is most likely to occur. Supplemented with sound oratorical and intellectual skills associated with traditional lawyering, human rights advocates can use social-science knowledge to identify, alter and harness those factors that structure thinking about certain kinds of issues and legal problems. TLP accordingly recommends that lawyers and other jurists adopt interdisciplinary, social science-based methodologies when engaging in

⁵⁹ *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, s. 4 as am. by R.S.C. 2005, c.38, s. 118, R.S.C. 2008, c.3, supra note , s. 115; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

argumentative discourse. In particular, it recommends the adoption of the following approaches:⁶⁰

- 1) Goal-orientation: the clarification of one's base values and of the symbolic and/or material results one wishes to get out of a decision.
- 2) Trend Description: understanding the historical course and general direction of current thinking about issues relevant to this goal. This task requires attention to the perspectives of state officials (e.g. case law, statutes, parliamentary reports, policy briefs, etc.) as well as of non-state actors (e.g. scholarship, community knowledge and experiences, etc.). Just as importantly, it requires a good understanding of how the two interrelate.
- 3) Factor Analysis: identifying the background values, interests, ideologies, and other forces that have historically structured trends in decision-making about similar issues. This orients advocates to the deeper causes or influences that shape general attitudes, values, and beliefs, a task facilitated by the use of social science methodologies.
- 4) Projection of Future Decisions: the use of trend description and factor analysis to predict what future decisions about an issue would be if one were to stand aside and do nothing to influence decision-makers.
- 5) The Formulation of Alternatives: the construction of viable alternatives that may be simultaneously justified on the basis of pre-existing rules and one's (and the audience's) normative commitments.

These tasks suggest that (persuasive) arguments have internal/logical and external/empirical elements.⁶¹ Internally, proposed conclusions will have to be validly or

⁶⁰ MacDougal & Lasswell, "Jurisprudence in Policy-Oriented Perspective", *supra* note 54 at 508-511; MacDougal, Lasswell & Reisman, *supra* note 38 at 358-259.

⁶¹ Perleman, *supra* note 48 at 1-10. There are wide and varied ways of dissecting the various features or senses of "argument", which may be generalized into three distinctive, theoretical perspectives: logical (formalist), rhetorical (pragmatic, process-based), and dialectical (critical, proceduralist); see, Feteris, *supra* not 2; van Eemeren, Grootendorst, & Henkemans, *supra* note 2; Joseph W. Wenzel, "Three Perspectives on Argumentation" in, *Perspectives on Argumentation: Essays in Honour of Wayne Brockreide*, Robert Trapp and Janice Scheutz, eds., (Prospect Heights: Waveland Press, 1990) 9; Daniel J. O'Keefe, "The Concepts of Argument and Arguing", in *Advances in Argumentation Theory and Research*, J. Robert Cox & Charles A. Willard, eds. (Carbondale: Southern Illinois University Press, 1982) 3; Brant R. Burleson, "The senses of Argument Revisited: Prolegomena to Future Characterizations of Argument" in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation*, George Ziegelmüller & Jack Rhodes, eds., (Annandale, Va: Speech Communication Association, 1981) 962; Charles A. Willard, "A Reformulation of the Concept of an Argument: The Constructivist/Interactionist Foundations of a Sociology of Argument" (1978) 14 *Journal of the American Forensic Association* 121; Daniel J. O'Keefe, "Two Concepts of Argument" (1977) 13 *Journal of the American Forensic Association* 121; Wayne Brockreide, "Characteristics of Arguments and Arguing" (1977) 13 *Journal of the American Forensic*

justifiably inferred from recognized facts and values. Sound reasoning in the context of adjudication will consist in drawing valid or justified inferences from authoritative laws and the recognized facts of a case. Given legal indeterminacy, jurists have the freedom to infer a limited set of alternative conclusions out of any given material. The external element of persuasion consists in invoking one of these alternatives as the best solution to a problem, a task that requires one to appeal to an audience's values, beliefs, and expectations. This is a social process, by which advocates tailor a logical argument to resonate with various socio-cultural "fields" that are structured by distinctive criteria of rationality, truth, and beauty.⁶² At the same time, there may be a host of formal and informal rules, principles, and standards that structure dialogical interaction, limiting the sorts of rhetorical practices that a community deems appropriate.⁶³ A community that strongly values mutual respect and decorum, for instance, may not be receptive to dramatic rhetorical practices that demean or degrade the integrity of other disputants. Together, the processes and procedures of argumentation simultaneously facilitate and constrain intersections between legal argumentation and ambient socio-cultural fields, as advocates have to tailor their arguments to fit an audience's subjective values and beliefs while complying with formal and/or informal standards of conduct, reasoning, and interpretation.

One may adopt a descriptive or a normative perspective on the external elements of argumentation. Observations of rhetorical practices and social or communicative processes tend to be more descriptive and pragmatic, whereby theorists inquire into the

Association 129; Wayne Brockriede, "Where is Argument?" (1977) 11 *Journal of the American Forensic Association* 179.

⁶² Toulmin, *supra* note 48 at 212.

⁶³ Willard, *supra* note 61; Wenzel, *supra* note 61.

means by which disputants secure adherence to their position in various social situations.⁶⁴ This is not to say that rules structuring interaction are irrelevant, but they should be of concern to observers of argumentation only to the extent that they are actually observed in practice. Focus on dialogical rules, principles and standards as free-standing objects of inquiry tend to be more normative and critical in orientation, facilitating the rational appraisal of arguments (e.g. logical reasoning, inter-personal conduct) against conventional or idealized standards of public reason, appropriateness, and interpretation.⁶⁵ A dialogical approach to argument produces:

an abstract, normative model which should present a relatively simple but precise set of rules and procedures representing how reasoned dialogue ought to be. This abstract conception of dialogue is, of necessity, an idealization, but one that should be capable of being used to model a given, particular text of discourse, and thereby aid in arriving at an analysis of whether the particular argument can be reasonably judged to be open to criticism.⁶⁶

TLP is more descriptive than normative at this point, since it does not detail in any sustained way what or how dialogical rules, principles, and standards constrain the projection of political or ideological power. It produces analytical frameworks for the observation of legal interaction, and strongly implies a normative, critical orientation, but it does not make good on this ambition by offering precise rules and procedures specifying how reasoned dialogue ought to be conducted. Still, a descriptive focus helps us focus on the sources of international and comparative law's persuasive influence, which include: the values and beliefs held by the target audience, orators' use of literary

⁶⁴ Willard, *supra* note 61 at 133, 137.

⁶⁵ Frans H. Eemeren & Peter Houtlosser, "Strategic Maneuvering: A Synthetic Recapitulation" (2006) 20 *Argumentation* 381; *Advances in Pragma-Dialectics*, Franz H. van Eemeren, Ed., (Amsterdam: Vale Press, 2002); Douglas N. Walton, "Dialogue Theory for Critical Thinking" (1989) 3 *Argumentation* 169; Franz H. Eemeren & Rob Grootendorst, *Speech Acts in Argumentative Discussions: A Theoretical Model for the Analysis of Discussions Directed Towards Solving Conflicts of Opinion*, (Dordrecht: Floris Publications, 1984).

⁶⁶ Walton, *supra* note 65 at 170.

tropes (i.e. “*topoi*”) to rework familiar stories and commonly accepted propositions in such a way as to lower an audience’s resistance to contested concepts and claims, and methods of presentation (e.g. stylistic and oratorical devices).⁶⁷

While downplaying the latter, TLP deals more extensively with the concept of *topoi*. Persuasive legal arguments involve more than the simple presentation of facts and law in logical order. Advocacy requires careful thought about what sort of narrative to construct about the actors, issues, and events at play, what facts to highlight and which to obscure, what legal principles to use, and how these principles should be interpreted and presented. This requires knowledge of trends in thinking about an issue, what is common knowledge about that issue within a given community, which propositions are generally accepted and which are disputed, and what methods of presentation have tended to be effective in the past. Applied knowledge of this sort will allow orators gradually to build up an audience’s willingness to accept conclusions that may otherwise be resisted. Trend and factor analysis accordingly help jurists identify, appraise, and then use *topoi* to cumulatively generate a willingness among audience members to make inferential leaps from accepted legal and factual premises to the speaker’s recommended conclusion. Far from simply generating intellectual agreement, strategic use of these rhetorical techniques can facilitate norm-internalization, as members of an audience see how a proposed prescription resonates with their own internal value sets.

⁶⁷ *Topoi* are especially important here, serving as rhetorical bridges from the familiar to the contested. I will build upon this concept below. See also: Perelman, *supra* note 48 at 83; Kratochwil, *supra* note 15; F. Kaufeld, “Pivotal issues and norms in rhetorical theories of argumentation” in *Dialectic and Rhetoric: The Warp and Woof of Argumentation Analysis*, Frans H. van Eemeren & Peter Houtlosser, eds. (Kluwer Academic, 2002); Christopher William Tindale, *Rhetorical Argumentation: Principles of Theory and Practice*, (Sage, 2004)

C. III. Summary

Effective engagement with TLP requires jurists to be clear about what it is they want to get out of a legal decision, to understand the general course or direction of thinking about issues relevant to this goal (among both state and non-state actors), to understand in detail the social, political, economic, and ideological factors that have historically influenced decision-making in this issue-area, to estimate how likely a favorable decision would be were one to do nothing to alter the course of these trends, and to decide what normative, material, and rhetorical resources can best help actualize one's goal.

TLP is clearly relevant to questions of compliance since it may be directed towards facilitating judges' internalization of human rights norms, absent the use of external enforcement mechanisms (if and when they exist). It is normatively compelling because it recommends the construction of inclusive interactions among rights-holders and duty-bearers towards the end of protecting and promoting human rights. This obviously resonates with conceptions of human rights as discursive mechanisms that give agency to individuals and groups who have been excluded from channels of authoritative decision-making. As an empiricist theoretical perspective, TLP is descriptively apt and strategically useful. A legal argument's persuasiveness depends in large part on its intersections with various socio-cultural fields, so reliance on doctrine, precedent and other formal legal arguments is insufficient for understanding whether, how and why arguments based on international and comparative human rights have been persuasive. Attention must also be paid to the social processes through which disputants use values, *topoi*, and other rhetorical strategies to persuade judges (and others) to adhere to their

recommended solution to a legal problem i.e. to internalize an international and/or comparative human rights norm. The analytical frameworks and recommended juristic tasks associated with TLP are designed to produce knowledge of the factors and conditions conducive to norm-internalization. If adroitly used, these tools can improve the effectiveness of transnational human rights advocacy.

Yet TLP in some ways overshoots the mark. Its focus on the influence of dynamic and interlocking social processes on the production of law leaves us with the question of what, if anything, constrains the distorting effects of political and ideological power. The rhetorical practices and social processes that TLP describes are not intrinsically oriented towards the protection and promotion of human dignity.⁶⁸ Disputants are likely to be primarily concerned with winning, and will use whatever material and rhetorical resources they have at their disposal to weaken or discredit their opponent's position. This kind of argumentative free-for-all is hardly conducive to critical and reasoned engagement with the merits of an argument. Indeed, unconstrained struggles for power will in most cases work to the disadvantage of human rights advocates, who typically contest the privilege of dominant members of society.

Working against transnational human rights advocates will also be a range of "epistemic communities" or "network(s) of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area".⁶⁹ These professionals will be members of powerful communities that possess or claim expertise over a complex issue-area and have

⁶⁸ Some even question the link between human rights and human dignity; see, David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2001) 15 *Harvard Human Rights Journal* 99.

⁶⁹ Peter M. Haas, "Regimes and Epistemic Communities", (1989) 44 *International Organization* 377, at 386.

direct links to policy-makers. The security intelligence community, for example, acquires, condenses, and translates high volumes of technical information into manageable form relevant to the making of policy-choices. Experts within this community have acquired significant influence over centralized political bodies, as high-ranking decision-makers rely on their interpretations of (what is) relevant information, what policy-objectives are feasible, and how to achieve these objectives.⁷⁰ Unless legal interaction is carefully designed to require adherence to certain principles of reason, fairness and inclusiveness, TLP can very quickly degenerate into lop-sided struggles for political power that are highly unlikely to result in norm-internalization.

D. Power, Persuasion, and the Spectre of Compliance: An Interactional Theory of Law

A common way out of this problem is to outline a set of procedural rules, principles, and standards that help guarantee the resolution of disagreements on their merits.⁷¹ Moving beyond both formal logic and rhetoric, some theorists view argumentation as a dialogical practice that develops according to its own, internal logic and which is, as a discursive enterprise, oriented towards the generation of understanding.⁷² As an empirical matter, arguments will usually consist in “strategic maneuvering”,⁷³ whereby interlocutors employ an assortment of rhetorical techniques to enhance their competitive advantage. However, the distorting influence of these

⁷⁰ Hudson, *supra* note 21. I will examine these issues in great detail in Chapter 4.

⁷¹ *Advances in Pragma-Dialectics*, *supra* note 8; *Speech Acts in Argumentative Discussions*, *supra* note 8; Frans H. van Eemeren & Peter Houtlosser, “Strategic Maneuvering: A Synthetic Recapitulation” (2006) 20 *Argumentation* 381.

⁷² Brant B. Burleson & Susan L. Kline, “Habermas’ Theory of Communication: A Critical Explication”, (1979) 65 *The Quarterly Journal of Speech* 412 at 421.

⁷³ van Eemeren & Houtlosser, “Strategic Maneuvering”, *supra* note 71. Van Eemeren and Houtlosser argue that rhetorical and dialogical conceptions of argumentation are mutually reinforcing rather than antagonistic. For a related view, see David Zarefsky, “Strategic Maneuvering through Persuasive Definitions: Implications for Dialectic and Rhetoric” (2006) 20 *Argumentation* 399.

techniques can be constrained by formal and informal standards of appropriate conduct, etiquette, and reasoning that make communication possible. If an audience takes compliance with these standards to be of fundamental importance, disputants' non-compliance can undermine a position that is otherwise logically sound and appealing to audience members' subjective values and beliefs. These points suggest that the persuasiveness of an argument depends, not simply on its logical strength and its coherence with subjective values and beliefs, but also on inter-subjective rules, principles and standards of communication that inhere within particular, discursive communities.

This sort of perspective obviously has immediate appeal to one interested in how juristic engagement with international and comparative human rights helps structure meaningful interactions among various discursive communities. Indeed, Stephen Toope and Jutta Brunnée apply this sort of perspective to the process by which multiple discursive communities collaboratively construct, interpret and apply international legal obligations. Toope and Brunnée's primary hypothesis is that international legal interaction is distinct from politics as well as all other forms of social normativity by virtue of procedural and substantive norms that are internal to law and that make the imposition and non-coerced observance of legal obligation possible.⁷⁴ These norms distinguish law from other discursive practices by helping to constrain state and other politically powerful actors' capacity to unilaterally impose obligations upon legal subjects.

Toope and Brunnée also adopt a distinctive methodology that eschews positivist conceptions of law, expressly distinguishing between formal or positive law and

⁷⁴ Brunnée & Toope, *supra* note 2.

“legitimate” law.⁷⁵ The former consists in state-produced rules, principles, and standards that may be analyzed independently of their intersections with various socio-cultural fields.⁷⁶ An oft-recognized consequence of positivist methodologies is that law’s influence on behaviour tends to be presumed, ignored, or correlated with coercion, a standpoint from which law as well as non-state normative orders are rendered “epiphenomenal”.⁷⁷ Toope and Brunnée counter that “law’s existence is best measured by the influence it exerts”, and that this influence is to be found in intersections between state law and non-state normative orders at various stages of legal process, including norm-production, -interpretation, and -application.⁷⁸ More precisely, law’s influence has to be distinguished from state-led coercion as well as political and ideological domination intrinsic to “culturally specific” forms of social normativity.⁷⁹

Before delving more deeply into the strengths and limitations of their theory, and its applicability to the Canadian law of reception, we should note that Toope and Brunnée

⁷⁵ *Ibid.* at 51-52, 70; Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge; New York: Cambridge University Press, 2010). Toope and Brunnée do not fully define the term “legitimacy”, other than to say it is the product of processes by which legal authors and legal subjects participate in the mutual construction of legal rules, principles, and standards. Legitimacy further describes the non-coercive, moral influence legal norms have over behaviour, which is manifested through norm-internalization or the congruence of a legal rule, principle, or standard and legal subjects; internal value sets. For critical views on the concept of legitimacy and its use in legal theory and practice, see Dennis R. Fox, “A Critical-Psychology Approach to Law’s Legitimacy” (2001) 25 *Legal Studies Forum* 519; Craig Haney, “The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process” (1991) 15 *Law and Human Behavior* 183.

⁷⁶ H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1980) at 104.

⁷⁷ For an overview of how this perspective has affected the study of international law, see: Anne-Marie Slaughter, “International Law and International Relations Theory: A Dual Agenda” (1993) 87 *The American Journal of International Law* 205; Robert O. Keohane, “International Institutions: Two Approaches” (1988) 32 *International Studies Quarterly* 379; *International Regimes*, Stephen D. Krasner, ed., (Ithaca : Cornell University Press, 1983); Kenneth Neal Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 4th edition, (New York: Knopf, 1967); Hans J. Morgenthau, “Positivism, Functionalism, and International Law” (1940) 34 *The American Journal of International Law* 260.

⁷⁸ Brunnée & Toope, *supra* note 2 at 65.

⁷⁹ *Ibid.* at 69. The clear and highly contestable implication here is that law is not a culturally specific form of social normativity or, at least, that is not as amenable to the distorting influences of political and ideological power. I will criticize Toope and Brunnée on this point below. In the meantime, I will concentrate on describing their position on this issue.

share several affinities with Koh and other process-oriented scholars. For instance, they share Koh's belief that legal norms "typically emerge from the interaction of participants (subjects), and an increasingly fixed pattern of expectations about appropriate behavior", suggesting that there is an underlying, systematic nature or recurring pattern to law's intersections with ambient social values, norms, and processes.⁸⁰ They also share an attraction to the normative ambitions and some of the methods associated with sociological legal realism, insisting that jurists should use knowledge of how social processes contribute to norm-production in order to pursue social justice objectives.⁸¹ Despite these affinities, Toope and Brunnée explicitly distinguish their theory from TLP in two important respects. First, they spend more time outlining the conceptual and functional differences between "material capabilities and interests, and normativity".⁸² Toope and Brunnée accept that legal norm-production is sensitive to the vicissitudes of politics. However, they argue that law operates according to a distinctive internal logic and set of principles that impede the capacity of participants to dominate, intimidate, or otherwise coerce others into altering their behavior. Second, they provide a far more nuanced account of the "constraining and facilitating (formal and informal) institutions of legal interpretation" that insulate participants to legal interaction from coercion.⁸³ As mentioned, this is because Koh focuses more on the rhetorical dimensions of legal argumentation, while Toope and Brunnée focus on its dialogical dimensions.

With these caveats, Toope and Brunnée proceed to argue that the source of law's persuasive influence is to be found in the procedures by which legal authors address legal

⁸⁰ *Ibid.* at 24.

⁸¹ *Ibid.* at 67-68.

⁸² *Ibid.* at 25.

⁸³ *Ibid.* at 25.

subjects with the reasons for a specific rule. These reasons, in turn, are to be correlated with enduring legal values and principles, entities which remain relatively stable even while discrete rules are produced, amended, and extinguished. Rule-production is to be considered a rhetorical activity in which legal authors try to demonstrate a “fit” or congruence between the more abstract, enduring reasons for imposing legal obligations on the one hand, and on the other legal subjects’ deeply held values and beliefs. These latter values and beliefs, in turn, have their provenance in the various socio-cultural communities to which disputants belong. The production of discrete legal rules is therefore very much a social process that responds to law’s prior, manifold intersections with other forms of social normativity; legal rules should flow from legal principles that are congruent with, or at least analogous to, principles that are also found within other normative orders.

Toope and Brunnee distinguish themselves from TLP, however, by moving beyond even this sort of rhetorical activity. As a public institution, law should be supported or justified on the basis of public reason and not its occasional, instrumental accommodation of agent-relative values and beliefs. This requires that participants to legal interaction encode their values, beliefs, and experiences in language that can be understood, not just by other participants to an immediate dispute, but by all members of a given legal community. This implies that rhetoric should be directed towards a “universal” audience the members of which possess a common identity as rational and/or moral agents,⁸⁴ qualities that inhere in everyone regardless of what may be their other,

⁸⁴ Pereleman, *supra* note at 48 at 31-35.

more personalized identities and interests.⁸⁵ From this common identity it is possible to construct a series of roles and responsibilities with regards to the morality of the conduct which is the subject of dispute. But more importantly, the very idea of a universal audience alerts orators to the kinds of reasons that would best justify the imposition of legal obligation in any given context. Arguments that are aimed exclusively at a particular group of individuals, while persuasive to this audience, will commit an orator to fixed beliefs and values that may be unacceptable to those who are not personally addressed. Arguments of this nature would also lose force if the values and beliefs held by the targeted audience subsequently change. In either case, non-congruence between legal obligation and subjective values and beliefs will increase the need for coercive or external measures of enforcement to secure compliance, factors authoritative decision-makers may take into account in deciding whether and how to produce, interpret, or apply a legal rule.

It is, of course, highly debatable whether there is in fact a universal audience united by values and beliefs that are, or logically must be, shared by all rational beings.⁸⁶ Discourses about the imposition of legal obligation will often centre around activities the

⁸⁵ There is a distinctly Kantian flavour to this argument. For a similar perspective in the context of international law, see Capps, *supra* note at 119-124, 153-154. Capps relies on the neo-Kantian moral theory of Alan Gewirth to support his arguments; see, Alan Gewirth, *Reason and Morality*, (University of Chicago Press, 1978); Alan Gewirth, *The Community of Rights*, (University of Chicago Press, 1996). For a critical review of Capps' arguments, see Graham Hudson, "Learning From Our Mistakes? Legal-Moral Philosophy and the Constitution of International Law- A Review of Patrick Capps' *Human Dignity and the Foundations of International Law*" (2011) 2 *Transnational Legal Theory* 145

⁸⁶ Christopher William Tindale, "Chapter 6" in, *Rhetorical Argumentation: Principles of Theory and Practice* (Sage Publications 2004); James Crosswhite, "Universalities" (2010) 43 *Philosophy and Rhetoric* 430; Scott Aikin, "Perelmanian Universal Audience and the Epistemic Aspirations of Argument" (2008) 41 *Philosophy and Rhetoric* 238; Antonio Raul de Velasco, "Rethinking Perelman's Universal Audience: Political Dimensions of a Controversial Concept" (2005) 35 *Rhetoric Society Quarterly* 47; Frans H. van Eemeren & Rob Grootendorst, "Perelman and the Fallacies" (1995) 28 *Philosophy and Rhetoric* 122; Lisa S. Ede, "Rhetoric Versus Philosophy: The Role of the Universal Audience in Chaïm Perelman's *The New Rhetoric*" (1981) 32 *Communication Studies* 118; John W. Ray, "Perelman's Universal Audience" (1978) 64 *Quarterly Journal of Speech* 361.

wrongfulness of which is precisely what is debated. Still, disputes of this nature will have to be ended at some point; someone will have a final say. Toope and Brunnée think that that our concern should be with the conditions under which debates may justifiably be terminated, an issue that relates to the fairness and inclusiveness of debate. If participants are able to participate meaningfully in debate, which is to say that their values and beliefs play a significant role in the construction of legal obligation, they should be able to endorse the process by which legal obligations are produced, even if they cannot fully endorse the content of the decision.

Toope and Brunnée are somewhat unspecific about what are the rules that structure fair and reasonable debate of this kind. This leaves us uncertain about such important matters as: who decides how legal interaction will be structured, who gets to invoke procedural rules and, accordingly, exclude putatively “unreasonable” arguments and “unfair” rhetorical techniques, and to what extent do dialogical rules inhibit the articulation of internal or personalized viewpoints on matters with significant public dimensions. Toope and Brunnée seem to have simply displaced confusion about the projection of power in the resolution of debates about substantive matters to debates about procedural matters. Other scholars, however, offer some thoughts on these matters. The following is an example of rules that may be essential to fair and reasonable debate:⁸⁷

- 1) Parties must not prevent each other from advancing standpoints or from casting doubt on standpoints;
- 2) A party that advances a standpoint is obliged to defend it if challenged by an opponent;

⁸⁷ These rules were derived from Frans H. van Eemeren, Rob Grootendorst, & A. Francisca Snoeck Henkemans, *Argumentation: Analysis, Evaluation, Presentation* (Mahwah, NJ: Lawrence Erlbaum Associates, 2002) at 182-183.

- 3) A party's attack on a standpoint must relate to the standpoint that has indeed been advanced by the other party;
- 4) A party may defend a standpoint only by advancing argumentation relating to that standpoint;
- 5) A party may not deny a premise that he or she has left implicit or falsely present something as a premise that has been left unexpressed by the other party;
- 6) A party may not falsely present a premise as an accepted starting point nor deny a premise representing an accepted starting point;
- 7) A party may not regard a standpoint as conclusively defended if the defense does not take place by means of an appropriate argumentation scheme that is correctly applied;
- 8) A party may only use arguments in its argumentation that are logically valid or capable of being made logically valid by making explicit one or more unexpressed premises;
- 9) A failed defense of a standpoint must result in the party that put forward the standpoint retracting it and a conclusive defense of the standpoint must result in the other party retracting its doubt about the standpoint;
- 10) A party must not use formulations that are insufficiently clear or confusingly ambiguous and a party must interpret the other party's formulations as carefully and accurately as possible.

Rules of this nature are designed to ensure that each participant to an argument has an equal opportunity to initiate and perpetuate discourse, forward challenges, criticisms, interpretations and explanations, express their internal values, attitudes, feelings and other features of their personal identities, and share in the invocation and application of the regulatory rules that structure power relations.⁸⁸ Notice that these four

⁸⁸ Burleson & Kline, *supra* note 72 at 421, 423.

conditions of equality are essentially procedural in orientation emphasizing, not what is argued, but how it is argued. These conditions, and the relatively stable, enduring rules that are used to secure them, frame an ideal speech situation within which personalized arguments are both permissible and encouraged, but which are nonetheless appraised relative to standards of public reason and their capacity to resist challenge. In this respect, there is a constant mediation or translation between the languages specific to disputants' personal, pre-legal identities and the language used to structure reasonable discourses about the distribution of value. The latter offers hope of helping disputants identify common meaning, knowledge, identities, and interests and to work with these materials towards a mutually satisfying solution.

Toope and Brunnée believe that law gives expression to these four conditions of equality through professional and ethical norms that protect a “morality of aspiration” and a “morality of duty”.⁸⁹ A morality of aspiration describes one’s ethical duty to make the most of one’s time and resources to fully realize her personal and civic potential, whereas a morality of duty is concerned with the “minimum standards of appropriate conduct that make life in society possible”.⁹⁰ A morality of duty corresponds to formal, legal rules and obligations that forbid conduct and, for our purposes, may be correlated with “primary rules” that are applied to legal subjects and with “secondary rules” concerning how state officials are to interpret and apply primary rules.⁹¹ A morality of aspiration, by contrast, for our purposes consists in principles and values that direct state officials to produce, interpret and apply primary and secondary rules in such a way as to

⁸⁹ Brunnée and Toope, *supra* note 2 at 54.

⁹⁰ *Ibid.* at 54.

⁹¹ Hart, *supra* note at 76 at 87-90.

protect and promote individuals' capacity to form and realize personal life projects.⁹²

These principles may be expressed as formal features of law (e.g. constitutional rights provisions, precedent) or they may be more informal in nature.

Viewed in terms of a morality of duty, legal argumentation is structured by professional rules and principles germane to the specific institutional settings within which legal interactions occur. These rules ensure a level of "path-dependency"⁹³ which informs the timing, source and substance of permissible arguments. A dispute in an adjudicative setting, for instance, will be structured by rules and principles that govern such matters as: what field of law a dispute falls under (e.g. contracts, constitutional, property, etc.), the relevance and admissibility of evidence, who has standing, when they may speak and for how long, what statutes, cases and other legal materials are considered authoritative, and decorum, etiquette, etc.⁹⁴ Rules of this nature are supposed to ensure logical and historical consistency in the resolution of similar disputes. A dispute over damaged goods, for instance, may give rise to a contractual or a tort dispute. In filing and responding to statements of claim, parties to the dispute will have to employ concepts and categories of thought germane to one (or both) of these fields e.g. offer and acceptance, negligence. This will affect what facts and values are relevant, the substantive laws to which one may appeal, and the range of remedies that are available. In theory, dialogical rules of this nature are elements of a common language that disputants may use to encode their subjective values and beliefs in terms meaningful to anyone who has experience

⁹² Jurgen Habermas, "Struggles for Recognition in the Democratic Constitutional State" in Amy Gutmann, ed., *Multiculturalism* (Princeton: Princeton University Press, 1994) 107.

⁹³ For a sound overview of the meaning of this term and its applicability to common legal systems, see Oona Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 *The Iowa Law Review* 101. See also, Oliver Wendell Holmes Jr., "The Path of the Law" (1897) 10 *Harvard Law Review* 457.

⁹⁴ Kratochwil, *supra* note 15 at 174-185.

with the legal field in question. Disputes that are moral, ethical, economic, political, or religious in nature become legal disputes, carrying the debate into a new domain of discourse that provides, according to Toope and Brunnée, neutral, a-political criteria for appraising the merits of argumentative positions.

Rules that structure legal argumentation help establish the four conditions of equality outlined above by granting each participant the freedom to advance and criticize positions, requiring participants to be explicit about their premises and conclusions, and establishing, in advance, standards concerning relevancy, onus of proof, and burden of proof. Standards concerning what count as valid or justifiable arguments in a given legal field are extrinsic to formal logic *per se*, but germane to the institutional setting within which arguments occur; this gives legal arguments a public, dialogical structure. Even while participants may use substantive rules in combination with rhetorical narratives (*topoi*) to support their position, they must comply with procedural rules that establish additional criteria of validity or justifiability.

A morality of duty can, however, interfere with a morality of aspiration. As an aspirational enterprise, legal argumentation is a perpetual process by which multiple, discursive communities cooperatively arrive at shared understandings about the imposition of legal obligations. Toope and Brunnée define shared understandings as inter-subjective structures and institutions “that help in specifying the interests that motivate action: norms, identity, knowledge, and culture”.⁹⁵ Shared understandings structure social roles and responsibilities, enabling members of particular communities to access traditional knowledge and to subsequently participate in meaningful socio-cultural

⁹⁵ Brunnée & Toope, *supra* note 2 at 29; Peter J. Katzenstein, “International Organization and the Study of World Politics” (1998) 52 *International Organization* 670 at 679.

practices. They are not, however, static or uniformly experienced; they shift and change as new actors introduce different forms of knowledge and practices into a community. Often, these changes occur as members of a community interact with members of outside communities or environments, with alternative practices and different forms of knowledge straining the utility or appeal of tradition. However, changes also occur internally, as members contest tradition and introduce alternative values and beliefs.

Excessive reliance on formal legal procedures interferes with law's aspirational qualities by forcing participants to deconstruct and then re-configure their personal values and beliefs in terms of public rules, principles and standards. Inevitably, the full meaning or significance of the original values and beliefs --the original language and culture-- will be lost. Indigenous peoples seeking constitutional recognition of a customary practice, for instance, have to encode their legal traditions and knowledge in terms of common law concepts if they wish to be heard by judges. Although necessary to reach jurists familiar with Anglo-American legal reasoning, coding can distort the full cultural significance of the practice. More to the point, the language of law is hardly a-political or a-cultural. Anglo-American concepts and rules, even of a procedural character, cannot properly be described as elements of a "common" or "universal" language.

Feminist perspectives on the law of sexual assault support similar criticisms. In any criminal trial, rules of disclosure require Crown prosecutors to provide the defence with all information in its possession that is relevant to the subject matter of a charge.⁹⁶ The principle behind this rule is that disclosure enhances courts' truth-seeking function by enabling an accused to more effectively challenge the credibility and sufficiency of the prosecutor's allegations. Normally, these rules apply only to information in the

⁹⁶ *R. v. Stinchcombe*, [1995] 1 S.C.R. 754.

government's possession. Criminal defence lawyers have recently persuaded courts to expand the scope of this rule to force third parties to produce and possibly disclose complainants' private medical, therapeutic, and counseling records.⁹⁷ The rationale has been that these records may be relevant to credibility and, in particular, they can help facilitate the discovery of truth by exposing fabricated allegations, "false memory syndrome", or other indicators of a complainant's unreasonableness.⁹⁸ In truth, disclosure of these records violates complainants' rights to dignity and privacy, reduces their willingness to report sexual assaults, and helps defence attorneys discredit complainants who do not satisfy gendered standards of consistency and coherence. Ostensibly designed to facilitate the resolution of a case on its merits -- to protect fairness, reasonableness, and truth-- rules like this can and frequently are used to intimidate, demoralize, and fallaciously discredit participants.⁹⁹

But although judges, lawyers and others may use legal rules to replicate relations of domination, there is still value in constructing an ideal standard against which unethical behaviour may be more readily identified and criticized as inconsistent with the values of a legal community. The principle behind disclosure, for instance, is that criminal prosecutions are concerned with the discovery of truth. Rules of disclosure ought to actualize this principle by enhancing the circulation of, and critical engagement with, information. The principle of disclosure --and the ten postulated rules of rational argumentation outlined above-- can be used to criticize the ethics of using rules of disclosure to rationalize the distortion of truth through intimidation and stereotyping. This

⁹⁷ *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, [1999] 3 S.C.R. 668.

⁹⁸ Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) *Osgoode Hall Law Journal* 255 at 280-281.

⁹⁹ Laura Hengehold, "An Immodest Proposal: Foucault, Hysterization, and the 'Second Rape'" (1994) 9 *Hypatia* 88 at 95.

is to say that the interpretation and application of legal rules should at all times be constrained by a morality of aspiration, respect for other disputants, and concern for maintaining the integrity, fairness, and reasonableness of proceedings.

Coming full circle, we see why Toope and Brunnée consider the provision of reasons to be an important part of constructing persuasive or legitimate law; this ensures that rules are interpreted and applied towards the actualization of public values and not the private, egoistic interests of dominant actors. We also see how the inclusion of diverse discursive communities in the production, interpretation, and application of legal obligation is crucial, this helps to ensure that guiding legal principles are constructively related to the identities, interests, knowledge, and aspirations of all who are subject to legal obligation. Without these features, law can too easily be used to replicate relations of domination. But what are the mechanisms through which the perspectives of multiple discursive communities constrain the interpretation and application of legal rules consistently with moral and ethical principles? Further, how do these considerations bear on the law of reception?

The key to these questions is analogy.¹⁰⁰ For our purposes, analogical reasoning occurs whenever a court “draws on similarities or dissimilarities between the present case and previous cases which are not binding precedents applying to the present case”.¹⁰¹ It is important to recognize that analogies draw our attention to similarities between relationships and not between the inherent qualities of objects themselves.¹⁰² In the context of a legal case, for example, analogies are used to demonstrate that the relationship between the facts and law in one case or situation is similar in kind to the

¹⁰⁰ Brunnée & Toope, *supra* note 2 at 56.

¹⁰¹ Toulmin, *supra* note 48 at 202.

¹⁰² Perelman & Olbrechts-Tyteca, *supra* note 48 at 372-374

relationship between the facts and law in another. The “law” that is the subject of an analogy includes both rules and principles. In fact, analogies typically involve the examination of the different rules by which commonly held principles are actualized in similar contexts. Analogical reasoning therefore helps decision-makers use others’ past experiences in giving effect to common principles in order to identify and appraise the comparative merits of possible solutions to a recurring problem.

There should be nothing controversial about analogical reasoning of this sort. Jurists have long used comparative law to better understand and improve domestic law and, on occasion, to pursue the unification of various legal orders.¹⁰³ For example, Canadian courts frequently rely on American Bill of Rights’ jurisprudence when determining the content and scope of *Charter* rights.¹⁰⁴ In *R. v. Keegstra*, the Supreme Court of Canada stated that:

In the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts.¹⁰⁵

The Court then considered a wealth of American jurisprudence and academic commentary on content-based restrictions of speech in addressing the constitutional dimensions of Canadian anti-hate speech laws.¹⁰⁶ Although it found these resources useful in elucidating the values and principles that structure freedom of expression, it also

¹⁰³ Peter De Cruz, *Comparative Law in a Changing World, 3rd edition* (London: Routledge-Cavendish, 2007); Werner Menski, *Comparative Law in a Global Context: The Legal Traditions of Asia and Africa* (Cambridge: Cambridge University Press, 2006); *Comparative Legal Studies: Traditions and Transitions*, Pierre Legrand & Roderick Munday, eds., (Cambridge: Cambridge University Press, 2003); Kai Schabach, “The Benefits of Comparative Law: A Continental European View” (1998) 16 B.U. Int’l L. J. 331.

¹⁰⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

¹⁰⁵ *Ibid.* at 711.

¹⁰⁶ *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *Cohen v. California*, 403 U.S. 15 (1971); *Anti-Defamation League of B’nai B’rith v. Federal Communications Commission*, 403 F.2d 169 (D.C. Cir. 1968); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

recognized that comparative constitutionalism is limited by differences in the legal and political culture of comparison states as well as in the values, content, and overall structure of comparison constitutions. Dickson C.J. put it this way:

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.¹⁰⁷

So, comparative constitutionalism or analogical reasoning in general does not lead to extra-legal rules being “transplanted” into Canadian law. Judges are generally not interested in integrating Canadian law into broader regional or international legal orders. They are typically concerned with using foreign experiences as empirical and normative indicia of the constitutional (de)merits of Canadian laws, policies, or practices that are under judicial review. Moreover, interest in foreign legal rules is limited to what they reveal about the content, scope and applicability of principles a commitment to which is shared by the two countries.

By rejecting hierarchical distinctions between (positive) law and non-law, Toope and Brunnée recommend that legal actors be open in similar ways to those non-state normative orders that structure the values, beliefs, identities, and interests of participants to legal interaction. This recommendation flows from their vision of legal interaction as concerned with the generation of shared understandings and the fullest expression and recognition of participants’ personal identities and interests. Recalling the four conditions of equality in argumentation, discourses centred around a postulated (and contestable) common legal language must still permit speakers to express their personal identities and

¹⁰⁷ *Keegstra, supra* note 104 at 712.

interests; if this condition does not obtain, the language of law will not work from or generate shared understandings. Toope and Brunnée are fully aware that not all participants will share an enthusiasm for the kinds of rationality valued by judges, lawyers, or state officials and that some will probably believe that legal rules have no intrinsically superior merit relative to non-law. They think, though, that many of the principles that inform legal rules are congruent with the principles embedded within many non-state normative orders or, at least, with foundational moral principles, such as fairness, equality, autonomy, etc. Analogical reasoning consists in exploring the different ways in which these common values and principles are actualized in legal and non-legal rules that are authoritative within their respective normative orders. There is no *a priori* hierarchical distinction to be made between the values and beliefs of non-state communities and those of, say, the United States Supreme Court.

Thus, reference to past practices and future aspirations, mediated by analogy and structured by procedural rules of an ethical character, helps disputants collaboratively identify and generate shared understandings. These understandings form the principled basis for legal obligation and help constrain the interpretation of discrete legal rules. When disputants carry new or newly-discovered understandings back to their respective communities, there is an increased likelihood that corresponding legal obligations will be observed independently of external enforcement. Recalling Knop's metaphors, we might reconsider law as a process of translation whereby diverse inter-subjective perspectives rooted in the values, beliefs, and practices of local communities are converted into knowledge and values that are shared by members of an over-arching legal community. This process changes the participants and the communities to which they return, as their

prior values and beliefs will have been reconstituted through mediated encounters with “outsiders”. But law is also translated, as the production, interpretation, and application of legal rules occurs in close proximity to shifting normative environments and a morality of aspiration. Changes in legal culture will occur incrementally, collaboratively and from the bottom-up rather than episodically and unilaterally from the top-down,¹⁰⁸ as participants use their distinctive knowledge and experiences to collaboratively inform the construction, interpretation and application of those enduring values and principles upon which a given legal rule rests. Law is an enterprise, a dialectic through which actors and institutions in opposition converge around mutually reconstituted identities and interests.

E. Transnational Legal Process, Interactional Law, and the Relevant and Persuasive Doctrine

We may now consolidate these thoughts in terms of the relevant and persuasive doctrine. My claim has been that an informal approach to the reception of international and comparative human rights is sensible, when we consider the distinctive functions of the relevant and persuasive doctrine. This claim runs counter to traditional views, which decry the deconstruction of hierarchical distinctions between binding/non-binding international human rights and between international/comparative human rights: the absence of formal criteria governing the relevance and persuasiveness of international and comparative law means that judges can and will do whatever they please. Taken to its limits -- so the argument runs -- normative indeterminacy will lead to the instrumental use of law to replicate relations of social, political, and ideological domination.

To counter these worries, I have investigated theoretical perspectives that support two, inter-related hypotheses: 1) specific rhetorical practices and dialogical structures

¹⁰⁸ Janet Koven Levit, “Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law” (2007) 32 *Yale Journal of International Law* 393.

constrain judicial decision-making about the relevance and persuasiveness of international and comparative human rights and 2) applied knowledge of these practices and structures can enhance the effectiveness of transnational human rights advocacy. Although I have not submitted them to sustained empirical tests, these hypotheses do draw our attention to a logical fit between the form and the functions of the relevant and persuasive doctrine, which are to protect and promote human rights i.e. the high priority values and interests of the beneficiaries of *Charter* rights, to enhance the congruence between state law and ambient social values, beliefs and expectations that have global and multicultural dimensions, and to facilitate institutional linkages among Canadian, international, and foreign jurists.

How does informalism perform these functions better than something akin to the presumption of conformity doctrine? We should begin by reminding ourselves that binding international human rights are highly vague, abstract, and aspirational in nature; they contain principles and values that should guide the appraisal of, among other things, specific legal rules that have been produced by domestic legal institutions. This interpretive enterprise is facilitated by interactions among a plurality of discursive communities with differing perspectives on the human rights dimensions of state law. These communities lack the legal authority and political power to produce binding judgments, so their influence must be related either to their political power or their persuasive appeal. Consequently, persuasion is the only reliable means of influence. It follows that hierarchical distinctions between binding and non-binding international human rights norms which require judges to look only to the terminology of treaty

provisions, is likely to distort the spirit and obscure the full, contextualized meaning of treaty provisions.

However, we can see the appeal of making conceptual distinctions between the two classes of international human rights. Binding international treaties are the product of sustained negotiations and are designed to structure responses to recurring social problems; the time, energy, and resources that have gone into the construction of international legal obligation should count for something. TLP and Toope and Brunnee's interactional theory of law explain how these types of norms will have presumptively stronger persuasive influence, even absent formal doctrinal direction to this effect. Recalling the importance of *topoi* and working with an audience's prior values and beliefs, binding international human rights will be uniquely persuasive to both judges and representatives of the government because governmental bodies will have publicly expressed their commitment to the values and principles underpinning these types of norms. Unless this happens with little or no thought or consultation – an unlikely event – the acceptance of international legal obligations represents the construction of shared understandings among governmental bodies and other domestic and international actors. Through public statements, *opinio juris*, records of treaty negotiations, submissions to monitoring and reporting bodies, official reports, and other expressions of the government's factual and normative positions, observers will be able to construct a body of values and beliefs held by governmental actors with respect to an international treaty or custom. This is not the case with comparative human rights or international norms the production of which has occurred with little to no involvement by the Canadian government. The government's choice to bind itself to international legal obligations also

signals its intent to engage in continued interaction with interpretive communities concerning the interpretation and application of norms in increasingly specific contexts. The process of international norm production will accordingly provide appreciable textual and discursive resources that constrain the government's capacity distort argumentative interactions about the scope and meaning of binding international norms. This suggests that binding international human rights norms *as well as* the non-binding interpretive views of attendant treaty-monitoring and reporting agencies are more likely to be internalized by judges than comparative human rights or other norms produced independently of the involvement of the Canadian government.

This account of persuasive influence has the added advantage of countering complaints that the informal reception of international human rights contravenes respect for constitutional supremacy (e.g. federalism, parliamentary supremacy). First, courts are not transplanting external legal rules into Canadian law. Through analogical reasoning characteristic of all comparative law, they use these rules to appraise the comparative practical and normative merits of possible rule-formulations that are grounded in Canadian legal sources. Second, when dealing with binding international human rights, courts make use of rules and principles that are increasingly produced or at least endorsed by representative institutions. Provinces, for instance, play significant roles in the negotiation of international treaties touching upon matters falling within their sphere of constitutional authority.¹⁰⁹ The federal government also ensures that most treaties are

¹⁰⁹ David Cook, *The Millennium Round of Multilateral Trade Negotiations: The Provinces and Treaty Making - A Submission to the Standing Committee on Foreign Affairs and International Trade*, 25 April 1999; *Federal - Provincial Relations in the International Domain. Innovative Ways of Working Domestically with Provincial Governments on Matters where Canada's International Interests are Engaged*, Research Report 4 (1998), Global Challenges and Opportunities Network; Douglas M. Brown, "The Evolving Role of the Provinces in Canada-US Trade Relations" in *States and Provinces in the*

submitted to parliament for commentary before it undertakes new international legal obligations.¹¹⁰ Governments at all levels more frequently consent to international treaty obligations knowing that this requires them to interact with treaty monitoring and reporting bodies by submitting evidence of their compliance. To the extent that this is so, respect for parliamentary sovereignty and federalism will be less persuasive as a reason to not receive or give domestic effect to binding international human rights and the non-binding views of attendant monitoring and reporting bodies.

Now this account of the relevance and persuasiveness of international and comparative human rights is not inconsistent with the presumption of minimal protection articulated by van Ert, if we also allow for the generous judicial use of non-binding or unimplemented international human rights law and comparative human rights. We might say that judges should use the presumption of minimal protection when Canada's international obligations are at issue, and use the relevant and persuasive doctrine when dealing with non-binding international human rights or comparative human rights as interpretive aids; importantly, this is the position that Brunnée and Toope adopt. However, the foregoing, in combination with our observations that judges have failed to abide by or properly apply the presumption of conformity doctrine, has the advantage of explaining what (informal) factors affect judges' choices to (not) give domestic effect to binding international human rights; fidelity to doctrine cannot be added to this list, if we take into account judges' inability or unwillingness to correctly apply the presumption of conformity doctrine. If accurate, this account means that there is no practical reason to

International Economy, Douglas M. Brown and Earl H. Fry, eds., (Berkeley: Institute of Governmental Studies Press, 1993).

¹¹⁰ See, Canada's Policy on Tabling of Treaties in Parliament, Online: <http://www.treaty-accord.gc.ca/procedures.aspx> (date accessed: 13 April 2012).

insist on doctrinal distinctions between binding and non-binding international human rights, as the former will typically be found more relevant and persuasive by virtue of the comparative logical and rhetorical strengths of arguments within which they are employed. The foregoing account does not oppose doctrinal changes, but instead considers them to be unnecessary and ultimately ineffectual.

At the same time, the ultimate end of *Charter* litigation is, from the complainant's perspective, always the actualization of human dignity. If this, rather than compliance *per se*, is the primary objective, there is again little reason to insist on doctrinal distinctions between binding/non-binding norms; all classes of human rights help us realize this end and should be used on this basis. Indeed, comparative human rights will be distinctively relevant and persuasive in certain contexts, a practice we should again recall is part and parcel of courts' long-standing engagement in comparative law. Among the more important classes of problems to which comparative human rights are distinctively useful are those related to transnational social, political, and economic interactions. Following 9/11, for example, the Canadian intelligence community immersed itself in a wide range of formal and informal global intelligence networks in order to improve its capacity to identify and respond to transnational terrorist threats.¹¹¹ Given the nature and geographic distribution of transnational terrorist groups, the Canadian intelligence community has necessarily networked with non-traditional partners with poor human rights records, such as Morocco, Egypt, and Afghanistan. The intelligence acquired from these foreign agencies has been used to rationalize the detention of alleged terrorists residing in Canada. Using this intelligence as evidence, the government initiates deportation proceedings in order to return alleged terrorists to the very countries that supplied the

¹¹¹ Hudson, *supra* note 21.

intelligence, exposing affected persons to the substantial risk of torture and abuse.

Ostensibly designed to protect the Canadian public, proceedings of this nature may in certain situations be linked to “extraordinary rendition” or “torture by proxy”, whereby alleged terrorists are sent to jurisdictions where information may be extracted through means that are legally prohibited in Canada.¹¹²

In situations such as these, comparative human rights analysis is necessary for an adequate understanding of the nature and context of the problem as well as for the construction of effective solutions. They are not being “transplanted” into Canadian law; rather, they serve as empirical data. In the context of global intelligence agency cooperation, the human rights records of foreign states are invaluable for assessing what Canadian officials know or ought to know about the consequences of the intelligence and security relationships they form. Although not directly relevant to Canada’s international human rights obligations, other countries’ human rights records serve as data that engender shared understandings about the facts of a case and the normative dimensions of Canada’s domestic and international practices. But comparative human rights can also further the relevant and persuasive doctrine’s function of facilitating institutional linkages among courts in various jurisdictions in order to strengthen the review of unrepresentative transgovernmental practices. Global intelligence and security relationships among executive agencies typically span multiple jurisdictions, which helps to insulate them from meaningful parliamentary and judicial review. Judges’ reliance on each others’ rulings can help them cultivate a “pan-constitutional law of human rights”,

¹¹² Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin’s Press, 2006); “Torture by Proxy: International Law Applicable to ‘Extraordinary Renditions’” (The Centre for Human Rights and Global Justice) December 2005.

whereby persons harmed by governmental practices in one jurisdiction may more successfully pursue remedies in another.¹¹³

All of this is to say that the relevance and persuasiveness of international and comparative human rights should not be linked to the form that a norm assumes or to its pedigree but rather its place in lines of reasoning that are constrained by formal and informal interpretive institutions. Ideally, judicial decision-making about the reception of international and comparative human rights norms is conditioned by the (government-initiated) congruence of international and Canadian constitutional legal principles, government institutions' express commitment to use these principles to guide decision-making, and judges' willingness to exercise their interpretive latitude in accordance with a morality of aspiration. Since the government is directly involved in the production and diffusion of binding international human rights, the judicial reception of norms of this nature should presumptively be easier to justify and, as importantly, will often be comparatively useful as *topoi* i.e. in building off of and generating shared understandings. However, the nature of a legal problem may be such that other kinds of human rights norms will be equally or even more useful for framing and resolving an issue. Comparative human rights are especially useful for contending with problems raised by transgovernmentalism, helping domestic courts in various jurisdictions fill in regulatory gaps within transnational regimes.

Although the foregoing helps us conceptualize how international and comparative human rights might exert a distinctive, persuasive influence if they can be (and are) accessed without formal doctrinal constraints, several outstanding issues remain. First,

¹¹³ Craig Scott & Phillip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom Promise" (2000) 16 South African Journal of Human Rights 206 at 213.

we might inquire into the process by which legal arguments are to be identified and appraised against specified legal and ethical criteria. Arguments are, as we have learned, constructed out of a set of indeterminate formal norms, pertinent facts, and informal logical devices; they are composed of both explicit and implicit premises. Given the absence of a logically complete and clearly stated argument, observers will have to reconstruct them out of a set of discursive practices. In the context of case law, for instance, we might be inclined to construct arguments out of, *inter alia*, recorded judgments and associated formal documents, such as *facta*. But recorded judgments obviously do not fully convey judges' actual lines of reasoning and, for some, they serve the contrary purpose, namely, to conceal or mystify the political or ideological bases of decision-making.¹¹⁴

Since TLP is concerned with the perspectives of non-state actors, this interpretive problem extends well beyond the good or bad faith of judicial reasoning. The law and literature movement, for instance, convincingly establishes that legal meaning is constructed, both consciously and otherwise, through the interaction of text, interpreter, and larger social structures.¹¹⁵ Each participant in a legal interaction and each observer thereafter will interpret legal judgements differently, even if the text of a decision does bear an approximate relation to a judge's reasoning. Toope and Brunnee insist that legal interaction is structured by shared understandings, but these relate, at best, to a small set

¹¹⁴ Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1997); David Kairys, "Law and Politics" (1984) 52 *George Washington Law Review* 243; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983); Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard Law Review* 1685.

¹¹⁵ Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge, Cambridge University Press, 2007); Ian Ward, "From Literature to Ethics: The Strategies and Ambitions of Law and Literature" (1994) 14 *Oxford Journal of Legal Studies* 389; Richard Weisberg, *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992); James Boyd White, *The Legal Imagination* (Boston: Little, Brown, 1973).

of conventions about legal interaction. They do not, and cannot, assign one settled “core” or universal meaning to a given legal text. Although conscious of these sorts of issues,¹¹⁶ Toope and Brunnée offer no conclusive standpoint from which analysts may reconstruct particular arguments out of a plethora of potential meanings. Consequently, the political and ideological power Toope and Brunnée wish to exclude from legal interaction may resurface at this analytical stage, when observers privilege some meanings over others. The arguments we reconstruct and analyze may bear little relationship to disputants’ values, beliefs, and positions.

Second, there are methodological difficulties associated with isolating the distinctive influence that international and comparative human rights have had on judicial reasoning and the broader meanings associated with a decision. The more we appreciate law’s intersections with multiple normative orders, the more challenging it is to disaggregate the former from the latter for the purpose of tracing the influence of specific norms.¹¹⁷ TLP certainly can and should be applied to the study of law’s intersections with normative orders other than international and comparative human rights. But it is hard to see why we should presumptively privilege international and comparative human rights over other classes of legal norms. If we are able to justify such a focus, how are we to assess their influence? Are we to correlate influence with explicit citations in recorded judgments? Alternatively, should we explore indirect and implicit influence through such

¹¹⁶ As is clear from their extended discussion of, and commitment to, social constructivism; Brunnée & Toope, *supra* note 2; Brunnée & Toope, *supra* note 75. See also, John Gerard Ruggie, “What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge” (1998) 52 *International Organization* 855; Alexander Wendt, “Anarchy is What States Make of It: the Social Construction of Power Politics” (1992) 46 *International Organization* 391; Peter Berger & Thomas Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, NY: Anchor Books, 1966).

¹¹⁷ William A. Bogart, *Consequences: The Impact of Law and its Complexity* (Toronto, Buffalo: University of Toronto Press, 2002).

channels as legal education¹¹⁸ or judges' personal histories, experiences and independent research? If so, are we still discussing something in the order of a distinctively "legal" influence tied to specific argumentative contexts?

Third, as suggested above, Toope and Brunnée have not altogether accounted for political and ideological power imbalances, even from an elevated theoretical plane. They place a lot of stock in the equalizing power of rationality, but this comes at the cost of devaluing classically non-rational components of argumentation, such as emotion and oratory. Surely these are essential features of persuasive argumentation, yet they are almost after-thoughts, as if their relevance depends on whether or not they are cognizable in terms of legal concepts and categories of thought. This raises all sorts of problems for those who hold different conceptions of rationality or who do not regard law as the quintessential form of rationality. Many feminists, for instance, would take issue with rigid distinctions between reason/emotion and the historical baggage that comes with reifying reason and rationality as the source of moral agency.¹¹⁹

Finally, we must consider the implications of TLP for the second pillar of the law of reception: the principle of respect for constitutional supremacy. How can the relevant and persuasive doctrine? I will address this issue in the concluding chapter.

F. Conclusion

In sum, a process-based conception of law helps us to appreciate the form and functions of the relevant and persuasive doctrine and, indeed, the informal factors that

¹¹⁸ For a small sampling on how legal education shapes legal practice in global and multicultural contexts, see: Harry Arthurs, "Law and Learning in an Era of Globalization" (2009) 10 *German Law Journal* 639; Peter Strauss, "Transsystemia – Are We Approaching a New Legal Langdellian Moment? Is McGill Leading The Way?" (2006) 24 *Penn State International Law Review* 763; Roderick MacDonald & Jason MacLean, "No Toilets in Park" (2005) 50 *McGill Law Journal* 721; H. Patrick Glenn, "Doin' the Transsystemic: Legal Systems and Legal Traditions" (2005) 50 *McGill Law Journal* 863

¹¹⁹ Karen J. Warren, "Critical Thinking and Feminism" (1988) 10 *Informal Logic* 31.

influence judges' decisions to (not) use international law generally. The doctrine has been appropriately designed to reduce hierarchical distinctions between binding/non-binding international human rights as well as between international/comparative human rights. Lingering concerns about the uses to which judges may put this doctrine have been provisionally met on theoretical grounds. To recapitulate, I have hypothesized that the distinctive logical form to persuasive arguments involving international and comparative human rights and the distinctive dialogical structure to legal argumentation both serve to constrain the projection of raw political and ideological power. I have also argued that the importance of actualizing human dignity and the fact that judges have consistently failed to abide by or correctly apply the presumption of conformity doctrine suggests that there is no good reason to insist on traditional doctrinal distinctions between binding and non-binding international human rights. This does not reduce the importance of conceptual and normative distinctions between binding and non-binding international human rights as well as between international and comparative human rights. To the contrary, there are a number of non-doctrinal factors that increase the persuasiveness of arguments that rely on binding international human rights and non-binding views of interpretive communities attendant to authoritative international regimes. However, the persuasive appeal of such arguments is unlikely to be improved by the doctrinal mandates akin to the presumption of conformity doctrine. It may even obscure the informal bases of judicial reasoning about these issues, thereby reducing the effectiveness of advocacy.

These arguments have been supported by a reading of Brunnée and Toope's interactional theory of international law. Brunnée and Toope provide a model for the rational analysis and appraisal of legal arguments and argumentation against a set of

ethical standards. These standards direct participants to make the generation of shared understandings their primary motive for engaging in legal interaction. When supplemented with professional rules and a range of recommended juristic tasks and roles such as trend description and factor analysis, Brunnée and Toope's ethical code of conduct enhances rational, fair, and inclusive interactions among a wide range of discursive communities. This has the dual effect of generating shared understandings among participants (and the broader discursive communities of which they are a part), and, making state law more responsive to non-state normative orders.

This theoretical framework is a heuristic device only; it is not supposed to describe actual decision-making. This on its own is a significant problem for a theoretical perspective that is supposed to help us actualize high priority values and interests in concrete contexts. But there is also a wide range of conceptual, normative, and methodological issues that have yet to be adequately addressed. It may be possible to address these issues, but I will not assume responsibility for defending Brunnée and Toope's theory. My interest is in applying their model, flawed as it is, to a set of decisions about the international and comparative human rights dimensions of Canadian national security law and policy. Hopefully, this will help us draw some conclusions about the nature and quality of decisions about the reception of international and comparative human rights. It may even be that we may use these conclusions to revise features of TLP and Brunnée and Toope's theoretical perspective.

Transnational Legal Process and the Reconstitution of the Canadian Security Certificate Regime

Chapter 4

A. Introduction

Although problematic, TLP and associated theoretical perspectives are useful in the study of the Canadian law of reception as both heuristic and critical devices.

Heuristically, they offer analytical frameworks that help us bring order to the processes by which international and comparative law shape norm-production in judicial settings. As critical devices, they allow us to evaluate the uses to which judges put international and comparative human rights relative to ethical and professional standards. Of course, case law will not correspond perfectly with theoretical or normative ambitions. This may be because international and comparative human rights simply have not had a significant impact on judicial reasoning, or because juridical discourses have been distorted by projections of ideological and political power. However, even (or especially) here, an idealized conception of the relevant and persuasive doctrine allows us to criticize divergent case law for failing to abide by core ethical standards and principles.

The purpose of this chapter is to test TLP's heuristic and critical utility by applying it to a case study, namely, how international and comparative human rights have influenced the judicial review of security certificate provisions and associated security intelligence practices. In existence since 1976, security certificates permit the government to name, detain, and deport non-citizens who pose a threat to, *inter alia*, national security. Long-considered to be "ordinary" -- or at least constitutionally permissible-- components

of immigration and refugee law,¹ certificates have become key components of an alternate legal system functionally oriented around the administration of post-9/11 national security policy. In this context, it is arguable that security certificates have become “extraordinary”, which is to say they fall outside the ambits of autonomous legal values, such as the rule of law and respect for rights.² Indicia of their extraordinary nature include: their functional connections with largely unregulated global security intelligence networks; the enhanced risk of torture and similar abuses faced by persons named in certificates post-9/11; the reduction of basic procedural rights *circa* 9/11, despite the likely grave consequences of deportation; and, links between security certificates and the human rights abuses suffered by Maher Arar, Abdullah Almalki, Ahmed El Maati, and other victims of extraordinary rendition.

This case study bears upon the law of reception because judicial review of security certificates and security intelligence practices has been facilitated by two, distinct juridical regimes: domestic law and policy, and, international and comparative human rights. Historically courts, administrative bodies and other legal institutions have relied on domestic norms when reviewing and regulating national security practices. However, these normative resources have become less effective in the context of security intelligence due to the executive’s invocation of a continuing or indefinite state of emergency following 9/11, the subsequent use of national security discourse to rationalize extraordinary measures, deep-rooted assumptions about the formal nature of certificate proceedings as well as the rights to which non-citizens are entitled, and threats

¹ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

² Graham Hudson, “Transnational Human Rights Advocacy and the Regulation of Global Intelligence Agency Cooperation in Canada” in Craig Forcese & Francois Crepeau, eds., *Terrorism, Law and Democracy: 10 Years After 9/11* (Canadian Institute for the Administration of Justice, 2012).

that have required Canada to integrate itself in global security networks that transcend the jurisdictional reach of domestic law and policy.

International human rights are arguably important resources in this context because they can help us fill up semantic and functional gaps in domestic law and policy. For instance, international human rights documents contain relatively clear criteria concerning when a nation may declare a state of emergency and when (and what) human rights may be curtailed to respond to that emergency. They also provide a fairly clear statement of the rights to which all human beings are entitled, regardless of citizenship. In fact, there is some evidence to suggest that Canadian courts have been using international human rights when reviewing Canadian national security law and policy. The Supreme Court of Canada, for instance, has regularly cited decisions by the Supreme Court of the United States, the United Kingdom House of Lords, the European Court of Human Rights, and other judicial bodies when reviewing such issues as the constitutionality of security certificate proceedings,³ the constitutionality of global security intelligence gathering and sharing,⁴ and the rights of Canadian citizens detained in Guantanamo Bay.⁵ Reviewing these cases, TLP theorists would predict that international and comparative human rights will have helped Canadian courts to better understand the full nature and global context of Canadian national security law and policy, to fill in semantic gaps in domestic normative materials that have not kept pace with changing contexts and practices, and to cooperate with international and foreign courts to fill in jurisdictional gaps that lie in the transnational space occupied by global intelligence networks.

³ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (“*Charkaoui I*”)

⁴ *Charkaoui v. Canada (Citizenship and Immigration)* (2008), 294 D.L.R. (4th) 478 (“*Charkaoui II*”)

⁵ *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125.

Using TLP and associated perspectives, I will show how international and comparative human rights norms were infused into court proceedings, namely, through the factual and legal submissions of parties to proceedings, judicial notice of official documents, international and foreign judgments and academic scholarship, and oral arguments as evidenced by video recordings of Supreme Court proceedings. I will argue that international and comparative human rights norms played a modest role in contextualizing the problems posed by security certificates as well as in motivating the Supreme Court to require changes in the ways in which security intelligence is collected, shared, retained and disclosed. I will qualify the normative significance of this claim, however, by making a distinction between international and comparative human rights perspectives, which are sourced in the typically critical views of non-state transnational human rights networks, and international and comparative human rights case law, about which courts have been somewhat “apologetic”⁶ and which they have sourced in positive law produced by foreign and regional courts. I will argue that recent international and comparative human rights case law grants the executive too much discretion in defining states of emergency and that this is likely to facilitate the normalization of extraordinary practices associated with security certificates. I will accordingly suggest that transnational human rights advocates would be well-advised to more fully exploit domestic experiences, institutional histories and wisdom.

It should be noted that the case study is significantly limited in numerous respects. Most importantly, it does not include a full empirical record of judicial reasoning nor all of the ways in which international and comparative human rights entered proceedings.

⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

Part of the reason for this has to do with the absence of direct empirical data about judges' actual reasoning, other than recorded judgments from which judicial reasoning may be inferred. As noted earlier, many, if not all, idealized argumentative models require analysts to reconstruct arguments out of discourses that unfold according to informal logic, assumptions and other directly unobservable factors. This carries with it a host of interpretive problems. There are also significant impediments to data collection in cases concerned with national security where, for obvious reasons, many facts and submissions are not made publicly available. When submissions were accessible, I found that international and comparative human rights were referenced only sporadically, although they played a much more prominent role in the oral arguments of many litigants and interveners. Finally, international and comparative human rights influenced the construction of many documents upon which litigants and judges relied, suggesting an indirect influence. The case study will for these reasons be fairly schematic in orientation, lacking compelling evidence for whether judicial attitudes towards security certificates have changed, the precise causes or influence of any such changes, the intended and actual effects of the Supreme Court's judgments and the extents to which international and comparative human rights have influenced the attitudes of lower court judges and other state officials. Despite these limitations, however, I maintain that the case study highlights the heuristic and critical merits of TLP and lays the groundwork for a future research agenda.

This chapter is divided into three sections. The first will review the changing nature of Canadian security intelligence practices and the implications these changes have for the constitutionality of security certificates. This section will also introduce us to

the various discursive communities that are engaged in debates about the human rights dimensions of security certificate provisions and practices and help us to firmly identify the base values that characterize their divergent positions. In the second section, I will reflect on how international and comparative human rights might help structure fair and reasoned debate about these issues. I will specifically suggest that international and comparative human rights can help minimize the distorting effects of national security language on rational argumentation about certificates by increasing state officials' adherence to professional rules relating to fairness, equality and adversarial challenge in the context of certificate proceedings. Finally, I will use a case study on disclosure in security certificate proceedings to test the hypothesis that Canadian courts have used international and comparative human rights to better protect the procedural and substantive rights of named persons. This case study will involve a loose comparative analysis of interconnected case law from Canadian courts, UK courts, and the European Court of Human Rights (ECtHR).

B. 9/11, Canadian Security Intelligence Practices, and the Constitutional Dimensions of Security Certificates

It is axiomatic that the terrorist attacks of 9/11 contributed to fundamental revisions in thinking about how to address the threats posed by transnational terrorism. To be sure, international terrorism had been a subject of domestic and international concern since at least the 1960's. However, technological advances, changes in global power dynamics, the fall of the Soviet Union, the subsequent proliferation of nuclear,

chemical, and biological weapons, greater mobility of people and goods across borders, enhanced communication capacities, and the aggravation of colonial and cold war-based regional conflicts have contributed to a fundamental change in the nature and gravity of terrorist threats.⁷ By the 1990's, non-state terrorist groups had become extremely well-funded, well-resourced, and well-organized, while forces of globalization had enhanced the capacity of these groups to deploy their resources to inflict large-scale damage across great distances.

Despite these obvious developments, and the warnings issued by certain members of the intelligence community, Western governments did little to adapt intelligence agencies' policies, priorities and practices to the new situation. In fact, many governments cut funding during this period, contributing to internecine competition between agencies struggling to justify their existence in a post-Cold War world.⁸ One of the 9/11 Commission's central conclusions on this point was that inefficiency, competition, and fragmentation within the intelligence community inhibited the American government's capacity to quickly identify and respond to the terrorist attacks of 9/11.⁹ Bob Rae made similar observations in his 2005 report on the bombing of Air India Flight 182 in 1985, noting that competition between the then-new Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP)

⁷ For a range of critical commentaries on the changing nature of terrorism in the post-Cold War era, see Gabe Mythen & Sandra Walklate, "Terrorism, Risk and International Security: The Perils of Asking 'What if?'" (2008) 39:2 Security Dialogue 221; T. Copeland, "Is the 'New terrorism' Really New?" (Winter: 2001) The Journal of Conflict Studies 7.

⁸ Richard J. Aldrich, "Beyond the Vigilant State: Globalisation and Intelligence" (2009) 35 Review of International Studies 889.

⁹ Thomas H. Kean, et al., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, (Washington D.C.: National Commission on Terrorist Attacks upon the United States. 2004) at 401-406; see also, Adam D. Svendsen, "The Globalization of Intelligence Since 9/11: Frameworks and Operational Parameters" (2008) 21:1 Cambridge Review of International Affairs; Michael Smith, "Intelligence-Sharing Failures Hamper War on Terrorism," (July 2005) Jane's Intelligence Review.

obstructed the flow of essential intelligence to requisite departments, agencies, and front-line workers.¹⁰

Influenced by these sorts of observations, Canada's post-9/11 national security policy has been designed to facilitate the performance of three sometimes inconsistent functions. First, it has helped government construct a tightly integrated security system that is notionally organized and directed by a range of centralized political and bureaucratic bodies.¹¹ A hallmark of this approach has been the blurring of the functional mandates assigned to civilian, law-enforcement, and military intelligence agencies, and a strengthening of their aggregate linkages to Cabinet through such institutions as the Cabinet Committee on National Security (chaired by the Prime Minister), the National Security Advisor to the Prime Minister (who is mandated to "improve co-ordination and integration of security efforts among governmental departments"),¹² and an "Integrated Terrorism Assessment Centre" (ITAC), which is located within Public Safety Canada and tasked with the intake, processing, and dissemination of intelligence from and to peripheral departments and agencies.¹³

Although in many ways successful, centralization has been limited by a second priority of post-9/11 national security policy – enhancing domestic intelligence agencies' integration into a number of poly-centric global intelligence networks. Of course, Canada has long been a member of various international intelligence regimes. However, post-9/11, global intelligence agency cooperation has followed the contours of multiple,

¹⁰ Bob Rae, *Lessons to be Learned: The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on Outstanding Questions with Respect to the Bombing of Air India Flight 182*, (Ottawa: Air India Review Secretariat, 2005) at 16-17.

¹¹ Canada. Privy Council Office. *Securing an Open Society: Canada's National Security* (2004) at 9.

¹² *Ibid.* at 9.

¹³ Online: Integrated Terrorism Assessment Centre at <http://www.itac.gc.ca/index-eng.asp> (date accessed: 20 August 2011).

informal “liaisons” with non-traditional allies, such as Pakistan, Morocco, and Afghanistan,¹⁴ sometimes in ways that suggest the absence of political control. For example, seemingly unauthorized cooperation between Canadian intelligence and law-enforcement officers and United States and Syrian counterparts outside formal intelligence and diplomatic channels contributed to the detention, deportation, and torture of Canadian citizen Maher Arar in 2002-2003. A commission of inquiry concluded that Canadian agencies had facilitated grave human rights abuses by sharing false or grossly inaccurate intelligence in violation of clear domestic and international laws as well as internal policies and guidelines.¹⁵ It also noted that these liaisons frustrated consular efforts by the Department of Foreign Affairs and International Trade’s to have Mr. Arar repatriated. This may be viewed as part of a larger trend towards “transgovernmentalism” which, as noted, describes formal and informal joint-governance initiatives between functionally differentiated institutions of two or more states, often with little input or oversight by non-participating institutions. In the Arar case, the intelligence and diplomatic communities’ performance of their respective roles and responsibilities vis-à-vis Syrian agencies frustrated the realization of goals common to all interested Canadian departments and agencies.

A third feature of post-9/11 national security law and policy in Canada has been the use of emergency discourse to justify heavy reliance on extraordinary measures, such as preventative detention, intrusive surveillance and extraordinary rendition.¹⁶ Legal and

¹⁴ D.S. Reveron, “Old Allies, New Friends: Intelligence-Sharing in the War on Terror”, (2006) 50:3 *Orbis* 453.

¹⁵ I will provide a more detailed review of the circumstances and implications of this example below.

¹⁶ For an excellent analysis of the nature and rhetorical uses of national security language, see Barry Buzan, Ole Waever & Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998) at 21-47

political theorists have long noted how executive agencies employ national security language to rationalize extraordinary measures that operate outside the confines of pre-existing legal rules and/or enduring legal values.¹⁷ Typically, invocations of exceptionality are persuasive because pre-existing rules have not been explicitly designed to address the novel and complex problems posed by emergencies, or because the government's responsibility to secure public safety and security may on occasion outweigh its duty to comply with clear but unduly restrictive laws.¹⁸ In such situations, legal institutions must decide whether a political community is indeed facing a public emergency and, if so, whether the extraordinary measures used to address this emergency are constitutionally permissible.

The purpose of this section is to provide a rough empirical account of how processes of intelligence gathering and sharing in Canada have changed post-9/11 and how this raises novel human rights issues in the context of security certificates. It will begin with a survey of Cabinet-led improvements to domestic intelligence agency cooperation, followed by a discussion of the nature and regulatory challenges posed by global intelligence agency cooperation. Particular attention will be paid to links between global intelligence practices and the experiences of Maher Arar. It will conclude with a look at the use of global intelligence as secret evidence in security certificate proceedings, which I connect to the experiences of Mr. Arar and the practice of extraordinary rendition.

¹⁷ David Dyzenhaus, "The State of Emergency in Legal Theory" in Victor V. Ramraj, Michael Hor & Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge; New York : Cambridge University Press, 2005) 65; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" (2003) 112 *Yale Law Journal* 1011.

¹⁸ For a good example of this line of reasoning, see Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

B. I. Domestic Intelligence Agency Cooperation

Historically, military and police agencies conducted the lion's share of Canada's intelligence work, growing in size, complexity, and political influence post-WWII.¹⁹ This remained the case until the early 1980s, when the RCMP's Security Service was investigated by the Royal Commission of Inquiry into Certain Activities of the RCMP (the Macdonald Commission) for engaging in a litany of illegal acts designed to curb radical Quebecois separatism and other supposed threats to national security.²⁰ Among the recommendations of the MacDonald Commission was that the Security Service be dismantled and replaced with an entirely civilian intelligence agency trained in intelligence acquisition, processing, and analysis, regulated by robust legal frameworks, and submitted to strong, centralized oversight by political bodies.

In 1984, the government followed this recommendation, creating CSIS. Since then, CSIS has been the agency with primary responsibility for domestic security intelligence work, with Communications Security Establishment Canada remaining a primary source of foreign signals intelligence. One of the comparative advantages of a civilian intelligence service is that it is held to lower standard of evidentiary disclosure and less stringent privacy standards than conventional law-enforcement agencies.²¹ Whereas law-enforcement agencies must demonstrate the "credibly-based probability" of past or future

¹⁹ Wesley K. Wark, "Canada and the Intelligence Revolution", in *Secret Intelligence in the 21st Century*, Heike Bengert et al., eds., (Frank Cass, 2003) 170.

²⁰ *Freedom and Security Under the Law: Second Report* (Ottawa: The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1981).

²¹ *Atwal v. Canada (Solicitor General)*, [1988] 1 FC 107 at 133-134; *Corporation of the Canadian Civil Liberties Association v. Canada (AG)* (1992), 8 O.R.(3d) 289 (Ont. Ct. (Gen. Div.) at para. 116. Part of the principle behind these cases is that information collected by CSIS is unlikely to be submitted as evidence against an accused in criminal trials, so affected persons' interest in liberty and privacy is lower.

criminal conduct in order to justify significant intrusions on privacy,²² CSIS must merely show reasonable suspicion that an individual or group is engaged in activities which pose a threat to Canadian national security.²³ Similarly, CSIS has been accorded wide discretion to deny to the public or affected individuals personal information collected during the course of its national security investigations.²⁴

Subsequent to 1984, CSIS' enabling legislation and policies underwent numerous changes to improve the regulation of its activities. First, the government created the Security Intelligence Review Committee (SIRC), an independent, external review body that reports directly to Parliament on the performance of CSIS.²⁵ Among other things, it is authorized to hear complaints against CSIS as well to review CSIS' activities.²⁶ SIRC's functions are supported by its entitlement to:

have access to any information under the control of the Service or of the Inspector General that relates to the performance of the duties and functions of the Committee and to receive from the Inspector General, Director and employees such information, reports and explanations as the Committee deems necessary for the performance of its duties and functions.²⁷

Second, Parliament amended the *CSIS Act* to require CSIS officers to acquire judicial authorization for certain, intrusive investigative techniques, following "stringent criticism" of the original CSIS bill that was lacking in this respect.²⁸ Finally, perhaps

²² Although the lower standard of "reasonable suspicion" justifies investigative stops and detentions, this does not expand powers of search and seizure beyond pat-downs to ensure the safety of officers and persons in the immediate area; *R. v. Mann*, [2004] 3 SCR 59; *R. v. Simpson*, [1993] 12 OR (3d) 182; 79 CCC (3d) 482.

²³ *Canadian Security Intelligence Services Act*, R.S.C., 1985, c. C-23, s. 12.

²⁴ Sections 19 and 21 of the *Privacy Act* mandate heads of governmental institutions to refuse to disclose personal information that is received in confidence from foreign nations and permit them to refuse to disclose information the disclosure of which would, in their estimation, be injurious to, inter alia, counter-terrorist activities; *Privacy Act*, R.S.C. 1985 c. P-21. The constitutionality of these provisions was upheld in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3. Similar provisions may be found in ss. 13, 15, and 20 of the *Access to Information Act* R.S.C., 1985, c. A-.

²⁵ The legislative framework for SIRC includes s. 6 and ss.34-46 of the *CSIS Act*.

²⁶ For a full list of its powers and duties, see *CSIS Act*, *supra* note 23, s. 38.

²⁷ *Ibid.* s. 39.

²⁸ Ian Leigh, "Secret Proceedings in Canada" (1996) 34:1 Osgoode Hall Law Journal 113 at 133; *CSIS Act*, *supra* note 23, ss. 21-28.

anticipating *Charter* challenges that had succeeded in the context of law-enforcement officers' powers of search and seizure,²⁹ but most directly due to specific controversies and recurring criticisms regarding warrant applications and surveillance practices,³⁰ CSIS created and then revised an internal review process with respect to the use of intrusive investigative techniques. Officers must now secure permission from a Warrant Review Committee before applying to the Federal Court for a warrant permitting the use of designated investigative techniques.³¹ However, these reviews only occur during the course of domestic intelligence activities; no similar reviews are required regarding the acquisition of intelligence received from foreign agencies. Officers must also seek approval from the Target Approval and Review Committee in order to target individuals and organizations for investigation, using standards outlined in s. 2 of the *CSIS Act*.³²

Although dividing security intelligence and policing functions no doubt is sensible, many observers believed that functional distinctions of this sort were "artificial, and that in fact the lines between the two were frequently blurred".³³ In an attempt to remedy this problem, the RCMP and CSIS signed a Memorandum of Understanding in 1984 that outlined the conditions under which the agencies would share intelligence and other information.³⁴ However, this agreement failed to ensure cooperation. For example, the Rae Report indicated that CSIS had deliberately failed to share essential information with the RCMP with respect to the Air India bombing and, what is more, it had even destroyed

²⁹ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265.

³⁰ Leigh, *supra* note 28 at 134.

³¹ Security Intelligence Review Committee, *Annual Report*, 1987-88; Canada. House of Commons, *In Flux but Not a Crisis: Report of the Special Committee on the Review of the Canadian Security Intelligence Service Act and Security Offences Act* (Queen's Printer, September 1990) at 14.

³² Security Intelligence Review Committee, *Annual Report*, 1986-87 at 36.

³³ Rae, *supra* note 10 at 12.

³⁴ *Ibid.*, at 12. CSIS is also authorized to disclose intelligence and other information to law-enforcement agencies for the purposes of facilitating an investigation and/or prosecution; see *CSIS Act*, *supra* note 22, s. 19.

crucial pieces of evidence, pursuant to internal policy.³⁵

The government reduced incentives for competition post-9/11 by increasing the funding and enlarging the responsibilities of both agencies and by trying to engender parallel or cooperative national security investigations.³⁶ The creation of ITAC, the Cabinet Committee on National Security, and a National Security Advisor contribute to the realization of this latter objective. It is reasonable to conclude that information exchange between CSIS and the RCMP has improved at least partly due to post-9/11 shifts in priorities. For example, in the aftermath of 9/11, CSIS and the RCMP were placed under enormous pressure to contribute to the identification of suspects and detection of possible future attacks.³⁷ Lacking the capacity to conduct full and effective investigations on its own, and recognizing that the identification and capture of persons involved in the 9/11 attacks was largely a law-enforcement matter, CSIS transferred files on suspected terrorists of note to the RCMP, along with primary (though not exclusive) responsibility for future investigations.³⁸ However, since anti-terrorism is directed towards both the prevention and punishment of terrorist acts, CSIS and the RCMP agreed to coordinate their efforts. Coordination was facilitated through periodic briefings and meetings as well as the provision of situation reports.³⁹

At first glance, parallel investigations and enhanced cooperation between CSIS and the RCMP appear to run counter to the fundamental recommendation of the MacDonald

³⁵Rae, *supra* note 10 at 16-17.

³⁶ *Securing an Open Society*, *supra* note 11 at 16-17; Martin Rudner, "The Globalization of Terrorism: Canada's Intelligence Response to the Post-September 11 Threat Environment" (September 2002) *Canadian Issues* 24.

³⁷ Canada, Parliament, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) [hereinafter the "O'Connor Report"] at 66.

³⁸ *Ibid.* at 66-67.

³⁹ *Ibid.* at 69.

Commission, namely, to maintain clear separations between security intelligence work and policing.⁴⁰ In 2008, the Supreme Court of Canada noted that, the “division of work between CSIS and the RCMP in the investigation of terrorist activities is tending to become less clear than the authors of the (MacDonald) reports...originally envisioned”.⁴¹ Should we therefore revise the regulatory frameworks applicable to CSIS and the RCMP in the context of national security investigations?

On the one hand, CSIS’ increasing role in furnishing Crown prosecutors with evidence to be used in trials suggests that it should be subject to more exacting rules governing privacy and disclosure in the context of criminal investigations and prosecutions. It follows that cases such as *Atwal*, which presumed clear functional distinctions between CSIS and law enforcement agencies, should be reconsidered.⁴² In addition to its direct involvement in criminal investigations and prosecutions, CSIS has been the primary source of evidence used in security certificate proceedings.⁴³ Security certificates are used to indefinitely detain suspected terrorists and submit them to extended secret trials in their absence. If a judge finds the certificate to be reasonable, the government may deport named persons to face persecution abroad and, in some instances, a substantial risk of torture or similar abuse. Although not formally criminal proceedings, the Supreme Court of Canada has found that certificate proceedings are analogous to criminal prosecutions by virtue of the impact they can have on an accused’s dignity, life, liberty, and personal security.⁴⁴

⁴⁰ This, of course, is not a necessary consequence. On this point, see *R. v. Ahmad*, [2009] O.J. No. 6153. For a contrasting view and concern for maintaining clear functional distinctions, see the O’Connor Report, *supra* note 37 at 312-315.

⁴¹ *Charkaoui II*, *supra* note 4 at para. 26.

⁴² These sorts of issues are being raised; see *Ahmad*, *supra* note 40; *R. v. Ahmad*, [2011] 1 S.C.R. 110.

⁴³ I will provide a more detailed overview of security certificates below.

⁴⁴ *Charkaoui I*, *supra* note 3.

On the other hand, although the RCMP has assumed greater responsibilities in national security investigations, it is not subject to review mechanisms similar to those applicable to CSIS. This is somewhat surprising, since review mechanisms applicable to CSIS were designed precisely to prevent the re-occurrence of rights abuses committed by RCMP officers during the course of security intelligence work. Further, the RCMP has only recently begun adequately training its officers in security intelligence work. As the O'Connor report amply demonstrated, lack of training, minimal oversight and review and pressure to produce results all contributed to the sorts of illegalities and abuse of rights in the Arar affair that led to the creation of CSIS in the first place.⁴⁵ If the RCMP is going to continue to engage in preventive national security investigations, there are good reasons to revise existing regulatory frameworks.

B. II. Global Intelligence Agency Cooperation

Generally speaking, global intelligence agency coordination takes two forms: multilateral and bilateral.⁴⁶ Multilateral intelligence frameworks are *formal* regimes that host long-term interactions between the intelligence agencies of more than two states. They are often codified, setting out a range of governing rules and principles relating to such matters as burden-sharing, technology-sharing, targeting and coverage, operational collaboration, access to intelligence assets, and wholesale intelligence sharing.⁴⁷ Multilateral arrangements provide a range of benefits, including the enhancement of trust,

⁴⁵ O'Connor Report, *supra* note 37 at 23-25, 71-72, 107-111, 118, 323-324, 332-343.

⁴⁶ For excellent pieces on multilateral and bilateral intelligence networks, see Aldrich, *supra* note 2; Reveron, *supra* note 14; Adam D. Svendsen, "Connecting Intelligence and Theory: Intelligence Liaison and International Relations" (2009) 24:5 *Intelligence and National Security* 700; Martin Rudner, "Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism" (2004) 17:2 *International Journal of Intelligence and Counterintelligence* 193; Glen M. Segell, "Intelligence Agency Relations Between the European Union and the U.S." (2004) 17:1 *International Journal of Intelligence and Counterintelligence* 81; Stéphane Lefebvre, "The Difficulties and Dilemmas of International Intelligence Cooperation" (2003) 16:4 *International Journal of Intelligence and Counterintelligence* 527.

⁴⁷ Rudner, *supra* note 46 at 195.

increases in collective strength and resilience, and more effective pursuit of common interests. Regular, policy-oriented interactions among leaders within the intelligence communities of participating states also contribute to long-range planning and priority-setting. Finally, as international legal institutions, networks structured within multilateral frameworks are more amenable to direction and control by heads of government and/or state and their representatives.

However, multilateral arrangements also involve a number of distinct disadvantages. First, the operation of formal institutional arrangements can be hindered by extraneous variables, including the domestic laws and policies of participating states, international dynamics and “regime collisions” (e.g. between the demands of various multilateral arrangements or between multilateral arrangements and international human rights),⁴⁸ and differences in the internal culture of participating intelligence agencies.⁴⁹ Second, although shrouded in secrecy, multilateral networks are designed to disseminate intelligence to a wide range of recipients, thus reducing individual intelligence agencies’ ability to control the precise locations to which their intelligence is sent. Shared intelligence may accordingly be kept generic by contributing agencies and, therefore, less useful, particularly with regard to ongoing operations.⁵⁰

While multilateral arrangements are useful in many respects, intelligence agencies often prefer a “well-cultivated and closely monitored bilateral arrangement rather than exchanges within a group”.⁵¹ Bilateral frameworks arise when intelligence agencies enter

⁴⁸ Gunther Teubner & Andreas Fischer-Lescano, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) 25:4 Michigan Journal of International Law 999.

⁴⁹ Lefebvre, *supra* note 46 at 529.

⁵⁰ Jennifer E. Sims, “Foreign Intelligence Liaison: Devils, Deals, and Details” (2006) 19:2 International Journal of Intelligence and Counterintelligence 195 at 202.

⁵¹ *Ibid.* at 202.

ad hoc relationships with agencies of a foreign country in relative autonomy from an over-arching international legal framework.⁵² Such relationships may be agency-wide, formally structured and set out in memorandums of understanding, or they may be informal, consisting in undocumented understandings between individuals or sub-groups within two or more agencies.⁵³ In either case, bilateral arrangements tend to be structured by the “third-party rule”, in which any intelligence or other information sent to a requesting agency may not be disclosed to a third-party without the sending agencies’ express authorization. This rule helps maintain the bilateral nature of the relationship and maintains trust.

It is often said that a defining feature of bilateral intelligence relationships is that they “operate within the framework of each partner’s foreign and domestic policies and legal systems” rather than an international regime *per se*.⁵⁴ Differences in domestic legal standards applicable within participating states may impede cooperation or, alternatively, it may incent agencies to find ways around accountability mechanisms. These issues have arisen more frequently post-9/11, as Canadian, US, and European agencies increasingly partner with Morocco, Syria, Afghanistan, and other non-traditional allies with poor human rights records.⁵⁵

Canada has asserted some level of control over bilateral arrangements by

⁵²Rudner, *supra* note 46 at 213; Lefebvre, *supra* note 46 at 533; Sims, *supra* note 50.

⁵³ Lefebvre, *supra* note 46 at 533.

⁵⁴ Rudner, *supra* note 46 at 214.

⁵⁵ Svendsen, *supra* note 9; Richard J. Aldrich, “Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem.” (2009) 24:1 *Intelligence and National Security* 26; Chris Clough, “Quid Pro Quo: The Challenges of International Strategic Intelligence Cooperation.” (2004) 17:4 *International Journal of Intelligence and Counterintelligence*: 601; Shlomo Shpiro, “Intelligence Services and Political Transformation in the Middle East,” (2004) 17:4 *International Journal of Intelligence and Counter Intelligence*, 575.

requiring that they be approved by high-ranking Cabinet Ministers.⁵⁶ Section 17 of the *CSIS Act*, for instance, requires that the Minister of Public Safety, after consulting the Minister of Foreign Affairs, approve CSIS' cooperation with a foreign government or institution. The Minister must take into account the possible impact of intelligence relationships on domestic law and policy, on public confidence, on international legal obligations springing from multilateral arrangements and on international human rights. Canadian intelligence agencies are also legally obligated to control the information they acquire through the course of their investigations. RCMP policy, for example, requires officers to consider why a requesting agency wants information, to ensure that the uses to which that information will be put are consistent with Canadian law and policy, to screen information for reliability, to notify or acquire approval from senior officers in most cases, to ensure that disclosure of information complies with Canadian privacy laws and to attach caveats to released information outlining the uses to which that information may and may not be put.⁵⁷ CSIS is constrained by similar policies and is, as we have noted, subject to regular reviews by SIRC.

Despite these measures, the governance of global intelligence agency cooperation has proven to be exceedingly difficult within Canada. Much of this problem has to do with tensions between the centripetal force exerted by governmental structures, laws, and policies, and the centrifugal force exerted by globalized threat environments. On the one hand, the intelligence community is part of a consolidated national security framework notionally structured by constitutional norms. On the other hand, it has been asked to perform functions that require it to immerse itself in polycentric, fluid, and largely

⁵⁶ For CSIS and the RCMP, this is the Minister of Public Safety Canada and the Minister of Foreign Affairs and International Trade. See Lefebvre, *supra* note 46 at 535.

⁵⁷ O'Connor Report, *supra* note 37 at 22-23, 103-108.

informal networks which transcend Canadian jurisdiction.

Intelligence officers, and presumably Cabinet members, will sometimes act as though the exigencies of counter-terrorism require the prioritization of questionable bilateral arrangements over adherence to legal rules. In other words, the ends will be taken to justify the means under certain circumstances. The O'Connor Commission Report illustrates these tensions well. As the public's most comprehensive source of information on global intelligence agency cooperation, the O'Connor Report was concerned with Canada's role in the US decision to detain and then deport Canadian citizen Maher Arar to Syria in 2002, where he was tortured for almost one year. The Commission found that the US had falsely identified Mr. Arar as a terrorist threat on the basis of inaccurate and misleading intelligence provided by the RCMP. In particular, the RCMP ignored policies governing inter-agency information exchange by transferring entire files in bulk format to US authorities without scrutinizing information for reliability, informing superior officers, or ensuring that they would not be used contrary to Canadian law and policy.⁵⁸ Perhaps the most serious of these omissions was the failure to screen information for reliability and to specify that the information would not be circulated to third-parties.⁵⁹ Together, these omissions resulted in Syria receiving highly inaccurate information from American authorities that implied Canada was indifferent to, if not fully supportive of, Mr. Arar's deportation.

The Commission concluded that breach of official law and policy was the result of a number of factors, including tremendous political pressure applied by the US and

⁵⁸ *Ibid.* at 23-24.

⁵⁹ The O'Connor Commission received conflicting testimony from investigating, managing, and supervising officers concerning whether unrestricted information exchange was a matter of mistaken assumptions about the requirements of policy or conscious decision to establish alternative, informal policies with respect to the Canadian-US intelligence relationship; *Ibid.* 109-111.

Canadian governments, lack of training for new counter-terrorism officers, and poor internal leadership, communication, and supervision. The Commission also concluded that Canadian authorities at the very least inadvertently facilitated the torture of Mr. Arar as well as Abdullah Almalki, another Canadian citizen detained in Syria, by sending Syria questions to be asked of the latter that implicated the former.⁶⁰ These questions were sent despite knowledge of Syria's human rights record and of the likelihood that each man was being or would be tortured.⁶¹ Although not directly mentioned in the report, it is possible that Canada was engaging in what has been called "extraordinary rendition" or "torture by proxy", whereby persons are illegally removed to foreign countries to be tortured, with a view to producing actionable intelligence.⁶² There is considerable evidence that Canadian intelligence agencies worked with the US in precisely this way with respect to Ahmad El-Maati, Abdullah Almalki and others.⁶³

B. III. Global Security Intelligence Practices and Extraordinary Measures: The Case of Security Certificates

Security certificates are a good example of the problems posed by global intelligence agency cooperation. In existence since 1976, the security certificate regime was reformulated in the 1990s and then again just prior to 9/11. Certificates are currently issued under the joint powers of the Ministers of Citizenship and Immigration and of

⁶⁰ *Ibid.* at 206-207.

⁶¹ *Ibid.* at 179-181.

⁶² "Torture by Proxy: International Law Applicable to 'Extraordinary Renditions'" (The Centre for Human Rights and Global Justice) December 2005.

⁶³ Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006).

Public Safety⁶⁴ (“the Ministers”) and are issued against permanent residents and foreign nationals whom the Ministers to be inadmissible to Canada on the grounds of national security, the violation of human or international rights, or engagement in serious criminality or organized crime.⁶⁵ Once issued, certificates authorize the detention of non-citizens pending a review of the reasonableness of the certificate by a Federal Court judge. Judges are required to order the continuation of a detention unless they are satisfied that the conditional release of a detainee would not be injurious to national security or endanger the safety of any person or that the detainee would be unlikely to fail to appear at a proceeding or for removal.⁶⁶

If a certificate is ultimately found to be reasonable, it stands as conclusive proof that the person named is inadmissible and becomes, in effective, a removal order.⁶⁷ However, during the course of a review on the reasonableness of a certificate, a named person may apply to the Minister of Citizenship and Immigration for protection as a refugee or person in need of protection.⁶⁸ In the event that the application is successful, the Ministers still may issue a “danger opinion”,⁶⁹ enabling deportation notwithstanding that the person is at substantial risk of persecution (which is consistent with international law)⁷⁰ and, in exceptional circumstances, torture and similar abuses (which is inconsistent

⁶⁴ The Minister of Public Safety (formerly the Minister of Public Safety and Emergency Preparedness) replaced the Solicitor General in this capacity in 2005; see *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, s. 4 as am. by R.S.C. 2005, c.38, s. 118, R.S.C. 2008, c.3 s.1.

⁶⁵ *Ibid.* s. 77(1).

⁶⁶ *Ibid.* s. 82(5).

⁶⁷ *Ibid.* s. 80.

⁶⁸ *Ibid.* s. 112.

⁶⁹ *Ibid.* s. 115(2)(b).

⁷⁰ *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969/6 (entered into force 22 April 1954, accession by Canada 2 September 1969), arts. 1(F), 33.

with international law).⁷¹

Thus, the certificate regime is one of the means by which domestic and global intelligence is put to practical use. Working under the direction of the Minister of Public Safety, CSIS provides the bulk of the intelligence and other information used in support of certificates. This information is collected pursuant to ongoing domestic investigations as well as from foreign sources. Given countries of origin, significant volumes of foreign intelligence concerning named persons come from non-traditional intelligence partners, such as Morocco, Syria, Egypt, and Algeria. The fact that named persons are physically removed to these countries to face arrest, detention, and possibly prosecution, highlights functional similarities between certificate and extradition proceedings, although much greater procedural safeguards attend the latter.⁷² In these ways, certificates protect Canadian national security and, by denying safe haven to alleged terrorists, help us to discharge our international legal obligation to “cooperate on administrative and judicial matters to prevent (and punish) the commission of terrorist acts” regardless of where they might have occurred.⁷³

Since most of the evidence supporting the Ministers’ allegations is derived from security intelligence, much of it is not disclosed to named persons or their legal counsel. In fact, until very recently, the Ministers enjoyed unfettered discretion to decide what information would be disclosed even to reviewing judges.⁷⁴ This discretion authorized Ministers to withhold exculpatory evidence, such that a judge might only see materials

⁷¹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, arts. 2,3,16; United Nations. Committee against Torture. Conclusions and Recommendations of the Committee against Torture: Canada, UN Doc. CAT/C/XXV/Concl.4 (2000) at para. 6(a); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 59-75.

⁷² Graham Hudson, “The Administration of Justice? Certificate Proceedings, *Charkaoui II*, and the Value of Disclosure” (2010) 48:1 *Alberta Law Review* 195.

⁷³ United Nations Security Council, 4385th Meeting, “Resolution 1373 (2001)” (S/RES/1373), 28 September 2001; United Nations Security Council, 4956th Meeting, “Resolution 1540 (2004)” (S/RES/1540), 28 April 2004; United Nations Security Council, 5261st Meeting, “Resolution 1624 (2005)” (S/RES/1624), 14 September 2000.

⁷⁴ The Supreme Court removed this discretionary authority in 2008, requiring Ministers to disclose all information on file relevant to named persons. Reviewing judges then possess the power to order disclosure of this information to named persons; *Charkaoui II*, *supra* note 4.

that supported the reasonableness of a certificate. For reasons not directly related to certificate proceedings, CSIS had adopted the policy of destroying its operational notes that were, in its estimation, no longer “strictly necessary” from the standpoint of ongoing investigations.⁷⁵ These notes included originals of interviews with named persons and intelligence received from foreign countries. This policy contributed to the absence of full disclosure, not least to reviewing judges.

Security certificates raise issues that are strikingly similar to those identified by the O’Connor Commission. For example, in May 2003, the Ministers issued a certificate against Adil Charkaoui, a Moroccan-born permanent resident. At this point, several proceedings commenced regarding the reasonableness of the certificate and Mr. Charkaoui’s detention. On the advice of his counsel, Mr. Charkaoui requested that proceedings be postponed and, in July, he unsuccessfully applied to the Minister of Citizenship and Immigration for protection as a refugee or person in need of protection, pursuant to provisions governing pre-removal risk assessments.⁷⁶ At the time, applications for protection had the effect of suspending the review of the reasonableness of the certificate.⁷⁷ Mr. Charkaoui’s application for protection was refused on August 6, 2004 and, on November 9, 2004, Noel J. scheduled the resumption of the review of the reasonableness of the certificate for February 21, 2005. However, upon hearing that Moroccan authorities had recently issued a warrant for Mr. Charkaoui’s arrest, Noel J. ordered that the Minister of Citizenship and Immigration reconsider Mr. Charkaoui’s request for protection. While this had the effect of suspending the resumption of the review of the reasonableness of the certificate scheduled for February, Noel J. properly proceeded to schedule a fourth detention review hearing for January 10, 2005.

⁷⁵ *CSIS Act*, *supra* note 23, s. 12

⁷⁶ *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 ss. 112-116.

⁷⁷ *Ibid.* s. 79.

However, on January, 5, 2005, the Ministers disclosed to a reviewing judge a summary of two interviews which were held between Mr. Charkaoui and CSIS on January 31 and February 2, 2002. Although CSIS had this summary in its possession in 2002, it failed to provide it to the Ministers either prior to their decision to issue the security certificate or immediately after the commencement of proceedings. The Ministers claimed that the document “had not been produced because of an oversight”.⁷⁸ They also asserted that the original interviews could not be disclosed because they had been destroyed consistent with CSIS policy. A summary of the interviews was passed to the court and Mr. Charkaoui in lieu of the originals.

At the same time, the Ministers submitted additional evidence that they had recently received from the Moroccan government. This evidence stated that Moroccan authorities had identified Mr. Charkaoui as a member of the Groupe Islamique Combattant Marocain (GICM), that the GICM is linked to al-Qaeda and is allegedly responsible for terrorist attacks in Casablanca and Madrid, on May 16, 2003 and March 11, 2004, respectively, that Mr. Charkaoui took educational and theological training in Afghanistan in 1998, that he was identified by the emir of the GICM, that he set up funds to support international terrorist cells and that he sent money and resources directly to the GICM.⁷⁹ As a result of these allegations, Moroccan authorities had issued an arrest warrant against Mr. Charkaoui and were anxious to have him returned to their jurisdiction.

Two interrelated normative issues are at play here. First, there are issues concerning the norms that apply to the receipt, retention, and disclosure of information,

⁷⁸ *Charkaoui II*, *supra* note 4 at para. 8.

⁷⁹ *Charkaoui (Re)* (2005), F.C. 149 at para. 27.

by Canadian agencies in the course of their interaction with countries that have poor human rights records. In Mr. Charkaoui's case, CSIS worked closely with Morocco, a country long recognized to engage in torture and other human rights abuses, particularly when dealing with alleged terrorists.⁸⁰ There is no evidence to suggest that CSIS made efforts to ensure that the investigative techniques used to generate evidence against Mr. Charkaoui were consistent with international or Canadian law or was credible.⁸¹ In fact, at the time, CSIS was under no serious obligation to do so.

Second, there are normative issues relating to the treatment Mr. Charkaoui would likely receive if deported to Morocco. Given Morocco's human rights record, implicating Mr. Charkaoui in terrorism and attempting to deport him exposed him to the substantial risk of torture or similar abuse. Canada is internationally obligated to never deport a person to face a substantial risk of torture, even if such persons pose a national security risk. Generally speaking, parliament has implemented this international obligation, but has made an exception in the statute for persons named in a valid certificate.⁸² The Supreme Court similarly refused to give full effect to international human rights in this regard, ruling in *Suresh v. Canada* that the executive may, in "exceptional circumstances", deport persons to face the substantial risk of torture.⁸³ In the absence of meaningful disclosure and adversarial challenge in certificate proceedings,⁸⁴ the government runs the risk of exposing potentially innocent persons to face torture on the

⁸⁰ Human Rights Watch. "Human Rights at a Crossroads" (October 2004) Vol. 16, No. 6(E), online: Human Rights Watch <http://www.hrw.org/reports/2004/morocco1004/> (date accessed: 11 August 2011); Human Rights Committee, 82nd Session, "Concluding observations of the Human Rights Committee: Morocco" (CCPR/CO/82/MAR1), 1 December 2004 at paras. 10, 14m 15-17, 19-21. For a more recent report, see, Amnesty International, Annual Report 2009, online: Amnesty International <http://report2009.amnesty.org/en/regions/middle-east-north-africa/morocco> (date accessed: 11 August 2011).

⁸¹ Parliament recently amended IRPA to preclude the admissibility into certificate proceedings of information believed on reasonable grounds to have been acquired, if even indirectly, through the use of torture or similar abuse; see the *Immigration and Refugee Protection Act*, *supra* note 64, s. 83(1.1). However, intelligence received through less egregious but still unlawful techniques is still admissible.

⁸² *IRPA*, *supra* note 64, s. 115.

⁸³ *Suresh*, *supra* note 71 at paras. 59-75.

⁸⁴ Significant improvements have been made in this regard such as through the incorporation of a "special advocate" regime into IRPA. I will review the nature and quality of this regime below.

basis of misinformation and circumstantial evidence, much as the American authorities had done by rendering Mr. Arar to Syria.

C. Filling in the Gaps: International and Comparative Human Rights and Constitutional Learning

In many ways, the legal dilemmas posed by post-9/11 intelligence practices are not new. Legal and political theorists have long observed that law loses its effectiveness during times of real or perceived crisis, as executive agencies employ extraordinary measures that are not, strictly speaking, justified by or based on pre-existing law.⁸⁵ The legitimacy of such measures tends to be tested against political standards and, more practically, successfully invoked through the use of national security language and the exploitation of legal ambiguities or “indeterminacy”.

“Legal indeterminacy” describes the inability of law--no matter how clearly and definitely it may be described-- to determine a single, incontestable solution to any legal problem.⁸⁶ It is caused by the dynamic and open-textured nature of legal texts, which yield a plurality of possible conclusions depending on how one interprets and presents legal and factual premises. As noted in earlier chapters, we can adopt a range of theoretical and normative stances on legal indeterminacy. Critical observers, such as radical legal realists, insist that judicial decisions are typically based on political or ideological assumptions that reinforce relations of domination, which results in the virtual collapse of the law/politics distinction.⁸⁷ More optimistic observers --a category into which one might place Koh, Toope and Brunnée -- would counter that indeterminacy provides judges with an opportunity to use moral, ethical, and other non-state normative

⁸⁵ Dyzenhaus, *supra* note 17; Gross, *supra* note 17.

⁸⁶ The problem of normative indeterminacy was perhaps most famously iterated by such legal realists as: Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 *Harvard Law Review* 457; Herman Oliphant, “A Return to Stare Decisis” (1928) 14 *American Bar Association Journal* 71; Underhill Moore & Theodore Hope, “An Institutional Approach to the Law of Commercial Banking” (1929) 38 *Yale Law Journal*; Karl Llewellyn, “A Realistic Jurisprudence: The Next Step” (1930) 30 *Columbia Law Review* 431; Karl Llewellyn, “Some Realism about Realism: Responding to Dean Pound” (1931) 44 *Harvard Law Review* 1222; Edward S. Robinson, “Law: An Unscientific Discipline” (1934) 44 *Yale Law Journal* 235

⁸⁷ David Kairys, “Law and Politics” (1984) 52 *George Washington Law Review* 243.

frameworks to enhance the “congruence” of state law and ambient social values, practices, and expectations;⁸⁸ a process I will describe as “constitutional learning”. In the former instance, judges use the values and beliefs of executive officials and other state authorities as bases of a decision, while in the latter instance they use the values and beliefs of non-state discursive communities and individuals most directly affected by state law. Implied in the optimistic view is that legal interaction is concerned with generating understanding and that judges will use their interpretive freedom to steer law towards the protection and promotion of constitutional values such as respect for rights and the rule of law. Also implied is that there exist adequate institutional “pathways” or vectors through which desirable public values, beliefs and expectations may find their way into discourses. As noted earlier, these pathways function best when participants to legal process adhere to professional rules and principles that insulate dialogical interaction from the projection of raw political and ideological power.

In normal situations, either of these perspectives is tenable. In times of emergency, however, critical perspectives may seem more plausible. This may be because an emergency poses novel and complex problems the solutions to which lawmakers have not contemplated. Until such time as legal institutions produce workable laws, executive agencies have to base their decisions on non-legal criteria more germane to their areas of expertise. Dialogical rules that normally enhance openness and that slow down decision-making in order to submit argumentative positions to critical reflection become less influential than they otherwise might be; the unilateral decisions of executive officials increase in frequency and influence while critical positions are marginalized. Alternatively, there may be definite procedural and substantive rules pertinent to the resolution of problems that arise during an emergency, but the executive may consider

⁸⁸ Jutta Brunnée & Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:19 *Columbia Journal of Transnational Law* 19 at 49; Gerald J. Postema, *Implicit Law* (1994) 13 *Law and Philosophy* 361; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (Cambridge University Press, 1989)

these rules to be inappropriate or impractical under the circumstances. In this situation, so-called “strategic maneuvering” increases in frequency and influence, as national security language may become relatively more powerful than that of human rights. When iterated in secretive and relatively exclusive judicial proceedings, such as certificate proceedings, national security discourse helps executive officials rationalize actions that, in normal situations, might be more effectively criticized as illegal or immoral. This practice is exemplified in the attempt by the Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee to expansively interpret the legal meaning of “torture” to help legitimize questionable interrogation techniques during the so-called “War on Terror”.⁸⁹

Of course, parliament and the judiciary still have a role to play in times of crisis. In particular, they must decide how to react to invocations of exceptionality and the deployment of extraordinary measures.⁹⁰ Parliament, for example, could amend ordinary, statutory law to more expressly prohibit, or alternatively to legalize, extraordinary actions *post-facto*. In the former case, one would rightly question the efficacy of these rules: would they lead to changes in executive conduct or stand, at best, as symbolic affirmations of the rule of law?⁹¹ In the latter instance, one should query whether the “normalcy” formally provided *post-facto* by law legitimates practices that run counter to enduring legal values, such as human rights and the rule of law.⁹² Emergency situations can pose a stark choice between upholding the symbolic value of law and promulgating rules that may mask “substantial damage to the rule of law” but which at least are comparatively effective.⁹³

These are the sorts of considerations Canadian courts have made when reviewing

⁸⁹ William Ranney Levi, “Interrogation’s Law” (2009) 118 Yale Law Journal 1434.

⁹⁰ John Ferejohn & Pasquale Pasquino, “The Law of Exception: A Typology of Emergency Powers” (2004) 2 International Journal of Constitutional Law 210.

⁹¹ Even if purely symbolic, there may be value in defending the rule of law; see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).

⁹² Gross, *supra* note 17 at 66.

⁹³ Dyzenhaus, *supra* note 17 at 72.

the constitutionality of national security law, policy, and practices. Of course, constitutional norms are as indeterminate as any other legal norms, if not more so. But courts seem to have filled in logical and semantic gaps in constitutional texts by relying on international and comparative human rights, suggesting that a TLP perspective on how judges can and do deal with indeterminacy even in times of crisis is tenable. In particular, we may suppose that international and comparative human rights norms help constrain the projection of political and ideological power in two ways. First, they reinforce the importance of maintaining adherence to professional rules that govern how adjudicative proceedings ought to be structured, thereby maintaining limits on the distorting effects which national security discourse can have on critical argumentation. Second, and more substantively, they provide a set of clear, definitive criteria concerning when and how human rights may be limited for reasons of national security. Legal definitions of and justifications for torture, for instance, will typically require one to reference international legal texts the meaning of which is clarified by multiple interpretive bodies, such as the Committee Against Torture.

Obviously, what kind of doctrinal approach they take to the law of reception will influence the relative ease with which judges may rely on international and comparative human rights in these procedural and substantive senses. TLP predicts that the relevant and persuasive doctrine is the most appropriate approach from a human rights perspective. No more determinate than other legal norms, and not always “binding”, international and comparative human rights texts nonetheless stand as relatively stable clusters of meaning that, when connected to each other, help triangulate points of common or shared meaning. When viewed in global context, this is a function that *Charter* rights do not perform; a presumption of minimal protection approach would simply invite courts to reduce the scope and content of binding international human rights in the same way they would reduce the scope and content of *Charter* rights. What would constrain this practice if not doctrine? In keeping with Toope and Brunnée’s theory, we

might predict that diverse discursive communities connected to international and comparative human rights regimes can help facilitate and constrain the interpretation of domestic legal texts by establishing and reinforcing shared understandings concerning matters of both procedure and substance. This, in turn, helps facilitate courts' learning about the nature and context of a problem, the bodies of rules, principles, and standards that bear on an issue, and the procedures by which political power may justifiably be exercised. Shared understandings of this sort also constrain courts' capacity to uncritically reduce the scope, content, and applicability of rights; but these interpretive constraints are not accessible if we do not blur boundaries among binding international human rights, non-binding international human rights, and comparative human rights.

International human rights documents, when interpreted by discursive communities, contain clear criteria concerning when and by what procedures human rights may be limited in order to contend with a national emergency. Article 4(1) of the *International Covenant on Civil and Political Rights* provides a typical example:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁹⁴

This sort of provision requires governments to expressly and officially declare a state of emergency and imposes limits on what kinds of extraordinary measures may be subsequently taken. In addition to ensuring that rights limitations are proportionate to the harm being avoided, there are absolute bars on derogations from certain rights, including rights to equality and non-discrimination, to life, and to be free from torture or similar abuses.⁹⁵

International treaty bodies as well as international and foreign courts give greater depth to these provisions by commenting on whether extraordinary measures are justified

⁹⁴ *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

⁹⁵ *Ibid.*, art. 4(2)

in particular cases. To begin, this requires the executive to tender justifications for extraordinary measures in terms that are meaningful within a human rights discourse. Interpretive communities connected to international and comparative human rights regimes then scrutinize these justifications against autonomous legal values, standards and principles. This leads to the progressive filling in of legal gaps, as human rights norms are concretized and specified in the context of particular public emergencies. Ultimately, this discursive process helps compensate for legal indeterminacy in domestic norms, lending parliament and judges a richer array of normative materials upon which to rely when reviewing executive actions and assertions. It can also help motivate judges to ensure that executive officials adhere to professional rules that promote fair and critical argumentation, in effect limiting the use of extraordinary legal processes such as secret trials. Indeed, human rights-based discursive communities have on a number of occasions commented directly on how Canada's role in global intelligence agency cooperation and use of secret legal proceedings have affected its human rights record and how national security and human rights may be more effectively balanced.⁹⁶ As we will soon see, Canadian courts can also rely on the judgments of foreign courts that have reviewed the legality of similar practices and proceedings in other states.

Finally, a human rights perspective is closely linked to the notion of "human security", which situates individual persons and communities, rather than states, as the referents of security discourse.⁹⁷ This resonates with the kind of open, fluid and poly-centric argumentative interaction favoured by TLP theorists, highlighting that compliance with rules that protect equality, criticism and fairness in legal proceedings is all the more

⁹⁶ International Commission of Jurists, "Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights" (Geneva, 2009) at 67-73; Human Rights Committee, Eighty-fifth Session, "Concluding Observations of the Human Rights Committee: Canada", CCPR/Can/Co/5 20 April 2006, at paras. 14-16; Committee Against Torture, Thirty-fourth Session, "Conclusions and Recommendations of the Committee Against Torture: Canada" CAT/C/CR/34/Can (7 July 2005) at para. 4.

⁹⁷ Buzan *et al.*, *supra* note 16; Commission on Human Security, *Human Security Now*. (New York: United Nations, 2002), Keith Krause & C. Michael Williams, "Broadening the Agenda of Security Studies: Politics and Methods", (1996) 40:2 *Mershon International Studies Review* 229.

important in times of perceived crisis. It also alters the purchase of securitizing language, which ordinarily depoliticizes executive action and insulates intelligence activities from political or legal contestation. If successfully invoked, human rights language can improve judges' willingness to constrain executive discretion concerning such issues as whether we are operating in an exceptional moment and, if so, what extraordinary measures are justified.

In sum, international and comparative human rights offer a measure of continuity necessary for navigating through changing regulatory environments, while also providing a package of language and norms suitable for constraining the arbitrary exercise of executive power. Functionally, they enable domestic interpretive communities to contend with legal indeterminacy in exceptional moments, offering a plurality of legal rules, principles, and standards appropriate to the judicial review of national security law and policy. Rhetorically, and dialogically, they strengthen jurists' argumentative position vis-a-vis an executive, helping to ensure that legal indeterminacy -- which can be a good thing-- is used to protect and promote human rights rather than to rationalize relations of domination. Conceptually, international and comparative human rights resonate with autonomous legal values fundamental to the Canadian constitutional order, rendering judicial reliance on them both sensible and justifiable. Since classical doctrine is unduly restrictive with respect to the kind of human rights upon which judges may rely, the relevant and persuasive doctrine is the most appropriate approach to the law of reception when dealing with the human rights dimensions of Canadian national security law, policy and practices. The presumption of minimal protection is a less compelling option, since we can expect that a court that is willing to reduce the scope, content, and applicability of a *Charter* right to suit executive discretion would do the same to a binding international human right. The constraint on this practice is to be found, not in doctrinal mandates to treat binding international human rights as *Charter* rights, but in judges' immersion in relatively stable structures of meaning characteristic of non-binding human rights norms

(international and comparative) the deviation from which would render a judgment less principled and persuasive.

D. Putting Theory to Practice: International and Comparative Human Rights in Canadian Courts

Although in existence only since 1976, certificates nonetheless have achieved extraordinary notoriety for their procedural flaws (e.g. lack of disclosure and adversarial challenge) and substantive effects (e.g. discrimination against non-citizens and/or Arab-Muslims, indefinite detentions, deportation to face torture, etc.). They have become a conspicuous cornerstone of an alternate legal order that facilitates and, to a lesser extent, constrains executive discretion over matters of national security.

The utility of certificate proceedings in the context of anti-terrorism depends on global intelligence cooperation, both in terms of evidence to be used against named persons and in terms of the actionable intelligence received from the countries to which named persons are deported. In many of these areas, legal rules have been designed to enhance executive discretion and to expedite the judicial review of executive decision-making. For these reasons, security certificates are a prime source of the problems raised by post-9/11 security intelligence practices and bear a disconcerting similarity to the processes leading to the extraordinary rendition of Mr. Arar and other Canadians. In this section, I will examine how engagement with international and comparative human rights during *Charter* reviews of certificate provisions and practices have helped courts “learn” to better regulate aspects of global intelligence agency cooperation. This will include an appraisal of whether international and comparative perspectives have helped protect and promote human rights in this context or, alternatively, whether they have helped normalize what are in many respects extraordinary measures.

D. I. National Security Confidentiality and International and Comparative Human
Rights in the Federal Court (of Appeal) of Canada

As mentioned, security certificate provisions facilitate executive discretion over the identification, detention and deportation of suspected terrorists. The procedural and substantive rules that have constrained the exercise of this discretion have changed considerably since 1976. In their original form, certificate proceedings were overseen by the Security Intelligence Review Committee, an independent body of national security experts mandated to review CSIS. Decisions about the issuance of a certificate were, of course, made by the government, but SIRC and its legal counsel scrutinized and challenged the government's allegations, issuing a recommendation about whether a certificate should be issued.⁹⁸ SIRC's recommendations and the government's decision to issue a certificate were subject to judicial review by the Federal Court.⁹⁹

As in contemporary proceedings, SIRC-based proceedings were often conducted in the absence of affected persons, who were also denied access to confidential information. However, SIRC and its legal counsel claimed the authority to access all information on the government's file relevant to a certificate, to subpoena witnesses, and to communicate with affected persons throughout the course of proceedings. Legal counsel consisted primarily of SIRC in-house counsel and "legal agents" whose primary role was to ensure "SIRC's fair conduct of an investigation".¹⁰⁰ However, outside counsel could be employed to help with workload or to conduct aggressive cross-examinations that might call SIRC's impartiality into doubt were they conducted by in-house

⁹⁸ For a comprehensive treatment of the SIRC regime and its functions in the context of security certificates, see Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990) 3 C.J.A.L.P. 173.

⁹⁹ *Al Yamani v. Canada (Solicitor General)*, [1995] F.C.J. No. 1453 (FCTD); *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] F.C.J. No. 1160 (FCA).

¹⁰⁰ Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (Ottawa: Faculty of Law [Common Law Section], University of Ottawa, 2007) at 9.

counsel.¹⁰¹ Although time-consuming, this process helped balance national security confidentiality with meaningful procedural fairness, disclosure and adversarial challenge.

Over the course of the mid-1990's, parliament gradually eased SIRC out of this role, replacing it with the Federal Court. Just prior to 9/11, parliament granted the Federal Court exclusive responsibility for reviewing the reasonableness of all certificates and certificate-based detentions. Parliament instructed judges to conduct proceedings "as informally and expeditiously" as possible, to receive into evidence anything that, in their opinion, was reliable and appropriate, even if it is inadmissible in a court of law, and to base their decisions on that evidence.¹⁰² At the request of the Ministers, judges were required to hear evidence in the absence of the public, the named person, and his/her counsel, if the disclosure of such evidence could be injurious to national security or the safety of any person.¹⁰³

The Federal Court's enhanced role implied that executive discretion was being made subject to greater review, particularly since the court's judgments are legally binding while SIRC's views were merely advisory. However, the Federal Court was not expressly granted, nor did it assume, many of the powers that SIRC had assumed. This is to say that the court did not appoint *amicus curae* to access secret evidence, subpoena witnesses, attend secret hearings to advocate on behalf of a named person or communicate with named persons throughout a proceeding.

Shortly after 9/11, transnational human rights advocates challenged the constitutionality of certificate provisions on the ground that they undermined named persons' s. 7 rights to a fair trial (among other *Charter* rights). In making these claims, advocates relied on a mixture of historical and international and comparative law arguments. Historical perspectives included criminal law principles regarding disclosure,

¹⁰¹ *Ibid.* at 8.

¹⁰² IRPA, *supra* note 64, ss. 83 (a)(h-i).

¹⁰³ *Ibid.*, s. 83(c)

procedural fairness, and adversarial challenge, the proven merits of the SIRC system in balancing national security confidentiality and rights, and other similar institutional arrangements, such as that adopted by the O'Connor Commission. International and comparative legal perspectives were rooted primarily in UK and ECtHR jurisprudence concerning the legality of national security-based deportation proceedings similar in kind to certificate proceedings. This jurisprudence was not, strictly speaking, "binding" as it flowed from an exclusively European human rights regime. Its successful invocation therefore depended on the authority of the relevant and persuasive doctrine and the persuasive appeal of analogical reasoning.

Indeed, underscoring Toope and Brunnée's interactional theory of law, transnational human rights advocates' primary rhetorical strategy was to analogize the 9/11 certificate regime to a similar UK regime that the ECtHR had found to be incompatible with the *European Convention on Human Rights* (ECHR) in its 1996 judgment, *Chahal v. The United Kingdom*.¹⁰⁴ As with Canadian security certificates, the UK regime granted the executive extensive discretion to deport non-citizens that it believed threatened national security. It similarly allowed the government to base its decisions about deportation on secret evidence the reliability and sufficiency of which was not subject to independent review or adversarial challenge. The government did allow affected persons to appeal decisions to a special "advisory panel", which was chaired by a judge and a senior immigration official.¹⁰⁵ However, the panel was only authorized to issue advisory opinions about the merits of decisions, and typically used a low standard of review. Although given an opportunity to make representations, to call witnesses, and to seek assistance from "a friend" during advisory proceedings, deportees were not entitled to legal representation, to knowledge of representations made about them by others, or to be informed of the advice the panel gave to the government.

¹⁰⁴ [1996] ECHR 54.

¹⁰⁵ *Ibid.* at paras. 29-32, 60.

One of the ECtHR's primary concerns was that persons subject to this system would face the substantial risk of torture or similar abuse if deported after having been labeled national security risks. After clarifying that the UK may not under any circumstances deport persons to face torture,¹⁰⁶ the ECtHR held that the use of confidential evidence in the absence of meaningful adversarial challenge violated Article 5(4) of the ECHR.¹⁰⁷ Interestingly, the ECtHR relied on the then-operative SIRC system to demonstrate that an alternative, less restrictive process could have been used in the UK.¹⁰⁸ While conscious of the necessity of secrecy in national security proceedings, the ECtHR demanded that there be an adjudicative framework sufficiently distanced from the executive, capable of ensuring that investigations and decisions were made fairly, and empowered to provide remedies for human rights abuses. This demand required that decisions about the deportation of national security risks be preceded by argumentative interactions that reflect principles of equality, criticism/adversarial challenge and procedural fairness; principles that ideally minimize the distorting effects of national security discourse on legal decision-making.

In response, the UK introduced a Special Immigration Appeals Commission (SIAC), which it loosely modeled after the SIRC system. Positively, it provided persons facing deportation for reasons of national security with security-cleared special advocates mandated to represent their interests during secret hearings. However, the UK omitted from the SIAC model many features characteristic of the SIRC system. First, special advocates were not authorized to subpoena documents and witnesses, whereas SIRC had access to all information on file relevant to a case. UK special advocates have been restricted to the use of information the government has prepared for the SIAC, which is unlikely to be exculpatory in nature. Second, the UK prohibits special advocates from communicating with detainees after having accessed classified documents, whereas SIRC

¹⁰⁶ *Ibid.* at paras. 95-107.

¹⁰⁷ *Ibid.* at paras. 124-133.

¹⁰⁸ *Ibid.* at para. 144.

counsel possessed the power to communicate with named persons throughout the entirety of proceedings. This power was an essential part of the SIRC regime, as it enabled secret counsel and named persons to clarify misunderstandings, explain circumstantial evidence and modify legal strategies. Third, UK special advocates were denied adequate resources and administrative support and prohibited from networking with other advocates. Finally, the SIAC was composed of judges as well as immigration officials, whereas SIRC was staffed entirely by laypeople with expertise in national security, intelligence, and human rights. While advantageous in some respects, the inclusion of the judiciary has led to power struggles between legal and national security experts, with one well-respected expert having resigned as a result.¹⁰⁹

Drawing attention to these well-documented shortcomings,¹¹⁰ transnational human rights advocates analogized the 9/11 certificate regime to the UK's pre-*Chahal* deportation model, emphasizing that Canada was dismantling rights protections at the same time as the UK was adding them. Yet, the UK's SIAC model was still defective in important respects and, at the time *Charkaoui I* was decided by the Federal Court, it was not clear whether it was wholly compatible with the ECHR. International and comparative human rights served as a useful point of relevance, but the old SIRC regime remained the best benchmark against which the 9/11 certificate regime could be measured.

The Federal Court was not persuaded by human rights advocates' historical and comparative law arguments, ruling that reviewing judges in Canada were capable of effectively deciding on the basis of the facts and law relatively free from executive

¹⁰⁹ Brian Barder, "On SIAC" (2004) 26:6 London Review of Books 40.

¹¹⁰ Forcese & Waldman, *supra* note 100. United Kingdom, House of Commons and House of Lords, Joint Committee on Human Rights, "Review of Counter-terrorism Powers, Eighteenth Report of Session 2003-2004" HL 158, HC 173 (4 August 2004) at para 40; United Kingdom, House of Commons, Constitutional Affairs Committee, "The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates-Seven Report of Session 2004-2005" Vol. I, HC 323-I (3 April 2005)

interference.¹¹¹ This position depended on an unarticulated distinction between the formal, legislative scheme and the informal, discretionary features of the certificate regime. Formally, the 9/11 certificate regime more closely resembled the UK's advisory panel than the SIRC model (or even the SIAC model), as the Federal Court was neither expressly granted nor claimed the powers that had enabled SIRC and its counsel to effectively perform an adversarial role. If the UK's advisory system fell well below international human rights standards, the post-9/11 certificate regime would do so as well. Looking beyond legislative language, however, the Federal Court asserted that reviewing judges possessed the legal expertise, requisite experience with security intelligence matters, and the will to rigorously challenge government lawyers and witnesses. This informal or discretionary dimension was, in the court's view, sufficient to bring the certificate regime into conformity with constitutional – if not international-- values associated with human dignity and the rule of law. Otherwise put, reviewing judges were trusted to secure compliance with professional rules and principles protecting equality, criticism and fairness, even though legislation specifically mandated that argumentation be expedited and relatively one-sided.

D. II. National Security Confidentiality and International and Comparative
Human Rights in the Supreme Court of Canada

On appeal, the Supreme Court overruled aspects of the Federal Court's rulings, holding that reviewing judges were not adequately positioned to decide on the basis of the facts or law and, accordingly, that certificate provisions unjustifiably infringed named

¹¹¹ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 32; *Charkaoui v. Canada (Minister of Citizenship and Immigration)* (2004), F.C.A. 421.

persons' s. 7 right to a fair trial.¹¹² A threshold issue was whether s. 7 principles germane to criminal law should be applied to certificate proceedings which, to recall, are formally a part of immigration and refugee law. The government argued that parliament should be held to lower constitutional standards in the design of certificate proceedings because these proceedings are administrative in nature and because non-citizens do not enjoy an unqualified right to remain in Canada. These were arguments that had proven to be highly persuasive in the past.¹¹³

Transnational human rights advocates responded that immigration and refugee law had effectively been subsumed within an alternative legal system rooted within global counter-terrorism law and policy. Although historically concerned with deportation, certificates were now performing functions akin to extradition, namely, to expose alleged terrorists to arrest, prosecution, and/or torture abroad. Again invoking analogical reasoning, advocates noted that the ECtHR ruled in *Chahal* that the severe impacts of national security-based deportations on individual rights require a high level of procedural and substantive rights.

Historically, courts have often sided with the government and parliament on these issues. In *Chiarelli*, for example, the Supreme Court upheld the constitutionality of the SIRC system largely on the basis that certificate proceedings are administrative in nature and that non-citizens do not possess an unqualified right to enter and remain in Canada.¹¹⁴ However, this trend in legal reasoning was refracted when viewed through

¹¹² *Charkaoui I*, *supra* note 3.

¹¹³ *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077. For critical commentary on this point, see Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005) 54 U.N.B.L.J. 235.

¹¹⁴ *Chiarelli*, *supra* note 1.

four factual and normative lenses that we may link to international and comparative human rights.

First, oral submissions, *facta* and judicial notice of evolving case law, parliamentary and other official reports, scholarship and the views of human rights interpretive communities all contributed to the Court's recognition that security intelligence practices have changed markedly post-9/11. The Court was acutely aware that persons named in certificates post-9/11 have all immigrated to Canada from countries with poor human rights records and with which Canada has only recently forged bilateral intelligence relations. The Court was accordingly alive to the human rights dimensions of global intelligence networks involving non-traditional partners and of the risks named persons would face if deported. Mr. Charkaoui's counsel and interveners on his behalf -- most notably Barbara Jackman -- were also careful to remind the Court of Canada's international human rights obligations not, under any circumstances, to return persons to face torture; an observation that may be confirmed by viewing video records of oral submissions before the Supreme Court. Also present within these records are repeated suggestions that Canada's international reputation as a leader of human rights would be further tarnished if the impugned provisions were upheld. The importance of interveners in communicating global human rights perspectives to the Court supports Koh, Toope and Brunée's emphasis on critical, transnational interaction and the prospects of norm-internalization or persuasion.

Second, the court was therefore conscious of international and foreign trends towards providing enhanced protection to non-citizens in the context of national security-based detention and deportation proceedings. The United States Supreme Court had

recently affirmed that non-citizens detained in Guantanamo Bay possess the constitutional right to *habeas corpus*.¹¹⁵ The UK House of Lords had similarly ruled in *Re A and Others* that the UK's version of security certificates unjustifiably discriminated against non-citizens. And in *Silvenko v. Latvia*, the ECtHR expressed a willingness to submit states to fairly exacting review of decisions to deport persons for posing a threat to national security.¹¹⁶ These decisions, all of which were expressly cited in the *Charkaoui I* judgment and the facts of litigants, made it difficult for the Supreme Court of Canada to uncritically accept that non-citizens do not deserve robust procedural protections during national security-based detention and deportation proceedings.

Third, the Court's reasoning was almost certainly influenced by the factual and normative findings of the O'Connor Report which, to recall, was expressly cited by the Court. This report exhaustively detailed shifting global contexts, the Canadian government's increasing reliance on, or complicity in, extraordinary rendition, and obvious human rights abuses caused by intelligence agencies' circulation of misinformation. The Court saw clear connections among security certificates, extraordinary rendition and the perils of under-regulated intelligence practices, all of which had roots within the darker domains of global counter-terrorism law and policy. Quoting the Commission's report, the Court expressed concern that the unfettered circulation of misinformation and the absence of adequate review and accountability mechanisms with respect to security intelligence practices may have negative effects on the integrity of immigration and refugee law in general, not to mention the rights of

¹¹⁵ *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

¹¹⁶ [GC], No. 48321/99, E.C.H.R. 2003-X.

named individuals.¹¹⁷ Crucially, analogies between Arar's experience and that of individuals named in certificates were easily made, despite the fact that the latter were by definition not Canadian citizens. This underscored the influence of international human rights, where such distinctions have little relevance. The overall thrust of the Court's reasoning was that the government was using comparatively lax evidentiary standards characteristic of immigration and refugee law to shield it from more demanding standards characteristic of criminal and extradition proceedings. Insofar as the Court had already analogized the former to the latter, it predictably concluded that unchecked national security confidentiality would restrict "the ability of courts to guarantee individual rights".¹¹⁸

Finally, the Court was wary of the language of exceptionality that characterized post-9/11 national security discourse. It noted that the nature of terrorism is indeed such that the "executive branch of government may be required to act quickly, without recourse, at least in the first instance, to the judicial procedures normally required for the deprivation of liberty or security of the person".¹¹⁹ Speaking to the ability of the law to guide decision-making of this nature, the Court added that, if the exigencies of counter-terrorism "makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found".¹²⁰

In this last dimension of its judgment, the Supreme Court seemed to be stating that, even in exceptional moments, legal interaction should be structured fairly and in such ways as to facilitate criticism and adversarial challenge. It also seemed to be stating

¹¹⁷ *Charkaoui I*, *supra* note 3 at para. 26.

¹¹⁸ *Ibid.* at para. 26

¹¹⁹ *Ibid.* at para. 24

¹²⁰ *Ibid.* at para. 23.

that, even in times of perceived emergency, indeterminate law can and should be infused with moral and ethical perspectives that challenge relations of domination. It did not, however, pronounce on the issue of whether the attacks of 9/11 have in fact created an ongoing public emergency. As we have seen, even international human rights allow for the limitation of rights to contend with emergencies that plausibly threaten the life of a nation. The *Charter* similarly authorizes the imposition of such reasonable limits on guaranteed rights as can be “demonstrably justified in a free and democratic society”.¹²¹

It is here that an optimist might have expected the court to directly rely on international and comparative human rights norms. Yet, these norms might actually have helped to rationalize the further diminution of human rights, supporting the critical perspective and weakening the hypothesis of TLP that international and comparative human rights improve the quality of domestic decision-making. In *Re A and Others*, for instance, the UK House of Lords approached the questions of whether the threat of transnational terrorism 9/11 stands as a public emergency and what criteria judges should use in deciding about the necessity and legality of extraordinary measures. It began by stating that “the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself”, and as therefore incompatible with excessive deference to executive decision-making.¹²² However, it went on to say that the UK government was justified in treating the mere threat of a terrorist attack post-9/11 as a public “emergency threatening the life of the nation”.¹²³ On the strength of this factual finding, the court

¹²¹ *Constitution Act, 1982*, Enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11, s. 1.

¹²² *A v. Secretary of State for Home Department (Re A)*, [2005] 3 All E.R. 169, [2004] U.K.H.L. 56 at para. 42.

¹²³ *Ibid.* at para. 118; this decision was released before the July 7, 2005 London Bombings.

ruled that derogations from the ECHR in which persons can be indefinitely detained on the strength of undisclosed evidence is justified.

The finding that the mere threat of transnational terrorism constitutes a permanent or ongoing public emergency does not sit well with the views of most human rights-based discursive communities.¹²⁴ The prevailing view among non-state, or at least non-judicial, discursive communities is that emergencies are temporary events that threaten, or are imminently about to threaten, a nation and should be invoked sparingly. Derogations from human rights should therefore be temporary in nature and demonstrably necessary to enable a state to restore order. Extraordinary measures cannot, in other words, be used indefinitely, but must be carefully tailored to respond to a specific threat and then be dismantled. The purpose of imposing temporal restrictions on the invocation of emergencies is to guard against the gradual ratcheting down of rights and the normalization of practices that should be used sparingly and only at the utmost extremes of need.

Although perhaps unsurprising in light of the July 7, 2005 London bombings, the ECtHR modified its earlier position by siding with the House of Lords in its 2009 judgment on *Re A and Others*. The ECtHR stated in unequivocal terms that certain international human rights may be derogated from in order to contend with an emergency that is neither immanent nor immediately manifest.¹²⁵ Since the facts and issues of this

¹²⁴ Report of Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom, CommDH(2005)6/8 June 2005 at paras. 5-8; Directorate General of Human rights. Council of Europe. "Human rights and the fight against terrorism: The Council of Europe Guidelines" (March 2005); The United Nations Committee on the Elimination of All Forms of Racial Discrimination "Concluding Observations: United Kingdom" CERD/C/63/CO/11, 10 December 2003 at para. 17; Council of Europe Parliamentary Assembly Resolution 1271 "Combating terrorism and respect for human rights" (2002) at paras. 9, 12(v); United Nations Human Rights Committee, "General Comment No 29 on Article 4 of the ICCPR" CCPR/C/21/Rev.1/Add.11, 31 August 2001 at para. 2.

¹²⁵ *A. and Others v. the United Kingdom*, [2009] E.C.H.R. 301 at paras. 178-180.

case --but not the judgment-- arose prior to the London bombings, this argument makes clear that a public emergency can be initiated by the mere threat of a transnational terrorist attack and the gravity of harm that might follow should the government fail to act. It noted that “case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary”¹²⁶ and that “national authorities enjoy a wide margin of appreciation... in assessing whether the life of their nation is threatened by a public emergency”.¹²⁷ Still, the ECtHr’s statement does not address the pervasive view among human rights communities, constructed out of experience as well as moral considerations, that the protection and promotion of human rights requires that invocations of emergencies and deployment of extraordinary measures be time-limited. Granting the executive a “wide margin of appreciation” with regards to identifying and defining emergencies contributes to the legitimization of extraordinary measures that may be used indefinitely.

It is perhaps a good thing, then, that the Supreme Court of Canada did not directly consider available international and comparative human rights on this point when deciding whether s. 7 infringements caused by the certificate regime could be justified under s. 1 of the *Charter*. It instead began by exploring received wisdom about how to balance national security confidentiality and individual rights in Canadian contexts, paying special regard to the old SIRC system and the procedures adopted by the O’Connor Commission. The SIRC system was an obvious candidate for consideration, but also problematic given that parliament had deliberately dismantled it. The O’Connor Commission was an important additional resource since it was modeled after the former

¹²⁶ *Ibid.* at para. 178

¹²⁷ *Ibid.* at para. 180.

SIRC system, was successful in balancing national security confidentiality and disclosure in a more contemporary context, and had generated significant public awareness around these issues. The insights offered by the O'Connor Commission's approach to national security confidentiality merit special attention. The O'Connor Commission used two security-cleared legal counsel (Ronald Atkey and Paul Cavalluzzo) to attend *in camera* proceedings in which privileged information was examined. Commissioner O'Connor's original plan was to examine evidence in these closed proceedings and then make available such information as could safely be disclosed to Mr. Arar and others who attended the open hearings. This would have given Mr. Arar and others the opportunity to challenge the government, thereby producing a better factual record. However, this plan was stonewalled when the government began claiming exceedingly broad national security confidentiality and applying to the Federal Court under s. 38 of the *Canada Evidence Act*¹²⁸ to prohibit the Commission from disclosing information. These tactics would have forced the Commission to delay its investigation in order to fight national security confidentiality challenges in court. Commissioner O'Connor responded by continuing closed proceedings without disclosing any information, with a view to ruling contending with all the government's confidentiality claims once the Commission finished its inquiry. This meant that Mr. Arar, his legal counsel, and other interested parties were unable to cross-examine government witnesses or effectively challenge the government's position during open hearings. To compensate for this, Commissioner O'Connor authorized Messrs. Atkey and Cavalluzzo to adopt an assertive, adversarial role, pressing government witnesses on their testimony and on the strength and sufficiency of their evidence.

¹²⁸ R.S.C. 1985, c. C-5, 2001, c. 41, as am. by R.S.C. 2001, c. 41.

It is reasonable to say that, post-O'Connor, we now possess a wealth of experience, institutional blueprints and received wisdom concerning how to effectively protect the integrity of legal proceedings touching on matters of national security. However, despite the availability of these resources, the Court chose to view the UK's SIAC model as a possible alternative to the impugned certificate provisions. It expressly recognized the deficiencies of the SIAC system as highlighted in successive UK parliamentary reports, by human rights organizations and by UK special advocates themselves.¹²⁹ The Court nonetheless went on to note that some members of SIAC have "commented favourably on the assistance provided by special advocates".¹³⁰

Two implications flow from the Court's choice in *Charkaoui I* to cite the strengths of the UK system while minimizing its well-documented flaws. First, the international human rights which the UK model transgresses have no binding force in Canada; they are norms our government may respect, but is not obligated to do so. It is indeed true that the pronouncements of the ECtHR and the norms of the ECHR are not binding on Canada. However, the ECtHR's judgments are sourced in international treaties to which Canada is bound, namely, the *International Convention Relating to the Status of Refugees* and the *International Convention Against Torture*. Insofar as the UK's system and Canada's security certificates have analogous effects on affected persons, we may infer that the latter contravene international treaty law binding on Canada. The Court discounted the relevance of this inference, suggesting, in keeping with the relevant and persuasive doctrine, that binding international human rights are no different from comparative human rights or any other non-legal interpretive resource and so "may" be

¹²⁹ *Charkaoui I*, *supra* note 3 at para. 83.

¹³⁰ *Ibid.* at para 84.

referred to. In this respect, the presumption of conformity doctrine and the conception of compliance it embodies might have been more useful to human rights advocates, although even here the resulting norms might have been too vague to add depth to domestic normative materials. In any event, the constitutional dimensions of security certificates were sketched out in the absence of extensive international human rights analysis.

Second, the Court tried to obscure the failings of the SIAC system by suggesting that the opinions of the English judiciary on the matter are more informative or authoritative than those of non-state actors. The critical views of civil society groups and special advocates themselves were apparently regarded as less “legal” than moral or political in nature, and so did not stand up nearly as well as relevant and persuasive sources of insight. There was a clear selection bias at play in terms of which discursive communities the Court was willing to engage with. This underscores the normative pitfalls associated with transjudicialism, which may tend less towards the emergence of a global rule of law than it does the replication and expansion of well-engrained legal ideologies, an observation that is consistent with a critical view of legal indeterminacy, most especially in the context of real or perceived crises. It also reinforces the difficulties transnational human rights advocates face in penetrating channels of authoritative decision-making. Although seemingly influential, the perspectives of non-state discursive communities carry considerably less weight than those of foreign state actors.

In any event, following *Charkaoui I*, the government amended certificate provisions ostensibly in the image of the UK’s SIAC system, but failing to expressly include many of the features that made the SIRC system and the O’Connor Commission

effective. Positively, it authorized security-cleared special advocates to represent named persons during secret proceedings, to access classified evidence, to challenge that evidence, and to seek disclosure of evidence that has been withheld.¹³¹ It also reinforced reviewing judges' discretionary authority to make use of SIRC-style powers on a case-by-case basis.¹³² However, the value of disclosure has been only partially realized, as special advocates are not expressly empowered to subpoena documents or witnesses and were expressly forbidden from communicating with named persons or their counsel about any matter whatsoever after having accessed classified evidence, unless authorized to do so by reviewing judges.¹³³ It is unclear how often this occurs.

D. III. Appraising the Impacts of International and Comparative Human Rights: Current Trends and Future Trajectories

On the whole, international and comparative human rights were relevant but decidedly capricious feature of *Charkaoui I*. Transnational human rights advocates effectively used them to characterize certificates as extraordinary measures; no small feat considering that they have been staples of immigration and refugee law since 1976. This rhetorical success was made possible by the arguments and facts collected by various discursive communities that describe the human rights dimensions of global intelligence agency cooperation and that associate certificate proceedings with extradition and, more debatably, extraordinary rendition. Advocates were able to arrange this information to cast certificates as keystones, not in immigration and refugee law *per se*, but in a functionally differentiated national security framework that facilitates, but does not adequately constrain, executive discretion. This motivated the Court to reconsider the

¹³¹ *JRPA*, *supra* note 64, ss. 85.1 (1)(2), 85.2.

¹³² *Ibid.*, ss. 85.2(c), 85.4(2)(3), 85.5.

¹³³ *Ibid.*, ss. 85.4(2)(3), 85.5.

constitutional dimensions of certificates and ultimately to compel parliament to find alternative approaches that better protect human rights. In these respects, transnational human rights advocates seemed poised to succeed in securing executive officials and reviewing judges' compliance with professional rules and principles associated with critical argumentation and, accordingly, in improving the likelihood that the substantive rights of named persons would be better protected.

However, international and comparative human rights had the contrary effect during the court's s. 1 analysis. The Court's proposition that the SIAC system would likely pass constitutional muster if incorporated into Canada ignored the received wisdom of various discursive communities and downplayed the viability of domestic approaches taken by SIRC and the O'Connor Commission. This made it easier for parliament to make the bare minimum of changes and to reject a prior domestic regime with a proven record of effectiveness. All this occurred without the court explicitly referencing comparative human rights case law, including a holding by the House of Lords that courts should defer to the UK government with regards to whether the perpetual *threat* of transnational terrorism stands as a public emergency warranting the indefinite use of extraordinary measures.

Still, perspectives contributed by human rights-based discursive communities help us appraise the strengths and weaknesses of judgments about the legality of extraordinary measures. In particular, we can criticize judgments for deviating in substantial ways from shared understandings concerning what is a public emergency, who ought to decide if there is an emergency and by what criteria, whether extraordinary measures that limit human rights are justified (and for how long), and what rules and principles ought to

structure adjudication over such matters. Critics would reply that *Charkaoui I* was a hollow victory, with the Court having used the rhetoric of human rights to legitimize an abusive regime. However, there is some evidence to suggest that courts have been striving, and will continue to strive, towards imposing more meaningful constraints on executive discretion post-*Charkaoui I*, though, once again, with virtually no direct reference to international and comparative human rights.

In the 2008 case of *Charkaoui II*, transnational human rights advocates shifted gears and challenged the constitutionality of executive policies and practices, rather than of legislative provisions. Since the Supreme Court had found that certificate proceedings are analogous to criminal proceedings, and since CSIS provides the bulk of evidence used in certificate proceedings, it follows that CSIS is performing or facilitating the performance of law-enforcement functions. Transnational human rights advocates argued that CSIS should therefore be held to evidentiary standards analogous to those binding on law enforcement agencies. In particular, it should be obligated to retain and disclose to reviewing judges and special advocates operational notes regarding a person named in a certificate. An obligation of this nature would enhance the truth-seeking function of the court by improving special advocates' capacity to rigorously challenge the government's allegations and its resistance to requests for disclosure.

This was in effect a second attempt to inject features of the old SIRC system into certificate proceedings and it seems to have worked. The Supreme Court sided with human rights advocates and required CSIS and the Ministers to disclose to the court and special advocates all information on file regarding a person named in a certificate. In justifying this unprecedented decision, the Court spent considerable time outlining the

changing nature and global context of security intelligence work. It noted that CSIS has increasingly been co-operating with the RCMP in the investigation of threats to national security. Noting that the “activities of the RCMP and those of CSIS have in some respects been converging”, and that the information which CSIS collects and distributes may be used in criminal proceedings, the court found it necessary to revise its long-standing assumption that “CSIS cannot be subject to the same duties as a police force”.¹³⁴

The Court also noted that a heightened duty to retain information is essential to improving the quality of Ministerial decision-making prior to the commencement of certificate proceedings:

The submission of operational notes to the ministers and to the designated judge may be necessary to ensure that a complete and objective version of the facts is available to those responsible for issuing and reviewing the certificate. The retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence because of problems connected with the handling of information by intelligence agencies. In addition, the destruction of information may sometimes hinder the ability of designated judges to effectively perform the critical role, delegated to them by law, of assessing the reasonableness of security certificates, reviewing applications for release by named persons and protecting their fundamental rights.¹³⁵

In another passage, the court cited a 2005 decision by SIRC, noting that CSIS’ policy of destroying operational notes has been a source of “long-running concern” and that “complainants frequently allege that the investigator’s report of their interview is not accurate: that their answers are incomplete, or have been distorted or taken out of context”.¹³⁶ The Court also cited the O’Connor Report, which stated that “the need for accuracy and precision when sharing information, particularly written information in terrorist investigations, cannot be overstated”.¹³⁷ In order to facilitate judicial and public

¹³⁴ *Charkaoui II*, *supra* note 4 at para. 29.

¹³⁵ *Ibid.* at para. 42

¹³⁶ *Bhupinder S. Liddar v. Deputy Head of the Department of Foreign Affairs and International Trade and Canadian Security Intelligence Service*, File No. 1170/LIDD/04, June 7, 2005 at para. 72.

¹³⁷ O’Connor Report, *supra* note 37 at 11.

scrutiny of security intelligence practices and, more fundamentally, to enhance the truth-seeking function of the Federal Court, the Supreme Court ruled that CSIS is generally obligated to retain its operational notes in much the same way as the police.¹³⁸

The Court also imposed upon the Ministers an obligation to disclose to reviewing judges all relevant information in their possession, irrespective of whether that information is inculpatory or exculpatory and whether or not they intend to submit the information as evidence.¹³⁹ Although obligations of this nature have historically been reserved for Crown prosecutors,¹⁴⁰ the Court repeated that certificates are analogous to criminal proceedings insofar as they require indefinite detentions, expose persons to severe deprivations of life, liberty, and personal security, and are presided over by judges rather than administrative decision-makers.

The imposition of disclosure requirements in *Charkaoui II* achieves objectives similar to those achieved by granting special advocates the power to subpoena documents, with some important differences. To recall, SIRC had assumed these powers as part of its broader institutional powers, while the Supreme Court declined to force their inclusion in amended certificate provisions in *Charkaoui I*. In *Charkaoui II*, it indirectly enhanced the performance capacity of special advocates by requiring the government to provide much of this sort of information to reviewing judges and special advocates as a matter of course. Expanded disclosure has had significant effects on certificate proceedings. It contributed to the quashing of the certificate issued against Mr. Charkaoui and Mr. Alrmei in late 2009.¹⁴¹ Shortly following *Charkaoui II*, the government was

¹³⁸ *R. v. La*, [1997] 2 S.C.R. 680.

¹³⁹ *Charkaoui II*, *supra* note 4 at paras. 2, 56.

¹⁴⁰ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

¹⁴¹ *Charkaoui (Re)* (2009), F.C. 1030; *Alrmei (Re)* (2009), F.C. 1263.

ordered to disclose 2000 documents containing at least 8000 pages of information relevant to Mohamed Harkat.¹⁴² Initially, the Ministers had redacted significant portions of this information based on their considerations of relevance and national security confidentiality. On March 12, 2009, the Federal Court rejected most of the redactions made to 67 contested documents,¹⁴³ although it has generally been respectful of national security confidentiality with respect to human source intelligence, as it is in the criminal law context.¹⁴⁴ Moreover, while the government has forestalled a judicial reading-in of any power analogous to that of SIRC counsel to subpoena witnesses, disclosure of documents has certainly exposed the government to greater adversarial challenge.

The precise scope of disclosure obligations has been a contested issue, most especially as regards what information may be safely disclosed directly to named persons. Ordinarily, named persons are only entitled to information (in full or summary form) that informs them of the case *against* them.¹⁴⁵ *Charkaoui II* disclosure requires all information regarding a named person to be submitted to reviewing judges and special advocates, regardless of whether it supports the Ministers allegations or not. In 2009, the Ministers tried to appeal a Federal Court ruling on the grounds that a reviewing judge, Tremblay-Lamer J., had inappropriately ordered the disclosure of information directly to Mr. Charkaoui.¹⁴⁶ The Ministers insisted that the contested evidence could not be disclosed without compromising national security or the safety of a person. Tremblay-Lamer J. nonetheless ordered that it be disclosed during closed hearings, along with

¹⁴² *Harkat (Re)*, (2009) F.C. 340 at para. 7.

¹⁴³ *Ibid.* at para. 9.

¹⁴⁴ *Harkat (Re)* (2009), F.C. 204; *R. v. Leipert*, [1997] 1 S.C.R. 281; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Canada (Solicitor General) v. Royal Commission (Health Records)*, [1981] 2 S.C.R. 494; *Marks v. Beyfus* (1890), 25 Q.B.D. 494.

¹⁴⁵ IRPA, *supra* note 64, s. 83(1)(e).

¹⁴⁶ *Charkaoui (Re)*, *supra* note 141.

original copies of CSIS' operational notes pertaining to this evidence. Tremblay-Lamer J. then indicated that she would forward to Mr. Charkaoui summaries of these originals and associated information, and would include details the Minister had insisted could not be safely disclosed.

Disputing the factual question of whether or not this information could safely be disclosed, the Ministers invoked s. 83(1)(j) of IRPA, which reads:

the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

By withdrawing key evidence, the Ministers deprived the court of its authority to compel the disclosure of the contested information to Mr. Charkaoui, either in full or in summary form. Of course, by withdrawing this information, the Ministers deprived themselves of evidence to demonstrate the reasonableness of Mr. Charkaoui's certificate, a fact which they expressly admitted.¹⁴⁷ It seems that this move was designed to invite the Federal Court of Appeal to intervene on their behalf.

In the absence of supporting evidence, Tremblay-Lamer J. ruled that there was no statutory basis for the certificate, which was therefore null, void, and *ultra vires* the authority of the Ministers. She based this judgment on s. 77(2) of IRPA, which requires the Ministers to "file with the Court the information and other evidence on which the certificate is based". Tremblay-Lamer J. also denied the Ministers' request to certify questions for review by the Federal Court of Appeal, holding that there were no questions of general importance raised in this case. She had, in her view, appropriately applied the

¹⁴⁷ *Ibid.* at paras. 16, 43.

criteria laid down in *Charkaoui II*, finding as a matter of fact that certain evidence could safely be disclosed to Mr. Charkaoui.

Except for one case,¹⁴⁸ special advocates with whom I have spoken have been satisfied with the extent of the government's disclosure practices following *Charkaoui II*. They have indicated, however, that their performance capacity continues to be constrained by strict bans on their communication with named persons throughout the entirety of proceedings. This problem is exacerbated by the fact that IRPA stipulates that the Ministers, and not judges, are to provide named persons with a summary of the evidence against them when certificates are initially filed with the court.¹⁴⁹ This means that when a named person first communicates with his or her special advocate, they must rely on the Minister's unilateral appraisal of what is and is not protected by national security confidentiality. By the time courts exercise their authority to subsequently order disclosure or independently compile additional summaries, special advocates are likely to have already accessed classified information and will not be able to receive further instruction or insights from the named persons whose interests they represent.

Similar practices have been upheld as compatible with international human rights by UK courts as well as the ECtHR. In *Re A and Others*, the ECtHR was asked to decide, *inter alia*, if the UK's reliance on closed materials during SIAC proceedings contravened Article 5(4) of the ECHR, which states:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

¹⁴⁸ *Harkat (Re)* (2009), F.C. 533.

¹⁴⁹ IRPA, *supra* note 64, s. 77(2).

Notwithstanding that the SIAC system was designed to comply with *Chahal*, associated legislation omitted numerous procedural safeguards and did not expressly grant special advocates important powers. Among the omitted powers, it will be recalled, is the ability to communicate with alleged terrorists throughout the entirety of proceedings -- a power essential to challenge the credibility and sufficiency of circumstantial evidence, to design legal strategies, and clarify certain facts. It was suggested that, absent this power, special advocates could only perform their roles effectively if alleged terrorists are well enough informed at the outset of proceedings to engage in meaningful discussion. The problem, in other words, could be resolved, either, by ensuring that enough information is disclosed to detainees early enough that they can meaningfully communicate with special advocates or, enabling detainees and special advocates to converse throughout the course of proceedings.

As noted above, the ECtHR had already decided in this case that the mere threat of transnational terrorism stands as a public emergency in the UK and that a “margin of appreciation” should be granted to the executive over the necessity of extraordinary measures. It also ruled that the SIAC regime was, in principle, consistent with the ECHR, adding that SIAC is “a fully independent court”, is “best placed to ensure that no material...(is) unnecessarily withheld” and that special advocates “provide an important, additional safeguard” in these respects.¹⁵⁰ It recognized, however, that the disclosure of information at the outset of proceedings is not always sufficient and that, when the executive fails to make adequate disclosure, the integrity of the proceeding is called into

¹⁵⁰ *Re A and Others*, *supra* note 125 at para. 219.

question.¹⁵¹ Whether this has happened, however, is a matter to be decided on a case-by-case basis and need not be dealt with by way of legislative amendments.

Pursuant to the UK *Human Rights Act*, the House of Lords is legally obligated to give effect to the ECtHR's judgments. However, in *Secretary of State for the Home Department v. AF*,¹⁵² some judges were reluctant to comply with the ECtHR's judgment, considering it to be an excessive intrusion into executive discretion and state sovereignty. Lord Hoffman was particularly strong in his criticism of the ECtHR, stating that he thought it was "wrong" and that its ruling may well "destroy the system of control orders."¹⁵³ This criticism misses the mark. The the ECtHR had both endorsed the government's invocation of a state of emergency (contrary to the preponderance of opinion among non-judicial authorities), and found the SIAC system cohered with *Chahal* (even though it is widely known to be woefully inadequate in key respects). In fact, the ECtHR could have easily addressed issues of procedural unfairness by requiring the UK Parliament to legislatively authorize ongoing communication between special advocates and detainees. The ECtHR chose not to take this route, leaving it to SIAC to ensure that detainees have enough information to give effective instructions to their special advocates. In any event, the House of Lords accommodated divergent views on this matter by reading down the impugned provisions of the UK legislation rather than declaring them to be invalid. This left trial judges with the discretion to decide on a case-by-case basis whether proceedings have been fair.

¹⁵¹ *Ibid.* at para. 220.

¹⁵² [2009] U.K.H.L. 28.

¹⁵³ *Ibid.* at para. 70.

The upshot of the ECtHR and House of Lords' rulings is two-fold. First, they uphold the validity of the *Prevention of Terrorism Act, 2005*,¹⁵⁴ which in turn strongly implies that both courts believed rights-infringements to be relatively rare or the product of circumstance rather than parliamentary intent. This is especially problematic given the fact that UK special advocates, parliamentary committees, and human rights organizations have repeatedly stressed the serious difficulties posed by parliament's express prohibition of ongoing communications between special advocates and detainees. Parliament has hardly been unaware of human rights infringements, even if they occur on a case-by-case basis, and to that extent knowingly condoned them.

Second, these rulings perpetuate the assumption that the judiciary is the best available safeguard against rights abuses. For its part, the ECtHR has repeatedly mischaracterized the nature of the SIRC system, falsely stating that SIRC was a judicial rather than an administrative body. The ECtHR's unwillingness to force improvements in special advocates' powers is partly due to unwarranted assumptions about the capacity, and willingness, of judges on the SIAC to hold the executive to high standards. The House of Lords similarly expects trial judges to compensate for questionable statutory provisions and omissions -- an expectation not justified by experience. In fact, courts have a poor track record in holding the executive to account in matters of national security.

These developments do not bode well for transnational human rights advocates who are currently challenging the constitutionality of Canada's special advocate system, especially if their objective is to force further legislative amendments. Current certificate provisions, supposedly designed to replicate the SIAC system, consciously eschew both

¹⁵⁴ UK 2005, c. 2.

the formal and the informal powers possessed by SIRC and its counsel. *Charkaoui II* provides special advocates with some of these powers by requiring the government to disclose to reviewing judges and special advocates all information regarding a named person. But the Supreme Court has consistently refused to force parliament to adopt a specific legislative framework. It has, however, helped expand reviewing judges' discretionary power (and their willingness to exercise it) and consequently has helped to constrain executive discretion over matters of disclosure, whether someone is a national security threat, and what can legally be done about it. The ECtHR and the UK House of Lords have adopted a similar, discretion-oriented approach. They have each ruled that SIAC legislation is lawful, but that errors in judicial or executive discretionary decision-making may render particular proceedings procedurally unfair. It is hard to see how international and comparative human rights case law can advance the effort to force further legislative amendments in Canada. At best, one might hope for renewed emphasis on the need for full disclosure at the outset of proceedings and perhaps more vigilant judicial review of the adequacy of initial summaries.

E. Conclusion

Global intelligence agency cooperation poses a wide range of novel and complex regulatory challenges. On the one hand, global intelligence networks are transnational, hosting interactions among a plurality of state and non-state actors who interact in public and private as well as domestic and international contexts. The global scale of contemporary intelligence practices transcends the jurisdictional reach of Canadian law and has required us to integrate ourselves into various bilateral and multi-lateral regimes, often with little to no involvement of parliamentary or judicial institutions. For some, the

transnational and executive-led qualities of global intelligence networks render them inherently ungovernable. On the other hand, national security discourses and invocations of exceptionality support reliance on extraordinary measures that do not sit comfortably alongside legal values, such as the rule of law and respect for rights. During moments of real or perceived crisis, the tendency is for executive officials to insist on deference to their identification of security threats and their views on the proper design, operation and reach of extraordinary measures. Depending on their determination and/or institutional capacity to resist the executive, judges may or may not be able to constrain the arbitrary exercise of executive power based on claims of exceptionality. Critics argue that legislatures and courts will tend to defer to the executive in times of crisis, while optimists argue that they simply have to find more creative ways of protecting human rights.

There are, of course, many sites within which the dynamics of global intelligence agency cooperation could be explored. I have approached them from the context of certificate proceedings. This approach has emphasized a few trends, including the growing role of security intelligence as evidence in legal proceedings, the association between global intelligence practices and the human rights of migrants, refugees, and Canadian citizens, the fraying of functional boundaries between security intelligence work and policing, the impact of international law and relations on Canadian national security law and policy and the role of the judiciary in constraining executive discretion over the identification and treatment of security threats. These issues point to a slow and painful process of learning about the constitutional dimensions of global intelligence practices as they intersect with various legal fields, including immigration and refugee

law, criminal law, extradition, privacy and, of course, human rights.

As one of the most conspicuous fields of contestation post-9/11, certificate proceedings offer insights into the trajectory and fruits of constitutional learning. Judicial reasoning has been both facilitated and constrained by two, distinct sources of knowledge: domestic experience and international and comparative human rights. The former includes statutory and regulatory frameworks (contemporary and historical), constitutional rules, principles and values, the output of commissions of inquiry and parliamentary committees, and the thick institutional histories of national security agencies, courts, and assorted oversight and review bodies. The latter includes the perspectives of various discursive communities, including international human rights treaty monitoring and standard-setting bodies, foreign courts, tribunals, and legislative bodies, transnational human rights networks, and regional courts, such as the ECtHR.

One might think that international and comparative human rights would be a natural resource for courts, given the global scope of contemporary intelligence practices and the extraordinary qualities of certificate proceedings. In order for advocates to successfully marshal this resource, though, judges would have to accept the authority of the relevant and persuasive doctrine. A TLP theory of this doctrine predicts that international and comparative human rights norms function largely through analogy and that the logical and rhetorical appeal of arguments constructed out of these norms would depend on arguers' (and judges') compliance with certain dialogical rules and principles. The case study was relevant to these hypotheses because, as many critics would predict, the distorting effects of national security language might interfere with the production of fair and critical judgment about the constitutionality of certificate provisions,

contradicting TLP. The critic would indeed be unsurprised that the Federal Court, charged to administer an expedited, secretive and uncritical regime, did not internalize international and comparative human rights and decided to uphold the constitutionality of certificate provisions. The optimist, by contrast, would find encouragement in the Supreme Court's use of international and comparative human rights and its decision to declare certificate provisions unconstitutional; a decision that, on its face, coheres with *Chahal*, thereby implying norm-internalization.

Thus, TLP would see in *Charkaoui I* a correlation between judicial reference to international and comparative human rights and the diminished impact of national security posturing. There is, however, insufficient evidence to confirm this and, what is more, we might just as easily argue the reverse: international and comparative human rights helped rationalize the projection of political and ideological power. At the very least, the case study permits us to make the modest descriptive claim that international and comparative human rights contextualized the problems posed by global intelligence agency cooperation. Human rights communities produced extensive factual records concerning the changing nature of security intelligence practices and the human rights implications of post-9/11 national security law and policy. Advocates for named persons used the judgments and experiences of foreign courts to identify credible solutions to the problems posed by changing security practices. They were able to persuade the Supreme Court to rule that security certificates, staples of immigration and refugee law since 1976, had assumed extraordinary qualities that carried them beyond legally permissible limits.

However, international and foreign case law was then used by the Court to offer an alternative that only partially actualized important legal values. But the values of

pertinent human rights norms were not observably “internalized” by the Court or other duty-bearers. Parliament responded with legislation that failed to expressly provide special advocates with powers considered indispensable in alternative, domestic regimes. Added to this, recent international and foreign case law dealing with analogous legislation in the UK has stood for the dubious proposition that public emergencies need not be temporary and that extraordinary measures therefore may be used indefinitely. International and comparative human rights are supposed to facilitate constitutional learning by providing clear criteria concerning when there is a public emergency as well as whether and by what procedures rights may be limited. There are certainly clusters of understandings shared by non-judicial discursive communities that would support this function, but transjudicialism has tended to prioritize the divergent opinions of apologetic courts over the perspectives of non-state discursive communities with expertise in human rights.¹⁵⁵

All of this is to say that the spirit of the relevant and persuasive doctrine as illuminated by TLP was not clearly manifested in the *Charkaoui* judgments. True, TLP and associated theoretical perspectives were useful in structuring the rational analysis and appraisal of international and comparative human rights arguments. However, its normative claims have not been well represented. To the contrary, the case study suggests

¹⁵⁵ This can lead to positive results, such as in *Khadr*, *supra* note 5, where the Supreme Court of Canada ruled that Canada violated international human rights by interviewing a Canadian citizen detained in Guantanamo Bay. This finding was supported by its interpretation of the four *Geneva Conventions of 1949* as well as recent Supreme Court of the United States decisions whereby military commissions established to try detainees at Guantanamo Bay were expressly held to be inconsistent with international human rights (*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, *supra* note 115). The Supreme Court of Canada found that Canadian officials’ participation in processes associated with these military commission violate Canada’s international legal obligations, and, that this legal consequence was enough to activate the extra-territorial application of s. 7 of the *Charter*. It then ordered the disclosure of records of interviews held between Mr. Khadr and Canadian agencies and any information sent to the United States as a direct result of the interviews.

that international and comparative human rights were, at best, highly ambivalent and, at worst, used by result-oriented judges determined to spread a veneer of legality over an otherwise abusive regime. Strategically speaking, it might be more fruitful for transnational human rights advocates to avoid engagement with international and comparative human rights and to instead more fully exploit domestic experiences, institutional histories and other received wisdom. This approach met with considerable success in *Charkaoui II*, where the Supreme Court largely ignored international and comparative human rights and focused instead on how to apply longstanding criminal law principles concerning disclosure to CSIS.¹⁵⁶ Subsequent Federal Court decisions noted above are similar in these respects.¹⁵⁷ Interpreting and applying exclusively domestic norms, reviewing judges, both at first instance and on appeal, have helped construct a markedly improved certificate regime that, though imperfect, imposes serious constraints on executive discretion and has reduced -- but has not eliminated -- the distorting effects of national security discourse.

¹⁵⁶ This decision is not without its negative effects. Kent Roach has observed that *Charkaoui II* disclosure, which requires CSIS to retain personal information indefinitely, may violate privacy rights; see, Kent Roach, "When Secret Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui IP*" (2009) 47 *Supreme Court Law Review* 147.

¹⁵⁷ See also *Harkat (Re)* (2009) F.C. 203.

The Art of Persuasion: International Law, Domestic Courts, and Transnational Human Rights Advocacy in Canada

Chapter 5

A. Introduction

The universal applicability of international human rights render them attractive instruments for the protection of non-citizens' rights in Canada.¹ As with constitutional rights mechanisms, and the broader Enlightenment traditions of which they are a part, international human rights theoretically inhere within individuals irrespective of personal characteristics, national political boundaries, or the exigencies of public policy. Unlike constitutional law, though, the international human rights enterprise consists in the attempt to give practical effect to human rights across national boundaries. While certainly rooted in a longer tradition of its own, international human rights have for this reason become closely linked to more general developments in international law and institutions.

Given serious institutional limitations, the effectiveness of international human rights depends upon the cooperation and coordination of domestic legal systems. Accordingly, each major international human rights treaty places upon states a special responsibility to promote and protect international human rights within their respective jurisdictions. This requires that international human rights be given effect through legislation, policy and the provision of judicial remedies to those whose rights have been breached.

Despite the need for close functional associations between international human rights and domestic law, the two frequently diverge and sometimes conflict. In Canada, where the law of reception is structured by common law doctrines, the resolution of these

¹ As I noted in Chapter 2, there is no need to insist on making hard distinctions among international, comparative, and domestic human rights, as they all perform the same essential function. However, when recounting dominant/traditional narratives within the Canadian law of reception, I will focus on the inter-relationships between international and domestic human rights.

tensions may raise questions about the legitimacy of judicial review. This is because judges possess seemingly unfettered discretion regarding whether and how to make use of international human rights, most especially when reviewing the constitutional merits of validly enacted laws. This discretion does not always sit comfortably alongside principles of respect for constitutional supremacy, including federalism and parliamentary sovereignty.

As we have seen, Canadian judges have done a fairly poor job justifying their use of international human rights. Largely a product of conflicting common law doctrines, the Canadian law of reception straddles two sets of principles. On the one hand, the judiciary is supposed to respect international law as law, which traditionally has meant they are to strive to ensure that the substance of domestic law conforms to the substance of binding international legal rules and standards. On the other hand, courts have historically been reluctant to interfere with the legislature's asserted exclusive authority to alter domestic rights and obligations. In the pre-*Charter* era, judicial authority to apply international law was for this reason conditional on such law first having been implemented through statute.

The emergence of strong judicial review in the *Charter* era has altered this doctrinal landscape. Traditional doctrine has been supplemented, but not replaced, by the relevant and persuasive doctrine, which currently rationalizes judicial reliance on a wide range of international and foreign law sources when deciding cases. New attitudes towards the role of the judiciary in sensitizing state law to the global and multicultural context of Canadian society are part of the larger shifts in constitutional power and discourse that followed the entrenchment of the *Charter of Rights and Freedoms*. Itself informed by international human rights, the *Charter* has unsettled traditional understandings of self-government that locate law-making authority solely within the legislatures. In light of this shift, international human rights have come to be regarded as legitimate constitutional resources. However, whether they do, or should, stand as a

legitimate *source* of Canadian law remains subject to debate. Whatever might be the most convincing rationale for the relevant and persuasive doctrine, judges have generally failed to articulate it.

What is more, the relevant and persuasive doctrine does not seem to have constrained judicial decision-making. Originally restricted to the intersection of international human rights and *Charter* rights, courts have used the doctrine to rationalize many possible mixtures of international, comparative and domestic law. One result has been the deconstruction of hierarchical boundaries between binding/non-binding international human rights as well as international/comparative human rights. The rejection of classical binaries has strengthened criticisms of the relevant and persuasive doctrine as an *ad hoc* rationale for “result-oriented” judges determined to decide issues on the basis of their own political or ideological ends. International human rights and comparative human rights each serve as mere rhetoric –critics maintain-- mystifying judges’ attempts to subvert Canadian constitutional authority by subordinating it to the will of external political powers or simply their own, personal values.

This dissertation has been concerned with identifying links between the form and function of the relevant and persuasive doctrine, justifying the doctrine in terms of traditional juristic principles and developing a set of analytical frameworks useful for studying how the doctrine influences the behaviour of, and interactions between, various discursive communities. Reflecting on accompanying narratives and theoretical perspectives, I have argued that the relevant and persuasive doctrine is designed precisely as it should be, given its purposes and functions. I have also argued that it coheres with principles of respect for international law and with principles of respect for constitutional supremacy. However, we must distinguish doctrine from actual decisions, since the latter rarely appears to follow the contours of the former. Decision-making exhibits capriciousness, with judges often failing to observe the restrictions imposed by doctrine. To an outside observer, the relevance of international law may indeed seem to depend

only on judges' personal attitudes and ambitions.

One of my core arguments has been that, despite outward appearances, there is principled order to be found in many decisions about the relevance and persuasiveness of international and comparative human rights. On the one hand, I have argued that there is *functional* order to decision-making in this field, meaning that decisions are anything but capricious or whimsical. Viewed in the right light, seemingly random decisions may be seen to be part of identifiable streams of legal processes that are, in turn, structured by a range of interlocking actors and institutions. On the other hand, I argued that decision-making can exhibit *normative* order, meaning that it may be consistent with the expectation that judicial reasoning will be constrained by pre-existing rules, principles and values. Links between the two kinds of order, and therefore between doctrine and jurisprudence, can be made by supplementing dominant, formalist narratives of the relevant and persuasive doctrine with more sophisticated analytical frameworks.

Using *Transnational Legal Process*, I have argued that the proper approach to the study of the jurisprudence consists in a careful, interdisciplinary review of the context within which decisions are made and the problems with which decision-makers are concerned.² Generally, *Charter* cases arise in global and multicultural contexts, and are concerned with providing sustainable solutions to disputes about human dignity. Given this context, international and comparative human rights can and often do play an important role in framing the very nature of a legal problem and in providing resources for appraising the normative and functional merits of alternative solutions. However, this role falls short of the expectation that international human rights be clearly distinguished from, and considered more important than, comparative human rights. It also diverges from the view that "compliance" with international human rights law means that specific international norms will either determine domestic decisions or, at least, be transplanted

² Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence" (1968) 8 *Virginia Journal of International Law* 188; Myres S. McDougal & Harold D. Lasswell, "Jurisprudence in Policy Oriented Perspective" (1967) 19 *University of Florida Law Review* 486.

verbatim into domestic law.

Holding unrealistic expectations of courtrooms as “downpipes” for international law, skeptics are blinded to the informal, admittedly modest, influence that international and comparative human rights exert on judicial reasoning as part of the institutional and intellectual setting within which arguments are formed, expressed and evaluated. Sometimes, the direct application of precise international human rights rules is either not possible or, more frequently, simply unnecessary. The problem with the Canadian law of reception lies not in the jurisprudence *per se*, but in the theoretical optic we use to appraise the jurisprudence and in underlying assumptions about matters of compliance and constitutional supremacy that in turn hinder the realization of fundamental normative commitments. In this concluding chapter, I wish to consolidate the observations and claims made thus far concerning the processes by which international and comparative human rights influence judicial decision-making in Canada.

B. The Canadian Law of Reception and International Human Rights: Conceptual Considerations

Classical approaches to the law of reception have been governed by the belief that the judicial enforcement of international law must be reconciled with principles of respect for self-government. The presumption of conformity doctrine resolves this tension by granting hierarchical superiority to the latter, as is consistent with dualist conceptions of international law. Structured by rigorous procedural rules, this doctrine limits the judiciary’s role to that of policing constitutional boundaries between federal and provincial authority as well as between the executive and legislative branches of government. The federal executive is exclusively authorized to assume international legal obligations, while the federal and provincial legislatures are exclusively authorized to implement international treaties. Only when binding international treaty law has been legislatively implemented may judges apply it, but only to resolve ambiguities in statutory language. In this way, domestic law and life is hermetically sealed against

external pollutants, guarded against the destabilizing effects of judicial activism and internationalism.

We have seen, however, that the presumption of conformity doctrine has failed at this task. To begin, the judiciary regularly disregard its operative elements, rendering jurisprudence an “appalling mess”;³ judges quite simply do not respect formal criteria governing when and how international law may be judicially received and have gone so far as to conflate it with comparative law in many instances. Systematic disregard for doctrine may be explained in a number of ways. Charitably, judges may have gradually adopted modern, contextual approaches to statutory and treaty interpretation in place of the traditional “plain and ordinary meaning” approach; statutes increasingly regulate transnational social and economic interactions and so international and comparative law stand as viable resources for giving effect to underlying legislative objectives.⁴ At worst, disregard for doctrine signals the judiciary’s utter disrespect both for international law *qua* law and for principles of constitutionalism. International law and contextual interpretation become mere rhetorical tools for obscuring judicial forays into the realm of law- and policy-formation. Whatever may be the cause, it is clear that doctrine alone has neither determined choices about the reception of international law nor served to “map” jurisprudence. Something more is needed.

Making matters worse, the presumption of conformity doctrine has almost no direct bearing on human rights issues raised in the context of the *Charter of Rights and Freedoms*, nor does it capture broader transnational phenomena that unsettle dualist metaphors pertaining to what is “domestic” and what is “international”.⁵ Designed decades before the entrenchment of the *Charter*, this doctrine could not fill considerable

³ Stephen J. Toope, “Keynote Address: Canada and International Law”, in *The Impact of International Law on the Practice of Law in Canada. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998* (The Hague: Kluwer Law International, 1999) 33 at 33.

⁴ Hugh Kindred, “Making International Agreements and Making them Work within a Multicultural Federal State: The Experience of Canada” in Stephen Tierney, ed., *Multiculturalism and the Canadian Constitution* (UBC Press, 2007).

⁵ Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 *Canadian Bar Review* 534.

“legal gaps” associated with new constitutional arrangements,⁶ leaving judges few justifications for relying on international human rights when interpreting the content and scope of *Charter* provisions. This is not a simple matter of form. The *Charter* permits the judiciary to invalidate laws based on their interpretation of the content and scope of *Charter* provisions. Extensive reliance on international human rights here strongly implies that they stand as supplemental sources of Canadian constitutional law, possibly undermining democratic values associated with federalism and parliamentary sovereignty.

The presumption of minimal protection stands as the best possible account of how the presumption of conformity doctrine might be applied to the *Charter*. However, this account would have to do away with or radically revise important organizing concepts, such as those pertaining to implementation and ambiguity, and leaves unaddressed whether and how we should respect such values as parliamentary sovereignty and federalism. Indeed, the presumption of minimal protection sidesteps serious questions about the implications of treating binding international human rights as sources of Canadian constitutional law. Finally, it ignores the fact that courts have routinely disregarded or misapplied doctrine; judges’ choices about whether and how to use international law have always been based on informal factors. It is not that the presumption of conformity doctrine cannot be applied to the *Charter*. The issue is that this would serve no practical purposes and, what is more, the changes we would have to make would render it virtually indistinguishable from the relevant and persuasive doctrine. In my view, it is better to do away with the presumption of conformity doctrine entirely in the context of *Charter* review.

I defended this argument in Chapter 3. Problematic in many ways, the relevant and persuasive doctrine was part of broader constitutional shifts in the constellation of

⁶ These may also be classified as “unregulated” disputes; see, Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) at 181-193.

power among the legislatures, the executive and the judiciary, whereby the latter has assumed a legitimate law-making role. By enabling the judiciary to review the substantive merits of validly enacted laws, the *Charter* has invited judicial reliance on a wide range of extra-legal materials, including social science data, policy, morality, and philosophy, all towards the end of making state law more responsive to diverse social needs, values and expectations. At root, the relevant and persuasive doctrine recommends the use of both international and comparative human rights norms to attain a deeper appreciation for the meaning latent in *Charter's* provisions and principles, improve judgment by making it more responsive to the global and multicultural context of Canadian society, and to enhance constructive, rights-sensitive interactions among Canadian, international and foreign legal institutions.

In judges' minds, these functions justify the use of international and comparative human rights in the context of *Charter* review. Part of the rationale for this position is that international and comparative human rights resemble *Charter* rights, insofar as they are historically and conceptually linked to familiar legal principles such as equality, fairness, human dignity and representative government. Despite these similarities, international and comparative human rights add something more to the picture; their value lies in their jurisdictional and historical scope, serving as a kind of global repository of experience with recurring problems. Relying on the experiences of others who share similar legal values, principles and rules, and who have used these same resources to contend with similar problems, Canadian judges may be better equipped to identify workable solutions at home.

But while international and comparative human rights may resonate with familiar constitutional principles they are not, after all, part of the Canadian constitution. Given the expanding potential for conflict amongst domestic and international normative orders, judges may also use the relevant and persuasive doctrine to entrench external norms into the Canadian constitution, a practice that rightly raises concerns about federalism and

parliamentary supremacy. The relevant and persuasive doctrine as such offers no precise means for resolving these tensions; this is the judge's responsibility.

Two groups of scholars have tried to assist in this task: transnationalists and traditionalists. Most transnationalists, Brunnée and Toope notwithstanding, analogize the law of reception to an exercise in comparative law, whereby international law is one, and only one, among various resources necessary for state law to be made more responsive to the kinds of problems that arise in pluralistic societies. This is not so much about creating a global community of courts, establishing judicial supremacy over representative government, or prioritizing external law over domestic law -- they argue -- as it is about the much broader project of recognizing the already-existing moral and political authority of non-state normative orders. The consideration of international human rights law may then be understood as an act of translation, whereby such law helps structure legal interactions of a certain kind among globally diffuse discursive communities; a function that more localized normative orders cannot perform. International human rights, though arguably distinctive in this way, still are by no means "special" or intrinsically superior to other kinds of law. What matters is the product as well as the nature of the processes by which legal obligations are imposed; these are factors that vary from context to context.

Working with the translation metaphor, it is important to recognize that comparative analyses do not provide judges absolute freedom to modify or flatly disregard Canadian law. Judges must remain true to the "languages" with which they interact with each other and the broader community. According to transnationalists, there is a certain syntax, a set of understandings, shared by speakers of these languages that constrain interpretive choices: results still must be *meaningful* to those accustomed to domestic legal language. While the relevant and persuasive doctrine encourages the movement of judicial consciousness across legal cultures, judges are properly focused on their primary concern to sensitize *domestic* law to the global and multicultural contexts of Canadian society. Although it is altered in the process, domestic law remains the site of

legal authority and reason. Novel social phenomena are being translated *into* domestic law, hopefully in order to produce healthier interactions among discursive communities.

But there remain questions about precisely how tradition and innovation are to be balanced. To begin, there is the issue of compliance and the question of whether a comparative law approach loses sight of the fact that international law, unlike foreign law, may be legally binding on Canada. This is a problem that Brunnée and Toope are concerned with, even though they share many of the anti-positivist commitments of comparativists such as Knop. The problem boils down to the recurring concerns about respect for international law *qua* law: does something other than power or ideology influence judges' choice to use international law as an interpretive device? If international law is conflated with foreign law, does the law of reception consist simply in the spreading of other states' ideological and political interests across the Canadian constitutional landscape? Conversely, might it be that judges' use of both international law and foreign law is constrained by certain values, principles and standards that mitigate the distorting influence of ideological and political power?

The concept that is most often used to answer these questions is, aptly, "persuasion". Transnationalists want to say that international law and foreign law exert a persuasive influence on legal reasoning because they help judges *justify* decisions to pluralistic communities on the basis of shared values, understandings and expectations. Sensitizing law to diverse perspectives enhances the perceived legitimacy of the decision and, presumably, the likelihood of it being accepted by legal subjects. Yet, an emphasis on decision-makers' openness to diverse social values, interests, and expectations suggests that acculturation, social power, and one's membership in various non-state communities also play decisive roles in decision-making. An important variable here is access to legal process and the ability to secure judicial recognition of one's values, interests and expectations. Unless legal process is structured in such a way as to ensure that all interested parties have a fair and equal chance to persuade a judge, the values and

beliefs that influence judicial reasoning may well be those that resonate with judges' own personal cultural, political, or ideological commitments.

There is some empirical evidence to support this claim. While judges do refer to the decisions of foreign and international courts, they tend to rely on the decisions of courts that share certain cultural, political and ideological characteristics.⁷ Familiarity with legal cultures and practices certainly makes judges more willing and able to explore comparative law. But this may result in the further entrenchment, rather than critical appraisal, of dominant ideologies. The same can be said about the sorts of international laws that judges use. Canadian courts, for instance, tend to rely on international civil and political rights norms during *Charter* litigation, but far less upon international economic, social and cultural rights.⁸ This strongly suggests that choices about the reception of international law are driven by judges' membership in certain cultural and ideological communities and their desire to fulfill the expectations of other members of those communities. If this is so, "acculturation" or "normative coercion", far more than persuasion, explains decision-making in this field.⁹ Any account of the relevant and persuasive doctrine requires a more refined account of what distinguishes persuasion from acculturation and other mechanisms of political influence.

Traditionalists argue that this dilemma highlights precisely why the relevant and persuasive doctrine must fail to harmonize respect for international law with respect for constitutional supremacy. Treating international law as "mere" comparative law diminishes the value of binding international law, robbing rules of their force and

⁷ Anne-Marie Slaughter, "A Typology of Transjudicial Communication", in, Thomas Franck & Gregory H. Fox eds., *International Law Decisions in National Courts* (Transnational Publishers, Inc., 1996) 37.

⁸ Bruce Porter & Martha Jackman, "Justiciability of Social and Economic Rights in Canada" in *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative International Law*, M. Langford, ed. M. Langford, ed., (Cambridge: Cambridge University Press, 2008); Martha Jackman, "What's Wrong With Social and Economic Rights?" (2000) 11 *National Journal of Constitutional Law* 235-246; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law & Social Policy* 117; Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?" (1999) 10 *Constitutional Forum* 97.

⁹ Asher Alkoby, "Theories of Compliance with International Law and the Challenge of Cultural Difference" (2008) 4:1 *Journal of International Law and International Relations* 151.

allowing judges unfettered discretion in the exercise of their powers. Traditionalists believe that the best course of action is to adapt the presumption of conformity doctrine to better guide specific interactions between international human rights and *Charter* rights. In instances where Canada's international legal obligations are not an issue, the relevant and persuasive doctrine should enable judges to use international and comparative human rights as interpretive aids. This may be done by deeming the *Charter* to function as the equivalent of implementing legislation or, better yet, by explicitly codifying the law of reception in statutory or even constitutional form. Failing these steps, courts might adopt the presumption of minimal protection, as suggested by van Ert.

However, even if adapted in these ways, the presumption of conformity doctrine does not permit the reception of legal norms unless they can be traced to the express provisions of international treaties binding on Canada. Desirable to some, this doctrine precludes the judicial reception of a wide range of extremely important international human rights norms that are "extra-legal", hence invalid, sources of international human rights law; norms that in part result from the hard work of Canadian officials (and non-officials) in generating new rights and obligations. The preparatory work of treaty negotiators, the opinions of advisory agencies, NGOs, monitoring bodies' responses to Canada's annual reports, and the decisions of international and foreign courts about the content of international human rights norms and their applicability to diverse fact scenarios are all, strictly speaking, invalid objects of judicial consideration according to traditional domestic and international doctrine. If, on the other hand, we allow judges to use these non-binding norms to interpret the content and scope of Canada's international legal obligations, we either must admit that this is in principle no different from the relevant and persuasive doctrine, or, we must account for why norms produced by international and regional legal bodies ought to be granted constitutional status. While possible, no such account has yet been tendered, much less harmonized with one of the two most essential features of the presumption of conformity doctrine: respect for

representative democracy. Finally, traditionalists must also admit that doctrine has had little perceptible impact on judicial reasoning; such reasoning was erratic long before the relevant and persuasive doctrine came into being. Upon what empirical basis do traditionalists believe that formalizing the law of reception now will produce results different from previous jurisprudence? I will now consider these points in more detail.

To begin, international human rights treaties make heavy use of abstract, open-ended norm types, such as standards, principles, and what might be called aspirational goals. It is inherent in a regime founded on universalized, pre-political rights that their legal codification requires extensive reliance on vague and abstract values, principles, standards and rules. Few states would expose themselves to exacting reviews by international agencies unless there exists sufficient ambiguity to enable them to contest charges of non-compliance.¹⁰ For this reason, the treaty-negotiation process is a crucial source of insight into the sorts of issues, values and expectations state parties had in mind. As with constitutional documents, international human rights treaties contain a wide array of legal concepts, but few rules capable of independently guiding decision-makers faced with complex legal problems. This problem is only exacerbated by the general lack in international law of clear rules governing how disputes about the content, scope and applicability of legal obligations are to be resolved.

The centrality of norm-types other than rules in international human rights treaties requires that indefinite interpretive communities play an active role in breathing life into law and, what is more, that these communities rely on far more than the “plain and original” meaning of legal terms or the intentions of those who produce them. This is why there has been such an impressive growth of increasingly specific international human rights treaties and regional human rights regimes, and their attendant clusters of polycentric monitoring, reporting and interpretive bodies; this is both a symptom of and

¹⁰ George W. Downs, *et al.*, “Is the Good News about Compliance Good News about Cooperation?” (1996) 50 *International Organization* 379.

an antidote to the decentralized nature of international law. But who, precisely, may stand as an authoritative interpreter of the law of such regimes and to what degree may they fashion new rules out of a synthesis of pre-existing rights and ambient social values and expectations? Given that they have a legitimate law-making, as well as law-applying role, to what extent should domestic courts be given a “margin of appreciation” over international institutions in the interpretation and application of international legal norms? ¹¹

Domestic legal institutions have a number of advantages in norm-interpretation and -application vis-à-vis their international counterparts. Moreover, respect for self-government, as well as principles of comity, suggest that local, state governmental agencies should be given considerable discretion regarding whether and how to receive international law. With respect to institutional capacity, the presumption of conformity doctrine rests on the idea that domestic rights and obligations should be altered only by, or at the acquiescence of, the legislatures. Since legislatures presumably will implement international law in consideration of a plurality of interests, including domestic policy preferences, one can expect that most international/domestic law intersections will produce hybrid norms. There is inevitably, then, a measure of tension between the guiding-functions of implemented international legal norms, and the realization of the goals of domestic laws and policies. Decision-makers must therefore have regard to a wide range of competing aims, values and expectations when deciding how to resolve disputes about the content and application of implementing statutes. Buried deep within the presumption of conformity doctrine, then, is the admission that the congruence of domestic law with international rules is not the only value at play.

¹¹ Andrew Legg, *The Margin of Appreciation in International Human Rights Law Deference and Proportionality* (Oxford University Press, 2012); Onder Bakircioglu, “The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases” (2007) 8:7 German Law Journal 711; Yuval Shany, “Toward a General Margin of Appreciation Doctrine in International Law?” (2005) 16:5 European Journal of International Law 907.

Although my concern has not been fully directed towards debates between formalism and anti-formalism, tensions between the presumption of conformity doctrine and the relevant and persuasive doctrine engage this controversy. Transnationalists defend the relevant and persuasive doctrine in terms resembling legal realism, holding that judicial decision-making is both indeterminate and responsive -- not always in ethically principled ways -- to its ambient society and culture. From this descriptive claim follow three normative claims. First, there is no point in pretending that decision-making can be any other way; the presumption of conformity doctrine should be jettisoned as a woefully inaccurate description of the actual law of reception. Second, judicial recourse to extra-legal norms may help produce better quality judgments, as measured by their responsiveness to those normative frameworks that in fact simultaneously regulate contested activities and events. Social diversity implies, if not determines, legal pluralism and at least in the context of *Charter* review, judges do and should adapt state law to better reflect varied identities, interests and expectations. This view is clearly built upon a conception of self-government that includes respect for semi-autonomous social orders, such as those arising in the workplace, family, corporations, ethno-cultural communities etc.

Finally, scholars can help to steer decision-making in desired directions by helping decision-makers better appreciate the societies they regulate and the means at their disposal for doing good, rather than ill. This may be achieved through the infusion into decision-making processes of factual data and discussions of relevant values. It may also be achieved by distributing among practitioners who share similar normative commitments knowledge about patterns and trends in decision-making and, accordingly, how to alter the paths decision-making might otherwise take.

Contrary to traditionalists' claims, all of this is not to say that judicial decision-making is unprincipled or disordered. It is to say that pre-existing legal categories and concepts cannot determine decisions in the sense that they justify one -- and only one --

outcome. It is also to say that pre-existing law may still structure decision-making, but that extra-legal factors are, and should be, crucial explanatory variables. This is a descriptive claim rooted in sober assessments of the presumption of conformity doctrine, judicial decision-making generally, and the ethos of legal pluralism. It is also a normative claim that conceives of good judgment as that which is critical, inclusive and justifiable in accordance with standards of public reason. Finally, it is part of a theoretical optic that is informed by legal realism and other, related perspectives, all of which claim to permit some level of predictability to be gleaned from judicial practices that exhibit little doctrinal order. From this non-doctrinal order may come refreshed strategic and tactical stances, with legal argumentation buttressed by realistic expectations.

C. International Human Rights, Transnational Legal Process, and the Spectre of Compliance

One of the core arguments of this dissertation has been that the relevant and persuasive doctrine can be justified using principles of respect for international law and principles of respect for constitutional supremacy. I have argued that the operation of these principles can be glimpsed in the processes through which international law exerts a persuasive influence on judicial reasoning. Unhappy with formalism and the failings of doctrine, transnationalists have alluded to, but not elaborated upon, a variety of theoretical perspectives in defending this sort of claim. However, many of these allusions have not been supplemented with concerted hypothesis-building. Not only has there been little by way of empirical tests, but there is not enough conceptual clarity to isolate important variables.

In Chapter 3, I suggested that the transnationalist narrative can be grounded in Transnational Legal Process (TLP), a theoretical perspective that helps analysts organize the messy process of law production into cognizable form. This is achieved by disaggregating legal process into a set of clearly identifiable functional stages, within which legal norms are collaboratively created and applied by a range of state and non-

state actors in various fora. Particular decisions are subsequently situated within multiple, interlocking networks of interaction that occur across various state and non-state legal institutions, such as courts, legislatures, civil society organizations and academia. Although analytically unnecessary, TLP adds to this a strong normative dimension, whereby legal interaction is conceived to be a distinctive mode of rational argumentation structured by dialogical rules that protect values of equality, fairness and freedom from coercion.

A core hypothesis associated with TLP is that participation in legal processes that are substantively and procedurally oriented towards values of human dignity increases the likelihood that legal subjects will comply with the resultant norms. Another hypothesis is that knowledge of the processes by which law is produced can enhance the effectiveness of transnational human rights advocacy. In these senses, TLP is a functionalist as well as a normative jurisprudence that helps organizations utilize available resources to facilitate domestic decision-makers' recognition of specifically international and comparative human rights. It also directs architects of law to design decision-making processes in a manner conducive to equality and fairness.

TLP is particularly useful for the study of the relevant and persuasive doctrine because it clarifies, first, what it means to say that law has "persuasive" influence and, second, because it advances our understanding of how legal interaction affects the identities and interests of multiple discursive communities. This vision is to be contrasted with power- and rule-based accounts of compliance that locate the entirety of law's influence in the projection of political or ideological power, the kind of perspective that traditionalists tacitly endorse when worrying about judicial instrumentalism or result-orientation. Borrowing from Toope and Brunnée, we may reject this perspective by saying that law's distinctive influence may be felt absent formalism and power; law's distinctive capacity to persuade lies in the organic processes through which participants are positioned to "freely" endorse a promulgated legal rule as a part of their internal value

system. This is to say that judicial instrumentalism is constrained by ethical and professional rules that ensure that all disputants have an equal opportunity to initiate and perpetuate discourse, forward challenges, criticisms, interpretations and explanations, express their internal values, attitudes, feelings and other features of their personal identities, and to share in the invocation and application of the regulatory rules that structure power relations.

For Toope and Brunnée, this freedom (or, in Koh's terminology, the possibility for "norm-internalization") is utterly dependent on participants' adherence to core ethical and professional principles that situate the generation of understanding as the only legitimate motive for engaging in legal interaction. Persuasion is accordingly not to be confused with acculturation, which describes the unilateral imposition of prescribed roles, values and codes of conduct upon weaker or politically marginalized members of a community.¹² Acculturation entails a scenario of coercion and the threat or use of sanctions. Persuasion describes voluntary accessions to arguments.

TLP helps us see why the relevant and persuasive doctrine is and should be designed precisely as it is, notwithstanding that Toope and Brunnée do not endorse TLP and wish to see doctrinal distinctions between binding international human rights and non-binding international and comparative human rights. In particular, it helps us see what criteria judges ought to use when deciding on the relevance and persuasiveness of international and comparative human rights arguments and how these criteria facilitate mutually re-constituting interactions among various discursive communities that wield disproportionate levels of political power. These criteria are: 1) The internal logical form of legal arguments, 2) resonance between the premises (and presentation) of such arguments and the personalized values and beliefs of target audiences (e.g. judges, norm entrepreneurs, governmental norm-sponsors, rights-holders, duty-bearers, and 3) compliance with ethical and professional rules that are designed to structure fair and

¹² Alkoby, *supra* note 9 at 154-156.

equal dialogical interaction.

When comparing this account of the law of reception with that of traditional accounts, it is important to remind ourselves of the connection between these sorts of rules and norm-internalization. Rules are abstract and formal logical propositions, while norms are a function of the attitudes which subjects hold towards rules; attitudes that are in turn constructed through actors' interaction with various social institutions. The very existence of a norm depends on the fact that people observe them. Put yet another way, rules may be declared or created by will alone and may be ineffective or inactive, but norms arise organically out of the collective behavior of members of a given community or society, existing as such only when they actively direct behavior in ways that cannot be unilaterally willed.

If one were to restrict one's analysis of the law of reception simply to substantive correspondence between international and domestic legal rules, as is conventionally done, little would be said about the motivations and impact of decision-making; "compliance" could simply describe the coincidence of behaviour and legal obligation. It is open to question, for instance, whether the reception of international law is influenced by judges' or state officials' respect for international law, or their amenability to ideological and political power or even their pursuit of egoistic self-interest. TLP helps us conceptualize compliance in a far more nuanced and constructive fashion, one which is also more conducive to empirical research. According to TLP, norms represent international legal rules that have come to guide the behavior of participants to legal process. It may be further said that there are two broad classes of rules at work here: substantive rules that supply the premises of legal argument, and, procedural rules that structure dialogue about the interpretation and application of substantive rules. It is through legal argumentation that subsets of the vast array of substantive rules infused into legal process may be accepted as norms by participants including, of course, authoritative decision-makers. There is accordingly a need to account for rules and process, form and function; neither

can be viewed independently of the other.

A key assumption here is that procedural rules are by and large already norms, meaning that legal argumentation in practice is a process of structured interaction concerned with which among a class of recommended substantive rules are to be concretized into legal prescriptions. In certain situations, such as in the context of emergencies, this may be a poor assumption. However, it may credibly be said that there is often enough agreement about procedural rules to support some level of rational argumentation in law; one who rejects conventional procedural rules is unlikely to resort to law to settle disputes, while extravagant interpretations of these rules will not be easy to justify to decision-makers and other participants. In most cases, then, arguers will more or less agree on a minimum core of rules that are designed to enable legal argumentation to begin with, even though particular rules will be, practically speaking, up for debate. To the extent that this is so, the persuasiveness of a *legal* argument is conditional on its internal logic, orators compliance with accepted procedural or dialogical norms, as well as the extent to which the facts and values that make up an argument's premises resonate with the beliefs and commitments of the target audience. A maximally persuasive argument is one that satisfies all of these standards. Again, this is to say nothing about the extents to which these conditions obtain in practice or the relative power of alternative modes of influence.

TLP stands only for the proposition that the persuasive influence of international law lies in how it reconstitutes pre-existing beliefs and commitments, integrating them within shared values and understandings. When one is persuaded, one changes one's beliefs, more or less accepting the position of the speaker. However, to be persuasive, the speaker also must moderate her own position to better resonate with those values and beliefs that the audience is unlikely to change. Importantly, arguments -- not the mere assertion of power -- are the primary vehicle through which persuasion is achieved. Of course, there may be no possibility of persuasion, most especially when positions rest on

implied premises and assumptions that have yet to be recognized by some or all participants. For persuasion to work, both the speaker and the audience must be prepared to make explicit and to concede certain points and to prioritize which values are indispensable and which values may be (temporarily) cast aside. This interaction necessarily must build upon a core of shared values and understandings oriented around the ideal of equality.

Norm-internalization can thus be seen as the end-stage of a discrete type of legal process, which progresses from the interaction of transnational actors in legal fora, to debates within and among interpretive communities about the content and applicability of a set of rules, to participants' endorsement of a particular interpretation over the alternatives. TLP draws our attention to situations where a legal rule influences behavior because it has been internalized into legal subjects' internal value-sets, changing not only their perception of self-interest, but potentially the very ends they value and, ultimately, their contingent or non-legal identities. Legal *rules* promulgated by external, third-party authorities, such as treaty regimes, legislators, or judges, become at one and the same time *norms* whose justification is congruent with those principles legal subjects already regard as ethically or morally authoritative.

All of this has raised the question of what should be the role of a judge according to TLP theory and, of course, how such theory supports the rational analysis and appraisal of decisions about international and comparative human rights. To begin, judges should be regarded as both speakers and audience members in the legal process, another advantage TLP holds over traditional accounts. Typically, literature on the law of reception focuses on judges merely as passive recipients of international legal arguments. That is, litigants attempt to persuade judges to make some kind of use of international law. A stumbling block in this literature has been discerning all the various ways judges respond to arguments, dissonance between judicial reasoning and the reasoning displayed in formal judgments, and whether indeed argument, rather than power, accounts for that

dissonance.

TLP offers some insight into how arguments of this nature might work and how they may be made more effective. As we observed in Chapter 3, a good strategy here is to *analogize* international and comparative human rights with domestic law, highlighting principles and values common to both. Analogical reasoning draws judges' attention to the experiences of other legal cultures in resolving similar problems using commonly-accepted legal principles. If a judge is committed to the values and principles of relevant domestic law, such as the *Charter*, then this approach can improve their receptivity to relevant international and comparative human rights arguments because they can see themselves as acting consistently with the domestic bases of their authority. However, judges are also speakers and judgments are also arguments. With limited resources for physically enforcing their rulings, judges frequently will make and present decisions in ways that respond to legal subjects' base values and commitments, in the hope of securing willing compliance. For much the same reason, while power may influence whose values and commitments are expressed or considered to be most important, judges ought to tailor rulings to appeal to as broad an array of perspectives as possible. As Toope and Brunnée argue, they have to provide all legal subjects with acceptable *reasons* for a rule.

Thus, even if a judge is personally persuaded by an international or comparative human rights argument, there are factors she must consider when deciding what use to make of underlying rules, principles and standards. As speakers, judges may find international and comparative human rights useful in making their decisions more persuasive to diverse participants. Conversely, they may find that such law is a poor rhetorical device under the circumstances. Although international and comparative human rights might well have altered judicial reasoning and, therefore, a final decision in such a situation, its influence may be hidden from view and quite different reasons offered in the recorded judgment. Thus, international and comparative human rights

might be enormously important variables even if they are not expressly referenced in judgments. This alone warrants a radical revision of the methods by which scholars customarily assess the significance of international and comparative human rights;¹³ so much is missed if one simply parses reported judgments looking for explicit references to formal international and comparative human rights law. But to must that court reports can be poor indicators of judicial reasoning raises a host of other problems associated with inferring judicial intent and psychology out of reconstructed arguments.¹⁴

We should at this point recall that TLP is an idealized if not romanticized conception of legal interaction with a host of serious methodological issues. TLP presupposes that in most, if not all cases, participants will share base values and understandings and that, if the processes through which law is produced are equal and fair, the finished product stands a good chance of being internalized by participants. This is a dubious assumption which has been roundly criticized by many, including legal realists, critical legal theorists, legal pluralists, and others. TLP also sidesteps methodological issues associated with whether and how we can accurately reconstruct arguments out of reported judgments. It is of course important to place a judgment in context and to read between the lines, as it were, but this invites questions about what tools we use to disentangle the relative influence of multiple normative and ideological forces. It also reminds us that the analyst can all too easily impose her own assumptions, biases and ambitions onto objects of analysis. Finally, TLP does not adequately acknowledge that ethical and professional rules distinctive to law often serve to reinforce relations of domination rather than to guarantee equality. For a self-proclaimed empiricist and critical perspective, TLP should lead one to find this both surprising and troubling.

Still, TLP is very useful as a heuristic and critical device and is vastly superior to

¹³ Examples of the use of this problematic methodology include: William Schabas, *International Human Rights Law and The Canadian Charter of Rights and Freedoms*, 2nd edition (Carswell, 1996); Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto and Vancouver: Butterworths, 1992).

¹⁴ Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press, 1998).

traditional approaches in these respects. Heuristically, it offers a set of analytical frameworks that help us explore the *possible* ways in which international and comparative law shape norm-production in judicial settings. This can help validate past and inspire new approaches to human rights advocacy. More to the point, it is vastly superior to prior, traditionalist approaches that stubbornly refuse to account for the reality of past jurisprudence, the aspirational nature of human rights, and the poverty of rule-based conceptions of compliance in a human rights context (among others). Critically, it allows us to evaluate the explicit and implicit uses to which judges put international and comparative human rights relative to ethical and professional standards. Case law may -- and often does -- diverge from TLP ideals, but TLP helps us clarify where decision-making can be improved. This may be small consolation to those who have lost faith in state-centred conceptions of law. But it should be appealing at least to traditionalists, who proclaim a commitment to the same values as do TLP theorists. It is hard to imagine what beneficial alternatives a traditional, rule-based approach offers either in terms of descriptive accuracy, explanatory power, or normative appeal.

D. The New Common Law? Constitutional Perspectives on the Law of Reception

The idealized nature of TLP highlights all the more clearly the need to engage in more rigorous empirical tests of its claims. Chapter 4 represents an attempt to begin this process. It demonstrates that techniques of persuasion must stand alongside manifestations of power as a key variable explaining the reconstitution of the Canadian security certificate regime. Before reviewing this claim, though, it is important to cement the link between TLP and the relevant and persuasive doctrine. With the concept of compliance understood more clearly, the final step is to explain how TLP addresses the second pillar of the Canadian law of reception: principles of respect for self-government.

A large part of this dissertation has been concerned with examining how different conceptions of constitutionalism influence the perceived legitimacy of the relevant and persuasive doctrine. Principles of respect for constitutional supremacy are, in the context

of the presumption of conformity doctrine, reducible to what Mattias Kumm calls a “statist” paradigm of constitutionalism.¹⁵ The statist paradigm of constitutionalism locates the authority of constitutions in an amorphous “will of the people”, where “the people” are coterminous with a given state. That is, the “constitution is seen as the legal framework through which a political community governs itself as a sovereign nation”.¹⁶ It is generally held -- wrongly, in my view -- that the judicial application of international law is inconsistent with constitutionalism so conceived, unless it has first been transformed into domestic law by representative institutions. The judicial reception of international law is justifiable if and only if judges limit their role to policing the constitutional boundaries between the federal and provincial governments as well as between the federal executive and federal and provincial legislatures. Resting on statist paradigms, the presumption of conformity doctrine cannot be disentangled from more general debates about the legitimacy of judicial review as appraised in relation to such values as federalism and parliamentary supremacy. Although there are democratic bases for justifying judicial review, the presumption of conformity has long been suspicious of judicial review.

Following the entrenchment of the *Charter*, the theory and practice of judicial review changed significantly, as did judges’ attitudes towards international law. Although they had by then already adopted contextual approaches to statutory interpretation, judges in the *Charter* era more frequently employ both binding and non-binding international law when reviewing the substantive merits of validly enacted law. There is here a perceptible shift in criteria of legitimacy with regards to the reception of international law that arguably rests on an alternative paradigm of constitutionalism. This “cosmopolitan” paradigm orients the basis of legal authority towards “a complex standard of public

¹⁵ Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and between the State”, in *Ruling the World? Constitutionalism, International Law, and Global Governance*, Jeffery L. Dunoff & Joel P. Trachman, eds., (Cambridge University Press, 2009).

¹⁶ *Ibid.* at 268.

reason” as well as towards the “legitimate concerns of outsiders”.¹⁷ This paradigm has emerged in response to forces of globalization that fray the boundaries demarcating domestic/international, Us/Them, and law/not-law.

Broadening the sources of law beyond those located within specific constitutional regimes, cosmopolitan constitutionalism legitimizes judicial recourse to international law, and regards it as authoritative in certain circumstances. Depending on the institution that has produced a norm, that institution’s recognized authority over a given issue, and the material role of a political community in making a problem better or worse, a domestic court could conceivably be authorized to prioritize an international legal norm over their home state’s constitution. The source of authority here lies not in the roots of particular legal orders or artificially circumscribed political communities, but rather in public reason, where the “public” in question transcends national borders. In this formulation, law is considered to be an autonomous, holistic mode of interaction that transcends and, indeed, prevails over, the contingent legal orders of individual political communities.¹⁸

Traditionalists’ resistance to the relevant and persuasive doctrine might be explained on the basis that they suspect that it may pave the way for cosmopolitan constitutionalism. They worry that judges may tend to ignore traditional constitutional limits on their authority, either because international and comparative human rights provides a virtuous cover for less altruistic ambitions, or because they genuinely believe that respect for rights should trump all other constitutional principles. But, despite appearances, the relevant and persuasive doctrine does not require that we jettison the statist paradigm. The reception of international law still has to be rhetorically justified to those affected if it is to be found persuasive on particular occasions. Since the state is always affected by *Charter* review, this strongly implies that a wholesale rejection of traditional constitutional values and associated paradigms is unlikely; unless persuaded,

¹⁷ *Ibid.* at 286.

¹⁸ Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009)

the government will consistently refuse to endorse decisions and may employ various tactics to limit their effect. Ironically, the presumption of minimal protection may itself be best understood as an instance of cosmopolitan constitutionalism, insofar as binding international human rights may stand as separate sources of constitutional law in Canada.

More fundamentally, though, the desire to protect the constitution from judicial tampering rests on a fundamental misconception concerning the nature of rights. As we saw in Chapter 2, rights are discursive devices that force us to justify desired distributions of value in accordance with standards of public reason. Justifying law in relation to public reason and recognizing the global and multicultural context of law are hardly values unique to cosmopolitan constitutionalism. Rather, these are values that inform the very concept of legal rights, including constitutional rights. Even if no infringements are found or no remedies are offered when rights are infringed, the invocation of rights-language forces governments to *justify* the exertion of public power. When issues are by their nature global and multicultural, it follows that this justification will have to be sensitive to the perspectives of outsiders. This does not require that a judge choose between domestic law and international law; each plays a distinctive role in constructing the context, depth, and importance of a problem.

With this in mind, I have suggested that the relevant and persuasive doctrine need not be made “strange”, as Knop suggests. Instead, it is built upon fairly traditional common law conceptions of judicial reasoning. The law of reception is in many ways part of the common law tradition of viewing the constitution as a “living tree” that is rooted in social context and that must be tended in order to remain vital. Far from serving as an independent source or “root” of Canadian law, international and comparative human rights can expand the *environment* within which Canadian law operates, providing room for it to grow in step with shifting social realities. This view is hardly novel, as a number of prominent constitutional scholars consider the *Charter* to be built upon the common law tradition in which statutory law is to be interpreted and applied in keeping

with changing social values.¹⁹ International and comparative human rights can serve as indicia of these values and, accordingly, may signal the direction technically valid law ought to move. This does not require that internationally-derived norms replace or overbear domestic law; the *Charter* itself is the engine of change.

How does this process work? I have asserted that international and comparative human rights influence judicial reasoning primarily through analogy. Analogical reasoning in the context of the law of reception means that one analyzes the ways in which recurring transnational legal problems are separately addressed by domestic law and by international or foreign law. Often, international and comparative human rights are turned to as sources of empirical data that help judges appraise the possible practical and normative consequences of alternative decisions at home. Careful reviews of how international or foreign decisions have or have not succeeded in actualizing certain ends can help Canadian judges identify the desirability and feasibility of proposed means of realizing similar ends in Canada. But the ends desired as well as the legal mechanisms through which they are actualized remain in large part domestically constituted; the relevant and persuasive doctrine does not authorize judges to simply give effect to the will of a foreign political entity without regard to the values, preferences and expectations of local communities.

It is crucial to appreciate that the mere consideration of international law as comparative law does not displace established processes of domestic law-formation and – application, any more than does a judge’s consideration of social science data or moral principles and values. International and comparative human rights are not simply taken from outside environments and then used to override domestic law, as the cosmopolitan constitutionalist would have it. Nor do judges simply ignore *Charter* provisions, precedent, parliamentary will, or domestic policy preferences; the *Charter* requires that

¹⁹ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Irwin Law, 2001).

all of these factors be considered. International and comparative human rights instead perform information-gathering and appraisal functions, refining judges' understanding of the causal and normative dimensions of alternative decisions that could, in theory, be made entirely on the basis of domestic normative resources.

E. Power, Persuasion, and the Reconstitution of the Canadian Security Certificate Regime

The reconstitution of Canada's post-9/11 security certificate regime presents an outstanding opportunity to apply the foregoing theory to a modest empirical test; can judges be said to have engaged in the kind of reasoning I argue is justified by the relevant and persuasive doctrine? If so, what have been the results and, in particular, is there evidence to support Koh's norm-internalization hypothesis?

Among the attractive features of this case study are: the dynamic, sometimes tense interplays between international human rights and Canadian constitutional law, the presentation of a confusing, outwardly contradictory jurisprudence that does not easily fall within identifiable doctrine, and the interplay between power and persuasion in explaining the impact of international and foreign law on judicial reasoning. This case study was outwardly marked by intense disorder and the seemingly result-oriented use of international and foreign law. Yet, it displayed some evidence of international human rights having influenced the gradual realization of values of human dignity in certificate proceedings. What motivated judges to take the approach they did to international human rights in this case and with what material results?

In Chapter 4, I used TLP to impose a significant level of order on ambiguous, ambivalent, and disjointed decisions. I also argued that argumentative persuasion stands as a necessary explanatory variable in the Supreme Court's decision-making process as well as in the effects of its decisions on the current state of certificate proceedings. However, persuasion certainly is not the only variable at play, nor does this stream of

legal process convincingly prove the occurrence of norm-internalization as Koh understands it. International and comparative human rights played only a modest role in structuring legal interactions both within certificate proceedings and about the constitutionality of certificate provisions and associated practices. Other prominent normative frameworks included global counter-terrorism law and policy, foreign national security law and policy, Canadian constitutional law, criminal law, immigration law and national security law and policy. The reconstitution of the certificate regime is in many ways a story about the percolation of constitutional principles across many of these legal fields, with institutional traditions in each field polarizing the interpretation and practical effect of these principles.

In many ways, the story begins with the influence of international political power on domestic decision-making and, with this, judges' unwillingness to abide by the principles of the relevant and persuasive doctrine. As we have seen, the post-9/11 security certificate regime is part of broad institutional response to transnational terrorism and one of the means through which parliament and the executive integrated Canadian national security law and policy with that of foreign and international regimes. A sovereign legislative act to be sure, the *Immigration and Refugee Protection Act* explicitly implements international counter-terrorism law and has been profoundly influenced by foreign legislative provisions and political pressures, emanating mostly from the United States and the United Kingdom. The same is true of security intelligence practices, which are embedded within increasingly effective global networks that operate in relative autonomy from serious judicial and parliamentary review. Expressible in terms of transgovernmentalism, the vectors of this external influence are rooted in linkages among Canadian and foreign legislatures and executive agencies, as evidenced by similarities in legislative language and the growing influence of a globalized Canadian intelligence community. Integrated within these global counter-terrorism networks, security certificates have been used to facilitate the generation and distribution of global

intelligence as well as the detention and transfer of alleged terrorists to jurisdictions where they may be more conveniently interrogated and prosecuted.

Until very recently, judges have deferred to parliament and the executive in this area, considering it to be a matter of policy best left to the expertise of relevant agencies. Critics would, of course, see here the exploitation of normative indeterminacy and the language of exceptionality to rationalize extra-ordinary practices. Slowly, practices not authorized by pre-existing law or autonomous legal values are legitimized as legal and security institutions adopt cosmetic changes to obscure the substantive damage they inflict on the rule of law. Optimists would counter that meaningful gains have been made, in part due to the values and insights gleaned from international and foreign experiences, as communicated by transnational human rights advocates and other discursive communities. The Supreme Court of Canada relied on these insights when it recognized that the changing, global context of the certificate provisions rendered them extraordinary and, consequently, unconstitutional. In particular, it recognized that this regime facilitates and depends upon the expanded territorial reach of Canadian national security agencies -- a reach that has escaped the grasp of autonomous legal values.

Although international and comparative human rights might have been an attractive means of expanding the scope of the *Charter*, they were not given direct effect or explicit acknowledgement in the court's decisions. In fact, in *Charkaoui I*, the Supreme Court seemingly sought to normalize our continued reliance on what remain decidedly abnormal measures. Recognizing that the extremely secretive, expedient and discretionary nature of certificate proceedings ran afoul of the *Charter*, the Court ignored domestic alternatives that would have significantly improved the rights afforded to named persons. Instead, it encouraged Parliament to adopt the UK's seriously flawed approach. Viewed cynically, there was indeed constitutional learning of a sort going on, but the Court was learning how to protect national security law and policy from human rights advocacy rather than vice versa. What is more, the court used this experience and

its role as a (de)legitimizing institution to help parliament and the executive learn the same lesson. A skeptic would be justified in suspecting that power -- and deference thereto -- best explained the judgment in this case.

Then, in *Charkaoui II*, the Court unexpectedly cast this skeptical account into doubt by surreptitiously revising its initial stance. Concerned with the constitutionality of executive practices, rather than legislative provisions, the court nonetheless used its powers to effect precisely the sort of changes that it could have mandated in *Charkaoui I*: expanded disclosure and adversarial challenge. Viewed in isolation, and literally, this case reveals next to nothing about international and comparative human rights, as neither of these normative perspectives received the slightest mention. Yet, the *Charkaoui II* disclosure rules clearly corrected some of the most serious flaws with the UK-based approach -- flaws the Court in *Charkaoui I* had all but said were constitutionally irrelevant. Why did the court not even once cite international or comparative human rights in *Charkaoui II*? Recognizing the role of the Canadian intelligence community and of the certificate regime in giving effect to global counter-terrorism law and policy, the court could easily have relied on international and comparative human rights in rendering its decision, much as it had with respect to Guantanamo Bay in *Canada (Justice) v. Khadr*. This would have been both logical and well within its authority. Perhaps to camouflage its retroactive reversal of its earlier decision, it chose instead to rely on traditional Canadian criminal law norms, but made them applicable to what historically was regarded as a purely administrative law regime.

These cases may be evaluated in a wide number of ways. Skeptics will doubtless see in them all that is wrong with our law of reception. We see in these rulings nothing more than the judiciary's clumsy attempt to use whatever tools were available to achieve the results they wanted, namely, the avoidance of complicity in the outsourcing of intelligence and law-enforcement activities to countries with deplorable human rights records. Forced to recognize that labeling the certificate regime "administrative" would

no longer absolve the judiciary of its role in constructing and reinforcing questionable policy, it did what it could to provide the illusion of respect for human rights. In the end of the day, however, it played a central role in re-balancing an arguably discriminatory regime that exposes non-citizens to a litany of human rights abuses both in Canada and abroad. While not the effective cause of this change, international and comparative human rights law played no small role in the reconstitution of the certificate regime as well as in the courts' largely successful attempt to avoid direct responsibility for it.

However, an alternative narrative is equally plausible -- one that looks beneath the terms of the official reasons for judgment and reformulates the ends towards which the Court was working. We might assume that the Court from the very beginning was persuaded by the international and comparative human rights arguments submitted by Messrs. Charkaoui, Almrei, and Harkat, and those intervening on their behalf. They might, in other words, have appreciated the practical and normative deficiencies of the UK-style regime as illuminated through international human rights advocacy. They might also have recognized the clear advantages offered by the former SIRC system and other domestic alternatives. Yet a range of practical problems precluded the articulation of a more frank and forceful judgment. The government had firmly declared its intention to dismantle the pre-9/11 certificate regime and was committed to using the powerful rhetoric of national security to insulate certificate proceedings and associated practices from meaningful parliamentary and judicial scrutiny. Canadian courts have traditionally deferred to the executive in this field and established a line of precedent clearly indicating the inapplicability of robust criminal law principles to this context.

Thus, there were good reasons for the court to tread softly and slowly, introducing reform surreptitiously rather than openly. Indeed, the court was acutely aware that judge-led attempts to force significant improvements in national security proceedings in the UK had met with significant setbacks. In *Re A*, the House of Lords relied on international human rights in finding that the UK's version of security certificates unjustifiably

discriminated against non-citizens. The UK government responded by amending the impugned regime to permit the targeting of both citizens and non-citizens.²⁰ From the government's perspective, the problem of discrimination had been solved and, in one sense, international human rights were given effect. But this effect was purely symbolic and painfully ironic; a wider range of people were exposed to potential abuses and, despite the form of the new provisions, executive officials retained discretion to apply it in an uneven, discriminatory fashion. As we have seen, international and comparative case law on national security proceedings in the UK has since become decidedly apologetic, with courts uniformly granting the executive a wide margin of appreciation in invoking states of emergency, a practice that flatly contradicts the views of virtually all human rights-based interpretive communities. These practical realities highlight the institutional limits of ambitious judicial decision-making, an issue that is quite different from whether or not judges wish to defend human rights. Recalling our earlier discussion on the art of persuasion, we see again that the judiciary is not just an audience hearing the arguments of litigants; it is also a speaker seeking to persuade its audience to accept the soundness of its ruling.

With this responsibility in mind, the Court had a choice: to issue a decision that aligned the *Charter* more closely with available international and comparative human rights norms or to issue a decision that was more likely to give practical effect to those norms in the long –run. Having recommended the further entrenchment of a flawed, foreign-based certificate regime in *Charkaoui I*, it understandably opted for the latter. This approach resonated with the Canadian government's routine of borrowing legislative provisions and practices from the UK, making its respect for the ruling more likely. And, although symbolically the ruling was conservative if not outright apologetic, it left open the possibility of progressively infusing the certificate regime with more robust protections.

²⁰ *The Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2.

This is precisely what occurred in *Charkaoui II*, whereby many of the international and comparative human rights perspectives that the court seemed to disregard a year earlier were given expression through the extension of existing judicial discretion to include matters of disclosure. Importantly, this discretion was conferred by parliament through its amendment package following *Charkaoui I*. Parliament had by this time also showed some interest in increasing its oversight over executive national security practices, as evidenced by three critical committee reports released shortly after *Charkaoui I*.²¹ Indeed, it included in its post-*Charkaoui I* amendment package a broader array of rights than was judicially required, including provisions governing the inadmissibility of evidence believed on reasonable grounds to have been obtained through the use of torture.²² When *Charkaoui II* was decided, it may have become clearer to the court that parliament was, for the time being, prepared to take a more assertive role in constraining abusive national security practices.

Critically, then, the court enhanced the persuasiveness of its ruling by directing its attention to the certificate-based practices of *executive* officials, leaving recently amended statutory provisions intact. In one sense, this approach was necessary, given that the factual and legal issues in *Charkaoui II* arose in the context of pre-*Charkaoui I* certificate provisions. If the court was interested in revising its original position on the constitutionality of the special advocate system, it would have had to wait for this issue to wend its way back up the system, an undesirable delay for human rights advocates considering that international and foreign courts had recently upheld the UK regime. By focusing on the more general question of disclosure, the court was able to build on s. 7 precedent in this field, on numerous parliamentary reports and other evidence of shifting legislative consciousness, and on the unfolding global disrepute of certificate-like

²¹ Canada. House of Commons, Report of the Standing Committee on Public Safety and National Security, Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues (March 2007); Senate, Report of the Special Senate Committee on the Anti-terrorism Act, Fundamental Justice in Extraordinary Times (February 2007); House of Commons, Report of the Standing Committee on Citizenship and Immigration, Detention Centres and Security Certificates (April 2007).

²² *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, s. 83(1.1).

regimes to impose upon executive agencies a direct and general duty with respect to the retention and disclosure of security intelligence. This had the same prescriptive effect as requiring parliament to rewrite security certificate provisions to ensure that special advocates be granted the power to subpoena documents and witnesses, except that the court was able to approach the issue in a manner less easily derided as “activist”.

What is more, by resting its judgment on well-established constitutional principles rooted in Canadian criminal law, the court demonstrated the persuasive appeal of analogical reasoning. That is, the decision was made on the basis of Canadian constitutional law and not international and comparative human rights. There was no question about the judiciary’s authority to make these decisions or doubt about the pedigree of the principles used. Yet, the court’s ability to appreciate the problems posed by the certificate regime and its willingness to remedy these problems consistently with values of human dignity were both improved by its exposure to international and comparative human rights arguments and associated social science data. Its appreciation of the normative demerits of the UK-style regime *and* of obstacles to a wholesale invalidation of the Canadian certificate regime may have influenced its choice to strike a middle ground when redirecting these arguments towards the executive. Though the decision seemingly lacked principle, we can glimpse a logical and normative structure to the rulings that is expressed through persuasive rhetorical argument.

The truth of the matter probably lies somewhere between these two perspectives. It would be easy to be cynical and to see in these cases the normalization of extraordinary practices. But valid critical perspectives notwithstanding, one could be forgiven for optimistically regarding the quashing of certificates against Messrs. Charkaoui and Almrei -- as well as the Federal Court’s spirited application of *Charkaoui II* disclosure -- as indicative of a long-lasting judicial willingness to more rigorously review executive claims of secrecy. We can at least say that international and comparative human rights

played a modest role in contextualizing the problems posed by security certificates as well as in motivating the Supreme Court to restructure the ways in which security intelligence is collected, shared, retained, and disclosed.

That said, the case study has fallen well short of confirming the norm-internalization hypothesis as well as the intrinsic normative merits of the relevant and persuasive doctrine. International and comparative human rights are quite simply not “special” norms that have the power to facilitate courts’ constitutional learning about the most ethical distribution of value. Domestic experiences and wisdom were far more influential (and normatively compelling), at least in the reform of the security certificate regime. But even if international and comparative human rights did perform this function, they have done little to alter the base values, identities, and interests of all discursive communities -- most especially the intelligence community. There have been a number of notable examples of non-compliance with *Charkaoui II* obligations²³ as well as attempts to re-litigate the issue in hopes of reducing the scope of disclosure. More worrying still is the Harper administration’s recent decision to dismantle the office of the Inspector General of the Canadian Security Intelligence Service²⁴ and to resist implementation of the many sound recommendations in the O’Connor Report.

F. Conclusion

That there are so many different ways of interpreting the Supreme Court’s reasoning confirms the perils of reconstructing argument out of formal and informal texts. The analyst doubtless imposes her own values, ambitions, and assumptions on these materials. Still, the case study confirms that meaningful reports on the domestic

²³ *Harkat (Re)*, 2009 F.C. 553, 345 F.T.R. 143.

²⁴ “CSIS Inspector General Cut In Tory Budget Bill” The Canadian Press, April 26, 2012, online <http://www.huffingtonpost.ca/2012/04/26/csis-inspector-general-cut-budget_n_1456231.html>.

impact of international and comparative human rights must include far more than a review of instances in which it is cited within, or otherwise “incorporated” into, domestic legislation and case law. While such reviews have been useful for sketching doctrinal terrain, they have failed to place the reception of international and comparative human rights into a proper context or to identify the problems with which decision-makers have been concerned when fashioning their decisions. Without context and problem-orientation, analysts are likely to miss the many kinds of influence which international and comparative human rights exert on judicial reasoning and the direct and indirect effects this can have on domestic rights and obligations.

Context increases the relevance of research because it situates particular decisions, and appraisals of decisions, within an identifiable social and institutional setting. This allows scholars to account for a greater range of variables than they otherwise would if they were to simply treat each instance where international law has (not) been cited as evidence of its (in)effectiveness. We have seen, for instance, that international legal norms come in a variety of types (binding/non-binding, hard/soft law, rules/principles/standards) and that law’s general effectiveness is affected by its intersections with a wide range of informal normative frameworks. While surveying the symbolic recognition of international law in an array of cases has its uses, it is too general to present one with an understanding of precisely how and why international law has (or has not) been effective and, consequently, what are the chances of it working in the service of a given end or value.

Problem-orientation sharpens context by focusing our attention on the *consequences* of decisions and of their alternatives. The judge’s dilemma is that s/he is

required to find a solution to a problem, even though one cannot be derived exclusively from available stocks of norms. In some instances, this requires judges to base their judgments on incomplete sets of logical premises, relying on extra-legal resources to fill in the gaps. In other instances, it requires them to choose from a range of otherwise valid or justified decisions the one that best responds to the interests, values, beliefs, and expectations of those party to, and affected by, a dispute. The comparative persuasiveness of some decisions over their alternatives is not reducible to their formal, logical qualities (which is not to say that decisions therefore are unprincipled or arbitrary). Rather, contextual factors such as audience, value, social science data, rules which structure legal interaction and argumentation, and the rhetorical practices of participants in legal process are the most important variables.

TLP provides analytical frameworks useful for imposing order on the Canadian law of reception and the relevant and persuasive doctrine in particular. This order is both functional and principled, in the sense that it can be justified by reference to principles of respect for both international law and constitutional supremacy, should one wish to do so.²⁵ At the very least, international and comparative human rights help judges appraise the functional and normative merits of alternative decisions. Treating international law as similar in kind to comparative law does militate against traditional conceptions of compliance, in which courts are expected to faithfully apply pre-existing international legal rules. However, in the context of international human rights at least, this traditional preoccupation with congruence or conformity is simply not possible; there are few rules precise enough to be applied in this fashion and even when rules are clarified by treaty-

²⁵ One could always adopt a more critical stance, adopt a cosmopolitan conception of constitutionalism, or break faith altogether with state-centred conceptions of law; see Craig Scott, "Transnational Law' as Proto-Concept: Three Conceptions" (2009) 10:7 *German Law Journal* 877.

bodies, they remain non-binding. Courts must necessarily be free to interpret the content, scope, and applicability of international human rights norms in diverse contexts.

Compliance is accordingly better understood as a process of *engagement*, in which participants to legal interaction use international and comparative human rights to collaboratively construct and evaluate alternative solutions to transnational problems.

Principles of respect for constitutional supremacy are simultaneously respected since decision-making remains grounded in the Canadian constitution; in some ways, the relevant and persuasive doctrine is actually more in keeping with conceptions of constitutionalism germane to traditional doctrine than is the presumption of minimal protection. The reception of international law is in the case of the former doctrine best viewed as a species of common law, analogical reasoning, where judges use the experiences of other legal cultures to appreciate the functional and normative merits of a decision that could, in principle, be made on the basis of domestic materials alone. There is no need to consider it a “strange” or disturbing practice that needs to be tamed. Indeed, the persuasiveness of international and comparative human rights depends on disputants’ commitment to ethical and professional rules of a dialogical character that are sourced in a plethora of domestic institutions. The authority of domestic law is therefore important both substantively and procedurally.

When viewed in this way, we can synthesize the relevant and persuasive doctrine with actual decision-making to some extent. If this is not descriptively possible, we at least are able to identify the way decisions --and legal interaction-- ought to be structured, in consideration of the core purposes of the doctrine as well as those ethical and professional principles that are conducive to fair, equal and rational argumentation. This

is perhaps the most convincing, practical benefit TLP has to offer; it enables one to identify or to critically impose principled order on an apparently disorderly body of capricious case law. This, in turn, helps one recommend ideal means of organizing legal arguments and to predict how advocacy campaigns might fare under certain conditions. Less clear are the normative implications of this practical knowledge. The limited empirical work conducted here demonstrates that knowledge of TLP may be used to improve the effectiveness of human rights advocacy, largely by helping advocates marshal procedural norms and substantive values to inhibit the distorting influence of political and ideological power. Those who conceive of human rights as universal moral principles will find this encouraging. But we have seen that knowledge of this process and the adroit use of legal argument may also be used for the contrary purpose -- to normalize relations of domination.

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