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***255** Truth and Method in the Domestic Application of International Law

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I. Introduction

International human rights law has permeated decision-making in domestic courts as judges increasingly turn to international texts for guidance and as sources of authority. While some legal commentators celebrate the result, others lament it. Few, however, consider the impact of interpretative contexts, most notably local cultures, on the meaning of international texts. The international and national are pitted against each other in matters of meaning.

In response, this paper presents a particular reading of *Truth and Method*, Hans-Georg Gadamer's landmark text, as a lens through which to consider the meaning of international texts in domestic contexts. Gadamer's thoughts have been the subject of inquiry and controversy across legal lines; yet, they remain virtually unknown within international human rights law. His absence within this circle is unfortunate because Gadamer takes up questions concerning culture, perspective, difference, and authority—issues that no international human rights scholar can hope to ignore. More importantly, however, Gadamer addresses these issues within a theory of language that proves relevant to the very structure of international human rights law itself, given that it lacks a third party arbitrator authorized to pronounce on meaning. The judicial use of international law within domestic courts brings this feature of the international regime into stark relief because the rising judicial reliance on international law has the potential to generate as many meanings of international texts as there are courts willing to engage those texts. *Truth and Method* expounds a theory of language that recognizes the authority of international texts and international law's governance ambitions while still accommodating variations in interpretation between national jurisdictions.

This paper is divided into several parts. The first provides a brief overview of the debate concerning international law's use in domestic courts in so far as this debate engages the place of culture within interpretation. The second part critiques the traditional model of interpretation assumed by proponents of the debate. This model seeks to locate meaning in an objective text capable of impressing itself upon an interpreter-subject. While it seems to offer an objective way of resolving disputes over meaning, this approach nonetheless proves unable to mediate between divergent interpretations. The third part addresses the interpretive community model of meaning that developed as a reaction to the failed quest for objective meaning. While this model can explain divergent interpretations, it ultimately lacks a critical capacity and therefore cannot provide a basis to reconcile international law's ***256** governance ambition with divergent meanings. The fourth part turns to Gadamer's *Truth and Method* as an alternative to both the traditional and the interpretive community models. It identifies the affinities between Gadamer's theory of language and the domestic application of international law while emphasizing that his work cannot be cited in support of a cultural relativist position despite his premise that all interpretation is

shaped by the prejudice of the interpreter. The Nigerian Court of Appeal's decision in *Muojekwu* v. *Ejikeme* is used throughout this paper to ground the analysis.

II. International Law In Domestic Courts

The British House of Lords decision in *Pinochet* represents the best known, widely scrutinized and most dramatic example of the invocation of international law by national judges. [FN1] As a former head of state, General Pinochet was certainly no stranger to international law and international norms. Yet, international law is also becoming relevant to the lives and claims of individuals who have no public or internationally recognized persona. Courts in several different countries have turned to international law to resolve disputes that specifically concern the rights of "ordinary" individuals. Of course, the trend is hardly universal: it has not appealed to all judges and has not taken root in all countries. However, international law has found its way into the national courts of India, Botswana, Israel, Lebanon, Ireland, Egypt, Canada, Australia, England and beyond. [FN2]

Two distinct responses have developed around the question of whether international human rights law represents a source of authority in relation to domestic human rights regimes. One response is characterized by enthusiasm. Proponents ***257** of this position tend to approach international law as a source of salvation, a way to overcome seemingly immovable barriers to human rights protection in the domestic order. For example, Kate Millet, a leading American feminist scholar, recently lamented the swing to the political right in her country. [FN3] Invoking that famous call to revolution, Millet asks "what is to be done?" She turns to international women's human rights law as a force that can help deliver the fall of patriarchy. [FN4]

This growing enthusiasm for international law exists alongside a growing wariness shared by judges, human rights advocates, governments and scholars. On occasion, the resistance takes the form of cultural or religious relativism. It represents a desire to protect a culture or people that feel themselves under siege from foreign influences. [FN5] For example, the government of Nigeria refused to contemplate the pleas for clemency based on international legal standards in its decision to whip Bariya Ibrahimi Magazu for purportedly engaging in consensual extra-marital intercourse. [FN6] On other occasions, resistance manifests itself in concerns over democracy and the desire to preserve local institutions, particularly parliamentary decisionmaking, in the face of rising globalization. [FN7] Still others reject the domestic application of international norms because of an amorphous conviction that local justice represents inherently better justice. [FN8]

Although they adopt opposing stances in the debate over international law's use in domestic courts, both international law's enthusiasts and its detractors assume that the question of international law's application at the local level involves the two domains in a battle from which one or the other must emerge victorious. The former champion international law, while the latter pin their hopes on local legal traditions. This battle between international law and local values posits the application of international law as an all or nothing affair. It tends to ignore that judges who apply international law must interpret—and not simply apply—those norms within a particular context and that local norms and legal traditions inevitably shape interpretation. [FN9]

The quest to impose text upon context remains part and parcel of adjudication ***258** and analysis involving international norms in domestic courts. [FN10] Commentators frequently assume that when judges apply international human rights norms, they all have the same substantive understanding of what is required by the norm. Hence, international law's authority is predicated, at least implicitly, upon its ability to produce homogeneous results across cultures. [FN11] While international law enthusiasts celebrate this vision, its detractors lament it. Both, however, implicitly rely upon a theory of language that leaves no room for culture as an integral part of

the interpretive exercise even though they might acknowledge spaces in which culture can limit international law's application. [FN12]

III. Meaning Resides Within the Text

Proponents of the traditional model of interpretation assume that when judges correctly interpret and apply international human rights norms, they impress the meaning of international texts upon local contexts. [FN13] They fail to consider that judicial interpretation of international human rights norms take place within a particular cultural context that has an impact on the ultimate meaning assigned to the norm. Culture represents a threat to the traditional model because accepting the influence of culture in the understanding of a norm makes it more difficult to hold judges accountable to international standards. The threat takes the following form: Culture is difference; if one admits that differences in interpretation are possible and legitimate, then one must give up the notion that there is one correct understanding of international norms. If one gives up the notion that international law can be correctly applied, then one must also give up the notion that it can bind judges. If meaning is up for grabs, then there are no standards against which a given judicial interpretation can be assessed: judicial decision-making veers into the subjective abyss and international law loses its binding capacity. [FN14]

The traditional model posits a particular vision of language. International law can only produce homogeneity across contexts if one assumes that meaning is inherent within the text. Understanding, viewed from the perspective of the subject-object divide, entails grasping meaning by acquiring direct access to the object-text in an unmediated, unadulterated fashion. The interpreter-subject must overcome her cultural context to arrive at this inherent meaning. Much as the concept of "1+1" conveys the idea of "2," words also convey a message to the reader who, if she is interpreting properly, will understand the exact meaning conveyed.

***259** Consequently, if one examines the phrase "no violence against women" one should be able to arrive at an understanding of its meaning simply through our understanding of the individual words and the way they are positioned in relation to each other. Indeed, one should be able to accept or reject whether a certain practice falls within the definition of "violence" simply by examining the practice and comparing it against the meaning inherent within the word. 1+1 requires us only to examine the concept of "1" and "+" and "1," and nothing else before arriving at the concept of "2." Context and culture has no place in the picture. If you understand that "no violence against women" requires the end of female genital cuttings and breast implants, while I reach the opposite conclusion, then one of us must be right and the other must be wrong. There is no room for difference. 1+1W2, not 3 or 4 or anything else. [FN15]

International legal scholars have not engaged the debate over meaning and language with the same vigor as their domestic counterparts. [FN16] Yet, the claim that meaning resides in the text holds serious implications for international law's use in domestic courts. [FN17] The claim cannot tolerate divergent interpretations across jurisdictions. If meaning resides in the text, then a single proper interpretation of a treaty must emerge. If two national court judges interpret the same treaty differently, then one is right while the other is wrong. Consider Justice Tobi's reasons in the *Muojekwu* v. *Ejikeme* decision of the Nigerian Court of Appeal.

This case involves a custom called "Nrachi" which entitles a man who has no male heirs to keep one of his daughters at home so that she can raise sons for him. The daughter thus cannot marry. As compensation, she symbolically adopts the status of a son and stands to inherit her father's estate, something that she would otherwise have been denied because of her sex. Justice Tobi concludes that women should be allowed to inherit their father's estates without having to undergo Nrachi. [FN18] He denounces the custom in no uncertain terms. His

reasons in part rely on the conclusion that Nrachi violates article 6 of the Women's Convention. Article 6 reads

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

Justice Tobi characterizes Nrachi as a practice "repugnant to natural justice, equity and good conscience." But, he writes, [t]his is not all.

> *The Nrachi ceremony encourages promiscuity and prostitution*, the latter condemned in Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW usually refers to the Committee rather than the treaty]. ***260** *A women who has no husband generally has more freedom to involve in sexual practices than one who is married. In such a situation indiscriminate sexual practices would result in promiscuity and prostitution*. While I should not be understood as saying that a married woman is entirely free from such sexual practice, it is much more pronounced in cases of unmarried women (emphasis added). [FN19]

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

Most women's rights advocates would welcome Justice Tobi's conclusion that Virginia Muojekwu should be permitted to inherit her father's estate without having to undergo the Nrachi custom. But, the question remains whether Justice Tobi interpreted the Women's Convention correctly. Does the Convention's prohibition of prostitution include non-marital relations between a woman and her freely chosen partners? Or, is Justice Tobi wrong in his interpretation of the Convention?

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

How would one resolve this conflict over interpretation? The traditional model of interpretation looks for truth in the text. Thus, it would resolve conflicts over meaning by pitting Justice Tobi's interpretation against that of his critics. Each would claim with confidence that they have the right interpretation of article 6 of the Women's Convention. According to this model, differences can be decided simply by peering into the words and seeing the meaning contained therein. The problem with such a claim, however, is that it does not tell us what to do when two meanings present themselves. Some might contend that the right meaning can be discovered by determining which interpretation better corresponds to a given fact or to social reality. [FN20] However, Justice Tobi's critics would clearly not be placated if he were able to prove without a shadow of a doubt that women who do not marry in fact have more sexual partners than married women. The debate is not about whether single women are more or less "promiscuous" than married women. Rather, it is about the propriety of interpreting the term "prostitution" with reference ***261** to the concept of promiscuity. The conflict between Justice Tobi and his critics revolves around the question of whether the term "promiscuous" is contained within the term

"prostitute"? This cannot be resolved with reference to any set of facts. It relies on an understanding of words and meaning.

Others might suggest that the debate between Justice Tobi and his critics can be resolved by uncovering the intent of the drafters of the Women's Convention: the interpretation that best corresponds to the drafter's intention wins. [FN21] However, this does not end the dispute either. In the first place, international law recognizes that treaty interpretation can move beyond the intention of the drafters. More fundamentally, however, both Justice Tobi and his critics can claim to have captured the intent of the drafters since intent can only express itself through the text. There is no way to divine intent independent of interpretation. Inquiring into intent raises the same problems as inquiring into inherent meaning: there is no way to be sure.

IV. The Interpretive Community Defines Meaning

Not surprisingly, the notion that words convey a single, correct meaning that can be uniformly transmitted to readers regardless of context has come under heavy assault across disciplines. Law proves no exception. Like their counterparts in other disciplines, legal realists cleared a path to the conclusion that texts do not transmit meaning. [FN22] Yet law, unlike literature or art, cannot afford the conclusion that one interpretation is as good as another, shared meaning is impossible and truth can never be discerned. Law is language. If language is indeterminate, then law must also be indeterminate. If law is indeterminate, then it cannot direct judgment and adjudication veers into the subjective abyss. [FN23]

In a bid to circumvent radical skepticism, some legal scholars propose the idea of interpretive communities. They aim to explain why, if meaning does not reside in the text, shared interpretations remain possible and law can continue to insist on its authority. Stanley Fish represents the leading legal scholar who argues in favour of an interpretive community. Fish accepts the radical skeptical insistence on the indeterminacy of language. Yet, this fact does not lead to nihilism or deny the possibility of communication through a text.

Interpretive communities assign meaning. [FN24] They consist of "those who share interpretive strategies." [FN25] Communication thus proves possible where author and reader both belong to the same interpretative community. Interpretive communities explain why some interpretations can be regarded as false or objectively invalid. Individuals within an interpretive community can debate the proper meaning of ***262** a legal text and can decide which interpretation best adheres to their interpretive strategies. However, their debate involves the efficacy of their interpretive strategies or the conventions agreed upon by the community and not about the meaning that flows from the text independent of any community. [FN26] The text totally 'disappears,' but communication remains. [FN27]

Attacks on the possibility of shared meaning have gone hand in hand with skepticism about the possibility of knowing truth objectively. [FN28] One cannot ask whether an interpretation is correct because it reflects a true state of affairs. Rather, one must inquire whether an interpretation adheres to the belief systems of a given community as reflected in its shared interpretive conventions. In short, is it persuasive to an audience? [FN29]

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

viour?

Like Fish, Johnstone argues that not all interpretations of international human rights treaties are equally valid. While different interpretations are possible, the meaning assigned by the international interpretive community remains the proper one. The international interpretive community must persuade individual states of the efficacy of a given interpretation. If the individual accepts that interpretation, then she retains membership in the interpretive community. If she does not, then she forfeits membership. According to this model, one cannot simultaneously have difference and community. Johnstone emphasizes that "divergence from the conventions and practices of the relevant interpretive community signifies that the interpreter has taken himself or herself out of it altogether." [FN30]

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

Moreover, national court judges who hold a different interpretation than their ***263** international peers cannot be judged by them. The national court judge can claim that her interpretation is valid, but its validity is limited to the internal structure of her particular national community. Culture holds the key. Outsiders cannot begin to understand. Differences between interpretations based on culture thus represent a barrier to understanding and communication at the international level. The judge cannot engage both communities at the same time. Moreover, comparisons across difference prove either impossible or dangerous. [FN31] The two cultures have no common medium through which to engage in cross-cultural exchange. Examinations of one culture by another operates entirely through the traditions and value assumptions of the culture through which the gaze originated, thereby preventing knowledge or understanding of the other. Difference dooms comparison and dialogue to failure.

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

Interpretive communities thus forces interpreters to choose between cultural relativism or imperialism. Either the judge must defend her interpretation as a manifestation of local culture that cannot be understood by outsiders or she must betray local conventions in favour of the international community. The former threatens to fragment the meaning of international treaties into as many pieces as there are possible cultural interpretations, the latter threatens to swallow up culture in the name of transjudicial coherence. [FN32] Justice Tobi of the Nigerian Court of Appeal thus faces a dilemma when his interpretation of the Women's Convention diverges from those of his international peers. He can seek to justify his interpretation of article 6 of the Women's Convention as a manifestation of Nigerian interpretive norms. This claim, however, effectively cuts off communication at the international level. The implication is that judges who do not share the same cultural norms as Justice Tobi cannot begin to understand his analysis of article 6 of the Women's Convention and cannot comment on the pro-

priety of equating “prostitution” with “promiscuity” in the Nigerian context. Alternatively, Justice Tobi can relinquish his interpretation in favour of a meaning assigned by his transnational peers. He cannot, however, claim membership in both the Nigerian and the international community.

Like their traditional counterparts who look for transcendental meaning in the text, interpretive communities cannot account for different contexts or outside perspectives. While interpretive communities do recognize the efficacy of difference as a force of change, they cannot accommodate the external gaze as an inherent ***264** part of understanding and analysis. The external other represents a foreigner who must be converted one's own ways, not someone whose external perspective offers integral value. Interpretive communities as envisioned under Johnstone's model thus degenerate into imperialism. They seek to convert the other or risk being converted themselves. Identity stands diametrically opposed to difference, nothing connects the incommensurable divide.

V. The Conceptual Shift: Breaking The International vs. Cultural

A rising school of legal scholarship seeks to dissolve the international (universal)-cultural (local) divide in international law by recognizing that culture and international law need not stand in opposition. [FN33] Culture, on this view, does not represent an exception of international law's universality. Rather, culture pervades universality. Increasingly, the international system is coming to grips with the principle that states have an obligation of ends but not an obligation of means. [FN34] Various scholars have sought to apply this principle to specific contexts.

Abdullahi An-Na'im demonstrates that culture has a role in relation to a broad range of rights including those of women and children. [FN35] Similarly, Annie Bunting argues that international law does not mandate a universal age of marriage while concluding that states remain under an obligation to ensure that early marriage does not threaten the physical, emotional or social development of the individual. [FN36] Martha C. Nussbaum promotes the concept of “multiple realizability” which recognizes that universal aspirations may be made real through a plurality of practices and circumstances that reflect local customs and traditions. [FN37] Aihwa Ong argues for a cross-cultural strategic sisterhood that acknowledges the diverse communities which shape individual lives and that promotes inclusive notions of citizenship. [FN38] Karen Knop suggests an analogy between the domestic application of international law and the idea of translation. [FN39] Knop wants to preserve the possibility that judges ***265** can reach different interpretations of international treaties without requiring the judge to exit from either the local or international interpretive community to which she belongs. In short, Knop does not want difference to amount to an incommensurable divide across which parties cannot speak.

This important trend in international scholarship raises crucial theoretical question related to the invocation of international norms in divergent cultural and legal contexts. Are divergent interpretations of international norms permissible? Are they avoidable? Will the emergence of divergent interpretations shatter international law's ambition to govern and effectively abandon its norms to cultural relativism? Which is the ultimate arbitrator of meaning, the national or the international realm? It is against the backdrop of the rising scholarly concern for reconciling culture with the core of international law—rather than as an exception to it—together with the rising use of international human rights law in domestic courts that I suggest an exploration of Hans-Georg Gadamer's hermeneutic [FN40] philosophy as expounded in the landmark book, *Truth and Method*.

VI. Hans-Georg Gadamer's Hermeneutics

Hans-George Gadamer published *Truth and Method* in response to the notion, associated most closely with the Enlightenment, that abstract reason and scientific inquiry alone can arrive at truth. [FN41] His central claim is simple yet poignant: every interpretation takes place within a context. There is no objective meaning that transcends context or proves good for all time. [FN42] Gadamer's central insight was that understanding and application are inextricably linked. Thus, every application of the law to a set of circumstances changes the law at the same time that the law changes the circumstances. He strove to demonstrate across disciplines that understanding involves a "to and fro" between the general-abstract-universal and the particular-concrete-local.

His work sits at the core and periphery of legal scholarship. It assumes an uncontested place at the core of the Critical Legal Studies movement. [FN43] Within these circles, scholars explicitly acknowledge Gadamer's influence. Yet, his work lingers at the periphery of the legal mainstream at least in North America. This is true even though the "interpretive turn"—the idea that all adjudication inevitably involves some form of interpretation rather than mere discovery of the law—represents a virtually uncontested claim across a range of legal perspectives.

***266** If domestic legal scholars do not sufficiently acknowledge or discuss Gadamer's hermeneutics, international legal scholars all but ignore him. Yet, his theory holds special resonance for international human rights law and its domestic application. His philosophy can lend support to international law's central mission, namely its quest to bind actors to a particular set of norms while remaining cognizant of local differences.

Gadamer occasionally turned his attention to specific questions concerning law and adjudication; however, he regarded legal interpretation as another instance of the "interpretive turn" and not some altogether unique interpretive undertaking. As he put it, "the text, whether law or gospel, if it is to be understood properly ... must be understood at every moment, in every particular situation, in a new and different way. Understanding here is always application." [FN44] Accordingly, my discussion will not focus on his meditations about law but will instead set out the hermeneutical framework described in his major work, *Truth and Method*, and discuss its significance for the domestic interpretation/application of international human rights texts.

Gadamer maintains that "the possibility that the other person may be right is the soul of hermeneutics." [FN45] As this definition implies, hermeneutics eschews claims that language conveys meaning unmediated by the experiences and assumptions of the reader. There is no pure, transcendental gaze. A reader does not approach a text as *tabula rasa* but as "historically affected consciousness" situated in a particular time and place, shaped by personal and collective experiences. The reader-interpreter-judge brings pre-conceptions or "tradition" to the interpretive task.

> To try to eliminate one's own concepts in interpretation is not only impossible, but manifestly absurd. To interpret means precisely to use one's own preconceptions so that the meaning of the text can really be made to speak for us .... An interpretation that was correct 'in itself' would be a foolish ideal that failed to take account of the nature of tradition. [FN46]

Thus, whereas those who espouse the traditional theory of meaning insist that prejudice must be overcome before one can get at the meaning of a text, Gadamer regards prejudices as a necessary perquisite to textual understanding. Readers cannot escape their prejudices: they form the context in which all interpretation takes ***267** place and situate readers within a given interpretive community.

Interpretive acts pull the past into the future in an ever growing concentric expanse of circles. [FN47] But, the circles are not vicious. We are not, in other words, trapped in a perpetual re-invention of the past by our pre-

judices or fore-understandings. [FN48] The text moves us forward. As time passes, one's understanding can evolve not only because one's historical context and experiences have altered, but also because one has been changed by the text at the same time that one changes the text. History pervades understanding.

> [T]he idea of an absolute reason is impossible for historical humanity. Reason exists for us only in concrete, historical terms, i.e. it is not its own master, but remains constantly dependent on the given circumstances in which it operates .... In fact history does not belong to us, but we belong to it. [FN49]

Consequently, one is ready to engage and understand the text from a new perspective at every new reading and with every new experience. "Every interpretation has to adopt itself to the hermeneutical situation to which it belongs." [FN50]

Interpretation commits the reader to a dialogical or interactive exercise in which she projects the interpretive possibilities. Interpretations inherent within the text are projected or made available through engagement with the text; our experiences and our willingness to consider other perspectives determine which interpretation will impress itself upon us. Tradition informs the text and the text informs tradition. Hence, interpretation allows us to put our assumptions into play while simultaneously exposing them to risk. Of course, the text does not compel us to a new state of understanding. We can approach a text with a closed mind. In such circumstances, however, we are depriving ourselves of "experience." [FN51]

Experience entails a textual encounter with the unexpected, something that awakens us out of a dogmatic slumber. Experience makes authentic interpretation possible. Experience makes manifest the contingencies of one's past and thoughts. This awareness of our "historically affected consciousness," in turn creates "openness to the other." Simply stated, "openness to the other" entails a willingness to learn from and be changed by the other.

> Thus we hold that the connection with language which belongs to our experience of the world does not involve an exclusiveness of perspectives. If, by entering into foreign linguistic worlds, we overcome the prejudices and limitations of our previous experience of the world, this does not mean that we leave and negate our own world. As travelers, we return home with new experiences ... we are fundamentally aware ***268** of the historical contingency of all human thought concerning the world, and thus of our own contingency. [FN52]

Meaning reveals itself as unstable and constantly open to risk. It derives from an openness to the other that can produce a "fusion of horizons" between self and other. A horizon constitutes "a range of vision that includes everything that can be seen from a particular vantage point." [FN53] The horizon metaphor stresses that one's prejudices or the fore-ground of understanding are not static. The text can surprise us and move our horizons forward because the text's meaning extends beyond the standpoint that defines our interpretive community.

> ... [O]ne intends to understand the text itself. But this means that the interpreter's own thoughts too have gone into re-awakening the text's meaning. *In this the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says*. I have described this above as a "fusion of horizons." We can see that this is the full realization of conversation, in which something is expressed that is not only mine or my author's, but common (emphasis added). [FN54]

Dialogue extends beyond the text and contemplates interaction with other readers. Indeed, the purpose of engaging the text may be to engage the opinion of others. The text provides a common medium or channel of com-

munication between readers. The text structures their dialogue and creates the possibility of shared understanding. [FN55] Successive encounters with a text and conversations with other readers may eventually lead readers to agreement. In successful conversation,

> something comes into being that had not existed before and that exists from now on ... as in a genuine conversation, something emerges that is contained in neither of the partners by himself. [FN56]

Agreement, however, does not represent the stripping away of culture. Rather, individuals can attach different content to a particular concept while agreeing that they are speaking about the same concept. [FN57] By implication, natural law can change. [FN58] This conclusion should not appear shocking if one envisions that abstract ***269** notions like "justice" or "dignity" can have varying content while still retaining their normative coherence. Words not only can but must have both flexibility and meaning because all meaning takes place in context but is not thereby reduced to its context. [FN59]

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

Nonetheless, Gadamer's thesis distinguishes itself from Fish's in crucial ways. First, the two thinkers differ in their conceptions of tradition and interpretive communities. The text cannot change Fish's community. Rather, the interpretive community always acts upon the text. The meaning assigned to a text by a given interpretive community can change as the community's conventions are altered. Such change, however, does not flow from the text even though it does alter the text's meaning. Fish's interpretive community is the locus of both meaning and change.

By contrast, Gadamer's text both alters and is altered by the community. The text does not disappear altogether. It maintains an ontological status independent of the interpreter. Language "is not an object but stands in relationship with us." [FN60] It is more appropriate to speak of "meanings" than "meaning" with respect to Gadamer for the simple reason that ahistorical or eternal meaning cannot be captured. Meaning remains in a constant state of flux. But, the reader does not entirely create meaning. "Language is more than the consciousness of the speaker; so it, too, is more than a subjective attitude." [FN61] Fish, for his part, rejects the claim that the text generates meaning independent of an interpretive community. The problem for Fish is to define meaning if it does not reside in the text. The problem for Gadamer is not that the text has no meaning, but rather how can we come to know meaning(s) given that we always approach the text through a situated gaze.

Gadamer's answer to the question concerning how we acquire meaning creates the second point of departure between his theory and Fish's interpretive community. Unlike Fish, Gadamer embraces difference as a precondition of understanding. Difference does not preclude community under Gadamer's theory but creates the potential for meaningful understanding of both self and other and hence the creation of new communities of interpretation. He aims at explaining how shared understanding is possible while still permitting understanding to interact with difference. ***270** Difference does not dictate exit. It represents the heart of meaningful interpretation. [FN62]

Interaction with difference produces new interpretations and an expanded understanding of the world within

Gadamer's hermeneutics. This expanded understanding cannot develop through abstract, metaphysical reasoning nor can it assume a transcendental perspective. Readers are always situated.

> The criterion for the continuing expansion of our world-picture is not given by the 'world in itself' that lies beyond all language. Rather, the infinite perfectibility of human experience of the world means that, whatever language we use, we never achieve anything but an ever more extended aspect, a "view" of the world. Those views of the world are not relative in the sense that one could set them against the 'world in itself,' as if the right view from some possible position outside the human, linguistic world, could discover it in its being-in-itself. [FN63]

Readers *cultivate* meaning within Gadamer's framework while they assign it within Fish's. Cultivation denotes the possibility of development, progress and working towards something while at the same time emphasizing contingency and fluidity.

Can readers ever cultivate truth that is good for all time? Gadamer's theory proves unclear on this point. He contemplates that different readers might share an interpretation and characterizes this as coming "under the influence of the truth of the object." [FN64] Does this coming together in a new community mean that the parties to the conversation have revealed an independently existing ontological truth, or does it signal their willingness to create a shared truth? Does their agreement represent a contingent state of affairs or mark their passage into transcendental truth for all time? In part, it is difficult to decide this question because Gadamer's theory refuses to contemplate meaning independent of a reader and yet also refuses to abandon the notion that the text binds the reader in some way even though it is not entirely determinative of meaning. One cannot prioritize text (necessary, eternal, transcendental) over reader (created, contingent, situated) as the source of meaning.

This refusal to prioritize indicates that questions like "is this truth for all time?" or "is this truth revealed and proscribed or created and contingent?" obscure more than they reveal. They deny historically affected consciousness as a lived reality [FN65] and reimpose the quest to find truth in language independent of the reader. In short, the deny the dialogical nature of the interpretive enterprise. Accordingly, *Truth and Method* betrays impatience with such an inquiry, contrasting the modern understanding of "theory" with its ancient meaning. In the modern framework of the ***271** Enlightenment, "theoretical knowledge is itself conceived in terms of the will to dominate what exists," whereas theory in the ancient sense "means sharing in the total order itself." [FN66]

Inspired by the Ancients, Gadamer stressed that philosophy must free itself of the quest to capture infinite and eternal knowledge and accept that the "role of prophet" or of "know-all" does not suit the philosopher. [FN67] Yet, the metaphysical enterprise retains a tight and seemingly inevitable grip on our imaginations. Philosophy need not give up the quest for truth altogether, it simply needs to change its orientation.

> [T]he tradition of metaphysics and especially of its last great creation, Hegel's speculative dialectic, remains close to us. The task, the 'infinite relation,' remains. But the mode of demonstrating it seeks to free itself from the embrace of the synthetic power of the Hegelian dialectic, and even from the 'logic' which developed from the dialectic of Plato, *and to take its stand in the movement of that discourse in which word and idea first become what they are* (emphasis added). [FN68]

Truth and Method turns to Aristotle to reorient modern thinking about the self-other divide. In an obvious reference to René Descartes' attempt to reconstruct his world while trapped inside his *cogito*, Gadamer observes that Aristotle's thinking does not raise the "question of a self-conscious spirit without world then having to find its way to worldly being; both belong originally to one another. The relationship is primary." [FN69]

More truth, better understanding, and improved meaning remain possible. However, securing truth as singular understanding or one meaning across contexts remains elusive. At the very least, it is questionable whether we can ever know that we have captured truth even though, as an ontological fact, we might. Gadamer expresses skepticism about the possibility of pure knowledge and seeks to construct a state of knowing that does not depend on the acquisition of a transcendental perspective as a prerequisite to knowledge claims. One knows that one has adopted the proper method, according to Gadamer, when one recognizes the infinite "possibility that the other person may be right." [FN70] In other words, we have adopted the proper method when we begin always from the premise of that our knowledge is contingent and when we can imagine the self changing in light of the other. [FN71]

His thesis proves frustrating at times. He speaks of a differentiated horizons, yet he also contemplates that possibility of coming "under the influence of the truth of the object." [FN72] If this so, how can different horizons continue to exist? Why do ***272** we have the notion of tradition if not to delineate horizons? And, as Gadamer' himself asks, "If there is no such thing as these distinct horizons, why do we speak of the fusion of horizons and not simply of the formation of one horizon?" [FN73] His answer is that although the single horizontal horizon might exist as an ontological fact, individuals do not possess the transcendental gaze to know where or what it is. Gadamer points to the need to embark on "not only a persistent asking of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now." [FN74]

If his work is frustrating, it is also undeniably provocative. Ultimately, it represents an invitation to humility. It warns against both skepticism or cultural relativism and imperialism. Its humility derives from an awareness of historicism. Both the notion that one can capture transcendental truth or that one can create it *ex nihilo* seem arrogant. [FN75] Instead, Gadamer invites readers to discover truth together through engagement with the text. Gadamer does not espouse skepticism because he does not deny the possibility of working towards and arriving at truth. He does not promote cultural relativism because although meaning is always the product of a time and place, it has the potential to be shared across time and space. He is not imperialist because he does not seek to impose one side of the equation—self versus other—at the expense of the other but exposes them both to risk and change.

Of course, Gadamer's hermeneutics holds tremendous normative implications. His overarching claim is not that there are no objective truths, but that we cannot know those truths through abstract analysis or in isolation from others. Meaning cannot be extracted from a text without context but develops through engagements with different contexts. His work is a call to action, a warning for all those who believe that the human mind can devise a metaphysics that transcends this world. Such a vision leads no where but to "the nihilism that Nietzsche prophesied." [FN76]

In this regard, Gadamer's interpretive theory echoes Martin Heidegger's meditations on Being which "finds its meaning in temporality." [FN77] Rejecting quests to find meaning in life through futile attempts to secure values that transcend space and time, Heidegger stressed that "the essence of Dasein lies in its existence" [FN78] which is "always also absorbed in the world of its concern." [FN79] Gadamer's personal and philosophical connections to Heidegger are well known. A student of ***273** Heidegger, Gadamer's genius lay first in recognizing the parallels between Heidegger's thoughts on being and time and the philosophical questions posed by notions of truth and understanding. [FN80] In particular, Gadamer sought to rehabilitate the notion of prejudice as a condition of understanding much as Heidegger stressed that Being finds significance in its existence. Both sought to overcome the metaphysical divide between subject and object that marked the Enlightenment project. Both thinkers value meaning as it arises from within a human horizon and eschew the fruitless quest to capture

meaning from a transcendental perspective of an elusive all-knowing Being. In short, both begin from the position that being and understanding are necessarily embedded in and conditioned by time and tradition.

Gadamer's interpretive exercise also echoes Jean-Paul Sartre's proof for the existence of self. Sartre denies the possibility of demonstrating the existence of the self through abstract analysis as pursued by René Descartes and others seeking metaphysical certainty. Instead, he demonstrates the existence of self by affirming his relationship to the other.

> Therefore the Other penetrates me to the heart. I cannot doubt him without doubting myself since 'self-consciousness' is real only in so far as it recognizes the echo (and its resolution) in another. [FN81]

Sartre uses the concept of shame and the example of one being caught peeping through a key hole at another to illustrate that the proof of self lies in the existence of the other. In the moment that one becomes aware of the gaze of the other, the moment that shame in one's self rises to the surface, one cannot doubt the existence of the other. Sartre's scenario demonstrates that individuals and communities do not simply agree that they exist. They do exist. However, the existence of self cannot be confirmed in isolation of the other. [FN82] As Sartre emphasizes, one "experiences the other as object. It is therefore not quite accurate to speak of perceiving oneself in the other's eyes." [FN83]

Similarly, Gadamer defines meaning through engagement with different interpretations. His theory of language holds significant consequences for law in general and for the domestic application of international human rights law in particular. Some cite him in support of a cultural and philosophical relativist stance in which all is "created," "contingent," and "political." [FN84] They emphasize Gadamer's claims that transcendental knowledge cannot be achieved and claim that we can never know if the other is right to support a cultural relativist stance. Such a conclusion, however, ignores crucial features of Gadamer's philosophy. There are certain ***274** universal, non-negotiable elements in Gadamer's theory that bely the cultural relativism claim.

First, Gadamer builds his entire theory on the notion of equality between the self and other. Culture and context cannot negate this proposition. [FN85] By necessary implication, all individuals have equal moral worth and culture cannot be used to deny this fact. Moreover, Gadamer's philosophy represents an invitation to activity. His theory of meaning invites individuals to *engage* the text in a process of self-discovery and growth. Some might see nothing but meaninglessness in the lack of certainty produced by the engagement between self and text. [FN86] Hermeneutics insists, however, that meaning flows from engagement, not from certainty.

Of course, the problem of particularizing the dignity and worth of individuals in a specific cultural context remains. If certainty and uniformity across contexts cannot be had, then how can differences to be judged? Gadamer's hermeneutics insists that practices promoting worth and dignity must be separated from those that detract from it. But, who decides in the absence of agreement what practices deviate from dignity?

Gadamer's philosophy recommends that such decisions be made from an internal perspective, that is, from within the culture in which the practice is rooted. [FN87] This does not lead to cultural relativism because proponents of culture must arrive at their positions while remaining in conversation with and open to other perspectives. [FN88] Hence, one culture can comment upon developments in another culture, provided that the commentators are themselves open to change. [FN89] Openness to change and the possibility that the other is right helps guard against both cultural relativism ***275** and imperialism. [FN90] Ultimately, the decision about whether a particular practice violates the dignity and equality of individuals must be made from within the culture rather than outside of it because this is the only way that a culture can make the text its own. [FN91]

Gadamer's hermeneutics theory stipulates that language (and hence law) can be binding under certain conditions. Words do have some controlling impact—the problem is epistemological. “How do we know?” We know through agreement that arises from our “fusion of horizons.” The possibility of a “fusion of horizons” suggests, in turn, that words do convey meaning but this meaning cannot be known in the abstract but only uncovered through engagement with the perspective of the other. Truth is not that to which we mutually agree to label “truth” but that which we mutually cultivate across our differences and that we know through our agreement. Agreement, in other words, has both an epistemological and an ontological significance: it is the mark of truth.

Agreement represents the desired state of affairs. However, it should not be arrived at inauthentically. [FN92] That is, parties should not agree simply for agreements' sake, they must struggle towards agreement. Gadamer appears optimistic, however, that if we really put our assumptions at risk and expose ourselves the possibility of change, agreement with the other is possible. We can still act on our beliefs even in the absence of agreement because we can never be certain even when we have full agreement. Agreement may bring comfort but it will never bring certainty, at least not the transcendental, good-for-all-time variety. Always within the shadow of uncertainty, we must work with our assumptions because they represent the best we have under the circumstances, but we must also continually challenge ourselves through engagement with the other. [FN93]

***276 VII. Gadamer and Justice Tobi**

Gadamer's emphasis on the other, openness, horizons, community and understanding suggests an approach to the interpretation of treaties that is not fully appreciated by those who insist that meaning resides in the text or by those who argue that an interpretive community assigns meaning. [FN94] An analysis of Justice Tobi's decision in *Miuojekwu* v.*Ejikeme* helps illustrate the significance of Gadamer's hermeneutic philosophy for the domestic application of international human rights law.

How would a critic of Justice Tobi approach his interpretation of article 6 of the Women's Convention within a hermeneutic framework? First, the critic need not agree or pretend to agree with Justice Tobi's interpretation. However, she does have to be ready and willing to engage him in a conversation about why his analysis does not make sense from the outsider's perspective. The critic must also be open to learning from Justice Tobi and embrace possibility that she herself might change from the encounter with his text. What might the critic learn from Justice Tobi given their apparently deep-seated and incommensurable disagreement? Several possibilities present themselves with close examination of Justice Tobi's decision. First, Justice Tobi examines the consequences of the Nrachi custom and does not focus only on whether the custom itself violates the Women's Convention. Thus, he looks at the possible impact of the custom on Virginia's life in general and not simply on the question of whether she should be allowed to inherit property. Other national courts, by contrast, have been steadfast in their position that one need only examine an impugned act without looking at its effects. [FN95] Moreover, Justice Tobi understands that “choice” can be negated by circumstances and that what might look like a purely private decision is in fact affected by the way society structures itself and its laws. [FN96] Thus, he reasoned that if she were allowed to marry, Virginia may choose not to have several sexual partners—the Nrachi custom could lead her to a choice that she would not otherwise have made.

Hence, Justice Tobi's critics can appreciate aspects of his judgment and can learn how to better interpret international conventions while still criticizing his interpretation of article 6 of the Women's Convention. This commitment to better interpretation does not mean that one must give up one's present view simply for the ***277** sake of change or to appease the other. At the same time, Justice Tobi can also learn from others. His interpreta-

tion of article 6 could have been better if he had considered other interpretations of Article 6 and the international debate about the meaning of "exploitation of prostitution." [FN97] He might have reached the same interpretation of the Women's Convention, but an openness to other and a willingness to expose himself to risk would result in more thoughtful analysis and appreciation of the range of issues at stake. He would have been forced to examine his assumptions, recognize the contingency of his position but still articulate his reasons for arriving at that decision.

Ultimately, Justice Tobi and his critics do agree on a crucial point: the Women's Convention aims at promoting the dignity and worth of all individuals. In Gadamer's words, "they both come together under the influence of the truth of the object and are thus bound to one another in a new community." [FN98] Gadamer would require Justice Tobi and his critics to continue engaging with each other as hermeneutic interpreters of the Women's Convention. In the end, they may agree on the meaning of article 6 without requiring that it must have the same content across contexts. Either way, both participants in the dialogue must be willing to change. [FN99]

VIII. Gadamer and the Domestic Application of International Treaties

Gadamer's theory proves significant for the domestic interpretation of international law for reasons that this survey of his thought cannot begin to suggest or analyze. My goal in this paper is not to catalogue every intersection between Gadamer and international law but simply to suggest why his theory is crucial to the domestic interpretation of international law and to argue for greater attention by international scholars to Gadamer's work. That being said, some general comments on the potential contribution of Gadamer's hermeneutics to international law's life in domestic courts prove necessary.

First, international scholars must acknowledge that national court judges approach international treaties with their own particular legal traditions in tow. They cannot escape their traditions any more than they can escape the finitude of their being. Thus, judges will not necessarily interpret the same international provision in the same way. Interpretation represents a creative act. Yet, national court judges in different jurisdictions are still interpreting the same text and must justify their interpretations in light of that text. For example, a determination by a judge in one ***278** jurisdiction that the marriage of a 15 year old girl conforms with the Women's Convention cannot be criticized simply because a judge in another jurisdiction determines that the marriage of a girl at 15 violates the Convention. [FN100] At the same culture cannot offer an excuse for denying human rights claims as embodied in the authority of the text. The onus is on both judges in each jurisdiction to explain themselves in light of the Women's Convention. [FN101] Meaning (and hence the authority of the text) must be preserved while simultaneously allowing the text to respond flexibly to divergent needs within divergent cultures. [FN102]

Second, hermeneutics recognizes that better judgment flows from a consideration of different perspectives. [FN103] Judges should not limit themselves to interpreting international texts but should also consider how these texts have been interpreted and applied in other national jurisdictions, taking into account as wide a spectrum of decisions as possible. It thereby emphasizes that adjudicators can find value in diverse legal traditions. [FN104] Difference in legal contexts does not create an incommensurable divide but an opportunity for engagement [FN105] and better judgment.

Finally, hermeneutics emphasizes that judgment and interpretation places both national and international texts or traditions at play and at risk. National norms are subject to interpretation and revision in light of international norms but the opposite is also true. Courts read international norms in light of their own national legal tra-

ditions and can help alter the meaning assigned to international norms at the international level and within other jurisdictions. Thus, "interpretive circles" characterize the relationship between national norms and international treaties: national norms ***279** are interpreted in light of international ones and national interpretations of international treaties are then shared with other courts. [FN106]

Since interpretation puts meaning into play while subjecting it to risk, both national and international norms stand available for revision and re-interpretation in the domestic application of international law. [FN107] The national and international norms may come together in a fusion of horizons thereby creating new legal norms based on the melding of the national and the international. [FN108] This fusion of horizons, however, cannot be secured or promised. It comes only through effort and engagement. Even then, it may prove elusive. Ultimately, as Gadamer saw, acquiring meaning through interaction proves more attune to the human condition which can only ever promise engagement, not certainty. [FN109]

IX. Conclusion

In the end, Gadamer's *Truth and Method* does not offer neat solutions for international lawyers seeking to resolve international law's relationship to culture and difference. It does, however, provide an alternative way of thinking about international law that eschews both colonizing claims of absolute authority and debilitating legal skepticism. Gadamer's meditations on the nature of meaning should prove attractive to those who want to avoid absolutism and skepticism in the domestic application of international human rights law. *Truth and Method* offers a framework for approaching the problem of treaty interpretation within diverse jurisdictions that posits international law as a mode of authority while simultaneously acknowledging its local character. In the process, it demonstrates how another's meaning can impel reflection and change in both self and other. Gadamer's complex thoughts combine a call for understanding, humility and reflection with an affirmation of the dignity and worth of all human beings. His works deserve more attention from international human rights scholars and advocates who find themselves thinking and strategizing in an increasingly interdependent yet divided and uncertain world.

[FNa1]. Thanks are owed to David Dyzenhaus, Richard E. Palmer, Ed Morgan, Nicholas Petk and the journal editors for their comments and suggestions.

[FN1]. *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (no. 2)* [1999] 1 All ER 577 (House of Lords), *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (no. 3)* [1999] 2 All ER 97 (House of Lords).

[FN2]. Various authors have analyzed cases from these diverse jurisdictions. Examples include Angela Byre & Beverley Byfield, eds., *Using International Human Rights Law in the Commonwealth Caribbean* (London: Martinus Nijhoff, 1991); Yuji Iwasawa, *International Law, Human Rights and Japanese Law* (Oxford: Clarendon Press, 1999); Benedetto Confroti, *International Law and the Role of Domestic Legal Systems* (The Netherlands: Kluwer Law International, 1993); Benedetto Conforti & Francesco Francioni, *Enforcing International Human Rights in Domestic Courts* (London: Martinus Nijhoff Publishers, 1997); Donna E. Arzt, "The Application of International Human Rights Law in Islamic States" (1990) 12 Human Rights Q. 202; Li Zhaojie, "Effects of Treaties in Domestic Law: Practice of the People's Republic of China" (1993) 16 Dal. L. J. 62; Hazel Fox, "The Pinochet Case No. 3" (1999) 48 Int'l & Comp. L. Q. 687; Michael Kirby, "The Australian Use of International

Human Rights Norms From Bangalore to Balliol—A View to Antipodes" (1993) 16 (2) U. New S. Wales L. J. 363; Martin Scheinin, "International Law in National Courts" in *An Introduction to the International Protection of Human Rights: A Textbook*, Hanski & Suksi, eds., (Turko/Abo: Institute for Human Rights, 1999) 417; Martin Scheinin, ed., *International Human Rights Norms in the Nordic and Baltic Countries* (London: Martinus Nijhoff, 1996); Roger S. Clark, "International Human Rights Law Affects Domestic Law" in *Human Rights: New Perspectives, New Realities*, A. Pollis & P. Schwab, eds., (Boulder, CO: Lynne Rienner, 2000) 185 [hereinafter *New Perspectives*]; Margaret Mulgan, "Implementing International Human Rights Norms in the Domestic Context: The Role A National Institution" (1993) 5 Canterbury L. Rev. 235; Stephen Donaghue "Balancing Sovereignty and International Law: The Domestic Application of International Law in Australia" (1995) 17 Adelaide L. Rev. 213.

[FN3]. Kate Millett "What Is To Be Done?" (2000) 75 Chi.-Kent L. Rev. 659 at 664.

[FN4]. *Ibid*. at 668.

[FN5]. International law has been used as a tool of colonialism and imperialism. See *New Perspectives, supra* note 3 and David P. Fidler, "International Human Rights Law in Practice: The Return of Standard of Civilization" (2001) 2 Chi. J. Int'l L. 137.

[FN6]. For example, Human Rights Watch urged the Nigerian government to ensure compliance with international standards and the Nigerian constitution. See http://www.hrw.org/press/2001/01/nigeria0123.html. Last visited February 2, 2001.

[FN7]. See for example the dissenting judgment in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and Curtis A. Bradley & Jack L. Goldsmith, "U.N. Human Rights Standards and U.S. Law: The Current Illegitimacy of International Human Rights Litigation" 1997 (66) Ford. L. Rev. 319.

[FN8]. *Regina* v. *Lord Chancellor, Ex Parte Witham* [1998], Q.B. 575 at 585 (QB): "I do not find it necessary to refer to these [European Court] cases, since I consider that the issue may correctly be resolved by reference to the substance of our domestic law ... it seems to me, the common law provides no lesser protection of the right of access to the Queen's court than might be vindicated in Strasbourg."

[FN9]. Karen Knop, "Here and There: International Law In Domestic Courts" (2000) 32 N.Y.U. J. Int'l L. & Pol. 501 at 505 [hereinafter Knop].

[FN10]. See for example Ed Morgan, "In The Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 U.T.L.J. 447.

[FN11]. For a discussion of the debate over pluralism in the women's rights context, see Radhika Coomaraswamy "Reinventing International Law: Women's Rights as Human Rights in the International Community." The Edward A. Smith Visiting Lecture Given at Harvard Human Rights Program (March 12, 1996) available at http://www.law.harvard.edu/programs/HRP/Publications/radhika.html. Last visited November 1, 2001.

[FN12]. Knop, *supra* note 9 at 527. Culture is seen as something that ousts international law.

[FN13]. *Ibid*.

[FN14]. See for example Farrokh Jhabvala, "Domestic Implementation of the Covenant on Civil and Political Rights" (1985) XXXII Netherl. Int'l. L. Rev. 461 who observes that the interpretation of the Covenant in different contexts makes it vulnerable to fragmentation.

[FN15]. Stephen M. Feldman, "How To Be Critical" (2000) 76 Chi.-Kent L. Rev. 893 at 895-97.

[FN16]. See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyer's Publishing Company, 1989) especially the final chapter entitled "Beyond Objectivism" for an example of a work that is explicitly concerned with theories of language and international law.

[FN17]. Derek C. Smith, "Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarex-Machain" (1995) 6(1) Eur. J. Int'l. L. 1 at 9 observes that the traditional model of interpretation frames the theory and practice of treaty interpretation in international law.

[FN18]. *Muojekwu* v. *Ejikeme*, [2000] 5 Nigerian Weekly L. Rep. 402 at 436.

[FN19]. *Ibid*. at 432.

[FN20]. Luc B. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal, PQ: McGill-Queen's University Press, 1997) at 48-51 [hereinafter *Tremblay*].

[FN21]. Some draw a distinction between the drafter's "meaning" and their "subjective intent." See George H. Taylor, "Hermeneutics and Critique in Legal Practice: Critical Hermeneutics: The Intertwining of Explanation and Understanding as Exemplified in Legal Analysis" (2000) 76 Chi.-Kent. L. Rev. 1101 at 1105.

[FN22]. Sanford Levinson, "Law As Literature" (1982) 60 Tex. L. Rev. 373 at 391-92.

[FN23]. For a discussion in the domestic context, see Brian Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L. J. 451 at 453.

[FN24]. Stanley Fish, *Is There A Text in this Class*? cited in Tremblay, *supra* note 20 at 43-44.

[FN25]. *Ibid*.

[FN26]. Tremblay, *supra* note 20 at 43-44.

[FN27]. *Ibid*. at 6.

[FN28]. See generally Elizabeth Comack, "Theoretical Excursions" in Comack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax, NS: Fernwood, 1999).

[FN29]. Tremblay, *supra* note 20 at 6.

[FN30]. Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities" (1991) 12 Mich. J. Int'l L. 371 at 377-378.

[FN31]. For a discussion, see David Nelken, "Disclosing/Invoking Legal Culture" (1995) 4 Soc. & Legal Stud. 435.

[FN32]. Anne-Marie Slaughter's vision of transjudicialism mirrors Fish's interpretive communities thesis and Ian Johnstone's application of it in the international context. See, for example, Anne-Marie Slaughter, "Human Rights International Law Symposium: A Typology of Transjudicial Communication" (1994) 29 U. Rich. L. Rev. 99 at 100.

[FN33]. This is not to deny that international law has been used as an instrument of colonization or that it continues to be invoked with such ends in mind. Rather, my point is that international law, properly applied, need not produce such a result.

[FN34]. See, for example, The Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* E/C.12/1998/24.CESCR.

[FN35]. See, for example, Abdullahi An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) and Abdullahi An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child" in *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Clarendon Press, 1994) 62. In his own contribution to this text entitled "The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights" at 19, Philip Alston argues that the room left within international law for cultural difference is the "elastic glue which enables the overall human rights enterprise to be held together and remain coherent."

[FN36]. Annie Bunting, *Particularity of Rights, Diversity of Contexts: Women, International Human Rights Law and the Case of Early Marriage*, SJD Thesis (Toronto, ON: Faculty of Law, University of Toronto, 1999).

[FN37]. Martha C. Nussbaum, "In Defense of Universal Values" (2000) 36 Idaho L. Rev. 379 at 444

[FN38]. Aihwa Ong, "Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia" (1996) 4 Global Leg. Studies J. 107. Ong is an anthropologist who argues that "we need anthropologists as much as lawyers to do the work of understanding and promoting women's rights."

[FN39]. Knop, *supra* note 9.

[FN40]. Richard E. Palmer explains in "The Liminality of Hermes and the Meaning of Hermeneutics" at http://www.mac.edu/~rpalmer/liminality.html that the god Hermes was the messenger between Zeus and mortals. He was the "god of all translations and transactions between realms." Last visited October 19, 2001.

[FN41]. Frederick Mark Gedicks, "Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation" (1997) 50 Vand. L. Rev. 613 at 622.

[FN42]. Richard E. Palmer "The Relevance of Gadamer's Philosophical Hermeneutics To Thirty-Six Topics of Fields of Human Activity" [A Lecture delivered at the Department of Philosophy, Southern Illinois University at Carbondale" April 1, 1999] at 5 available at http://www.mac.edu/~ rpalmer/relevance.html. Last visited on October 19, 2001.]

[FN43]. Robin L. West, "Are There Nothing But Texts In This Class? Interpreting The Interpretive Turns in Legal Thought" (2000) 76 Chi-Kent Law Rev. 1125 at 1125.

[FN44]. Cited in Dennis M. Patterson "Authorial Intent and Hermeneutics" (1989) 2(1) Can. J. Law & Jur. 79 at 83.

[FN45]. Jean Grondin, *Introduction to Philosophical Hermeneutics* (New Haven, CT: Yale University Press, 1994) at 124 citing Hans-Georg Gadamer at the Heidelberg Colloquium (July 9, 1989).

[FN46]. Hans-Georg Gadamer, *Truth and Method*, trans. Garrett Barden & John Cumming (from the 1965 German 2nd edition) (New York: Seabury Press, 1975) at 358 [hereinafter *Truth and Method*]. [Originally published as *Warheit und Methode* (Tubingen: 1960).] Tradition should not be understood as a "supra-individual" entity that imparts understanding. For a slightly more detailed discussion of Gadamer's notion of tradition, see Francis J. Mootz, "The Quest to Reprogram Cultural Software: A Hermeneutical Response to Jack Balkin's Theory of Ideology and Critique" (2000) 76 Chi-Kent L. Rev. 945 at 954. Habermas rejected Gadamer's notion of tradition as being inherently conservative and contrary to the powers of reflective understanding. He concluded that Gadamer's theory did not adequately consider the social forces that distort language as a mode of domination. For a discussion, see Fred R. Dallmayr, "Borders or Horizons? Gadamer and Habermas Revisited" (2000) 76 Chi-Kent L. Rev. 825.

[FN47]. Roy J. Howard, *Three Faces of Hermeneutics: An Introduction To Current Theories of Understanding* (Berkeley: University of California Press, 1982) at 147: "Interpretation, then, institutes a circular movement between the interpreter's expectations and the meaning residing within the text."

[FN48]. Fred R. Dallmayr, "Borders or Horizons? Gadamer and Habermas Revisited" (2000) 76 Chi-Kent. L. Rev. 825 at 828

[FN49]. *Truth and Method, supra* note 46 at 245.

[FN50]. *Ibid*. at 358.

[FN51]. "Real experience is that in which man become aware of his finiteness. In it are discovered the limits of the power and the self-knowledge of his planning reason .... Thus true experience is that of one's own historicality." *Ibid*. at 320-21.

[FN52]. *Ibid*. at 406.

[FN53]. *Ibid*. at 269.

[FN54]. *Ibid*. at 350.

[FN55]. "This is part of the meaning in which every human, linguistically constituted view of the world lives. In every view of the world, the existence of the world-in-itself is implied. It is the whole to which the linguistically schematised experience is referred. The variety of these views of the world does not involve any relativisation of 'world' .... Thus we hold that the connection with language which belongs to our experience of the world does not involve exclusiveness of perspectives." *Truth and Method, supra* note 46 at 406.

[FN56]. *Ibid*. at 419.

[FN57]. For example, prohibitions on child labour might be set at a different age in different countries or contexts. The International Labour Organization takes such a contextual approach to the prohibition on child labour. For example, work in the context of the family farm is not regulated in the same way as work on a commercial farm.

[FN58]. *Truth and Method, supra* note 46 at 471.

[FN59]. *Ibid*. at 419: "This event means the coming into play, the working itself out, of the context of tradition in its constantly new possibilities or significance and resonance, newly extended by the other person receiving it."

[FN60]. *Ibid*. at 321.

[FN61]. *Ibid*. at xxiv.

[FN62]. Similarly, Antoinette Sedillo Lopez, "A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology" (1999) 10 Hastings Women's L. J. 347 aims at mediating between homogenizing universalism and paralyzing relativism by emphasizing the value of cross-cultural interaction in the understanding of self and other. "Cross-cultural interaction makes the previously invisible visible" at 354.

[FN63]. *Truth and Method, supra* note 46 at 405.

[FN64]. *Ibid*. at 341.

[FN65]. "Whether what is handed down is a poetic work of art or tells us of a great event, in each case what is transmitted emerges newly into existence just as it presents itself. It is not being-in-itself that is increasingly revealed when Homer's *Iliad* or Alexander's *Indian Campaign* speaks to us in the new appropriation of tradition but, as in a genuine conversation, something emerges that is contained in neither of the partners by himself." *Truth and Method, supra* note 46 at 419.

[FN66]. *Ibid*. at 412.

[FN67]. *Ibid*. at xxv.

[FN68]. *Ibid*. at xxiv.

[FN69]. *Ibid*. at 416.

[FN70]. Grondin, *supra* note 45 at 124.

[FN71]. Isabelle R. Gunning's work lives up to the hermeneutic ideal. It reflects a willingness to engage and understand the other and an ability to learn from the other without resorting to agreement for the sake of agreement or "pretend acts of respect." See, for example, Isabelle R. Gunning, "Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora's 'Bridges and Barricades' (1997) 47 Case Western Reserve L. Rev. 445.

[FN72]. *Truth and Method, supra* note 46 at 341.

[FN73]. *Ibid*. at 273.

[FN74]. *Ibid*. at xxv.

[FN75]. Allan Hutchinson might disagree with my reading of Gadamer in so far as Hutchinson reads Gadamer to support the conclusion that because everything has been constructed, everything can be deconstructed. Hutchinson is referring to Gadamer's notion of tradition but he does not fully address Gadamer's ideas on the importance

of the other for hermeneutic interpretation. My reading of Gadamer is that the equality between self and other has not been constructed but is an integral part of being and thus a necessary part of any tradition. This reading might align me with more "conservative" natural law readers of Gadamer such as Ronald Dworkin. For a persuasive and compelling discussion, see Allan C. Hutchinson, "Work-in-Progress: Gadamer, Tradition, and the Common Law" (2000) 76 Chi.-Kent L. Rev. 1015.

[FN76]. *Truth and Method, supra* note 46 at xxv.

[FN77]. Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (New York: Harper & Row, 1962) at 41.

[FN78]. *Ibid*. at 67.

[FN79]. *Ibid*. at 237.

[FN80]. Gary Wickham, "Foucault and Gadamer: Like Apples and Oranges Passing In The Night" (2000) 76 Chi.-Kent L. Rev. 913. This is not to suggest that Gadamer simply applied Heidegger's thoughts or that he did not have other influences.

[FN81]. Jean-Paul Sartre, *Being and Nothingness*, trans. Hazel E. Barnes (New York: Washington Square Press, 1956) at 321.

[FN82]. *Ibid*. at 350: "It is shame or pride which reveals to me the Other's look and myself at the end of that look."

[FN83]. Edward M. Morgan, "Discovery" (1999) 10 Eur.J. Int'l. L. 583 at 587, fn 21.

[FN84]. See Grondin, *supra* note 45 at 140 for a discussion of cultural relativism and Gadamer. Grondin himself does not advocate such an understanding of Gadamer.

[FN85]. For this reason, I reject the conclusion of some scholars that Gadamer's theory does not provide a basis for cross-cultural criticism. See Gedicks, *supra* note 41 at 627. International instruments also protect culture while denying that it can be used as a pretext to subordinate or marginalize women. See Berta Esperanza Hernandez-Truyol, "Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty-First Century" (1997) 60 Albany L. Rev. 607 for a discussion of how culture can be both recognized and rejected in the context of international law's approach to violence against women.

[FN86]. See Patterson, *supra* note 44 for a defense of Gadamer against critics who charge him with expounding relativism and subjectivism.

[FN87]. This leaves open the question of how the term "within" a culture is defined. Geography is not necessarily determinative. For example, Mojubaolu Oiufunke Okome criticizes African women who "jump on the bandwagon of the anti-"FGM" brigade." She urges them to be wary of "the undue cosmopolitanism that such action entails." Her criticism suggests that she does not regard these women as being "within" the culture even though they live in it. Mojubaolu Olufunke Okome, "African Women and Female Circumcision" paper presented at Lehman College, CUNY, April 26, 1998 available on-line at http://www.africaresource.com/scholar/okom/women1.html.

[FN88]. See John T. Valauri, "The Search for Constitutional Hermeneutics" (2000) 76 Chi.-Kent L. Rev. 1083 for a discussion of Habermas and Betti's concern that Gadamer's emphasis on tradition and prejudice as aspects of dialogue allows power to replicate itself at the expense of less powerful members of society.

[FN89]. Commentators critical of the imperialism and essentializing approach of Western feminists often do not deny the efficacy of cross-cultural criticism but resent the all-knowing attitude and refusal to examine self that often pervades Western analysis of the other. For example Vasuki Nesiah, "Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship" in *Global Critical Race Feminism: An International Reader*, Adrien Katherine Wing, ed., (New York: New York University Press, 2000) at 47 argues that U.S. feminist legal scholarship approaches the "Third World" in a way that avoids critical self-reflection and change. In particular, she argues that U.S. feminists fail to interrogate how their decisions contribute to the oppression of women around the globe. She concludes that "this is not to say that we should not generalize but that generalization must always be hesitant and politically grounded .... Even when feminists deconstruct the presupposed commonality of women's experience, they must seek to hold on to the possibility of a strategic feminist internationality."

[FN90]. Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change" (1994) 42 Am. J. Comp. L. 233 argues that the boundaries between different legal systems including those of the United States, the European Union, the former Soviet Union, as well as those of the Islamic world are not watertight.

[FN91]. International human rights treaties often include the phrase "all appropriate measures." This has been interpreted to mean that the treaties allow for variations based on social and cultural structures. For example, the Committee on Economic, Social and Cultural Rights has noted that "each state party must decide for itself which means are the most appropriate ... [but country reports should indicate] the basis on which they are considered the most appropriate." Committee on Economic, Social and Cultural Rights, *General Comment No. 3: Nature of State Parties Obligation* U.N. Doc. E/1991/23 at para. 4. See also Barbara Stark, "The 'Other' Half of the International Bill of Rights as a Postmodern Feminist Text" in *Reconceiving Reality: Women and International Law*, Dorinda G. Dallmeyer, ed., (Washington: American Society of International Law, 1993) and Celestine Itumbi Nyamu "Rural Women in Kenya and the Legitimacy of Human Rights Discourse and Institutions" in *Legitimate Governance in Africa: International and Domestic Legal Perspectives*, Edward Kofi Quashigah & Obiora Chinedu Okafor, eds., (London: Kluwer Law International, 1999) for illustration of what it might mean to own an international text.

[FN92]. Ed Morgan illustrates with reference to civil litigation how American courts have acted inauthentically. He frames his work in terms of Jean-Paul Sartre's existentialist philosophy and his concepts of "insincerity" and "bad faith." Morgan, *supra* note 83 at 587.

[FN93]. See Lama Abu-Odeh, "Post-Colonial Feminism and the Veil: Considering the Differences" (1992) 26 New Eng. L. Rev. 1527 for a tangible illustration of how difference need not impede discussion and may give rise to mutual change.

[FN94]. Gadamer's theory aligns itself closely with Critical Race Feminism which focuses on the particularity and intersectionality and takes the local as its starting point while also engaging the universal. See Penelope E. Andrews, "Globalization, Human Rights and Critical Race Feminism: Voices From the Margins" (2000) 3 J. Gender, Race and Justice 373 for an example of such an approach in practice.

[FN95]. Consider , for example, the manner in which the Federal Court of Appeal insisted in *Baker* v. *Canada*

that it would not be proper to consider the effects of deporting a parent on a child. The Court's only task, according to its analysis, was to focus on the propriety of the deportation itself. See Sharryn Aiken & Sheena Scott, " *Baker v. Canada (Minister of Citizenship and Immigration)* and the Rights of Children" (2000) 15 J. L. & Soc. Pol'y. 211 at 213 for an overview of the decisions rendered and arguments advanced in this case.

[FN96]. *Ibid*. Again, contrast this to the Federal Court of Appeal's approach to the question of "choice" in *Baker* . Following a long line of cases, the court held that Mavis Baker had a choice about whether or not to take her children with her to Jamaica despite the fact that she would be living in abject poverty in Jamaica and subject to relapse into illness.

[FN97]. The proper scope of the term "prostitute" is contested at the international level as it is in some domestic jurisdictions. Some urge a reconceptualization of prostitution as sex work. See , for example, Jo Bindman, "Redefining Prostitution as Sex Work on the International Agenda" *Anti-Slavery International* available at http:// www.walnet.org/csis/papers/redefining.html. Last visited November 1, 2001.

[FN98]. *Truth and Method, supra* note 46 at 341.

[FN99]. The fact that I have not suggested the right interpretation under Gadamer's method should not be taken as a failure or oversight. Philosophical hermeneutics cannot resolve debates in the abstract because it is not intended to be normative. It aims to set out the conditions under which the debate must take place.

[FN100]. See Bunting, *supra* note 36.

[FN101]. The view that equality under the law is incompatible with different treatment has been increasingly challenged by legal scholars. See, for example, Martha Minow, *Making All The Difference: Inclusion, Exclusion and American Law* (Ithaca, NY: Cornell University Press, 1990). Canadians should be very familiar with the notion that equality of treatment does not necessarily produce equality of results. On the contrary, substantive equality requires different treatment.

[FN102]. L. Amede Obiora, "Toward an Auspicious Reconciliation of International and Comparative Analyses" (1998) 46 Am. J. Comp. Law 669 at 678: "If universals are essences common across the universe ... then the search for universals may be utopian .... Conceivably, though, it is possible to ascertain cross-cultural constructs that mutually appeal in the name of justice to uniform ideals which rest on foundations that are autonomous from the rules of positive law."

[FN103]. This is not an easy task given the complexity of the legal order across cultures. See , for example, Janet E. Ainsworth, "Categories and Cultures: On the "Rectification of Names" in Comparative Law" (1996) 82 Cornell L. Rev. 19 for a discussion of how understanding even the label that attaches to a given concept within another culture may require a broader socio-logical and philosophical understanding of the culture. However, international human rights law raises issues that are common among cultures and provides a common vocabulary with which to discuss those issues thereby making cross-cultural comparison easier.

[FN104]. See Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa L. J. 15 for a judge's perspective on the importance of considering international law and different perspectives.

[FN105]. Dallmayr, *supra* note 48 at 849 argues that Gadamer's work calls for "inter-civilizational learning and

practical engagement." This project is threatened both by particularism and Occidental meta-theories that suggest a "superior" standpoint. See also Benedict Kingsbury "Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment" (1998) 92 Am. J. Int'l. L. 713 who argues that the tendency to see one's system as superior remains prevalent in international law even though international scholars have paid homage at the throne of difference for centuries.

[FN106]. Craig Scott & Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16(2) S. African J. Human Rights 206 at 210.

[FN107]. Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997) at 42-43.

[FN108]. This is another way of "making the text one's own." L. Amede Obiora, "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision" 47 (1997) Case W. Res. L. Rev. 275. Obiora criticizes Western feminists for their campaign against female genital mutilation. Her observations reinforce the importance of making the text one's own and stress that imposing meaning on a culture only leads to alienation and rejection. See also at Hope Lewis, "Between Irua and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide" (1995) 8 Harv. Human Rights J. 1.

[FN109]. Morgan, *Discovery*, *supra* note 83 at 603.
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