

# Lost Without Translation? Cross-Referencing and a New Global Community of Courts

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## ABSTRACT

*Anne-Marie Slaughter has described the “new world order” as characterized by some “conceptual shifts,” including an increasing cooperation of domestic courts across nation-state boundaries. The cross-jurisdictional referencing of legal norms and decisions, as Slaughter holds, would lead into a “global community of courts.” This article takes issue with that observation. We argue that for such a community to emerge, cross-referencing would need to be followed by an effective transmission of meaning from one (legal) context to another. Following recent insights in the field of International Relations norm research, however, we can expect such meanings to be contested—in particular, when different cultural repertoires operate on either side of the interactive processes. Therefore, a need for translation ensues (i.e., a translation of constitutional norms or concepts from one legal order into another). The conditions of a “global community of courts” are thus not easily met. In this respect, the aim of the article is to put Slaughter’s thesis to an empirical test. To extrapolate the “normative structures of meaning-in-use” the article builds on the analysis of semi-structured interviews with legal practitioners who were involved in the jurisprudence on anti-terrorism measures in two countries, Canada and*

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*Germany. During this empirical work, we found a “global community of courts” not yet emerged. Although the concept of community does matter as an explanatory reference for research on legal cross-referencing across national borders, our research suggests that practice of cross-referencing is still more “culturally” fragmented than unified, and normative references are more regionally diverse than globally shared. Moreover, the normative context within which referencing takes place remains strong, so that the meaning of “foreign” concepts is often constructed by means of contestation rather than transferred from one contest into another.*

#### INTRODUCTION

In their everyday practice, judges reference previous legal decisions and, in so doing, reproduce what is sometimes called the “canon.” But what if the referencing practice of high courts transcends the confines of national jurisdiction and legal referencing turns into “cross-referencing,” understood as referencing *across the boundaries* of nation-states? This article takes issue with Anne-Marie Slaughter’s observation of courts taking part in a “new world order” characterized, *inter alia*, by a “conceptual shift . . . from two systems—international and domestic—to one.”<sup>1</sup> As Slaughter holds,

the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a global community of courts.<sup>2</sup>

We argue that for such a community to emerge, cross-referencing would need to be followed by effective cross-fertilization between constitutional courts and judges (i.e., a *transmission of meanings from one (legal) context to another*). Following critical norms research, we can

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1. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192 (2003); see also Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT’L L. & INT’L REL. 151 (2008); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501 (2000).

2. Slaughter, *supra* note 1, at 192.

expect such meanings to be contested,<sup>3</sup> in particular, when different cultural repertoires operate on either side of the interactive processes. Therefore, a need for *translation* ensues (i.e., a translation of constitutional norms or concepts from one legal order into another). The concept of translation—or the “problem of translation”<sup>4</sup>—brings a normative focus back in. When assuming that something has been translated, we can easily ask whether the translation from one setting into another was “successful,” indicated by either a “good” or “bad” translation. Neil Walker points to the “very idea of good translation” and proposes some normative indicators. A “‘thick’ conception of what is to be translated” would imply “a detailed hermeneutic understanding both of the context in which it was originally embedded and of the new context for which it is destined.”<sup>5</sup> Further, “those who can claim membership of both linguistic communities must agree that the method and product of the translation is adequate to capture and convey a similar meaning in the two languages.”<sup>6</sup>

Taken that any emergence of a community properly so called involves at least a certain amount of “hermeneutic understanding” and thus a “‘thick’ conception of what is to be translated,” Walker’s criteria of translatability provide a welcome element for a normative framework for scrutinizing the “global community of courts” thesis. Since we understand a legal community to include normative foundations<sup>7</sup> and hermeneutic understanding,<sup>8</sup> we argue that, without such “thick” conception, a newly evolved communal setting cannot come into being. In other words, the conditions of a “global community of courts,” let alone those of a systemic shift, are not easily met. In this respect, the aim of the article is to put Slaughter’s thesis to an empirical test. Against the *community thesis* we propose a *pluralist thesis* as a counter hypothesis, that is, different legal or constitutional communities of referencing can be expected to co-exist despite the fact of ongoing cross-

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3. See generally ANTJE WIENER, *THE INVISIBLE CONSTITUTION OF POLITICS: CONTESTED NORMS AND INTERNATIONAL ENCOUNTERS* (2008).

4. Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 27 (J. H. H. Weiler, Marlene Wind eds., 2003); J. H. H. WELER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999).

5. Walker, *supra* note 4, at 36-37.

6. *Id.* at 37-38.

7. See generally Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 *INT’L ORG.* 55 (1997) (discussing the nature of “fundamental institutions” and their role in international society); Friedrich Kratochwil, *International Law and International Sociology*, 3 *INT’L POL. SOC.* 311 (2010) (addressing the inherent difficulties of interdisciplinary endeavors).

8. Walker, *supra* note 4.

referencing between courts and judges. The methodology follows a bifocal approach that allows for a closer inspection of the interrelation between the empirical observation of cross-referencing as a social practice, on the one hand, and the normative underpinnings of community formation as a social construct, on the other. To probe our assumption that normative roots are indicative of a conceptual shift in international law, we carried out comparative research on a small-scale explorative basis. While agreeing with International Relations (IR) theory that social practice matters for community formation,<sup>9</sup> we hold that the observation of increased cross-referencing—as such social practice—is necessary, although insufficient, evidence for global community formation. We contend that, to reveal the necessary normative foundations of a legal community, the authority of its fundamental norms needs to be demonstrated with reference to shared meanings.<sup>10</sup> To extrapolate the “normative structures of meaning-in-use,”<sup>11</sup> we conducted semi-structured interviews with legal practitioners who were involved in the jurisprudence on anti-terrorism measures in two countries, Canada and Germany. During this empirical work, we found a “global community of courts” not yet emerged. As our explorative case study suggests, the *pluralism thesis* is better equipped to capture the normative effects of cross-referencing.

The remainder of this article first critically recalls the main assumptions of Slaughter’s thesis by embedding it into a body of theoretical work on *community* in the academic field of IR.<sup>12</sup> Against

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9. Emanuel Adler, *Imagined (Security) Communities: Cognitive Regions in International Relations*, 26 MILLENNIUM 249 (1997); Emanuel Adler & Vincent Pouliot, *International Practices*, 3 INT’L THEORY 1 (2011); Barry Buzan, *From International System to International Society: Structural Realism and Regime Theory meet the English School*, 47 INT’L ORG. 327 (1993); Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT’L L. 1 (1994); see generally ETIENNE WENGER, *COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY* (1998). For the interrelation between normative or ethical concerns with international practices, see, among others, MOLLY COCHRAN, *NORMATIVE THEORY IN INTERNATIONAL RELATIONS: A PRAGMATIC APPROACH* (1999); Anthony F. Lang, *Global Constitutionalism as Middle Ground Ethics*, in *ETHICAL REASONING IN INTERNATIONAL AFFAIRS: ARGUMENTS FROM THE MIDDLE GROUND* (Cornelia Navari ed., 2013).

10. WIENER, *supra* note 3. See generally HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967) (exploring the ways in which ordinary people construct a stable social world through everyday utterances and actions).

11. Jennifer Milliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, 5 EUR. J. INT’L REL. 225 (1999); Jutta Weldes & Diana Saco, *Making State Action Possible: The United States and the Discursive Construction of “The Cuban Problem”, 1960-1994*, 25 MILLENNIUM 361 (1996); Antje Wiener, *Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations*, 35 REV. INT’L STUD. 175 (2009).

12. See *infra* Part I.

this background, the article reformulates its major research question and outlines the framework of empirical analysis.<sup>13</sup> The main empirical part of the article consists of a discussion and evaluation of the interviews.<sup>14</sup> It concludes with the research findings and an outlook for further research.

#### I. TAKING THE GLOBAL “COMMUNITY” OF COURTS THESIS SERIOUSLY

Judicial cross-fertilization has been observed in the literature as the result of constitutional judges’ mutual referencing of foreign decisions with persuasive appeal. Pointing to the phenomenon of “constitutional cross-fertilization,” Slaughter explains,

Constitutional courts are citing each other's precedents on issues ranging from free speech to privacy rights to the death penalty . . . unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. They cite each other not as precedent, but as persuasive authority. They may also distinguish their views from the views of other courts that have considered similar problems. The result, at least in some areas such as the death penalty and privacy rights, is an emerging global jurisprudence.<sup>15</sup>

For the purposes of our study, however, we found it necessary to sharpen the used terminology, particularly to prevent a merging of the concepts with the result that causes and consequences can hardly be distinguished. We define *transjudicial dialogue* as direct interactions between involved legal practitioners including judges, lawyers, or prosecutors. In turn, we conceptualize *cross-fertilization* as a more complex phenomenon that is wider in scope but, at the same time, more demanding because it already implies a certain change in domestic jurisprudence. Since *cross-fertilization* literally points to a process of legal systems mutually affecting one another, it is not considered a practice in the strict sense of the term but rather an ongoing effect of inter-judicial practice such as *cross-referencing*. Notably, *cross-fertilization* implies a mutual process within which translation has a role to play. The same does not necessarily apply to *cross-referencing*. In

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13. See *infra* Part II.

14. See *infra* Part III.

15. Slaughter, *supra* note 1, at 193.

sum, while *cross-referencing* is considered a legal practice, *cross-fertilization* is understood as a consequence following from this practice.

With respect to the sharpening of the concept of *community*, we draw on insight in the field of IR. Basically, the concept of community plays an important role as a frame of reference with regard to the validity of rules or norms in international order,<sup>16</sup> thus accompanying broader theoretical considerations on normativity in international relations. This often implies the basic assumption of an international liberal community of states, providing a yardstick for (mostly state) behavior, for example, by pointing toward appropriateness with regard to respecting fundamental norms such as democracy, human rights, or the rule of law.<sup>17</sup>

In the work by Emanuel Adler and Peter Haas, *epistemic communities* are defined as consisting of professionals sharing, *inter alia*, a “set of normative and principled beliefs,” “shared notions of validity,” “intersubjective, internally defined criteria for weighting and validating knowledge in the domain of their expertise,” and “a common policy enterprise.”<sup>18</sup> Although mainly starting from an interest in the transnational role of networks of scientists providing issue-specific knowledge for international policy coordination—and not in global jurisprudence—this early approach does indeed parallel Slaughter’s account on juridical networks. More recent work has, in fact, concentrated on the process of the emergence of community through social practice.<sup>19</sup> In this respect, the incorporation of practice into IR has contributed to a deeper analysis of how communal settings beyond the nation-state may come into being through social construction, that is, by means of a *bottom-up* process. At the same time, however, practice research has so far failed to re-embed its analyses within a broad concept of global normativity.<sup>20</sup>

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16. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (2d ed.1995); Onuf, *supra* note 9.

17. See *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter Katzenstein, ed., 1996). Studies in IR have also theorized how this normativity is enforced through advocacy groups or other types of collective social actors, see MARGARET E KECK & KATHRYN SIKKINK, *ACTIVITIES BEYOND BORDERS* (1998); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887; Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS* (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 2013).

18. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992).

19. See generally Adler & Pouliot, *supra* note 9.

20. See, e.g., Antje Wiener & Antje Vetterlein, *Gemeinschaft Revisited: Die sozialen Grundlagen internationaler Ordnung [Community Revisited: The Social Foundations of International Order]*, 41 LEVIATHAN 78, 78 (2013) (Ger.).

Notably, Slaughter seems to take a position in between this body of work in IR. On the one hand, her claim focuses on a *bottom-up* process of emergence of a transnational communal structure. On the other hand, it also extends to a broader understanding of normativity in the global realm—that is, to a *liberal community assumption* including fundamental norms such as democracy, human rights, or the rule of law. It is for this reason that we are particularly interested in how this transmission of normativity operates.

Again, the “problem of translation” can help to make sense of this process. A “‘thick’ conception of what is to be translated,” as Walker holds, would imply “a detailed hermeneutic understanding both of the context in which it was originally embedded and of the new context for which it is destined.”<sup>21</sup> Further, “those who can claim membership of both linguistic communities must agree that the method and product of the translation is adequate to capture and convey a similar meaning in the two languages.”<sup>22</sup>

At first sight, the individual practice of “cultural validation,”<sup>23</sup> which comes to the fore here, finds its parallel in Slaughter’s work, where she points to the category of awareness as an “awareness of constitutional cross-fertilization on a global scale—an awareness of who is citing whom among the judges themselves and a concomitant pride in a cosmopolitan juridical outlook.”<sup>24</sup> Slaughter indeed identifies a “*psychological impact* . . . leading constitutional judges to *feel* part of a larger judicial community, an *awareness* strengthened by face-to-face meetings.”<sup>25</sup> Slaughter, in other words, understands the emergence of community as following from the judges’ awareness of mutual ties across jurisdictional boundaries. As the argument goes on, it is through an ongoing networking practice that something happens to the normative context within which the judges operate—a “network of translation,” as we would add.

Empirical research would therefore want to observe this kind of “translational networking” at work and scrutinize the community thesis by mapping cross-referencing and transjudicial dialogue as a cluster of practices. Although this cluster is considered a necessary condition for the constitution of a “new” sphere of normativity beyond the nation-state, it is arguably not a sufficient condition for speaking of an evolved community *strictu sensu*. To deliver that condition, the normative part of the analysis substantiates the cross-fertilization claim by

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21. Walker, *supra* note 4 at 27.

22. *Id.* at 37-38.

23. WIENER, *supra* note 3, at 183.

24. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 74-75 (2004).

25. *Id.* at 101, emphasis added by author.

demonstrating that translation really occurs and that, in so doing, transjudicial practice affects the judicial normativity at play in the domestic juridical contexts. If this can be achieved, the normative structure of meaning-in-use,<sup>26</sup> which is enacted by the legal practitioners' practice, would be expected to indicate a shift: *The structure would need to show shared normative perceptions—hermeneutical understanding—of constitutional court judges and lawyers with different national (or, more generally speaking, cultural) root contexts.* In a “Deutschian” sense, transnational arenas that are constituted through interactive social practice would thus indicate harmonization.<sup>27</sup> Once transnational normative structures of meaning-in-use are identified, the case for supporting the *community thesis* gains clout.

## II. RESEARCH QUESTION AND FRAMEWORK OF ANALYSIS

As a minimal condition for a community of courts, we would expect an international group of legal practitioners to be involved in a range of interactions. While engaging in issues that usually evolve domestically, practitioners would further be expected to take into account international norms and/or judgments made by courts from other jurisdictions. While they are expected to ascribe meaning to international or foreign legal norms as well as to elements of their legal culture, the ongoing meaning-generating process of translational jurisprudence holds the key to our understanding of how normative structures are affected. It was argued that normative structure depends on social practice. More specifically, given the contingent quality of *meaning-in-use*, the structure depends on iterated individual interaction.<sup>28</sup> These enactive practices include, for example, translating other normative meanings into one's own normative structure to the effect that domestic structures of meaning are challenged and may—over the ensuing course of contestation—become subject to change. As a result, new transnational structures of meaning would emerge and a contingent process enacting normative meaning-in-use would affect spaces of relevant judicial practice.

The leading empirical research question of this article highlights the way in which individuals relate to norms (principles, values, and

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26. Milliken, *supra* note 11, at 231; Weldes & Saco, *supra* note 11.

27. WIENER, *supra* note 3; see generally Karl W. Deutsch, *The Growth of Nations: Some Recurrent Patterns of Political and Social Integration*, 5 *WORLD POLITICS* 168 (1953); Adler & Pouliot, *supra* note 9; Adler, *supra* note 9; NICHOLAS ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989).

28. WIENER, *supra* note 3, at 184-93.

regulations) of international and/or foreign law. *Do individual international enactments of normative structures of meaning-in-use sustain the national (or domestically rooted) structure, or do they (also) reveal the emergence of a shared transnational normative sphere that could be considered the root of a global community?*

#### A. Case Selection

In a first step, the empirical research focused on comparing constitutional court jurisprudence in relation with anti-terrorism measures in two countries, Canada and Germany. Given the global spreading of a discourse on terrorist threats since 9/11,<sup>29</sup> a high degree of interrelatedness among national judicial systems can be expected in this issue area. The focus on counter-terrorism measures and their impact on fundamental rights issues were thus chosen as a “most likely” case scenario, suggesting that given the global reach of the discourse on terrorism and the related executive, legislative, and juridical practices,<sup>30</sup> reliance on experiences in other legal systems and international legal rules stands to be expected. This includes references to common fundamental norms in international relations, such as the norm of abstention from torture.<sup>31</sup> In other words, the prime interest of the project is not an elaboration of domestic or international juridical attempts to counter terrorism as such. Rather, our rationale is to scrutinize the “global community of courts” thesis with regard to an issue area where an effective cross-fertilization is most likely.

With respect to our case selection, Canada and Germany were chosen as legal systems with a remarkable willingness to look beyond their jurisdictional borders.<sup>32</sup> While in the literature, Germany falls under the “doing it open” category,<sup>33</sup> Canada is taken as a “wide-ranging use of foreign law” example.<sup>34</sup> In addition, we hold that a “global” community of courts should also bridge different legal cultures or “legal

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29. See Geoffrey Edwards & Christoph O. Meyer, *Introduction: Charting a Contested Transformation*, 46 J. COMMON MKT. STUD. 1, 4 (2008).

30. Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 16 INT'L REL. 155 (2002).

31. See generally, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (discussing the agreements between nations to not torture prisoners).

32. See generally Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 30-48 (2005) (giving examples and explanations of the use of foreign legal decisions in German and Canadian courts).

33. *Id.* at 34.

34. *Id.* at 45.

families.”<sup>35</sup> In this respect, our study includes practice of “Germanic” and “Anglo-American” legal systems.<sup>36</sup> Furthermore, the decision to focus on constitutional courts in Canada and Germany, respectively, follows from the relatively high international visibility of the two courts beyond the borders of their respective national communities.<sup>37</sup>

As would be expected given the context of global security threats, courts in both countries had to deal with government responses to terrorist threats. In Germany, cases were brought before the Federal Constitutional Court as constitutional complaints against decisions made by Higher Regional Courts. Initially, action had been taken against the complainants because of putative terrorist activities abroad following foreign authorities’ requests of extradition (by Turkey, Spain, and the United States).<sup>38</sup> Since these foreign extradition requests were judged in the affirmative and confirmed by the Higher Regional Courts, the defendants complained before the Constitutional Court, arguing, *inter alia*, that it had not been sufficiently considered that they would be at risk of being tortured when brought to the corresponding foreign countries.<sup>39</sup> While two of the complaints (the cases where extraditions to Turkey and Spain were contested) were rejected by the Federal Court for procedural reasons, the third one (the case of requested extradition to the United States) was reviewed substantively but was then rejected as well.<sup>40</sup>

A Canadian Supreme Court (SCC) decision that is often cited in support of the argument that the practice of judicial cross-referencing marks the emergence of a “global community of courts” is *Suresh v. Canada*.<sup>41</sup> In this case, the SCC addressed the constitutionality of deportation to face torture. While acknowledging international and foreign legal authorities suggesting that the norm against torture is an absolute one, the SCC concluded in *Suresh* that deportation to face

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35. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 63-65 (Tony Weir trans., Oxford University Press 3d rev. ed. 1998).

36. *Id.*

37. See generally Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue*, 80 TUL. L. REV. 203 (2005) (rationalizing that those courts which are perceived even beyond their jurisdictional boundaries are most likely to be referenced by their counterparts in other countries).

38. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 15, 2007, docket number 2 BvR 1680/07 (Ger.), available at JURIS; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 24, 2003, docket number 2 BvR 1521/03 (Ger.), available at JURIS; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 5, 2003, docket number 2 BvR 1506/03 (Ger.), available at JURIS.

39. *Id.*

40. *Id.*

41. *Suresh v. Canada*, [2002] 1 S.C.R. 3 (Can.); see also *Ahani v. Canada*, [2002] 1 S.C.R. 72 (Can.) (finding that Ahani’s risk of torture upon return to Iran was minimal).

torture was “generally unconstitutional,”<sup>42</sup> leaving open the possibility that deportation to torture could be justified under the Canadian Constitution in “exceptional circumstances.”<sup>43</sup> In considering the international legal authorities suggesting otherwise, the Court famously stated,

International norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. . . . Our concern is not with Canada’s obligations *qua* obligations [but] with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.<sup>44</sup>

The approach taken in *Suresh* has since been followed by the Canadian Federal Court of Appeal in several cases, notwithstanding the fact that the relevant revised act, renamed the *Immigration and Refugee Protection Act*, now contains a provision expressly directing that the “Act is to be construed and applied in a manner that . . . complies with international human rights instruments to which Canada is signatory.”<sup>45</sup> In *Charkaoui (Re)* the Supreme Court declined to revisit the issue and stated that deportation to torture remained a possibility under Canadian law, thereby implicitly endorsing the Federal Court of Appeal’s holding.<sup>46</sup>

In cases brought before Canadian courts after the *Suresh* decision, the “exceptional circumstances” exception has not been applied, and decisions by the government to deport noncitizens when risk of torture existed were not upheld by courts. However, the very existence of the possibility of deportation has had far reaching implications on the liberty of the individuals concerned. By leaving open the possibility of derogation from an established international norm, Canadian courts created a general as opposed to absolute prohibition on torture, with the effect that the meaning of this norm in Canada is fundamentally different than in other jurisdictions.<sup>47</sup>

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42. *Suresh*, [2002] 1 S.C.R. at ¶ 1.

43. *Id.* at ¶ 78.

44. *Id.* at ¶ 60.

45. Immigration and Refugee Protection Act, S.C., c. 27, 4 (Can.).

46. *Charkaoui v. Canada (Citizenship)*, [2007] 1 S.C.R. 350, ¶¶ 15, 99 (Can.); see also Rayner Thwaites, *Discriminating Against Non-Citizens under the Charter: Charkaoui and Section 15*, 34 QUEEN’S L. J. 669, 707 (2009).

47. Asher Alkoby, International and Foreign Law in Judicial Reviews of Anti-Terrorism Measures, unpublished working paper prepared for the TransCoop Workshop, University of Hamburg, Dec 16-17, 2010 (on file with the authors); Rayner Thwaites, *A*

*B. Interview Selection*

To establish how far practice, in fact, triggers a new global community, analyses that rely exclusively on court rulings and the scope and frequency of individual networking are less indicative than work that focuses on reconstructing the normative structures of meaning-in-use to establish whether they have changed through cross-referencing. Therefore, we conducted semi-structured interviews with some “key players,” including judges, prosecutors, and lawyers.<sup>48</sup> This selection was based on the assumption that these legal practitioners were most likely to enact normativity in the course of their daily legal practice. This allowed us to closely examine the normative structure of meaning-in-use in their respective practices to gain insight into the research question: *Is the normative context of judicial practice affected by cross-referencing, and, if so, does a jurisprudential community arise?*

Although relying mainly on interviews with legal practitioners, our approach does not take at face value what these practitioners tell us in such a way as a formal analysis of court rulings would. What we were mostly interested in is not facts but rather the normative underpinnings at work during the interviews and, so we assume, also in the practitioners’ daily practice. We thus build our analysis on the methodological assumption that interpreting text generated through interviews leads to the normative underpinnings “behind” or “underneath” the interviewees’ (legal) argumentations.<sup>49</sup> Against this background, we conducted the interviews along the following three clusters of indicators, which were selected with a view to establish standards of necessary elements of community (formation): (1) international law as a shared meta-framework; (2) shared interpretation of the norms of fundamental and human rights; and (3) shared interpretation of the global norm of abstention from torture. While the first indicator relates to more general patterns of recognition regarding the normative “outside” (legal practice beyond the national jurisdictional boundaries), the latter two have been selected to generate more specific and presumably varying interpretations of linking international and domestic law and, thus, revealing shades of

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*Coordinated Judicial Response to Counter-Terrorism?: Counter-Examples*, in MAPPING TRANSNATIONAL SECURITY RELATIONS: THE EU, CANADA AND WAR ON TERROR 236 (Mark B. Salter ed., 2010).

48. For the research project we have conducted semi-structured interviews with 14 individuals who are or have been involved in transjudicial dialogue as judges, lawyers or prosecutors (anonymized). The interview transcripts are on file with the research project.

49. Wiener, *supra* note 11; Friedrich Kratochwil, Book Review, 11 INT’L J. CON. L. 542 (2013).

distinctive or overlapping normativity in the international or domestic realms, respectively.

Although all interviewees seemed to be well aware of the fact that their working practice involved the potential of transcending jurisdictional boundaries, the text corpus generated by all interviews nonetheless revealed a predominant skepticism. But what exactly is the meaning of these boundaries to individuals who are referring to legal norms through jurisprudence in their daily working practice and who are therewith involved in enacting and (re)constituting normative structures of meaning-in-use? To this end, the interviewees were asked about their respective involvement and experience with referring to documents or sources that do not originate from their “own” jurisdictions. In particular, we were interested in how the interrelation between domestic and international normativity played out with regard to the meaning ascribed to the domestic and the international arenas, respectively, taking into account the interviewees’ daily legal practice.

### C. Hypotheses

It follows that for the *community thesis* to hold we should be able to find convergence or, at the very least, a certain overlap of patterns of recognition with the following interviewees’ perceptions: first, no absolute boundaries are drawn between domestic and international normative spheres; second, the way individual fundamental and human rights are handled in domestic normative frameworks converges across domestic arenas (of national jurisdictional spaces); and third, the way the norm of abstention from torture (particularly with respect to the international norm against torture) is handled converges as well.

In turn, we propose a *pluralist thesis* as a counter hypothesis. That is, different legal or constitutional communities of referencing coexist. For the case at hand, that means that while cross-referencing or transjudicial dialogue occurs on a regular basis, domestic arenas continue to exist as well, thus creating a plurality of arenas—without a remarkable amount of cross-fertilization. According to the pluralist thesis, we expect to find nationally distinct context-specific understandings though generated through cross-referencing beyond national jurisdictional boundaries. First, distinct boundaries between domestic and international normative frameworks or norms of international and/or international foreign law would be enacted with reference to specific normative structure of meaning-in-use related to the specific nation-state context. Second, interpretations of how to implement individual rights (including a corresponding consideration of international human rights norms) in the domestic normative

framework and, third, how to rely on the norm of abstention from torture (particularly with respect to the international norm against torture) would diverge across nation-state jurisdictional spaces.

### III. CASE STUDY EVALUATION

#### A. *Domestic v. International Normativity? “Community” Views*

When asked about the international relevance of domestic courts, interviewees in both countries articulated skepticism: “The international role of courts, including constitutional courts, is not as important as one could think;”<sup>50</sup> “I gave no thought on the community view;”<sup>51</sup> “I could participate in being a citizen of the world but at the end of the day I’m a citizen of this country.”<sup>52</sup> However, upon closer inspection, difference with regard to how interviewees related to “the international” was revealed. The German sample shows the emerging perception of an integrated sphere of normativity beyond the domestic jurisdictional arena. The Canadians, though well aware of international repercussions of their work, did not articulate these kinds of internationalist *sensibilities* or *fidelity*.<sup>53</sup> While for the project’s research question, the rationale for this difference matters less than the finding that different interpretations do exist, it is likely that the advanced state of European integration has affected legal practice in Germany. This is supported by reliance on European law and/or legal decisions by European courts, which interviewees considered an important aspect of German legal practice. In this respect, the practice at the German Constitutional Court would operate on an explicitly common “value basis, these are the other member states of the Council of Europe, these are the other member states of the European Union.”<sup>54</sup> And one German chief prosecutor stated that he would not perceive the jurisprudence of the European Court of Human Rights (ECtHR) as “foreign texts” from his “inner” perspective, adding that within the European Union, one

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50. Interview with Anonymous Interviewee German A (Jan. 21, 2011) [hereinafter Ger. A].

51. Interview with Anonymous Interviewee Canadian A (Aug. 1, 2011) [hereinafter CA A].

52. Interview with Anonymous Interviewee Canadian D (Aug. 1, 2011) [hereinafter CA D].

53. MARRTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 2 (2002); JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 30 (2010).

54. Interview with Anonymous Interviewee German B (Mar. 10, 2011) [hereinafter Ger. B].

would build upon a “relatively homogeneous body of values.”<sup>55</sup> And he added: “[A]nd you notice that despite the different legal systems our expectations and imaginations are coined in rather similar ways.”<sup>56</sup> Europe is thus perceived as having a relatively similar legal culture with a solid foundation of basic positions or principles that tend to be shared across the inner-European jurisdictional boundaries.

In turn, the Canadian interviewees demonstrated similar interfaces in legal culture by pointing to “friends from a legal point of view, so, U.K., Australia, New Zealand, U.S. as well.”<sup>57</sup> That is, they referred to countries with which they share the legal tradition of common law—as well as the historical experience of the Commonwealth of Nations (the Commonwealth). In addition, these countries are perceived as the normative environment in which their own legal practice is likely to be acknowledged and recognized.

This finding confirms the literature that suggests that the recognition of legal practice beyond the boundaries of one’s own legal system is rather selective and depends on shared experience.<sup>58</sup> Whereas the German interviewees support the perception of the European legal culture as remarkably similar, the Canadian interviewees show the reliance on the traditional bonds of the Commonwealth legal culture.<sup>59</sup> To take up Slaughter’s distinction between vertical and horizontal networks, the German interviewees’ construction of a European legal sphere reveals a tendency to rely on a *vertical* relation with an emphasis on European law and decisions by European courts. By contrast, the Canadian interviewees pointed to *horizontal* relations between legal practice in Canada and other Commonwealth countries. In each of the two normative contexts, translation between jurisdictional spheres seems to be taken as rather unproblematic.

Regarding this distinctive type of cross-referencing, it is notable that despite their respective openness toward “the international,” both

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55. Interview with Anonymous Interviewee German E (Aug. 10, 2011) [hereinafter Ger. E].

56. *Id.*

57. CA D, *supra* note 52.

58. See JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 140 (1995); Adler & Pouliot, *supra* note 9, at 111; see generally WIENER, *supra* note 3.

59. See MAURO CAPPELLETTI, MONICA SECCOMBE & JOSEPH WEILER, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (1986); Ulrich Haltern, *Integration Through Law*, in EUROPEAN INTEGRATION THEORY 177 (Antje Wiener & Thomas Diez eds., 2004); see also, the Opinion of the Advocate General in the *Kadi case*, C-402/05 P, *Kadi v. Council and Comm’n*, Jan. 16, 2008, and C-415/05, *Al Barakaat v. Council and Comm’n*, Jan. 23, 2008 (determining the invalidity of certain UN Security Council regulations regarding suspected terrorists).

groups of interviewees emphasized their respective national jurisdictional context. The interviews reveal a strong persistence of the respective domestic constitutional arena as their major normative frame of reference. As one Canadian judge stated, “We have a very strong constitutional accord of our own.”<sup>60</sup> Similarly, Germans were eager to point to their constitutional tradition, for example, by rejecting the importance of international law and instead relying on the “objective principle of the rule of law,”<sup>61</sup> as a concept that was first established by the Constitutional Court in the early *Lüth* judgment,<sup>62</sup> or by holding that “every country has developed their own style of jurisprudence.”<sup>63</sup> In one interview, a Judge referred to the importance of an “overall view of all fundamental rights and their inherent institutional components” and mentioned the role of the *Lüth* case with regard to the “argument with the objective legal order.”<sup>64</sup>

That is, with regard to the question of international law most broadly conceived, the interviews demonstrate that the importance of international norms is clearly subordinated to the specific *context of interpretation* in the domestic arena. One Canadian lawyer expressed this understanding quite well by noting that

even to the extent that we argue the [sic] refugee convention, the torture convention or the convention on the rights of a child in domestic courts, we are arguing that the principle in the convention but we are basing most of our arguments on Canadian interpretation of Canada’s obligations under those conventions.<sup>65</sup>

The same view is expressed even more strongly by the German interviewees, for example, by the following interviewee who thought that reliance on international law was simply not needed because the German Basic Law would be sufficient in most cases: “[T]hat means if we always comply with the Basic Law, we do actually also comply with almost all human rights treaties; in this respect, we don’t need an

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60. CA A, *supra* note 51.

61. German original term: *objektives Rechtsstaatsprinzip*; Ger. A, *supra* note 50.

62. Interestingly, even in this early judgment the court practiced cross-referencing. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, docket number 1 BvR 400/51 (Ger.), available at JURIS.

63. Interview with Anonymous Interviewee German C (Apr. 08, 2011) [hereinafter Ger. C].

64. Ger. A, *supra* note 50.

65. Interview with Anonymous Interviewee Canadian F (Aug. 27, 2011) [hereinafter CA F].

additional motivation from human rights treaties.”<sup>66</sup> And a former judge at the German Constitutional Court put it in an even more explicit way, noting that of course one would know the international norms “and one interprets everything. But I am that rigorous, for being solidly grounded in our constitution.”<sup>67</sup>

It follows that experience with one’s own legal system and tradition or legal culture was obviously felt as being of crucial importance. In the case of some interviewees, this kind of context sensibility even went so far as to promote a certain kind of skepticism toward transjudicial dialogue and the globalization of jurisprudence more generally:

But a comparable federal construction like Germany, I don’t know any country. And therefore you cannot make sense of legal comparison. And with respect to fundamental rights, the very same problem comes into play that I have mentioned earlier, that is, what is behind every legal order and every legal culture: the history . . . . And therefore it is very difficult, from my point of view, to rely on decisions from other countries in a legal comparison kind of way.<sup>68</sup>

It is important to mention at this point that, arguably, the experience with the domestic legal context relates to individual experience. And, therefore language problems—that is, linguistic translation—are often mentioned as a considerable hurdle toward effective transjudicial dialogue. However, the younger generation of lawyers, who are frequently educated abroad and, therefore, are well trained in international approaches to law, is expected to make a difference. This would sustain the expectation that, in the future, increased language competencies and professional experience abroad are likely to further transjudicial dialogue. If this were the case, it would enhance the probability for global community formation.

As the interviews reveal, cross-referencing and transjudicial dialogue is often considered with respect to consequences abroad, while the interviewees’ respective domestic legal arena was—by implication—understood as a kind of blueprint for the development of other, less developed systems. Dialogue across national jurisdictions is also seen as effective with regard to an evolving awareness of “outside sources.” As this Canadian interviewee stated for example,

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66. Ger. C, *supra* note 63.

67. Ger. A, *supra* note 50.

68. *Id.*

[W]hether they [the judges] cite them or not, they are aware of them. They really are. First of all, they [the “outside sources”] are pleaded before them. And secondly they go to these . . . Commonwealth conferences . . . every few years. They go to those kinds of things. And there are more and more sort of judicial interactions with other judges in other parts of the world in different forms more so than there ever was before. So, no, I think they are perfectly aware of them.<sup>69</sup>

Notably, this reply suggests “awareness” about the availability of foreign sources, rather than reference to an evolving transjudicial normative structure of meaning-in-use. With regard to the question about an evolving community, knowing that there is something “out there” must be considered as analytically distinct from the finding of an intersubjectively shared understanding about the meaning of these “outside” sources.<sup>70</sup>

An intriguing example of an established pattern of cross-referencing, and eventually cross-fertilization, came to the fore in one of the Canadian interviews when one practitioner referred to the “special advocate” model in the United Kingdom used to mediate the tension between confidentiality and disclosure when examining the case against suspected terrorists.<sup>71</sup> When asked for cross-fertilization in the area of national security, this Canadian interviewee mentioned the mutual reliance of the Canadian and British legal systems as follows:

The irony was they [the British] referred to the special advocates as the Canadian system when in fact it was not the Canadian system. In Canada, the process that we had in place was different. It was . . . a hearing held in front of the Security Intelligence Review Committee. It was a full hearing . . . you had the full right to counsel and the Security Intelligence Review Committee had their own counsel who . . . was there to protect the interests of the person in the secret hearing. But he had much more ability to communicate than the special advocate model that was adopted. But the Europeans . . .

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69. Interview with Anonymous Interviewee Canadian E (Aug. 24, 2011) [hereinafter CA E].

70. SLAUGHTER, *supra* note 24.

71. Audrey Macklin, *Transjudicial Conversations about Security and Human Rights*, in MAPPING TRANSNATIONAL SECURITY RELATIONS: THE EU, CANADA AND WAR ON TERROR 212 (Mark B. Salter ed., 2010).

the English thought they were bringing in the Canadian system. *They created their own system which was sort of a bastardized version of the Security Intelligence Review Committee's system* where you had security clearance lawyers who could meet with the person . . . . So there were these two different models. *The English said they were adopting the Canadian system when they were doing something different* which was the special advocate system.<sup>72</sup>

While from the perspective of the United Kingdom, as well as in the ECtHR *Chahal* decision, this procedure was perceived as originating from the Canadian legal system's *Security Intelligence Review Committee* (SIRC), Canadian courts viewed it as originating in the United Kingdom.<sup>73</sup> Curiously, the special advocate model was considered as "foreign" from both sides of the pond. The fact that ideas are traveling from one domestic legal system to another does not necessarily indicate an adoption of shared legal reference. Instead, the very idea changed while "traveling." From the point of view of the interviewee, this change of meaning had affected a core aspect of the procedure at hand, namely, the protection of "the interests of the person in the secret hearing."<sup>74</sup> When asked whether this sustained an exchange of ideas between two national jurisdictions, the same interviewee replied, "[W]e rely on their decisions, they rely on our decisions. We use the positive aspects of what is happening in England to our advantage and they use the positive aspects of what is happening in Canada in their submissions."<sup>75</sup>

This suggests that while cross-fertilization can be identified as a result of cross-referencing, it does not necessarily mean the transfer of one idea into another context as a mere diffusion of ideas in the sense that the meaning of a concept is left untouched when applied in another context. It does not happen in a linear manner. While both legal systems, Canada and the United Kingdom, relied on each other's procedures involving safeguards of constitutional rights, the outcome was obviously not a *mutual understanding* of norms, and the rights-

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72. Interview with Anonymous Interviewee Canadian G (Aug. 18, 2011) [hereinafter CA G] (emphasis added).

73. See *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, ¶ 69 (Can.).

74. See *id.*

75. CA G, *supra* note 72.

infringing practices continued to diverge.<sup>76</sup> Here, translation has obviously failed. “It is a complicated history,” another interviewee held.

The U.K. will tell you that they got their special advocates from the SIRC model. We would turn around that the SIRC model is fundamentally different from what ended up as the special advocates regime model in the UK because the SIRC model is based on the fact that the counsel is there to assist SIRC and special advocate is there to assist the person concerned. So you have got a *fundamental change of the focus* of the representation or the focus of the advocacy. But what you have is you have had this circle effect. And I think that that will always continue to happen.<sup>77</sup>

As the last sentence of this interview excerpt indicates, this interviewee expects concepts traveling across borders to change meaning and takes it for granted that things like this “will always continue to happen.” It follows from this view that cross-referencing may indeed have the effect of cross-fertilization, yet, without generating mutual understanding. But the insight that dialogue across jurisdictions is effective remains analytically distinct from the finding that the practice of inter-national cross-referencing to norms or procedures generates shared understandings. In effect, the case of the SIRC-Special Advocate model is a very good example of failed translation in the sense of a *misunderstanding*, though a productive one as evaluated in the corresponding domestic contexts.<sup>78</sup> The implementation of a concept within a new legal context did obviously take place without accounting for the context the concept was taken from. Interestingly, this mode of failed translations operated mutually, that is in both directions. Here, cross-referencing worked without an emergence of shared normative understanding.

Regarding our theoretical assumptions, we would expect this obviously lacking dimension of understanding to be furthered especially through interpersonal encounters (i.e., those forms of transjudicial dialogue that Slaughter also refers to). But here, again, the interviews

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76. Macklin, *supra* note 71, at 227 (“And that is what Canada has today: a special advocate scheme that mimics a deficient UK model that is itself a copy of a non-existent Canadian precedent.”).

77. Interview with Anonymous Interviewee Canadian H (Jul. 08, 2011) [hereinafter CA H] (emphasis added).

78. See generally Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985) (for the concept of “productive misunderstanding”).

reveal a considerable amount of skepticism, either with respect to lacking intensity or effectiveness of dialogue. At first sight, Canadian and German interviewees did not differ remarkably in this regard. For example, pointing to a corresponding distinction between referencing and dialogue, one Canadian lawyer said in an interview:

I would see more of a web of decisions than a web of people . . . like lawyers. I mean I'm conscious of decision making in other countries. And in a number of countries I know the lawyers who argued the cases. But I know them sporadically . . . I don't know them through any concerted effort to keep in touch.<sup>79</sup>

In effect, it is this kind of face-to-face interaction that can be assumed to be most effective with regard to the emergence of communal bonds. Trust seems to be an important aspect, and dialogue and cooperation are indeed seen as important for the emergence of trust, in particular because jurists would tend to be shaped by their respective domestic legal order. As this interviewee notes,

[T]he whole thing [cooperation across jurisdictional boundaries] indeed has an end in generating mutual trust. In the international context, this is not really that easy, one has to say [laughing]. Because the grounding in the own legal order very much forms the jurist, that is, the German jurist. There is indeed a certain hubris that the own legal order is fine while the other countries will have to be observed with a certain scepticism. And for this reason, cooperation is indeed important when one really sees that people elsewhere are concerned with similar problem as we are.<sup>80</sup>

Although this suggests that personal interactions are *helpful*, this is not the same as saying that they are also effective. With respect to effectiveness, interviewees demonstrate skepticism especially at the point when describing the concrete practice of dialogue. One German constitutional judge, himself well aware of Slaughter's work, pointed out:

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79. CA E, *supra* note 69.

80. Ger. E, *supra* note 55.

Everybody, I would say, has participated in this informal exchange that Slaughter refers to. That has even been rather troublesome, every two weeks another foreign court comes to Karlsruhe or we are going somewhere . . . and, in addition, there are private conferences where constitutional judges from different countries are invited. One indeed meets rather frequently . . . Thus, what Slaughter means does exist, although it might be a bit exaggerated that there is something like a brotherhood of judges. More often than not, it is more protocol or courtesy visits with no real value added in scholarly terms . . . There is not much happening.<sup>81</sup>

The same interviewee conceded that the format of the judicial encounters could affect the extent of the mutual learning process. While large conferences like the meeting of European constitutional courts would be “rather worthless events,”<sup>82</sup> there would be meetings like the Global Constitutionalism Seminar at Yale University<sup>83</sup> or meetings of only two constitutional courts. The latter type could be effective if no language difficulties exist. “Then, it comes to good cross-fertilization, one can really learn something.”<sup>84</sup>

Concluding from the individual perspectives of these interviewees, it is suggested that the crucial effect of transjudicial dialogue consists of learning from abroad. This finding is compatible with the literature on epistemic communities.<sup>85</sup> If we take the analytical distinction between

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81. Ger. C, *supra* note 63.

82. *Id.*

83. GRUBER PROGRAM FOR GLOBAL JUSTICE AND WOMEN'S RIGHTS AT YALE LAW SCHOOL, GLOBAL CONSTITUTIONALISM SEMINAR, <http://www.law.yale.edu/intellectuallife/globalconstitutionalismseminar.htm> (last visited Sep. 17, 2012).

84. Ger. C, *supra* note 63 (The whole passage reads: “Conferences, like meetings of the European Constitutional Courts. And these are rather worthless events, while there is, every year, a meeting, Global Constitutionalism Seminar. I have always attended during the last six years. These are meeting of professors from the Yale faculty who invite judges from high constitutional courts and high courts; and there is real talk going on for three days; that is really important; there is really something going on. And something similar exists. And also meetings of two constitutional courts, in particular when one has no language difficulties that one has very often of course when there is no interpreter. Then, there is not so much going on. But if one has a shared language, say, when we meet the Austrian Constitutional Court or an Anglo-Saxon like the Canadian Supreme Court, and so on. Then, it comes to good cross-fertilization, one can really learn something.”).

85. Haas, *supra* note 18, at 30; see generally Adler, *supra* note 9; Emanuel Adler, *Cognitive Evolution: A Dynamic Approach for the Study of International Relations and*

two types of social learning (i.e., one that focuses on behavioral change such as perception and recognition); another that focuses on cognitive change such as normative evaluation and validation—into account, however, it follows that epistemic communities that evolve through social learning based on “on and off” meetings at common conferences are a necessary, yet not a sufficient, indicator for shared normative understandings.<sup>86</sup> Such shared understandings depend on iterated individual interaction over time. That is, learning from foreign jurisdictions can occur without buying into their particular normativity. Translation occurs for a particular purpose, which is not the understanding of the normative context a norm or concept is taken from. This is also sustained by an assertion by this Canadian interviewee who says, “[W]hat is a driving force in UK may not even exist in Canada so you can learn from them but you learn with caution.”<sup>87</sup> This instrumental usage of references to legal practice beyond one’s own legal system demonstrates the latter, cognitive type of social learning. Canadian interviewees, in particular, expressed this type of learning. For example, a government counsel held that foreign cases were particularly discussed when raised by the applicant side.<sup>88</sup> In this respect, cross-referencing was revealed to be not an end in itself. In the same vein, another Canadian lawyer said that

[w]e rely on them to the extent that they help our position. So when the international norms have moved further than the norms in our country we will rely on the international norms to try and bring Canada in line with the rest of the world. At the same time the government relies on international norm sometimes because they have to make modifications to the legislation to make Charter requirements. So they turn to international norms too.<sup>89</sup>

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*Their Progress*, in PROGRESS IN POSTWAR INTERNATIONAL RELATIONS 43, 56 (Emanuel Adler & Beverly Crawford, eds., 1991).

86. See JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 5 (1989); see also Antje Wiener, *Contested compliance: Interventions on the normative structure of world politics*, 10 EUR. J. INT’L. REL. 189, 201 (2004); see also Peter J. Katzenstein, *Introduction: Alternative Perspectives on National Security*, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS, *supra* note 17, at 26.

87. CA H, *supra* note 77.

88. *Id.*

89. CA G, *supra* note 72.

And, regarding the development of Canadian law, another Canadian interviewee made a similar argument, yet, making a negative point:

[I]t is clear that there is something that has been developed in Canadian law that does not support the argument of the party that they will go outside. They've been using U.K. jurisprudence or Australian jurisprudence for that purpose . . . . It supports their argument and puts some weight into it.<sup>90</sup>

The cross-fertilization of the British and Canadian legal systems with regard to the Security Intelligence Review Committee (Canada) and Special Advocate (United Kingdom) procedures can be understood correspondingly: *reliance on beyond-the-border concepts for instrumental reasons instead of an integration of normative spheres.*

Though with less frequency (and perhaps concreteness), similar assertions of instrumentalism were also made by the German sample. As one German constitutional judge mentioned, cross-referencing “might be helpful, that can probably be said.”<sup>91</sup> At the same time, he was rather ambivalent as to the question whether cross-referencing was also crucial. He did, however, point out that it served

the legitimization [of a court decision]. When something is very unpopular, let's say the Muslim halal slaughter [*Schächten*<sup>92</sup>], where both, animal rights protagonists and Muslims go to the barricades. And then, one can cite; yes, the Austrian Constitutional Court has made the very same decision and also the ECtHR. Then, it is helpful . . . also in order to make clear: Here, we have a decision that we take up.<sup>93</sup>

Against this background, it is important to note an additional differentiation that was revealed following the interviewers' query “effective with regard to what?” Given the distinctive types of social learning, dialogue can be effective with regard to *learning* though not effective with regard to the emergence of a community. By the same token, cross-referencing can be effective as a means to a particular end.

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90. CA A, *supra* note 51.

91. Ger. C, *supra* note 63.

92. See Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] Jan. 15, 2002, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFGE) [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 104, 337 (Ger.).

93. Ger. C, *supra* note 63.

However, as long as ends are primarily defined in a national context, cross-referencing or transjudicial dialogue alone cannot be expected to generate the normative integration of legal systems or the merging of intersubjective “horizons,” as it were.

In her work, Slaughter differentiates *binding precedent* from *persuasive authority*, arguing that, in the context of cross-referencing, “the question of drawing on and actually citing foreign cases becomes one of the legitimacy of ‘persuasive authority.’”<sup>94</sup> Slaughter cites prominent U.S. judges who argue that even though foreign cases are “rarely binding . . . conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.”<sup>95</sup> Our interviews revealed a remarkable variance when it came to the evaluation of the normative validity of norms and decisions from “outside.” This was especially revealed by the German sample, with the social fact of the current state of European integration playing a decisive role. For example, one German judge was quite clear about this distinction when explaining:

[W]hat I have just pointed out is legal comparison which is never binding. By contrast, we are bound to international law; we are bound to European law. . . . That [legal comparison] is a totally different mode of application compared to the situation when we are bound to an international treaty. Then, we have to apply it. It does not override German law but we will try not to get into conflict with it.<sup>96</sup>

What is interesting about this assertion is that, notwithstanding prevailing questions about the formal or constitutional modes of incorporating international law into the domestic legal realm, the judge’s feeling of obligation toward the normative content of international legal norms does matter. It is thus the construction of normativity through daily practice that sets the ground for an international law-related argument to be “persuasive.” How such normativity is constructed becomes tangible in assertions pointing to the concrete function of international law in the domestic legal process. A corresponding aspect brought up by some of the Canadian interviewees is the function that international norms may have for the interpretation of domestic law, such as the *Canadian Charter of Rights*

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94. SLAUGHTER, *supra* note 24, at 75.

95. *Id.* (quoting Supreme Court Justice Sandra Day O’Connor).

96. Ger. C, *supra* note 63.

*and Freedoms*. For example, while talking about the status of ratified and not yet ratified international law, a Canadian judge asserted that “if it has been ratified by our country, the treaty, I would feel a lot more at ease using it. If our country has not ratified it . . . I would be less responsive.”<sup>97</sup> And on the same point another judge pointed out:

Well I think as an interpretive guide but I don't know where we could use it as a statement of domestic law. . . . If we are inconsistent with domestic law then we have to pull back and can inform our interpretation but we can't adopt a principle which is inconsistent with domestic law. . . . I think international law informs our interpretation of domestic law but it is not determinative unless it has been implemented in Canadian domestic law.<sup>98</sup>

While the mere distinction between ratified and nonratified international law is hardly surprising, as it is a consequent application of the Canadian dualist doctrine,<sup>99</sup> the ascription of international legal norms' status is coupled with a rather formalistic argument on normative implementation. The finding of a sensibility for international law is thus qualified as the formal validity of international law follows only from a formal act of implementation in the domestic legal order. Although the attitude toward international legal norms is, in principle, marked by openness (international law could guide the interpretation process even when it is not ratified), the opening and closure of the jurisdictional space is nonetheless strictly related to the formal procedure (ratification process). The translatability of norms from the international to the domestic sphere, in other words, is relocated to a formal level.

The German interviewees did not make this kind of detailed differentiation. Although differentiation is made between legal comparison and reliance on international law, international and European legal obligations are not questioned as to their formal status but taken as a given determinant of the domestic legal process. The generally unqualified insistence on the power of international norms in the domestic sphere is also to be understood as a *technique* backing up the underlying post-war German identity and transporting the belief in

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97. Interview with Anonymous Interviewee Canadian B (Aug. 1, 2011) [hereinafter CA B].

98. CA A, *supra* note 51.

99. See generally Renee Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125 (2008).

a state that is open toward international law.<sup>100</sup> At the same time, the interviews with German practitioners also reveal what may be called an ideational suppression of international law, in particular when it comes to the protection of fundamental rights.

In this respect, the comparison reveals an almost paradoxical constellation. On the one hand, we find a normative order that is formally closed toward international law (in a dualist sense) but, at the same time, ideationally open for foreign or international sources as interpretive guidance (Canada). On the other hand, we find a normative order characterized by a formal openness toward international law but, at the same time, an ideational closure regarding the usage of “outside” sources (Germany). It follows that international law can actually be conceived as binding in Germany in a way that is not possible in Canada (or other “dualist” systems). Yet, this “theoretical” dispute between dualism and monism remains rather academic and is somehow misplaced, at least with regard to the German case. While the Federal Constitutional Court has developed openness toward international law as a constitutional principle,<sup>101</sup> the court is, by the same token, explicitly committed to “dualism.”<sup>102</sup> Against this background, the theoretical distinction loses analytical clout. Subsequently, a distinction between binding and persuasive authority of foreign or international legal sources cannot be drawn exclusively from doctrinal reading of the (transnational) legal process. What the analysis shows is that, while reliance on international law and other exogenous legal sources does play a role in the two legal systems, the mere notion of openness toward international law is not an adequate category to evaluate the orientation of legal practice. Despite the shared awareness of what happens beyond the jurisdictional borders, notions of “communal” structures in the global realm or the ways in which international law is to be obeyed in the nation-state context differ remarkably. Although “the international” is available within the national context, its meaning is not shared as a structure of meaning-in-use.

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100. See generally Philip Kunig, *Völkerrecht und staatliches Recht* [Public International Law and State Law], in *VÖLKERRECHT* 73 (Vitzthum WG ed., 2010) (for a doctrinal discussion on that point).

101. “Constitutional Principle” is to be translated in German to “Prizip der Völkerrechtsfreundlichkeit.”

102. Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 14, 2004, *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* (BVERFGGE) (Decisions of the German Constitutional Court) 111, 307 (Ger.).

*B. Fundamental Rights and Torture*

The question on the abstention from torture brought up before constitutional courts did raise fundamental human rights issues and often involved a consideration of the possibility that individuals would face torture, in particular when being returned to their countries of origin.<sup>103</sup> Accordingly, international norms like those prohibiting the use of torture were used by practitioners arguing on behalf of these individuals in the domestic context.<sup>104</sup> This, in turn, gives us the opportunity to account for convergent or divergent cross-border reliance on those types of international legal norms. The indicators do, therefore, point to a useful example for our analysis of cross-referencing and community formation.

Thus, when asked for the priority of fundamental rights in the legal process, German judges tended to answer in a textbook style:

The fundamental rights . . . will have to be put in equilibrium with the rest of the legal order. And Article 1 (3) GG [German Basic Law] puts fundamental rights in a very strong position but in the considerations of proportionality . . . fundamental rights are to be balanced with other legitimate objectives and ends of the state. But almost the whole legal order can be derived from fundamental rights so that there is hardly a question that is not, in one way or another, influenced by fundamental rights. Of course . . . fundamental rights stand above any other law but they will also have to be embedded within the general legal order.<sup>105</sup>

Along the same line, another German judge held that “our fundamental rights can be restrained; and they can be restrained in the interest of the common good. This, the Constitutional Court has said again and again; not the sovereign individual but the individual within

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103. See BverfG, Oct. 15, 2007, docket number 2 BvR 1680/07 (Ger.), *available at* JURIS; BverfG, Oct. 24, 2003, docket number 2 BvR 1521/03 (Ger.), *available at* JURIS; *see also* BverfG, Nov. 5, 2003, docket number 2 BvR 1506/03 (Ger.), *available at* JURIS; Suresh v. Canada, [2002] 1 S.C.R. 3 (Can.); Ahani v. Canada [2002] 1 S.C.R. 72 (Can.).

104. See *generally* United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, United Nations, Treaty Series, vol. 1465, p. 85.

105. Ger. B, *supra* note 54.

the community.”<sup>106</sup> Later in the interview, the same judge reformulated this argument with respect to the challenge of terrorism.

Fundamental right[s] shall be maintained, even in times of terrorism. Of course, they can be restrained. That is written down in the Basic Law. For the protection of common goods, also security . . . . Both are important values, none of them shall be abandoned. We must safeguard fundamental rights also in the fight against terrorism but we must also fight terrorism.<sup>107</sup>

While it is not surprising that lawyers are turning to normative equilibria and questions of proportionality when fundamental rights may be constrained, the tone changed as soon as the discussion came to issues of torture. When asked about the role that abstention from torture plays in the legal system, all German interviewees converged on the distinctively common position that is exemplified in the comments made by this interviewee: “This prohibition of torture is absolutely effective; . . . any softening of this strict prohibition brings everything to collapse.”<sup>108</sup> The same interviewee goes so far as to say that any attempt to “influence the freedom of will or to push an accused person in a certain direction has nothing to do with the objective principle of the rule of law.”<sup>109</sup> Any notion of “collateral damage” would not be possible in this regard. The state would, in so doing, “in part put into question its substance.”<sup>110</sup> In other words, *any* move toward the acceptance of torture practice is understood as leading to the erosion of legality in a foundational sense. Torture was thus revealed to be understood *per se* as a contradiction of the identity of the German rule of law.<sup>111</sup>

While this notion of state identity represents the most explicit rejection of torture practices revealed by the project’s text corpus, it is nonetheless representative of the German sample. Other interviewees, though less explicitly, articulated similar positions. With regard to fundamental rights of individuals, one judge opined that “we balance like I have told you before but there are boundaries where we stop balancing . . . . And also, the prohibition of torture is where we stop

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106. Ger. C, *supra* note 63.

107. *Id.*

108. Ger. A, *supra* note 50.

109. *Id.*

110. *Id.*

111. Note that although commonly translated as “Rule of Law,” the German term “*Rechtsstaatlichkeit*” points to the state (or to statehood).

balancing.”<sup>112</sup> Thus, this boundary is torture, a line that is not to be crossed. In a cynical way, the same judge continues: “[C]ertain things the state is not allowed to do even though they might be very practical. Torture is practical but not allowed.”<sup>113</sup>

Relating to a more global perspective, another constitutional judge noted that torture would not belong to the terminology of the German Basic Law but would emanate from international law. “But,” he continued,

we have the human dignity [as used in Article 1 (1) GG] that might sometimes be exaggerated but for sure has an important position related to torture . . . also the Basic Law acts on the assumption of a notion of man, but also notion of the state, that excludes torture per se. That does come with a price as any legal warranty comes at a price. But in particular the constitutional order that declares human dignity as being untouchable in Article 1, Para.1 is aware of that price and is willing to pay for it.<sup>114</sup>

This interpretation of the torture norm was not only made by the perhaps more idealistic constitutional court judges. Chief prosecutors equally articulated quite distinct perceptions when pointing out that “the prohibition of torture is absolute.” An extradition to a country where somebody would face torture “cannot happen” and would be

an absurdity when human dignity is really taken as the superior principle; thus, I would reject that. . . . I mean, let’s say, the protection of human dignity prohibits torture. . . . I would say the overall spirit of the Basic Law itself makes that clear; with us, this does not happen. And in addition, we are obliged in terms of international law.<sup>115</sup>

It is important to note here that, although abstention from torture exists as a rather concrete norm in international law, the German interviewees developed their respective arguments against any practice of torture by building entirely upon domestic constitutional discourse.

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112. Ger. C, *supra* note 63.

113. *Id.*

114. Ger. B, *supra* note 54.

115. Ger. E, *supra* note 55.

Particularly, the last passage quoted above is symptomatic for the German normative structure of meaning-in-use. The normative rejection of torture mainly emanates from the “overall spirit of the Basic Law,” whereas the obligations from international law are mentioned only in addition.

We consider this an unexpected closure of the German normative structure-in-use. The emerging picture looks even more interesting when compared to the normative structure that can be said to be in use by the Canadian interviewees. While Canadian practitioners seem to be rather open minded with regard to relying on international norms as sources of interpretation or an “interpretive guide,” they nonetheless embrace international law conditionally. Thus, their fidelity toward international law remains qualified.

While the Canadian perception can, therefore, be interpreted as an ideational openness toward international law, which is coupled with a quite formalistic closure of the Canadian national jurisdiction, by contrast, the German perception reveals the opposite: the openness toward international law is very much accomplished by constitutional formalism while, at the same time, a closure of the structure of meaning-in-use operates in an ideational mode by taking the notion of human dignity as considered in Article 1(1) of the German Basic Law as the primary frame of reference.<sup>116</sup>

### C. *From Cross-Referencing to Cross-Fertilization?*

The Canadian and German samples demonstrated that decisions by foreign courts are understood as nonbinding, as Slaughter has argued. But against the background of the mentioned instrumentalist or strategic accounts on “the foreign” or “the international,” the question must be raised whether concepts established in the course of foreign jurisprudence can really be understood as having what Slaughter has called “persuasive authority.”<sup>117</sup> Here, the critical caveats on legal comparison apply.<sup>118</sup> A difference between Canadian and German positions can indeed be demonstrated based on the interviewees’ perception of the meaning of international legal norms. In comparison, German interviewees were much less reluctant in holding that international norms are binding on decisions of the domestic legal

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116. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1 (Ger.) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”).

117. SLAUGHTER, *supra* note 24, at 75-77.

118. See Frankenberg, *supra* note 78; see also Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparisons*, 6 GER. L. J. 1073 (2005).

system. Although one judge mentioned that international law would formally not supersede domestic law, he argued that one would always try not to interpret norms in such a way that a conflict or normative collision between international and domestic law arises.<sup>119</sup>

To relate this insight to cross-referencing and transjudicial dialogue with regard to the project's over-arching question about the emergence of a shared normative structure of meaning-in-use as a necessary condition for a global community of courts, the following five observations can be made. *First*, cross-referencing has been confirmed as a common practice among Canadian and German legal practitioners. Our interviewees were not only aware of this practice but took an active role in this process. Both groups of interviewees, however, revealed specific limits of reception. Normative structures across nation-state jurisdictions refer to a common space that is not necessarily identifiable as global. While Canadian interviewees demonstrated awareness of the Commonwealth community, German interviewees referred to a legal order that was predominantly characterized by the European Union's normative order. The types of transnational awareness that the case study found were thus distinctive with regard to *common legal traditions* and *trajectories* rather than with regard to a global community. This points to the problem of a limited notion of globality. Putative postcolonial limits of reception are beyond the scope of this paper. Against the background of the research conducted here, however, one can generally be skeptical toward transcultural reception of legal practice, let alone an effective integration of normative spheres through (or even despite) cross-referencing practice.

*Second*, cross-referencing did generate feedback as an indicator for normative cross-fertilization of the involved interviewees' respective root arenas. Despite the above finding of, if spatially limited, common normative reference, the emphasis that was applied to the respective domestic legal context suggests that claims about a normative penetration of domestic legal contexts through cross-referencing and transjudicial dialogue could not be confirmed.

*Third*, cross-referencing cannot always be considered as the most effective practice. While it was acknowledged as a frequent practice by the interviewees, it was often perceived as being ineffective. The meaning of international norms and the effectiveness of foreign legal practice reflected the particular normative context of the corresponding legal order, and interviewees in both countries seemed to be perfectly aware of the fact that these meanings changed when transferred to

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119. Ger. C, *supra* note 63.

another arena. This aspect directly affects the translational character of cross-referencing.

*Fourth*, cross-referencing was viewed as instrumental toward specific interests. Subsequently, it is to be understood as *productive* with regard to a particular legal community. This may be due to the fact that references to formally validated foreign or international law, more often than not, are made for strategic reasons. Thus, the motivation for cross-referencing was the intention of making a particular legal argument rather than the constitution of a common legal order. With regard to the putative emergence of a community, we can thus say that translation failed. In turn, the counterfactual question could be raised regarding the integrative consequences of successful translation: Would a community of courts render translation meaningless? It is particularly this aspect that points further research toward the nexus between legal community and translation.

*Fifth*, the two country samples revealed a distinct nexus between functional and normative community foundation. While the German interviewees by and large situated themselves within a normative structure, which they consider as open to the norms of international law, they demonstrated reluctance regarding an explicit reliance on the very norms of international law. By contrast, Canadian interviewees revealed a more frequent reference to international legal norms while at the same time pointing to the formal requirements of international legal treaties to be enacted through domestic legislation. In sum, this finding supports the project's argument that, to draw conclusions about the implications of cross-referencing for community formation, it is vital to identify whether or not shared normative structures of meaning-in-use emerge through that very dialogue.

#### CONCLUSION AND OUTLOOK

While cross-referencing between courts and judges is but one necessary aspect of an emergent global community of courts, a global community of courts depends on "good" translation resulting in the emergence of shared principles, values, and norms as the normative roots of community. This article argued that the practice of cross-referencing international norms or foreign court decisions is to be conceptualized as distinct from cross-fertilization. We have therefore suggested understanding *cross-referencing* mainly as an empirically observable process (i.e., as the referencing of positive legal norms or judicial decisions across jurisdictional boundaries). In turn, we understood *cross-fertilization* as the effective merging of normative meanings among two or more legal orders. To capture that additional

normative dimension, the project focused on the very notions of normativity revealed by the interviewees.

On the basis of our limited analyses of interviews conducted with legal practitioners in two countries, Canada and Germany, we hold—against Slaughter—that a global “community” of courts has not yet emerged. Although the concept of community does matter as an explanatory reference for research on legal cross-referencing across national borders, empirical findings suggest that regional communities, such as the Commonwealth and the European Union, provide a decisive common ground and thence the more important normative guidance for court judges. While international relations theorists and international lawyers have stressed the need for accountability and a new collective global responsibility (e.g., when studying global governance institutions, global networking, and global constitutionalism), our research suggests that practice of cross-referencing is still more “culturally” fragmented than unified, and normative references are more regionally diverse than globally shared. Moreover, the normative context within which referencing takes place—that is, where international norms or foreign legal decisions are translated to—remains strong, so that the meaning of “foreign” concepts is often constructed by means of contestation rather than transferred from one context into another.

As we have argued above, “good” translation of legal concepts from one legal order to another entails a notion of context because legal norms or decisions receive their particular meaning from how they are embedded in a legal discourse. In this sense, translation is a paradoxical practice since it implicates the embedding of a concept within a “new” context, while, at the same time, it necessitates a certain consideration of its “old” context. As our explorative case study suggests, the pluralism thesis is more likely to win the day in the long run, as it is better equipped to capture the distinctive normative effects of cross-referencing and, hence, understand why cross-fertilization among distinct normative orders remains still partial. For the time being, global legal practice is thus “lost without translation.”