

A research proposal for the GlobalTrust research project:

The Convergence of the Interpretative Approaches of Domestic Courts to International Law: A Normative Critique

There are now calls for a common interpretative approach of international law by national courts. The proposed research will question the normative basis of these suggestions. In doing so, it will critically examine the normative goals behind the calls for convergence, taking into account the benefits, and also the costs, of such a common approach.

The call for convergence of interpretative approaches seems, at first glance, technical and logical. When different national courts are called upon to interpret and apply the same international rule, it is only natural that they should do so in the same manner and reach the same outcome. But what is obvious at the national level, when courts in the same country apply that country's laws, is less obvious at the international level. First, in many cases the international norms are vague, often as a result of disagreements between states. Second, international law often grants states discretion, often reflected in the concept of margin of appreciation, regarding the implementation of international norms. The research will therefore point out that the real aim of the proposed convergence, or at least its main outcome, is the promotion of common substantive values, often reflected in a vision of a global "rule of law" or the strengthening a certain vision of "human rights." In fact, the use of "interpretative approaches" rhetoric actually serves as a non-controversial way for advancing such values.

The research will point out that the most likely result of the convergence of interpretative approaches will be an increase in the freedom of the judiciary to set policies, through inter-judicial cooperation, at the expense of the executive branches in the respective states. There may be three adverse results. First, a possible reaction of executives to such judicial convergence would be to prefer narrow-issue, soft law norms which retain their discretion. Thus, the recourse to such norms would add to rather than reduce the fragmentation of international law. Second, the outcome would weaken the relatively weak states. This is because relatively weak states fare less well under informal regimes that are less effective than formal ones in restraining powerful states. In addition, since the first courts that are expected to interpret international norms are courts from stronger countries, these courts would benefit from a first mover advantage and decide how the norms should be interpreted and applied around the world, thereby preempting courts in other countries. Finally, a unified approach will provide fewer opportunities for experimentation regarding the appropriate interpretative approaches as well as for the implementation of international norms.

While the research will concede that the trend toward convergence of interpretative approaches to international law will continue and is probably unavoidable, it must be achieved with sensitivity to the interests of non-national stakeholders whose interests must be taken into account by the judges. The research will assess to what extent it is possible to expect judges in national courts to perform such a task.