Some Uses of the Comparative Law Method in the Practice and Theory of International Law

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Introduction: Defining Comparative Law

Traditionally, comparative law is defined as a form of study and research whose object is the comparison of legal systems with a view to obtaining knowledge that may be used for a variety of theoretical and practical purposes. In the words of Zweigert and Kötz, comparative law is "an intellectual activity with law as its object and comparison as its process."[1] Comparative law embraces: the comparing of legal systems with the purpose of detecting their differences and similarities; working with the differences and similarities that have been detected (for instance explaining their origins, evaluating the solutions utilized in different legal systems, grouping legal systems into families of law or searching for the common core of

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[1] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 2nd edn (Oxford: Clarendon Press, 1987), 2.

the systems under comparison); and the treatment of the methodological problems that arise in connection with these tasks, including methodological problems connected to the study of foreign law.[2] As the above definitions suggest, the scope of comparative law is extremely broad and its subject-matter can never be treated in an exhaustive manner, for one can hardly imagine all the possible purposes and dimensions of legal comparison.[3] The scope of comparative law encompasses the study of all branches of law and all types of legal rule. But the subject-matter of comparative law extends beyond the study of particular legal rules or branches of substantive or procedural law. It also encompasses the study of law as a broader social phenomenon and the historical, social, economic, political and cultural milieu in which legal rules and institutions emerge and develop. In this way, comparative law offers valuable insights into the nature of law, its origins and development, the purposes which it serves, the values it pursues, the ways in which it impacts upon the structure and function of society, its conceptual schemes

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[2] See M. Bogdan, *Comparative Law* (Deventer: Kluwer, 1994), 18. For a closer look consider G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart, 2014), 8 ff.

[3] Although the terms 'comparative law', *droit comparé, diritto comparato, derecho comparado, Rechtsvergleichung* are generally understood to refer to the branch of knowledge concerned with the comparison of legal systems, the name 'comparative law' has semantic nuances. There are considerable divergencies to be observed not only among the various languages, but even within a single language. Some scholars who regard comparative law as empty of content of its own, draw attention to the fact that in some languages the relevant subject is referred to as 'comparison of laws' (*Rechtsvergleichung*) or 'law compared' (*droit comparé*) and argue that the term 'comparative law' should be abandoned. On the other hand, those who regard comparative law as an independent discipline with its own special subject consider the name 'comparative law' appropriate. According to K. Kerameus: "Because law is not only a reference but is the very field of our study, the traditional term of comparative law is fully justified and suitably reflects the field of our scholarly endeavours." "Comparative Law and Comparative Lawyers: Opening Remarks", (2001) 75 *Tulane Law Review* 859, at 867. And see E. Örücü, *The Enigma of Comparative Law* (Dordrecht: Springer, 2004, repr. 2013), 14.

and intellectual constructions.

As noted above, comparative law is concerned with the comparison of different systems of law. The term ‘system of law’ expresses the fact that law is constituted by numerous interconnected elements, which should be considered from the viewpoint of their functional interdependence.[4] Systems of law are concerned with relations between agents (human, legal, unincorporated and otherwise) at a variety of levels. Functioning at a territorial state level are the legal systems of nation-states and sub-national (e.g. the legal systems of the individual states within federal states) or sub-state jurisdictions (e.g. the bye-laws of counties or municipalities and the laws of ethnic communities within states which enjoy a degree of autonomy). At an international level, public international law governs relations between sovereign states and sets the limits for the exercise of state power in the light of generally recognized norms. At an international or transnational level also operate human rights law, refugee law, international environmental law, international commercial law (*lex mercatoria*), transnational arbitration and other systems. It is important to note that no legal system is complete, self-contained or impervious. Co-existing legal systems interact in complex ways: they may compete or conflict; sustain or reinforce each other; and often they influence each other through interaction, imposition, imitation and transplantation. In particular, national legal systems have become interconnected through the operation of international and transnational regimes in a variety of ways. They are subject to, and modified by, international conventions and treaties, trade regulations and various inter-state agreements. Some countries harmonize their laws, coordinate their fiscal policies, and agree to recognize each other’s

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[4] Related to the term ‘legal system’ is the term ‘legal order’ (*Rechtsordnung, ordre juridique*). When the latter term is used, emphasis is attached to the role played by the human agency in the formation and development of law.

judgments or cooperate in antitrust enforcement. Of course, not all laws and legal practice have developed in this direction and large areas of the law are untouched by internationalizing trends. The national legal systems still retain vital importance, notwithstanding the increasingly important role of international and transnational regimes.

Comparative law scholarship is concerned with different levels of concretization or abstraction. Depending on the level of concretization or abstraction on which a comparative study is conducted, a distinction is made between institutional or primary comparison, systematic comparison and global comparison. The institutional or primary comparison is concerned with the description, analysis and evaluation of a particular legal institution or rule. A legal institution may be considered from a number of different perspectives: historical, when one examines the development of the institution over time; sociological, when one considers the institution's operation in diverse socio-cultural environments; and normative-dogmatic, when the focus of the inquiry is on semantic and juristic aspects of the institution. The systematic comparison is concerned with the comparative examination of a set of legal institutions or rules pertaining to a particular branch of the law (e.g. private law). In this type of comparative study special attention is given to the interrelationship and interaction between the institutions under consideration and the general principles governing the relevant legal field. Finally, global comparison is concerned with the comparison of entire legal systems or legal traditions.[5] Elucidating the similarities

[5] J. H. Merryman draws a distinction between text-centered and system-centered comparative law scholarship. The former identifies law with authoritative texts and focuses on legal rules or norms – hence Merryman refers to this kind of scholarship as 'rule-comparison'. In this respect, a legal institution is understood as a structured body or rules (e.g. the institution of property, the institution of contract etc.) and the term 'legal system' is used to denote the body of rules in force in a particular jurisdiction. From the viewpoint of system-centered

and differences between systems of law presupposes consideration of a variety of exogenous and endogenous (to the legal system) factors, some permanent other transient. These factors include: origins and historical development; socio-cultural environment; political and economic ideology and structures; physical and geographical features; the hierarchy of legal sources; the structure of the judicature; the enforcement of law; legal education; the role of legal profession; legal science; and style of legal reasoning.[6] The various factors are not independent of each other but rather are interrelated or interdependent and the scale and complexity of their operation vary from society to society and from country to country.

For an intellectual enterprise to be regarded as a comparative study, it must meet certain conditions. The first point to note here is that comparative law involves drawing explicit comparisons between two or more legal systems or aspects thereof. One engaged in the study of a foreign legal system can hardly avoid making comparisons between foreign legal institutions and those of her own country. Any study of foreign law may be said to be implicitly comparative in so far as all descriptions of foreign law are trying to make the law of one system intelligible for those trained in a different system. However, such intuitive or implicit comparisons can hardly be regarded as comparative law, and this applies also to incidental and disconnected comparisons sometimes made in legal

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comparative law scholarship, on the other hand, 'legal system' is understood to mean "the complex of social actors, institutions and processes referred to by members and observes of a society as 'legal' or 'juridical' or as directly related to or forming part of 'law' or 'the legal system' or the 'juridical order'. These interrelated people, institutions and processes constitute a social subsystem that is the society's legal system." "Comparative Law Scholarship", (1998) 21 *Hastings International and Comparative Law* Review 771, 775.

[6] See R. Rodière, *Introduction au droit comparé* (Paris: Dalloz, 1979), 4 ff; E. Agostini, *Droit comparé* (Paris: P.U.F., 1988), 10 ff.

literature. For a study to qualify as a comparative study it is essential that the comparative approach to the legal systems, institutions or rules under examination is made explicit. As Bogdan points out, "one cannot begin to speak about comparative law until the purpose with the work is to ascertain (and possibly also to further process) the similarities and differences between the legal systems, i.e. when the comparison is not merely an incidental by-product. …It is the comparison that is the central element of the comparative work."[7] Framing the inquiry in clearly comparative terms makes one think hard about each legal system being compared and about the precise ways in which they are similar or different. This does not of course mean that the independent study of foreign law is unprofitable. Indeed, besides being a valuable form of legal scholarship in its own terms, such study is an important starting-point of any comparative inquiry.

Comparative law encompasses a variety of different, although often overlapping, studies: the study of two or more legal systems with a view to ascertaining their similarities and differences; the systematic analysis and evaluation of the solution which two or more systems offer for a particular legal problem; studies concerned with uncovering the causal relationship between different legal systems; anthropological and sociological studies into the ways in which different people experience legal norms and practices; and historical studies examining the legal evolution of diverse societies or countries. It should be noted,

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[7] *Comparative Law* (Deventer: Kluwer, 1994), 21, 57. According to K. Zweigert and H. Kötz, in order for a study to be regarded as a comparative law inquiry there must be "specific comparative reflections on the problem to which the study is devoted." *An Introduction to Comparative Law* (Oxford: Oxford University Press, 2011), 6. This is best done by the comparatist stating the essential of foreign law, country by country, as a basis for critical comparison, concluding the exercise with suggestions about the proper policy for the law to adopt, which may require him to reinterpret his own system. Consider also J. C. Reitz, "How to Do Comparative Law", (1998) 46 *American Journal of Comparative Law* 617, 618.

at this point, that comparative law embraces both the study of foreign law and the findings of a comparative study. Knowledge of foreign law is a necessary prerequisite for any comparative inquiry. In this respect, an important aim of comparative law is to supply the tools which would allow one to access with relative certainty foreign law and to derive the information one needs to deal with a particular legal problem. Besides the study of foreign law, comparative law includes also the results or conclusions of a comparative inquiry. In so far as these results confirm the existence of general principles of law recognized by the legal systems of the world, one might view comparative law as a source of an international or transnational body of positive law. Although this body of law cannot be regarded as an independent branch of positive law (as some early comparatists suggested), it may be said to constitute a *sui generis* or special form of positive law – a system of valid legal norms which differs from the norms laid down by national legislators in that its authority is derived from their universal recognition among the nations of the world. This last observation may serve as a useful starting-point in the discussion of the role of comparative law in the domain of public international law. The discussion will focus on three themes: (i) the notion of general principles of law as a supplementary source of international law; (ii) the unification or harmonization of law by means of international conventions; and (iii) the relationship between legal theory and international law. There are several other topics demanding attention, such as the role of comparative inquiries in establishing the elements of customary international law norms; the use of the comparative method by national courts when interpreting and applying rules derived from international law sources; the way in which comparative legal reasoning may inform the views of international law scholars as a subsidiary means for the determination of the rules of international law; and the use of comparative law in the bridging of differences between regional varieties of international law. However, addressing these topics would require much more

space than the present brief account can allow.

Perspectives on the Role of the Comparative Method in Public International Law

Public international law is the body of law that governs relationships involving states as well as intergovernmental or supranational organizations and other entities regarded as international legal persons. It is a huge field encompassing issues such the use of armed force, human rights, international crimes, the law of the sea, international commercial relations, the protection of the environment and even outer space. Comparative law, on the other hand, is traditionally concerned with comparatively examining problems and institutions originating from two or more systems of law or with comparing entire legal systems with a view to acquiring a better understanding thereof. At first glance, there is little that connects these two fields. This is mainly because public international law is perceived as a relatively uniform system providing little, if any, opportunity to compare anything. Although comparing the public international law system itself with other legal regimes, including domestic ones, might be very informative,[8] comparatists tend to focus largely on national systems and have by and large neglected public international law as an object of study. This does not mean, however, that the comparative method is of no use to international law scholars and practitioners. Indeed, scholars are increasingly recognizing the importance of this method in addressing the problems of international law. At the centennial world congress of comparative law in 2000, the leading German comparatist Mathias Reimann

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[8] Consider on this M. Reimann, “Beyond National Systems: A Comparative Law for the International Age”, (2001) 75 *Tulane Law Review*, 1103.

emphasized the need for comparative law to broaden its scope to embrace transnational and international issues, including regional and global economic organizations, the European Union and similar organizations.[9]

In recent years, several European scholars have been engaged in the work of weaving together the fields of comparative law and public international law, paying special attention to the comparison between national approaches to international law and governance. The comparative study of diverse national approaches to international law can be traced to the early 1960s, when the term comparative international law was used to describe the competing Western and Soviet perspectives on international law. In the period that followed, decolonization and developments in the fields of foreign policy and international relations made it very important to understand how states sought to rely on existing international processes and norms to strengthen their positions in the global power race. In this connection, reference should be made to the Protocol of Cooperation concluded in 1983 between the Law Faculty of the University College London and the Instituter of State and Law of the USSR Academy of Sciences. This cooperation agreement resulted in a series of studies on the relationship between comparative and international law and the methodological problems confronting the two disciplines.[10] In the early post-Cold War period, a number of scholars perceived the political changes taking placing in Eastern Europe and elsewhere as heralding the end of viewing international law and its institutions as ideological battlegrounds. However, the eruption of ethnic and religious conflicts in Eastern Europe (especially the Former Yugoslavia) Asia and

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[9] See M. Reimann, “Beyond National Systems: A Comparative Law in the International Age”, (2001) 75 *Tulane Law Review* 1103. And see R. Dibadj, “Panglossian Transnationalism”, (2008) 44 *Stanford Journal of International Law* 253.

[10] Consider on this matter W. E. Butler, “On the History of International Law in England and Russia”, in W. E. Butler (ed.) *The Non-Use of Force in International Law* (1989), 3 ff.

Africa and the rise of terrorism made it obvious that international law was entering a new period of crisis. In this new and unsettled environment, the principal challenge for international law has been to address the inability of states and other international agents to create an effective multilateral framework for ensuring and promoting global security. As contemporary international law has evolved towards of a complex system of diverse sub-fields, such as international human rights law, international criminal law, and international environmental law, institutional fragmentation, theoretical differentiation and political pluralism followed as a result.[11] The main task of comparative law in this new setting is to address the challenges public international law faces by taking into consideration diverse national, ethnic, religious and cultural approaches to the role of international law and its institutions.

Comparative law and general principles of law

We may now proceed to consider Article 38(1) (c) of the Statute of the International Court of Justice, which lists the 'general principles of law recognized by civilized nations' as one of the sources of public international law. Implicit in the idea of general principles of law as a source of public international law is the authority of a set of normative propositions that are valid across the spectrum of the different socio-political systems of the world, when all stylistic, technical and cultural differences have been accounted for. As commentators have observed,

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[11] Some scholars have associated this development with what they refer to as a split between European and American approaches to international law, both of which being subject to a comparative analysis. Consider on this issue, G. Verdirame, "The Divided West: International Lawyers in Europe and America", (2007) 18 *European Journal of International Law* 553; M. Koskenniemi & P. Leino, "Fragmentation of International Law? Postmodern Anxieties", (2002) 15 *Leiden Journal of International Law* 553.

comparative law plays a part in the work of discovering and elucidating these 'general principles of law' that international and, occasionally, national courts are required to apply.[12]

The origins of the idea of 'general principles of law recognized by civilized nations' may be traced to the ancient Roman concept of *ius gentium*, although the notion was not alien to earlier Greek philosophical thought. From an early period, the Romans realised that certain institutions of their own domestic law (*ius civile*) also existed in the legal systems of other nations. As contracts of sale, service and loan, for example, were recognised by many systems, it was assumed that the principles governing these were everywhere in force in the same way. The Romans deemed that those institutions that Roman law had in common with other legal systems belonged to the law of nations (*ius gentium*) in a broad sense. But this understanding of the *ius gentium* was of little practical value for the Roman lawyer, for the specific rules governing the operation of such generally recognised institutions differed from one legal system to another. When the Romans began to trade with foreigners they must have realised that their own domestic law was an impossible basis for developing trading relations. Foreigner traders too had little inclination to conform to the tedious formalities of the Roman *ius civile*. Some common ground had to be discovered as the basis for a common court, which might adjudicate on claims of private international law, and this common ground

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[12] According to R. B. Schlesinger, the phrase 'general principles of law recognized by civilized nations', "refers to principles which find expression in the municipal laws of various nations. These principles, therefore, can be ascertained only by the comparative method." *Comparative Law: Cases, Text, Materials*, 5th ed., (Mineola NY: Foundation Press, 1988), 36. See also Schlesinger, "Research on the General Principles of Law Recognized by Civilised Nations", (1957) 51 *American Journal of International Law*, 734. And see A. C. Kiss, "Comparative Law and Public International Law", in W. E. Butler (ed.), *International Law in Comparative Perspective* (Alphen aan den Rijn, NL: Sijthoff & Noordhoff, 1980), 41.

was found in the *ius gentium*, or the law of nations in a narrow, practical sense. Thus, in contrast to the *ius civile* as the law that applied exclusively to Roman citizens, the term *ius gentium*, in a narrow, practical sense, came to signify that part of Roman law governing relations between citizens and foreigners, and between foreigners belonging to different states. It was only in the classical period of Roman law (the imperial epoch that the further development of the *ius gentium* was influenced by comparative inquiries, and therefore was denationalized and turned into a form of universal law. This was accomplished by a combination of comparative jurisprudence and rational speculation.[13] It was now claimed that the Roman *ius gentium* was binding upon all inhabitants of the empire, because it was also natural law based on natural reason. This was justified by reference to its universal validity (i.e. in the Roman *orbis terrarum*). The second century AD jurist Gaius declares that Roman law was based in part on the law of nations (*ius gentium*), which he defines as "the law that natural reason establishes among all mankind [and] is observed by all peoples alike".[14] "Thus", he continues, "the Roman people observe partly their own particular law [and] partly that which is common to all peoples".[15] Although he does not provide a detailed schema whereby one can discern which legal institution belongs to the former and which to the latter category, he gives us enough markers so that we can have a reasonably good idea of what he regarded as domestic Roman law (*ius proprium Romanorum*) and what as *ius gentium* (or *ius commune*). For instance, acquiring title by delivery (*traditio*) from the owner was an institution of the *ius gentium* (which he identifies with *ius naturale*), whilst acquiring title by mancipation (*mancipatio*) was an

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[13] See T. Mommsen, *Romisches Staatsrecht* (Leipzig: S. Hirzel, 1887), 606.

[14] Gaius, *Institutes*, 1. 1.

[15] Ibid. Consider also the *Digest of Justinian*, 41. 1. 1 pr., 9. 3 (Gaius).

institution of domestic Roman law (*ius civile*).[16] Furthermore, the partnership (*societas*) that was contracted by simple agreement (*consensus*) among the parties was an institution of the *ius gentium*, while the partnership among heirs that in early times prevailed in Rome pertained only to Roman citizens.[17] One may discern behind Gaius' and other jurists' remarks a comparative effort. Unfortunately, however, the process by which the comparison was carried out was not committed to writing or, if it was, it has not survived. In all probability, that process had occurred prior to Gaius' time, and he merely reports some of the conclusions. Several centuries later, Hugo Grotius (1583-1645), a leading representative of the School of Natural Law and founder of modern international law theory, employed the comparative method to place the ideas of natural law on an empirical footing. Believing that the universal propositions of natural law could be proved not only by mere deduction from reason but also by the fact that certain legal rules and institutions were recognized in all legal systems, he used legal material from diverse countries and ages to illustrate and support his system of natural law.[18]

To return to the Statute of the International Court of Justice, realizing that treaties and custom, the two principal sources of international law, might not have

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[16] Gaius, *Institutes*, 2. 65. The *mancipatio* was a highly formal procedure employed when ownership over certain types of property, referred to as *res mancipi*, was transferred. *Res mancipi* included land and buildings situated in Italy, slaves and draft animals, such as oxen and horses. All other objects were *res nec mancipi*. The ownership of *res nec mancipi* could be passed informally by simple delivery (*traditio*).

[17] Gaius, *Institutes*, 3.154-154a.

[18] According to Grotius, "natural law is the command of right reason, which points out, in respect of a particular act, depending on whether or not it conforms with that rational nature, either its moral turpitude, or its moral necessity; and, consequently, shows that such an act is either prohibited or commanded by God, the author of that nature." *De iure belli ac pacis*, 1. 1. 10. 1-2.

answers to all the disputes brought before the Court, the drafters of the Statute added a third source designed to fill gaps in the law. The intention has been that such lacunae are to be filled by resort to principles of law that national systems have in common.[19] Historically, general principles of law played a vital part in the development of modern public international law as the norms derived from such principles were often the only ones available and acceptable to states as a means of regulating international relations. These principles were regarded as a source of law according to the theory that where states have universally applied similar principles in their domestic laws, their consent to be bound by those same principles on the international level could be inferred. However, contemporary international law relies less on general principles of law as a source of legal norms. This is so in part because of the extraordinary proliferation of treaties and other international legal instruments as a means of regulating relations between states; and in part because the bulk of the norms that were originally derived from general principles have in the course of time been embodied in customary international law. Furthermore, the process of international law-making by 'legislative' treaties (as opposed to merely 'declaratory' treaties) has reduced the need to resort to general principles of law to fill gaps in the international legal system. This explains why general principles are today regarded as a source subordinate to international treaties and custom.

General principles have been used to fill gaps in the law, especially with respect to procedural matters and problems of international judicial administration. For instance, the International Court of Justice has utilized general principles to

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[19] The phrase 'civilized nations' was used to indicate that the general principles are limited to those common to mature or developed legal systems as a means of preventing arbitrariness on the part of judges. The reference to 'civilized nations' sounds inappropriate in a post-colonial era and can safely be ignored.

determine the international rule that reparation is due for any internationally wrongful act;[20] that a state may be barred (estopped) from insisting on a claim brought about by its own actions;[21] that circumstantial evidence is admissible in determining a state's alleged wrongdoing;[22] and that a case once decided between the same parties on the same facts cannot be raised again – this is commonly referred to as the *res judicata* principle.[23] Equity is probably the most relevant general principle of international law, although some scholars have argued that it should be regarded as a distinct source not covered by Article 38 of the Statute of the International Court of Justice.[24] Equity, in a general sense, is understood to mean fairness or justice and, as such, it is regarded as having a central place in law in so far as the principal attribute of good law is that it is just. In a narrow sense, the term 'equity', as used in legal philosophy, is contrasted with strict law (*ius strictum*). Once a legal rule has been settled, it is the task of the judge to apply it, but not to question it, for justice demands certainty in the application of the law. However, no system of law can provide rules capable of achieving justice in all circumstances, because all the possible variations of circumstances can never be foreseen. The essence of a legal rule is that it should be of general application, i.e.

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[20] *Chorzow Factory (Indemnity) Case (Merits)* (1928).

[21] *Temple of Preah Vihear Case* (1962).

[22] *Corfu Channel Case* (1949).

[23] *Effect of Awards of the UN Administrative Tribunal Case* (1954). For more examples of cases that rely on general principles consider M. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 98 ff.

[24] Consider on this issue B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953), 1-26; H. Thirlway, The Sources of International Law (Oxford: Oxford University Press, 2014), 104-110. It should be noted here that Article 38 (2) of the Statute of the International Court of Justice provides that the Court may reach a decision in a case on the basis of what it deems just and right (*ex aequo et bono*), if the parties to the case agree.

binding in all cases within its scope. But cases inevitably arise which the general rules of the system are unable to address. In such circumstances, resort to equity, as distinguished from strict law, becomes necessary. The International Court of Justice has made several references to the issue of equity, especially in the context of cases concerning maritime delimitations but also in relation to the delimitation of boundaries on land.[25] The position adopted by the Court is that resort to equity is a logical and essential part of the application of substantive legal rules.[26] Furthermore, international law contains a general principle of *good faith* according to which states must act honestly in carrying out their international obligations.[27]

As previously noted, the comparative method is relevant to determining and clarifying fundamental general principles that the International Court of Justice may be required to apply. However, the role of legal comparatism in this respect should not be exaggerated, since serious comparative study to ascertain such general principles on a worldwide scale would be a nearly impossible task. Firstly, there is the problem of determining which legal systems should be considered. If priority is given to a few systems to the exclusion of others, questions may arise over the integrity and objectivity of the relevant judicial process. Secondly, questions arise as to whether certain domestic law concepts and principles are comparable or capable of being transposed into international law decisions. It is thus unsurprising that the comparative method is not frequently employed in

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[25] Consider, e.g., *North Sea Continental Shelf Cases* (n. 9) paras 85-88; *Frontier Dispute (Burkina Faso v Republic of Mali)*, Judgment [1986] ICJ Per. 554, para. 150.

[26] As stated in a recent case, the role of equity in delimitation cases is to "achieve a delimitation that is equitable" and not "an equal apportionment of maritime areas." *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment [2009] ICJ Rep. 61, para. 111.

[27] See on this issue B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953), 103-160.

practice.[28] The comparative method is more often utilized in connection with certain sub-categories of international law that have evolved over the last few decades. For instance, in interpreting the European Convention on Human Rights the European Court of Human Rights has frequently resorted to a comparative study of member state laws in order to ascertain the meaning and ambit of treaty provisions.[29] Similarly, the European Court of Justice has been using the comparative method in interpreting European Union law and in seeking to arrive at decisions by assessing solutions provided by various legal systems.[30] Although

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[28] For a closer look see: B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953, repr. 2006), 392; A. Zimmerman, C. Tomuschat and K. Oellers-frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006), 259-261 (notes). Consider also M. Bothe and G. Ress, "The Comparative Method and International Law", in W. E. Butler (ed), *International Law in Comparative Perspective* (Alphen aan den Rijn, NL: Sijthoff & Noordhoff, 1980), 61.

[29] See on this P. Mahoney, "The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law", in G. Cavinet, M. Andenas and D. Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2004), 135.

[30] In the *Nold* judgment, for instance, the Court expressed the view that "fundamental rights form an integral part of the general principles of law (…) In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States" (*Nold v Commission*, case 4-73, 14 May 1974, para 13). The Court has used the comparative method in diverse fields of law and in connection with a variety of legal issues. Consider, e.g., *Algera*, joined cases 7/56, 3/57 to 7/57, 12 July 1957; *Hansen and Balle v Hauptzollamt de Flensburg*, case 148/77, 10 October 1978; *Zelger v Salinitri*, case 129/83, 7 June 1984; *CECA v Ferriere Sant'Anna*, case 168/82, 17 May 1983; *Orkem*, case 374/87, 18 October 1989. And see C. N. Kakouris, "L'utilisation de la méthode comparative par la Cour de justice des Communautés européennes", in U. Drobnig & J. van Erp (eds), *The Use of Comparative Law by Courts* (The Hague: Kluwer Law International, 1999), 100 ff; P. Pescatore, "Le recours, dans la jurisprudence de la Cour de Justice des Communautés européennes, à des normes déduites de la comparaison du droit des États membres", (1980) 32 *Revue internationale de droit*

it may be unclear or controversial which legal principles are in reality universally recognized or capable of application at an international level, there is sufficient material in the domestic laws of states for the international judge to perform his mandate. Of particular importance in this respect is the so-called 'common core research', a form of research that seeks to bring to light the highest common denominator of an area of substantive law in diverse national legal systems. Common core research constitutes a reasonably reliable method of identifying common or general legal principles, and plays an important part in projects concerned with the international or regional unification or harmonization of law.[31] This observation brings us to the next topic of the present discussion: the unification or harmonization of law by means of international conventions.

The unification or harmonization of law by means of international conventions

The comparative law method may also play a part in the drafting of treaties and other international legal instruments concerned with the international unification or harmonization of laws. It should be noted here that whilst unification contemplates the substitution of two or more legal systems with one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards."[32] The leading comparatists Zweigert and

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comparé, 337.

[31] See R. Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems* (New York: Oceana Publications, 1968).

[32] W. J. Kamba, "Comparative Law: A Theoretical Framework", (1974) 23 *International and Comparative Law Quarterly*, 485 at 501. Consider also M. Siems, *Comparative Law*, 2nd ed., (Cambridge: Cambridge University Press, 2018), 5.

Kötz assert that harmonization is a desirable political objective with respect to which comparative law furnishes an essential starting-point. They draw attention, in particular, to the role of comparative law as a tool for "the development of a private law common to the whole of Europe."[33] According to these authors, "[t]he advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus, unified law promotes greater legal predictability and security."[34] A notable step in this direction was taken in 1989, when the European Parliament adopted a resolution stating its long-term goal to develop a uniform European Code of Private Law.[35] Furthermore, during the last three decades, several groups of academic lawyers from throughout Europe have been engaged in projects concerned with the harmonization of law in various fields of European private law.[36]

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[33] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., (Oxford: Clarendon Press, 1998), 16.

[34] Ibid. 25.

[35] Resolution A2159/89 of the European Parliament on action to bring into line the private law of the Member States, [1989] OJ C158/400. Reference should also be made in this connection to a report published by the Directorate General for Research of the European Parliament in 1999, under the title 'The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code.' See European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series JURI 103 EN (1999).

[36] In this connection reference should be made to the *Principles of European Contract Law*, a work of several European academics working in an independent capacity (the Commission on European Contract Law or 'the Lando Commission') (see *Principles of European Contract Law*, Parts I and II Revised 2000, Part III 2003); the Study Group on a European Civil Code (the successor to the Lando Commission), which prepared several volumes of the *Principles*

Comparative law has played and continues to play a significant role in projects concerned with legal integration or the harmonization of law at an international or regional level. These projects are designed to reduce or eradicate, as far as possible and desirable, the discrepancies and inconsistencies between national legal systems by inducing them to adopt uniform legal rules and practices. In pursuance of this objective, uniform rules are usually drawn up on the basis of research conducted by comparative law experts; these rules are then incorporated in transnational or international treaties obliging the parties to adopt them as part of their domestic law. However, the practical efficiency of unification or harmonization projects is necessarily circumscribed by the legal structures, institutions and procedures existing within the participating nations, which ultimately determine the degree of uniformity in the interpretation and application of the relevant rules.[37] Despite the difficulties surrounding the implementation of harmonization schemes, there have been some notable successes, especially with respect to countries that closely cooperate with each other, such as the member countries of the European Union, and with respect to certain areas of law, such as international commercial law, transportation law, intellectual property law and the law of negotiable instruments. In general, legal unification or harmonization is

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of European Law; the Acquis Group, focusing on the systematic arrangement of current Community law with a view to elucidating the common structures of the emerging Community private law; the Common Core of European Private Law Project, which has completed several important comparative studies on European private law; the Academy of European Private Lawyers ('The Gandolfi Project'), which has published a draft European Contract Code inspired by the Italian Civil Code, and a draft Contract Code prepared for the Law Commissions of England and Scotland; the European Group on Tort Law, which has drafted the *Principles of European Tort Law*; and the Commission on European Family Law, which carries out research concerned with the harmonization of family law in Europe.

[37] J. Merryman and D. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: Bobbs-Merrill, 1978), 58.

sought to be achieved through the use of international institutions. Such institutions include the International Institute for the Unification of Private Law in Rome (UNIDROIT);[38] the UN Commission on International Trade Law (UNCITRAL);[39] the European Committee on Legal Cooperation;[40] the Hague

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[38] The UNIDROIT is an independent intergovernmental organization concerned with the harmonization and coordination of private and especially commercial law between states and the formulation of uniform instruments, principles and rules to attain these goals. It was established in 1926 as an auxiliary organ of the League of Nations; after the League's demise, it was re-established in 1940 on the basis of a multilateral agreement (the UNIDROIT Statute). Achievements include: the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964); the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964); the Convention providing a Uniform Law on the Form of an International Will (Washington, 1973); the Convention on Agency in the International Sale of Goods (Geneva, 1983); the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995); the UNIDROIT Model Law on Leasing (2008); and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009). Consider also M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts*, 2nd ed., (Ardsley, NY, 2006).

[39] This is the core legal body of the UN systems in the field of international trade law. In establishing the Commission, the UN General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The focus of UNCITRAL's work is the modernization and harmonization of rules on international commercial transactions. Achievements include: the Convention on Contracts for the International Sale of Goods (1980); the Model Law on International Credit Transfers (1992); the Model Law on International Commercial Conciliation (2002); and the Model Law on International Commercial Arbitration (1985 – amended 2006).

[40] The European Committee on Legal Cooperation (CDCJ) is an inter-governmental body concerned with the standard-setting activities of the Council of Europe in the field of public and private law. It promotes law reform and cooperation in fields of administrative law, civil law, data protection, family law, information technology and law, justice and the rule of law,

Conference on Private International Law;[41] the World Intellectual Property Organization (WIPO);[42] the International Labour Organization;[43] the Comité

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nationality, refugees and asylum seekers. The Committee carries out its tasks through the adoption of draft conventions, agreements, protocols or recommendations; the organization and supervision of colloquies and conferences; and the monitoring of the implementation and functioning of international instruments coming within its field of competence. Recent achievements include: the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); and the European Convention on the Adoption of Children (revised, 2008).

[41] The Hague Conference on Private International law is an intergovernmental organization concerned with the progressive unification of the rules of private international law. The principal method used to achieve this purpose consists in the negotiation and drafting of multilateral treaties or Conventions in the various fields of private international law (international judicial and administrative cooperation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; jurisdiction and enforcement of foreign judgments). Notable achievements include: the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007); the Convention on Choice of Court Agreements (2005); the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993); the Convention of on the Law Applicable to Contracts for the International Sale of Goods (1986); and the Convention on International Access to Justice (1980).

[42] The World Intellectual Property Organization is a United Nations agency dedicated to developing an international intellectual property system. It seeks to: harmonize national intellectual property legislation and procedures; provide services for international applications for industrial property rights; provide legal and technical assistance to countries; and facilitate the resolution of private intellectual property disputes.

[43] The International Labour Organization is a UN specialized agency which seeks to bring together governments, employers and workers to set labour standards, develop policies and devise programmes. It carries out its work through three main bodies (The International labour Conference, the Governing body and the Office), which comprise governments', employers' and workers' representatives.

Maritime International;[44] and the International Civil Aviation Organization (ICAO).[45] Most of the relevant projects pertain to matters of private law, both civil and commercial.

An important aspect to the idea of legal integration or harmonization relates to the development of supra-national entities, or the aim of diminishing the traditional relations between state power and the legal regulation of society. Consider the European Union, for example. This organization embodies the idea of a non-state legislative power, whose rules and legal policy objectives are accorded priority over those of its individual member states. This may be perceived not only as an expression of a certain interpretation of an integration ideology, but also as a starting-point for a new perspective on legal theory. In the background lie important questions concerning the relationship between law and society: What are the goals of integration – whose interests do they express? If it is recognized that the goals of integration reflect certain interests, should they be acknowledged? The general assumption is that legal integration schemes are part of a coherent plan designed to facilitate economic transactions through the establishment of a legal structure that encourages enterprise and reduces costs. Although the principal motive appears to be economic, the forces driving legal integration are fundamentally political and cultural, and therefore closely connected with the institutional framework in which integration takes place.[46] The

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[44] This non-governmental organization is concerned with maritime law and related commercial practices; its object is to contribute to the unification of maritime law in all its aspects.

[45] The ICAO is a UN Specialized Agency seeking to promote secure and sustainable development of civil aviation through cooperation amongst its member States. The charter of ICAO is the Convention on International Civil Aviation, drawn up in Chicago in December 1944, and to which each ICAO Contracting State is a party.

[46] See on this A. Rosett, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law", (1992) 40 *American Journal of Comparative Law*, 683 ff.

comparative method may be indispensable to the design and implementation of legal integration schemes, but the purpose of such schemes cannot be fully understood without consideration of this framework.

Legal integration, in theory at least, entails that the resultant uniform law would incorporate the best elements from diverse legal systems and that this would be beneficial to all the countries concerned. In practice, however, the risk is that marginal but significant and useful legal categories from smaller legal systems would be lost and that larger systems would predominate; thus, the final result would be more akin to a form of 'legal imperialism' than harmonization. It is thus unsurprising that not all comparative law scholars, let alone all lawyers, consider legal integration desirable. Some have argued that in so far as we are capable of understanding one another's legal systems, interpret our laws and communicate effectively, then harmonization becomes less, rather than more appealing. With respect to the issue of European legal integration, in particular, it is noted that a common European private law would be an important symbol of European unity and could entail benefits for both the businessman and the individual citizen.[47] However, as a socio-cultural phenomenon, law is always linked to the culture of a particular society – legal norms and their socio-cultural context are interconnected. Thus, if a historically developed and functioning system of national law were to be replaced by a supranational and largely alien body of law merely for the sake of symbolism, European unity would be weakened rather than strengthened. A legal integration scheme imposed without sufficient attention to the diverse cultural traditions in which it should apply would be just as meaningless and counterproductive as doing away with the national languages and the imposition from above of a single 'official' language for the whole of Europe.

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[47] J. Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* (Tübingen: Mohr, 1993).

Comparative law, legal theory and international law

Let us now proceed to consider the role of comparative legal inquiries in addressing general theoretical issues concerning the nature and scope of public international law. Some reference to the relationship between comparative law and legal philosophy would be useful at this point. Broadly speaking, legal philosophy, also known as legal theory or jurisprudence,[48] is concerned with general theoretical questions about the nature of law and legal rules, about the relationship of law to morality and justice, and about law's social nature.[49] One of its principal objects is the analysis of the characteristic elements of law that distinguish it from other systems of rules and standards and from other social phenomena. A distinction is made between *normativist* (logical), *sociological* and *axiological* (evaluative) theories of law. In spite of their differences, all types of theory have universalism in common: they aim to systematize, to find a general means of

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[48] Legal philosophy is referred to as jurisprudence in England and other common law countries. French and other civilian lawyers use the term jurisprudence as the equivalent of that which English lawyers call case-law.

[49] Continental European jurists draw a distinction between general theory of law and legal philosophy (in a narrow sense). The former focuses on the basic concepts, methods, classification schemes and instruments of the law; the latter examines the values that underpin legal systems, institutions and rules. As J.-L. Bergel remarks, "the general theory of law starts out from the observation of legal systems, from research into their permanent elements, from their intellectual articulations, so as to extract concepts, techniques, main intellectual constructions and so on; the philosophy of law, on the other hand, is more concerned with philosophy than law for it tends to strip law of its technical covering under the pretext of better reaching its essence so as to discover its meta-legal signification, the values that it has to pursue, its meaning in relation to an all-embracing vision of humanity and the world." *Théorie générale du droit*, 2nd ed., (Paris: Dalloz, 1989), 4. Furthermore, the term legal science (*scientia juris*) is used to denote positive law organized in such a way that it rationalizes, scientifically, law as an empirical object. See on this P. Orianne, *Apprendre le droit: Eléments pour une pédagogie juridique* (Paris: Frison-Roche, 1990), 73 ff.

explanation to enable the discernment and understanding of legal phenomena. Even if it is admitted that different legitimate approaches to legal phenomena exist, something is considered as the inevitable starting-point, and this is often declared as the ontological essence of law. The questions, 'what is law?', 'how is law cognizable?' and 'what methods can be used for testing propositions concerning law?' must be coherent in a certain manner. A link abides between ontology, epistemology and the methodology of law. There are different possible ontologies: law is norms (a *normativist* ontology); or law is fact, a social or (also) a psychological phenomenon (a *realist* ontology). But whether law is considered as a matter of norms or of facts, it must be acknowledged that it involves values: law reflects certain values or it is a means for achieving certain desired social states of affairs or goals. Thus, one might declare that law has three aspects: rules, behaviour (social context) and values. These aspects must be tied together in some manner for a claim of universality to possess substance, and different theories attain this in different ways.

Commentators agree that comparative law is of great value in developing and empirically testing the propositions of legal theory.[50] Such propositions can be assessed on the basis of concrete comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order – indeed, most legal theorists seem to assume a deductive universality of analysis. Of particular interest is the way in which explicit or explicit comparisons between domestic and international legal systems, rules and institutions may be utilized to explain the nature and scope of international law in the light of general theories of law. As much as legal philosophers disagree about the nature of law, they generally agree that there

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[50] Consider, e.g., F. H. Lawson, *The Comparison: Selected Essays* (Amsterdam: North-Holland Publishing, 1977) II, 59.

actually *is* a thing called law. This is not the case, however, with respect to international law. An inquiry into the nature of the international legal system usually starts with the question of the legal quality of international law. Whilst most international lawyers would quickly declare the question moot or not worth thinking and arguing about it, doubts about the legal quality of international law have the potential to influence contemporary thinking about and attitudes towards international law.

The jurisprudence of international law has long been influenced by the command theory of law, developed by the English legal philosopher John Austin in his classic work *The Province of Juris-prudence Determined* (1832). According to Austin, in contrast with domestic law, international law does not stem from the command of a sovereign but is set by general opinion and enforced by moral sanctions only. International law is therefore not deemed to be positive law but only a form of positive morality. H. L. A. Hart is the legal philosopher who most effectively refuted Austin's denial of international law's legal validity. At the same time, Hart asserted that international law could not be regarded as a legal system because of the differences in form between domestic law and international law, in particular due to the absence of an international legislature, of courts with compulsory jurisdiction, of centrally organized sanctions and of a uniform rule of recognition. According to him, in contrast with domestic law, which can be characterized as a legal system, international law is a mere set of primary rules and, in this respect, resembles the simple form of social structure found in primitive societies.[51] Hart's legal theory raises a host of definitional and conceptual issues about public international law. Since legal positivism remains among the most influential theoretical approaches to law, it seems natural to engage with one of the most influential contemporary legal positivists and one of the few legal

[51] See H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Clarendon Press, 2012), Chapter 10.

philosophers who approached international law from the perspective of analytical jurisprudence.

More recently, Ronald Dworkin, Hart's successor to the Chair of Jurisprudence at Oxford University and a leading figure in contemporary philosophy of law and political philosophy, sought to extend his theory of political morality from the domestic to the international domain by comparing and drawing certain parallels between the two domains.[52] Dworkin argues that the principles governing the international legal system are not fundamentally different from those underpinning domestic legal systems. He even goes so far as to assert that the moral title to govern a particular territory is based on the principles that permeate the international system and that, therefore, the legitimacy of the domestic legal system is inextricably linked with the legitimacy of the international system. In other words, if convictions concerning the legitimacy of government power and the role of human rights constitute the most fundamental part of political morality at the domestic level, then it is reasonable to assume that this also holds at the level of international political morality. Taking the concept of legitimacy as his starting-point, Dworkin sought to develop a foundational theory of international law, one that would account for the roots of law in political morality.

The dominant paradigm of international law has its origins in the so-called 'Westphalian' system of international order, according to which the sovereign power of nation-states might be limited by the voluntary acts of state institutions (voluntarism). Positivist legal theorists have struggled to find the Hartian concepts of Rule of Recognition and secondary rules in the domain of international law. A solution to this problem has recently been proposed by assuming that the principle of state consent can serve as the basis of an international Rule of Recognition, as

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[52] His analysis on this issue is presented in his posthumous work "A New Philosophy for International Law", (2013) 41 (1) *Philosophy & Public Affairs* 2-30.

expressed by Article 38(1) of the Statute of the International Court of Justice.[53] This Article refers to the rules that are 'expressly recognized by the contesting states'[54], general practices that are 'accepted as law'[55] and 'general principles of law' that are 'recognized by civilized nations'[56] as being the principal sources of international law relied upon by the International Court of Justice.[57] Dworkin accepts that the consent model of international law addresses the paradox of the contemporary state system: a sovereign state can be a subject of law because the state has consented to be bound by law. He argues, however, that the consent model of international law is radically defective, for this model entails the potential to bind states that have not granted consent.[58] One of the principal objectives of international law is to curb the threat some states pose to others and this objective cannot be met unless we discard the straitjacket of state-by-state consent. What then is the key principle of international law that allows us to say that international law cannot be ignored or set aside regardless of consent? Dworkin asserts that the moral basis of international law is grounded in legitimacy and requires states to accept shared constraints on their sovereign power. The justification for coercive political power arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself. The principles that apply to the international system are in fact part

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[53] See, e.g., S. Besson, Theorising the sources of international law. In S. Besson & J. Tasioulas (eds), *The philosophy of international law* (Oxford: Oxford University Press, 2010), 163-186.

[54] Art 38(1)(a) International conventions both general or particular.

[55] Art 38 (1)(b) International customary law.

[56] Art 38(1)(c) The law of civilized nations (or *ius gentium*).

[57] Even the concept of peremptory norms, or *ius cogens*, is brought under the umbrella of consent via Article 53 of the Vienna Convention on the Law of Treaties (1969).

[58] This occurs through the medium of customary law and the general principles of law shared by 'civilised nations.' Such an approach has the effect of undermining the axiomatic place of consent and therefore the proposed jurisprudential basis of the entire consent model.

of the coercive system that sovereign states impose on their own citizens – hence the standing duty of states to improve their own political legitimacy includes an obligation to try to improve the overall international system.

Dworkin described international law as fragile, still nascent and in critical condition. He pointed out that a clear theoretical account of international law's basis was needed in order to determine what international law actually holds on practical questions. The situation where international military action, such as the NATO intervention in Kosovo, could be declared illegal under international law but upheld as a morally mandatory act of international civil disobedience was an example for Dworkin of a dangerous outcome of the two systems approach to law and morality. The unity of value, or a single-system conception of law views law as a distinct part of political morality because of the requirements of procedural justice or its special structuring principles.[59] These impose specific moral standards of legitimacy[60] and fairness[61] upon the law which arguably enhance certainty and accountability for both domestic and international law.[62]

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[59] See R. Dworkin, *Justice for Hedgehogs* (Cambridge Mass.: Harvard University Press, 2011), 5, 408, 411.

[60] Also referred to by Dworkin as 'fair governance' or 'democracy'.

[61] Also referred to by Dworkin as 'just outcome'.

[62] Although there is not much detail given by Dworkin, the principle of just outcome is concerned with precedent, reliance, fair play and fair notice. It is interesting to note that Dworkin's structural fairness principles that also place weight on convention, expectation and history bear some resemblance to Lon Fuller's inner morality of law. See Lon Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969), Part II, The Morality that Makes Law Possible.

Concluding Remarks

A notable effect of globalization has been the growth of what is now commonly referred to as 'transnational law': an umbrella concept embracing all law that regulates actions and events that transcend national borders, including problems arising from agreements made between sovereign states and foreign private parties. Transnational law was originally taken to encompass public and private international law as well as all domestic and foreign law concerned with trans-border issues.[63] In recent years the term is increasingly used to denote the amalgam of common legal principles of domestic and international law or the multidimensional international legal order brought about by the phenomenon of globalization. The rise of transnational law poses new challenges to comparative law. Firstly, comparative law must extend beyond the traditional system of coexisting nation-states, and come to grips with much more intricate and fluid relationships and interactions between a multiplicity of overlapping and intersecting legal orders. Secondly, the scope of comparative law must be broadened to embrace the study of international, transnational and supranational regimes, such as the United Nations, the European Union, human rights, the world trade system and environmental protection.[64] And, thirdly, comparative law must look beyond state law and pay attention to non-state legal norms, which play an increasingly important role in the world today.[65] To be able to describe, explain and help to co-ordinate the world's diverse legal orders, comparative law must

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[63] For an early treatment see P. Jessup, *Transnational Law* (New Haven 1956), 2. And see M. Shapiro, "The Globalization of Law", (1993) 37 *Indiana Journal of Global Legal Studies* 37.

[64] M. Reimann, "Beyond National Systems: A Comparative Law for the International Age", (2001) 75 *Tulane Law Review*, 1103.

[65] Consider on this matter G. Teubner (ed.), *Global Law without a State* (Aldershot: Dartmouth,1997).

rethink many of its traditional dichotomies, such as the distinction between national and international or between private and public law, since such dichotomies cannot adequately capture the complexity of this new world environment.[66]

Addressing issues posed by globalization and the growth of transnational law requires the development of a form of scholarship that is more scientific in some ways than the comparative law approach has traditionally been. Such a scholarship would pay greater attention to theory in the broad sense of conceptual structure, in so far as theories are the principal mechanisms for perceiving, understanding and structuring reality. Rethinking comparative law from a global perspective will involve all of the main tasks of legal theory including synthesis; the construction and elucidation of concepts; the development of models, both empirical and normative; and the critical analysis of assumptions and presuppositions underpinning legal discourse. In particular, there is room for a great deal of work on the question of transferability of legal concepts across different cultures in so far as the harmonization of global statistics about law requires reasonably transferable concepts. In this respect, the need for understanding diversity in a world driven by trends toward global law is vitally important. Comparatists need to develop the skills necessary to successfully navigate, interpret and critique laws and legal institutions, while being aware of the dangers of uncritically projecting their own values and assumptions about law onto other societies.[67] In this way,

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[66] See in general, S. Biddulph & P. Nicholson, "Expanding the Circle: Comparative Legal Studies in Transition", in P. Nicholson & S. Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008), 9; H. Muir Watt, "Globalization and Comparative Law", in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford: Oxford University Press, 2019), 599.

[67] See F. Werro, "Notes on the Purpose and Aims of Comparative Law", (2001) 75 *Tulane Law*

they could better elucidate differences between legal cultures and enhance understanding of the predilections and mental attitudes that determine how people in different parts of the world think about and react to law, including public international law. An understanding of these differences is essential to the larger international law objectives of maintaining peace and security and promoting international cooperation.

Review 1225, 1230-32; E. J. Eberle, "The Method and Role of Comparative Law", (2009) 8 (3) *Washington University Global Studies Law Review* 451, 485-486; D. J. Gerber, "Globalization and Legal Knowledge", (2001) 75 *Tulane Law Review* 949; N. Demleitner, "Challenge, Opportunity and Risk: An Era of Change in Comparative Law", (1998) 46 *American Journal of Comparative Law*, 647.