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Merging International Law and Comparative Law

Balancing Between Normative and Non-Normative

By JAAKKO HUSA, Helsinki

The relationship between comparative law and public international law is paradoxical. These fields are in principle close to each other but remote in practice. The emergence of comparative international law has changed the situation as it invites comparative law scholars to enter into discussion on international law. This article provides a critical analysis on the possibilities for comparative law in the field of international law. The article discusses and explains why a non-normative understanding of comparative international works well together with the pluralist conception of comparative law, and why a normative understanding of comparative international law is incompatible. This article explains why comparative law scholars do not welcome the use of comparative law for international law purposes with open arms.

I. Introduction

Little more than ten years ago, a famous international law scholar stated that an “approach that would take seriously the variations of approach, technique and substance of international law is largely absent”.¹ In recent years, the emerging field of comparative international law has taken shape in a manner of attempting to mend the absence. An important motivation for the new field is disappointment with how little the comparative approach to law has benefited the study of public international law. Private international law, on the other hand, has always enjoyed close cooperation with comparative law, because dealing with a conflict of laws requires knowing about the conflicting legal systems at issue.² For similar reasons, lawyers today acknowledgedly need to know diverse legal regimes beyond their own domestic systems.³ Consequently, the traditional division between public international law and comparative law has increasingly come under pressure from international law scholars.⁴ This is not totally surprising if we take into account that in their early stages of development, these fields were closely related because of a widespread nineteenth and early twentieth century belief in the notion of a universal legal order.⁵

The relation between the two fields is somewhat paradoxical, and their intellectual histories do not tell of a match made in heaven. As Mathias Reimann has pointed out, “It is difficult and dangerous to generalize about the relationship between comparative

¹ *Martti Koskenniemi*, The Case for Comparative International Law, *Finnish Yearbook of International Law* (FYBIL) 20 (2009) 1–8, 3.

² Essentially, the knowledge-process in the application of private international law is comparative; *Ernst Rabel*, *The Conflict of Laws: A Comparative Study* (1945) chapter 1. See also *Bénédicte Fauvarque-Cosson*, Comparative Law and Conflict of Laws: Allies or Enemies? – New Perspectives on an Old Couple, 49 *American Journal of Comparative Law* (Am.J.Comp.L.) 407–427 (2001) (“relationship between comparative and conflicts law has always been close”, 407); *Ralf Michaels*, Comparative Law and Private International Law, in: *Encyclopedia of Private International Law*, ed. by Jürgen Basedow / Giesela Rühl / Franco Ferrari / Pedro de Miguel Asensio (2017) 418 (private international law as applied comparative law).

³ From the point view of legal education, see *Jan Smits*, European Legal Education, or: How to Prepare Students for Global Citizenship?, *The Law Teacher* 45 (2011) 163–180.

⁴ For a history of comparative international law, see *Boris N. Mamlyuk / Ugo Mattei*, Comparative International Law, 36 *Brooklyn Journal of International Law* 385–452, 388–426 (2011).

⁵ *Martti Koskenniemi / Ville Kari*, A More Elevated Patriotism: The Emergence of International and Comparative Law (Nineteenth Century), in: *The Oxford Handbook of European Legal History*, ed. by Heikki Pihlajamäki / Markus D. Dubber / Mark Godfrey (2018) 974–999.

law and public international law”.⁶ Regardless, this article intends to do what is described as difficult and dangerous, namely to discuss the relationship between these two fields. This author is a comparatist, which means that the perspective is from comparative law to international law. This particular angle is surprisingly neglected in comparative law scholarship. It is not an exaggeration to say that modern comparative law scholars have mostly ignored international law as an object of study.⁷ The same had been true of international law scholars, who for their part showed only modest interest in comparative law before the recent appearance – or re-emergence if you like – of comparative international law changed the situation. This change in turn has raised a call, albeit mostly unanswered, to comparative law scholars to enter into discussion of comparative international law. This article attempts to throw a comparative law hat into the ring by analysing comparative law’s potential in the field of international law. Can these fields be merged?

One can, of course, doubt the utility of merging public international law and comparative law. The underlying idea seems to be that comparative international law scholarship can draw on theories and methodologies from neighbouring fields and disciplines, including from comparative law and comparative politics. For those seeking to reveal international law’s innate Western bias, the emerging field contributes to decolonising the discipline by addressing different constructions of the “universal” and the interplay of legal cultures.⁸ Others see comparative law as a tool to help international law fulfil a normative function. But why do comparative law scholars not welcome this use of comparative law with open arms? This article explains why modern comparative law scholars cannot fully embrace the re-emergence of comparative international law. In essence, it explains why the modern, pluralist conception of comparative law works well with a non-normative understanding of comparative international law, and why a normative understanding of comparative international law is incompatible with modern comparative law.

Before we journey into comparative international law, it might be useful to frame the question differently. Essentially, this article asks what distinguishes comparative law from comparative international law in its recent, renewed form. That is to say, can comparative law theories and methods be applied to international law without further

⁶ *Mathias Reimann*, *Comparative Law and Neighbouring Disciplines*, in: *The Cambridge Companion to Comparative Law*, ed. by Mauro Bussani / Ugo Mattei (2012) 13–34, 18.

⁷ *Reimann*, *Comparative Law and Neighbouring Disciplines* (n. 6) 18.

⁸ See *Miriam Bak McKenna*, *Decentering the Universal: Comparative International Law and Decolonizing Critique*, *European Society of International Law 2018 Annual Conference*, <www.ssrn.com/abstract=3363870> (12 April 2021).

ado? The core issue concerns the normative value of comparative international law. Since the analysis here centres on the issue of normativity and normative aspects (or a lack thereof), references to these and their role extend throughout the article. It seems natural to tackle normativity this way, as it is relevant for the themes each respective section deals with. That said, the discussion in section V. draws together the normativity-related threads in advance of the article's conclusions.

Prerequisite to an analysis of the relation between international law and comparative law is an overview of present-day comparative law. This is because today's comparative law scholarship offers a very different notion of the comparative study of law than the previous century's scholarship did. To that end, it is crucial to understand that modern comparative law is different from the earlier paradigm.

II. Modern comparative law

Past comparative law scholarship underlined the comparative approach as a means of creating uniformity and reducing differences. In contrast, today's comparative law scholarship underlines plurality and embraces other values and goals than using comparison in order to create similarity. One might say that comparative law scholarship has developed into a field that embraces the diversity and plurality of all sorts of legal systems, including non-State based normativities such as religious and indigenous legal traditions. Today's comparative law scholarship recognises pluralism in two forms: first, as an issue that concerns the substance; second, as an issue concerning the nature of the methodology of comparative law. Consequently, it is important to speak of comparative law methods in the plural, since there simply is no single comparative law method.⁹

Although there are different views on comparative law, some of its aspects seem to be undisputed. In principle, because it has no subject matter of its own, comparative law is not a field of law; it is a sub-discipline or a field of legal research, not a distinct

⁹ For a broader discussion, see *Maurice Adams / John Griffiths*, Against "Comparative Method", in: *Practice and Theory in Comparative Law*, ed. by Maurice Adams / Jacco Bomhoff (2012) 279–301. It has been suggested that we should not speak of comparative law methodology or a methodology of comparative law but of "methods employed in comparative law research, since there is no one single method"; *Esin Öriücü*, Methodology of Comparative Law, in: *Elgar Encyclopedia of Comparative Law*², ed. by Jan M. Smits (2012) 560–576, 573. These are not lonely contrarian voices; comparatists today accept the idea "that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow", as Vernon Valentine Palmer puts it; *Vernon Valentine Palmer*, From Leretholi to Lando: Some Examples of Comparative Law Methodology, 53 *Am.J.Comp.L.* 261–290, 290 (2005).

body of rules. Now, international law is not merely a form of legal scholarship; unlike comparative law, it has a body of rules. The fact that this body of rules is fragmented does not seem to be relevant; because there *are* substantive rules that *can* be deployed normatively, it makes for an important difference to comparative law, which lacks this quality altogether.¹⁰ To be sure, comparative law is not a field of law. But if one is to take comparative law seriously, this apparently unhelpful truism is more important than it appears on the face of it. It is an important distinction because it reveals two fundamentally opposing ways to understand the notion of comparative law, as we can see from the quote below from Samantha Besson, who makes her point in the context of comparative human rights law:

“Like custom, comparative law is non-written law, and it is identified by the observation of a general and regular practice that binds as law. [...] [I]t may be considered a source of law that belongs to different legal orders at the same time, both domestic and international.”¹¹

Why this differs clearly from a comparative law scholar’s understanding requires a short analysis of comparative law scholarship as it stands today. It is useful to take the intellectual pedigree of comparative law into account. Originally, it was a by-product of private international law in the nineteenth and twentieth centuries. The intellectual roots of both international law and comparative law were at first closely associated with the many notable jurists who were inspired by something that can be termed the spirit of internationalism.¹² Comparative law was essentially an auxiliary technique, the underlying idea being that private international law led to comparing laws because foreign law had to be applied by a court. Under the surface, the idea of universal harmonisation of law (in the sense of a truly cosmopolitan legal order) has been an important motivating legal idea. Such a universalist harmonisation view emphasises that, at the very least, we should seek regulatory uniformity across all kinds of borders.¹³

¹⁰ *Jaakko Husa*, *Global Law and Comparative Law: Allies or Adversaries?*, (2017) 12 *Journal of Comparative Law (J.Comp.L.)* 461–471.

¹¹ *Samantha Besson*, *Comparative Law and Human Rights*, in: *The Oxford Handbook of Comparative Law*², ed. by Mathias Reimann / Reinhard Zimmermann (2019) 1222–1249, 1228.

¹² *Koskeniemi/Kari*, *Elevated Patriotism* (n. 5) 998–999.

¹³ *Roger Cotterrell*, *What Is Transnational Law?*, 37 *Law & Social Inquiry* 500–524, 501 (2012).

However, today's comparative law scholars – not all of them of course – have managed to shake off the shackles of the Westphalian past.¹⁴ Yet this emancipation was not swift. The separation between comparative law and international law, both of which in principle embraced cosmopolitanism, started in the nineteenth century.¹⁵ The result has been a more open, more flexible scholarly conception of comparative law. The new trend in comparative law scholarship is described by Mark Van Hoecke as “clearly characterized by pluralism – pluralism as to the kinds of legal systems compared (not just state law) and a methodological pluralism”.¹⁶ In a world of transnationalisation and globalisation, comparative law's role has changed from handmaiden of harmonisation to research-oriented psychiatrist specialising in the diagnosis and understanding of legal cultures and global diversity. Ralf Michaels makes a fair point when he argues that comparative law is (still) needed because it is not just a tool but also a useful academic practice mediating between legal parochialism, totalising legal uniformity, and legal centralism. This means that comparative law scholarship becomes more diverse and more difficult to perform.¹⁷

Importantly, the development of comparative law into a plural, methodologically flexible field of legal research means that there are no clear lines of demarcation between comparative law, comparative legal studies, and comparative legal research.¹⁸ In essence, all these are connected to legal pluralism.¹⁹ As a result, comparative law severed the old Westphalian ties simply because comparatists understood that “the model of state law, which has come to dominate the western

¹⁴ See *William Twining*, A Post-Westphalian Conception of Law, 37 *Law & Society Review* 199–258 (2003).

¹⁵ “Later in the century, various specialised branches of cosmopolitan legal studies including international law and comparative law branched off to their own academic and institutional fields”; *Koskenniemi/Kari*, *Elevated Patriotism* (n. 5) 975.

¹⁶ *Mark Van Hoecke*, Is There Now a Comparative Legal Scholarship?, (2017) 12 *J.Comp.L.* 271–280, 280.

¹⁷ *Ralf Michaels*, Transnationalising Comparative Law, *Maastricht Journal of European and Comparative Law* (MJ) 23 (2016) 352–358, 358.

¹⁸ Considerable methodological expansion is taking place in comparative law. For example, Siems discusses three methodological extensions he calls postmodern, socio-legal, and numerical comparative law; *Mathias Siems*, *Comparative Law*² (2018) part III. We may speak of a methodological toolbox: “We may talk about the toolbox of comparative law, not of the only right tool, i.e. as a research field comparative law is necessarily methodologically pluralistic”; *Jaakko Husa*, *A New Introduction to Comparative Law* (2015) 260.

¹⁹ Even specialised comparative law research accepts that comparative law “invites a deep respect for difference even across shared values”; *Jane Stapleton*, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 *Journal of Tort Law* 1–45, 44 (2007).

world, is a historically and culturally distinct form of law”.²⁰ This idea is also one of recent comparative international law scholarship’s key insights (see III.1.). In this sense, both comparative law’s old paradigm and much of international law scholarship share something: they seek to be universalist, but their claim to universalism seems culturally dependent, as pointed out by decolonisation-inspired international law scholarship.²¹ Arguably, international law and comparative law share a certain intellectual openness to the globe, and both confront a diversity of domestic legal cultures as well as a global diversity stemming from different State practices.²²

One of the key differences between international law and comparative law seems to be the particular way in which each understands universalism.²³ Comparative law is non-national, in essence because it consciously detaches itself from the epistemic limits set by the nation-State.²⁴ Comparative analogy dismisses borders in research. Essentially, there is a certain kind of comparative ethos which is not that of an internationalist but rather of someone who has an epistemic urge to cross borders and gain general, non-national knowledge about law. In today’s comparative law scholarship, this epistemic urge is anchored in pluralism, which is fundamentally contrary to the universalism of international law. As Paul Schiff Berman puts it: “universalism inevitably erases diversity”, which is why combining a normative view

²⁰ *Fernanda Pirie*, *Comparison in the Anthropology and History of Law*, (2014) 9 J.Comp.L. 88–107, 106.

²¹ According to a critical view, this is a problem because universalism seems to play a part in global governance and the spread of neoliberalism. *David W. Kennedy*, *New Approaches to Comparative Law: Comparativism and International Law*, *Utah Law Review* (1997) 545–638 (discussing similarities and differences between “the comparativist” and “the internationalist”). See also: *The Battle for International Law: South-North Perspectives on the Decolonization Era*, ed. by Jochen von Bernstorff / Philipp Dann (2019) (analyses international legal debates between 1955 and 1975 concerning the decolonisation processes).

²² *Mathias Forteau*, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, 109 *American Journal of International Law* (AJIL) 498–513 (2015).

²³ This is also the issue where private international law and comparative law part company because the idea has typically been that “comparative law seeks to prevent these problems by advocating and working toward international unification or harmonization of national laws, while conflicts law seeks to resolve them after they occur by designating which of the conflicting national rules should be applied to the particular problem”, as expressed by *Fauvarque-Cosson*, *Comparative Law and Conflict of Laws* (n. 2) 407.

²⁴ Comparatists like to clearly distinguish comparative law from international law simply because moving beyond domestic law does not automatically include a specific comparative point of view. See, e.g., *Catherine Valcke*, *Global Law Teaching*, 54 *Journal of Legal Education* 160–182 (2004).

with universalism is so alien to present-day comparative law scholarship.²⁵ Instead of uniformity and harmonisation, present-day comparative law scholarship reminds us of global legal cultural diversity and warns against relying on simplified notions about Western law's possibilities for conquering the whole world.²⁶ In terms of the relation between international law and comparative law, it is important to register that the normative conception has seen its heyday in which comparative law was regarded, in an instrumentalist manner, as a tool of legal harmonisation.²⁷ As the following section will explain, this issue of normativity is an important line of demarcation between modern comparative law and many strands of international law.

III. Comparative international law as understanding, explaining, and decolonising

Scholars of comparative law and international law are well known for traditionally keeping their respective fields separate regardless of certain points of contact.²⁸ The separation is justifiable if one assumes that international law means a set of rules whose content and treatment by the courts ought to be identical across nations. This view conceives international law as a universal body of rules, which as such seems to exclude the idea of comparison simply because there is very little point in comparing what ought to be of a kind. However, this assumption is not as irrefutable as it may seem at first glance. Scholars have noted that even though international law is in principle universal, in practice States do not interpret or apply it evenly. The non-uniform reality of international law leaves room for a non-normative, non-universalising approach. Along these lines, recent comparative international law seeks

²⁵ *Paul Schiff Berman*, The Evolution of Global Legal Pluralism, in: *Authority in Transnational Legal Theory: Theorising Across Disciplines*, ed. by Roger Cotterrell / Maksymilian Del Mar (2016) 151–190, 171.

²⁶ As Menski says, “if law is a social phenomenon, any legal theory that ignores socio-cultural elements and values in relation to law would yield just a partial vision and remain unrealistic”; *Werner Menski*, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*² (2006) 83. See also *Pier-Giuseppe Monateri*, *Dominus Mundi: Political Sublime and the World Order* (2018), which traces the idea of ruling the world with law all the way back to Roman law.

²⁷ In other words, as Mireille Delmas-Marty said, “comparative studies means to give a preference to a pluralistic internationalisation which does not renounce the diversity of systems”; *Mireille Delmas-Marty*, *Études juridiques comparatives et internationalisation du droit*, Leçon inaugurale prononcée le jeudi 20 mars 2003, <www.books.openedition.org/cdf/2700> (6.5.2021).

²⁸ This has been the case for the most part; however, there have been some previous efforts to further develop the relation between international law and comparative law; see *William E. Butler*, *Comparative Approaches to International Law*, *Recueil des Cours de l'Académie de Droit International* 190 (1985) 9–89.

to tackle the problem by bringing together the two fields.²⁹ What follows discusses both international law in general and foreign relations law as a particular area of international law. Moreover, the following discussion addresses scholarship on decolonisation as it concerns general international law.

1. General international law

In light of the fact that international law and comparative law are both established fields, one of the first issues is how to define a field that merges two distinct fields. Key scholars in the lately budding comparative international law field propose a provisional definition according to which

“comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law.”³⁰

In that it focuses on differences and similarities to be identified, analysed, and explained, this definition relinquishes the universal-and-normative presumption and comes close to that of modern comparative law scholarship. When comparative international law is defined in this manner, it implies an important practical corollary concerning the nature of the field: it means in practice that the field is not purely normative but is also descriptive and explanatory in nature. The scholars behind this provisional definition – Roberts, Stephan, Verdier, and Versteeg – present three areas where they find the comparative approach useful.

First, they regard comparative law methods as potentially relevant in terms of identifying the substantive content of international law. This may mean several things, but none is far from a more traditional approach to international law, because it may mean seeking to identify general principles. Second, comparative methods may be relevant in terms of identifying, analysing, and explaining differences and similarities in the application and interpretation of international law, for example demonstrating how the same treaty provisions are interpreted by national, regional, and international courts. This is clearly different from the traditional normative, universalizing notion of international law, as it abandons the idea of international law as a (unified) body of rules. Third, comparative law methods may offer a useful way to understand and

²⁹ *Anthea Roberts / Paul B. Stephan / Pierre-Hugues Verdier / Mila Versteeg.*, *Conceptualising Comparative International Law*, in: *Comparative International Law*, ed. by idem (2018) 3–34, 3–4.

³⁰ *Roberts et al.*, *Conceptualising Comparative International Law* (n. 29) 6.

explain different approaches to international law. This may mean methods such as revealing different States' fundamental ideological commitments through their particular ways of interpreting such central international law notions as human rights or sovereignty.³¹ In practice, it would entail shunning normative universalism and the "body of law" notion and instead invoking a pluralistic view of international law.

As it encompasses pluralism in more than one way, this kind of approach to comparative international law is not very far from today's comparative law. The deeper justification of comparative international law, if grasped in this manner, is that it encourages international law scholars to include a comparative approach to their substantive subject matter. Importantly, this entails raising elementary questions about theory and methodology in order to further develop the field of comparative international law and to chip in for a better understanding of international law itself.³²

The question nonetheless is why comparative law is needed in the first place, or if it is something more than a mere auxiliary technique that helps to analyse legal rules and instruments and their application to facts. It seems plausible that the international law community considers comparative international law as some kind of remedy for the problems of international law. Anthea Roberts, a key scholar in the renewed comparative international law field, specifically starts from an assumption that the community is not uniform but rather is a divided group composed of "different national communities of international lawyers". Importantly, scholars construct "their understandings of international law in ways that belie the field's claim to universality". Accordingly, instead of one field there are in fact "multiple partially overlapping fields".³³ In this view, ambitious comparative approaches are helpful in the sense that they may aid international lawyers in becoming more "humble, open, and reflexive in their engagement with international law". The idea is that comparative law could assist international lawyers in seeing their own field in a new light and from different perspectives.³⁴ In practice, this means identifying and interpreting international law by doing comparative analyses of diverse international law-related domestic court decisions.³⁵

³¹ *Roberts et al.*, Conceptualising Comparative International Law (n. 29) 7–8.

³² *Roberts et al.*, Conceptualising Comparative International Law (n. 29) 31.

³³ *Anthea Roberts*, Is International Law International? (2017) 325.

³⁴ *Roberts*, Is International Law International? (n. 33) 325.

³⁵ *Anthea Roberts*, Comparative International Law? –The Role of National Courts in Creating and Enforcing International Law, (2011) 60 International & Comparative Law Quarterly (Int.Comp.L.Q.) 57–92.

2. Foreign relations law

It is argued here that much comparative law scholarship is in an inherent state of tension with international law. However, as later sections will show, this tension pertains to an important body of international law scholarship and its sub-fields and practices, but not to the entire field of international law such as it is today. For instance, if the emerging field of comparative international law is conceived in the manner suggested by Roberts and her colleagues, then there is actually very little or no tension between contemporary comparative law and international law. That notwithstanding, it would be too narrow a view to equate comparative international law with the work of the above-mentioned scholars alone. There are other, more specialised efforts to merge comparative law with international law that do not attempt to build arguments from a normative point of view. These are exemplified for instance in the work of scholars who deal with foreign relations law.

Although foreign relations law is separate from general international law, its defining feature is that it is also distinct from domestic law.³⁶ Foreign relations law concerns domestic legal systems and focuses on how each system (of a State) interacts with the rest of the world. Typically, foreign relations law deals with authority allotment among political actors: the State's diplomatic representation, concluding and terminating international agreements, or recognising foreign governments and their territories. These are sort of the classical foreign relations law matters; however, foreign relations law can also be about the role of courts in transnational cases.³⁷ How the field of foreign relations law connects to comparative law is clear:

“[...] the field of foreign relations law makes no claim of universality; it accepts that nations can and will have different approaches. This feature makes foreign relations law especially ripe for comparative analysis”.³⁸

Crucially, the field of foreign relations law is studied from a comparative viewpoint, and hence the role of comparison is not reduced merely to that of an instrument. Instead, comparative law approaches can be deployed as a method that generates critical distance. By creating critical distance, comparative foreign relations law reveals that the way one's own system approaches foreign relations law is not

³⁶ *Ganesh Sitaraman / Ingrid Wuerth*, *The Normalisation of Foreign Relations Law*, 128 *Harvard Law Review* 1897–1979, 1900 (2015).

³⁷ See *Curtis A. Bradley*, *What is Foreign Relations Law?*, in: *The Oxford Handbook of Comparative Foreign Relations Law*, ed. by *idem* (2019) 3–20.

³⁸ *Bradley*, *What is Foreign Relations Law?* (n. 37) 4.

universal.³⁹ This is also one of the classical ambitions of the comparative study of law: to reveal differences.

It is important to note that the field of comparative foreign relations law is different from a sort of “standard” international law approach. This means that it should be recognised that comparative foreign relations law does not answer to when international law is (or should be) legally effective. Instead, comparative foreign relations law may answer to when and in what manner a domestic system recognises international law as legally effective. Oona Hathaway stresses that one “should be careful to acknowledge that comparative foreign relations law, as important as it is, addresses one piece of the puzzle of international law’s legal effect”.⁴⁰ Hence, rather than generalising a normative view of international law, merging comparative and international law should lead to a more subtle view of international law. While not the same kind of comparative international law as what Roberts and others do, it is an example of how normatively oriented scholarship can bring modern comparative law on board to look at international law-related issues.

3. Decolonisation

One of the reasons why comparative law and international law have been conceived as difficult, if not impossible, to combine concerns the nature of international law as a universal legal entity. We may say that, from the very beginning of modernity, public international law has been depicted and understood as a legal discipline that has an open, universalistic vocation whereas comparative law has been seen as something that allegedly shuns universalism and embraces difference.⁴¹ Why some international law scholars have suddenly welcomed comparative law-related ideas embracing difference and pluralism goes back, in short, to disillusion with international law which has led in various directions, of which the comparative law-inspired path is but one.⁴²

The disillusion mostly concerns the promised universality of international law. Both unbelief in uniformity and an embrace of pluralism are common to comparative

³⁹ *Karen Knop*, Foreign Relations Law: Comparison as Invention, in: Bradley (n. 37) 45–62, 49.

⁴⁰ *Oona Hathaway*, A Comparative Foreign Relations Law Agenda: Opportunities and Challenges, in: Bradley (n. 37) 79–96, 96.

⁴¹ Cf. *Mamlyuk/Mattei*, Comparative International Law (n. 4) 451.

⁴² Essentially, this concerns fragmentation of international law. See *Martti Koskenniemi / Päivi Leino*, Fragmentation of International Law? – Postmodern Anxieties, *Leiden Journal of International Law* 15 (2002) 553–579.

law scholarship. Pluralism nurtures an intrinsic doubt in the promise of international law and generates an openly critical mind-set. In short, the promised universality has in fact constrained and undermined Third World demands. International law-related demands on the part of the Third World have come across as provincial sets of values against the claimed universality of the North. Mainstream international law scholarship used to maintain that blatant imperialism as well as the idea of a purely European international law disappeared in the period after the Second World War, thus creating a genuinely universal international law community. This view, it is now argued, has been illusory, and we should admit the existence of rifts in this allegedly universal international law community. This has let comparative law-inspired criticism creep in and transform the (dis)illusion into a critical scholarship informed by legal culture.

Looking under the surface has revealed a specific Western idea of “rationality” that has prevailed as a kind of a paradigm in the shadows. In other words, imperialism did continue beyond the post-World War II period, but under another banner.⁴³ Comparative international law can be regarded as a specific technique that can substantiate the hidden imperial dimensions of an allegedly universal body of rules. Therefore, comparative international law seems to be about more than theoretical and epistemic decolonisation of international law, although certain strands of thought behind it can indeed be traced back to decolonisation of international law scholarship. After all, it is not merely looking at differences and similarities in order to analyse and understand them; it is about invoking critical scholarship on international law.

Conceived like this, comparative international law is potentially beneficial as an approach to criticising the claims of normative universalism that tend to be an undercurrent of legal internationalism. Against this decolonising backdrop, comparison can offer support and enable revelation of a hidden bias held by international law scholars. This kind of comparative international law could, as Koskenniemi puts it, “contribute to the ideology critique of international law, and of the institutions sustained by that professional vocabulary”.⁴⁴ One could arguably designate this approach as critical comparative international law.

A comparative approach for decolonising purposes would offer a methodological remedy because it could help to identify and contrast essentially autochthonous ideas about international law. Importantly, this would entail a certain element of epistemic

⁴³ *Sundhya Pahuja*, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011) 3–4.

⁴⁴ *Koskenniemi*, *The Case for Comparative International Law* (n. 1) 4.

emancipation, because comparison would distinguish and highlight international law views not subsumable under European legal categories. Comparison could potentially reveal other interpretations and views on international law, enriching it with a broadened space for potentially fruitful views on rules and their interpretation. At the end of the day, this would mean providing a broad comparative perspective demonstrating that European categories are in fact just as provincial as the other non-universal or allegedly cosmopolitan views on international law.⁴⁵ According to this sobering view, the main task for the comparative approach is to expose the kind of legal-cultural differences that underlie a logic that presents itself as universal. Sundhya Pahuja describes the general idea as follows:

“As this universalising logic unfolds, the values with which it comes into contact and conflict are concomitantly understood as ‘relative’ and therefore specific and limited in their applicability.”⁴⁶

Like the notion held by Roberts and others, decolonising usage of comparative approaches fits in well with up-to-date comparative law scholarship, which has distanced itself from the projects of harmonisation and uniformisation that were the bread and butter of the old paradigm.⁴⁷ In the following section, an attempt will be made to sketch out how comparative law appears to those who hold universalising, normatively oriented views on international law (as broadly understood).

IV. Comparative law as an attempt to build a normative argument

The international law-based comparative law notions discussed above are recent creations. In fact, certain strands in international law have always grasped that comparative approaches can be tools for developing uniform standards. These more traditional views see plurality as a problem, and comparison as a technique for getting rid of the problems, caused by diversity.⁴⁸ Importantly, as will become clear, these strands have one thing in common: because their view of comparative law is instrumental, they are not interested in modern comparative law as a mature, culturally sensitive field of scholarship. To put it otherwise, comparative law is seen as a means

⁴⁵ Koskenniemi, *The Case for Comparative International Law* (n. 1) 5.

⁴⁶ Pahuja, *Decolonising International Law* (n. 43) 255.

⁴⁷ On harmonisation and unification as an objective of comparative law, see Konrad Zweigert / Hein Kötz, *An Introduction to Comparative Law* (1998) 15–18, 58–62.

⁴⁸ The comparative approach is explained as useful because it helps to avoid pitfalls of unification. See, e.g., Giesela Rühl, *Who’s afraid of Comparative Law? – The (Side) Effects of Unification of Private International Law in Europe*, *European Review of Private Law* 25 (2017) 485–522.

to an end. This kind of thinking reduces the import of comparative law scholarship by cutting out the academic exercise by underlining that comparative law is “also used by practitioners, for practical purposes”.⁴⁹ As such, this is of course true; but it does bring about a stymied notion of comparative law, as if someone were to go to a fine restaurant and eat only one course of a three-course dinner, leaving the staff puzzled. All the same, this kind of normative, instrumental comparative law differs from comparative international law as conceived in the recent strands discussed above. Perhaps it can be argued that such a stymied comparative law notion connects to international law through the point of view of domestic paradigms. Using domestic comparative law as yet another tool for international law in any case aptly illustrates how normatively oriented international law scholars grasp the value and function of comparative law.

A recent study has demonstrated that international courts and tribunals actually perform comparative reasoning when they interpret international legal rules or instruments. However, there does not seem to be a common *modus operandi*, since the specific manner in which courts and tribunals deploy comparative law depends so much on the legal and historical context. Even though it is difficult to paint an overall picture, it seems that domestic laws do play at least some role in terms of interpreting international law.⁵⁰ The following section addresses some of the key strands in this line of thinking.

1. General principles

It seems that many efforts to practice comparative international law contain some normative dimension. Effectively this means that even though there are other dimensions, inherent in the effort is an interest in normative knowledge. In other words, the focus is on the law and on legal concepts typically including statutory law, case law, and legal doctrines. In the context of comparative law, one typically invoked doctrinal point of contact between international and domestic law is Art. 38 para. 1 lit. c of the Statute of the International Court of Justice. As a source of international law, this Article seems to be controversial and neglected.⁵¹ But it is potentially relevant to comparative law nevertheless; it apparently offers at least some grounds

⁴⁹ *Forteau*, *Comparative International Law Within* (n. 22) 499.

⁵⁰ *Daniel Peat*, *Comparative Reasoning in International Courts and Tribunals* (2019).

⁵¹ *Jaye Ellis*, *General Principles and Comparative Law*, *European Journal of International Law* (EJIL) 22 (2011) 949–971; *Imogen Saunders*, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (2021) 223–224.

for injecting modest comparative dimensions into international law.⁵² It should be noted that Art. 38 para. 1 lit. c greatly stimulated comparative law scholarship's search for the common core of a plurality of legal systems. The common core project, led by Rudolf B. Schlesinger, sought to demonstrate a set of legal principles concerning contract formation that were general *beyond* individual systems.⁵³

The potential opening for comparative law comes from the very idea that general international legal principles exist in all legal systems and are acknowledged by States in their domestic systems. These principles can be applied on occasions when conventions or customary law do not offer enough guidance to support a judgment of the International Court of Justice. The normative idea behind this thinking can be seen in Art. 9 of the Statute of the Court, which provides that the members of the Court represent "the principal legal systems of the world". To that end (and continuing this idea of universalism), Art. 38 para. 1 sets out the legal sources that the Court must apply when deciding disputes submitted to it. Besides international conventions and custom, Art. 38 para. 1 lit. c mentions "the general principles of law recognized by civilized nations" as sources of law.⁵⁴

Essentially, the comparative law-related idea is that, throughout its existence, international law has drawn significantly on domestic legal systems. Of course it would be impossible not to recognize numerous points where international and domestic systems connect. But the question these intersections raise is difficult to tackle because the relation between comparative law and international law is unclear in many ways, in particular in terms of methodology. In other words, the prevailing situation in "international law methodology for identifying principles in municipal

⁵² That notwithstanding, some argue that comparative law "has played an important role in the reasoning of international courts", referring to the International Court of Justice; Jacques Ziller, Public Law, in: Elgar Encyclopedia of Comparative Law (n. 9) 744–753.

⁵³ See Formation of Contracts: A Study of the Common Core of Legal Systems, ed. by Rudolf B. Schlesinger (1968). See also *idem*, Research on the General Principles of Law Recognized by Civilized Nations, 51 AJIL 734–753 (1957). The ramifications of the common core project can be seen in later comparative law-inspired projects like UNIDROIT Principles on International Commercial Contracts as well as the European Principles of Contract Law. See *Ole Lando*, Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?, 8 Uniform Law Review 123–134 (2003).

⁵⁴ *Jean d'Aspremont*, What Was Not Meant to Be: General Principles of Law as a Source of International Law, in: Global Justice, Human Rights and the Modernization of International Law, ed. by Riccardo Pisillo Mazzeschi / Pasquale De Sena (2018) 163–184; *Rumiana Yotova*, Challenges in the identification of the "General Principles of Law Recognized by Civilized Nations", 3 Canadian Journal of Comparative and Contemporary Law 269–325 (2017).

law and transforming them into general principles of law is highly unsatisfactory”.⁵⁵ Again, it is easy to notice a certain problematic state of affairs within international law; hence, it makes sense for it to reach out to other fields in order to acquire tools that can help it resolve the problems.

Quite unsurprisingly, comparative law approaches are offered here as a methodological remedy.⁵⁶ To be sure, this would not mean transforming international law into a fully comparative law venture. Instead it would mean regarding the world’s legal traditions as a kind of cosmopolitan repository: a domestically built space of legal rules and ideas where international law can reach in and transfer what it finds there to a more international and – allegedly – universal sphere of law. At best, the various legal traditions of the world would become a resource “on which international jurists can draw in seeking to solve problems and disputes” without the need to demonstrate that a certain rule in a certain legal tradition could be regarded as common or globally representative.⁵⁷ Accordingly, a comparative law argument about a general principle would become a key element of an international law argument, enhancing its correctness and persuasiveness. As a lesson drawn from comparative law scholarship, however, it would rely not on the discipline’s methodological scholarship but rather on Patrick Glenn’s grand idea of the global sustainability of legal diversity – which, paradoxically, is methodologically peculiar. In reshaping the much criticised “grands systèmes de droit” tradition typical of macro-comparative law, Glenn’s discussion of legal traditions seems not to use any particular comparative methodology.⁵⁸ Then again, the idea of openly discussing legal transplants and borrowings against the backdrop of international law is certainly one way of making international law arguments from general principles more transparent and intellectually honest.⁵⁹ In the end, this approach is about using comparative law-based information as a tool to serve the normative purposes at its heart.

Before moving on to other normative usages, it is useful to note that the discussion of comparative law and general principles of international law concerns more than the

⁵⁵ *Ellis*, General Principles and Comparative Law (n. 51) 970.

⁵⁶ “By referring to comparative law, as well as to arbitral decisions, treaties and case law of other international courts and tribunals, decision makers are able to construct some benchmark of, for example, ‘fairness’ and ‘equitableness’ to which they can adhere, structuring their reasoning and absolving them of the responsibility and burden of substantiating the standard from scratch”; *Peat*, Comparative Reasoning (n. 50) 218.

⁵⁷ *Ellis*, General Principles and Comparative Law (n. 51) 971.

⁵⁸ For a critique of this tradition, see *Andrew Harding*, Comparative Public Law: Some Lessons from South East Asia, in: *Comparative Law in the 21st Century*, ed. by *idem* / *Esin Örüçü* (2002) 249–266.

⁵⁹ *Ellis*, General Principles and Comparative Law (n. 51) 970–971.

International Court of Justice. Particularly interesting in this regard has been the International Criminal Tribunal for the Former Yugoslavia's (ICTY's) effort to use general principles as a source of international criminal law. The comparison technique has apparently enabled the court to derive general principles based on comparative surveys of domestic laws.⁶⁰ Yet its use of the comparative approach has been far from perfect, because it has meant picking general principles based on comparisons in which "the sampling has been extremely limited and cursory".⁶¹ What is more, the manner in which the ICTY has arrived at general principles seems to suggest that failing to integrate sound comparative law methodology into the process leads to unpersuasive and potentially illegitimate solutions for international criminal law – assuming a proper comparative law study would be able to produce more persuasive, legitimate solutions in the first place. A proper comparative law study would allegedly help with building normativity, though not with appreciating difference or seeking to explain it.

2. EU law

International law and EU law are of course not the same thing, because EU law has features that tell it apart from public international law.⁶² However, for the purpose of this article it makes sense to discuss EU law, because the way in which comparative law has been conceived within the European context closely resembles the situation in international law.

In the European Union, comparative law (broadly understood) has been a multipurpose tool, especially for drafting legislation and for judicial decision-making. Surveying the legal systems of the Member States is an important part of legislative drafting in the European Union.⁶³ This is simply because EU legislation must be acceptable to the elected members of the European Parliament and to 27 Member States whose situations and legal cultures are different.⁶⁴ The easiest way to do this is to resort to existing majority approaches among the Member States. There is very little

⁶⁰ *Neha Jain*, Comparative International Law at the ICTY: The General Principles Experiment, 109 AJIL 486–497 (2015).

⁶¹ *Jain*, Comparative International Law at the ICTY (n. 60) 496.

⁶² For a broader discussion, see *Katja S. Ziegler*, The Relationship between EU Law and International Law, in: *A Companion to European Union Law and International Law*, ed. by Dennis Patterson / Anna Södersten (2016) 42–61.

⁶³ See *William Robinson*, Drafting of EU Acts: A View from the European Commission, *European Journal of Law Reform* 10 (2008) 151–162.

⁶⁴ *William Robinson*, Introduction: EU Legislation – A Shared Responsibility, (2014) 2 *The Theory and Practice of Legislation* 239–248, 246.

doubt that comparative law is instrumental to law drafters as need and practical purposes dictate. Nevertheless, from the point of view of comparative international law, the EU's judicial decision-making seems to be a more relevant point of departure.

Since its founding, the European Court of Justice has been using comparative law as an aid for making judgments. First, the comparative approach has been a *modus operandi* for taking into account the legal systems of the Member States. Second, comparative approaches have also allowed the Court to consider other sources of international and foreign law for the purpose of ruling on EU law matters.⁶⁵ It comes as no surprise that some of the classic cases, such as the *Transocean* case which involved a gap in EU law, are based on comparative law findings. Even though the Court did not refer to comparative law in its decision, its argumentation rested on a comparison performed by the Advocate-General. As a result, the judicial core of the case can be considered as partly built on a comparative study of the legal systems of the Member States.⁶⁶ This kind of usage is about bridging gaps with the help of other legal systems, choosing pieces of domestic laws to fill holes in the Union system.

In essence, “the comparative law method of the European Court of Justice centres on national norms that are ‘internal’ to the Union legal order and that sustain the interpretation and formulation of EU law”.⁶⁷ In practice, there are three kinds of situations. Clearly, finding and developing general principles of EU law by filling gaps has been one of these. Besides filling gaps, comparative law has also been a useful tool for interpreting rules and concepts of EU law. Moreover, comparisons have been helpful when the Court has reviewed the compatibility of a domestic law with EU law, or internally, when the Court has reviewed Union measures against hierarchically higher-ranking EU legal rules.⁶⁸

Another key point to remember is that because the Court is obligated to interpret EU law and ensure that it is applied evenly in all Member States, use of the comparative approach by the Court has a normative justification. However, there is more to it than just making sure that EU law is uniform in the Member States by way of some kind of comparative law inquiry. Lenaerts and Gutman note:

⁶⁵ Koen Lenaerts / Kathleen Gutman, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic*, 64 *Am.J.Comp.L.* 841–864 (2016).

⁶⁶ ECJ 23 October 1974 – Case C-17/74 (*Transocean Marine Paint Association v. Commission*), ECLI:EU:C:1974:106.

⁶⁷ Lenaerts/Gutman, *The Comparative Law Method* (n. 65) 844.

⁶⁸ Lenaerts/Gutman, *The Comparative Law Method* (n. 65) 844.

“[...] the comparative law method is an essential tool of the European Court of Justice that helps to make EU law operational in the legal orders of the member states and enables it to evolve in light of the legal and social developments taking place at the Union and national levels on numerous fronts.”⁶⁹

This quote reveals yet another potential benefit of building a normative argument on comparative law bedrock: the possibility of using dynamic interpretation to enable consideration of legal and social developments in the Member States. Arguably, the relationship between EU law and comparative law is less paradoxical than the relationship between international law and comparative law. Having said that, the story of comparative law and European Union law as natural bedfellows is not as straightforward as one might think. The basic situation with EU law is not fundamentally different from that of international law in this regard. Despite any difficulties and issues, the basic idea is that cross-country comparison is potentially beneficial for EU law.⁷⁰

From the point of view of comparative law scholarship, EU law’s interest in comparative law can be described as possessing two key dimensions. First, comparison is a tool for achieving an end, whether it be drafting EU legislation or interpreting EU law. Second, because the interest is in comparative law’s instrumental value, the main goal is by nature normative; in that sense, it is close to international law. As a result, comparative law as it serves EU law entails a narrow way of conceiving comparative law. Simply stated, comparative law enables integration and harmonisation. That is, it enables not only a distinct awareness of inherent legal pluralism but also a reduction of legal diversity through judicial decision-making. For these reasons, it is no wonder that one comparative law scholar has described EU-related comparative law attempts as “so superficial and methodologically dubious that they amount to little more than result-driven cherry picking”.⁷¹ The tension between result-driven normative usages of comparative law and modern comparative law notions is irreconcilable. They are unavoidably different: one seeks to reduce complexity whereas the other seeks to reveal and explain complexity while embracing legal-cultural diversity.

⁶⁹ *Lenaerts/Gutman*, The Comparative Law Method (n. 65) 864.

⁷⁰ Cf. *Antonina Bakardjieva Engelbrekt*, Comparative Law and European Law: The End of an Era, a New Beginning, or Time to Face the Methodological Challenges?, *Scandinavian Studies in Law* 61 (2015) 87–104, 88.

⁷¹ *Reimann*, Comparative Law and Neighbouring Disciplines (n. 6) 20.

3. ECHR law

As an object of study, today's international human rights law welcomes many methods and fuses together several approaches.⁷² In this context, it is not surprising that the relationship between human rights law and comparative law has grown closer in recent decades. Despite this development, we may say that even though "[c]omparative human rights law is en vogue, [...] its boundaries, methods, and authority are still in flux".⁷³ Much of this state of affairs can be seen in the context of judicial human rights protection in Europe.

In many respects, the European Court of Human Rights reminds one of the European Court of Justice. For instance it would not be correct to argue that the ECtHR engages in rigorous comparative law. Notwithstanding this, it certainly employs a comparative approach more frequently, and in a manner that looks more advanced, than the ECJ does. Quite safely, it can be argued that in European human rights interpretation, the comparative dimension often plays a role. Moreover, the comparatist role seems more apposite here than it does at the ECJ.

Why the work of the ECtHR involves some comparison is easy to understand.⁷⁴ Typically, the Court uses comparison among State Parties' legal systems in order to ascertain the meaning and scope of Treaty provisions. From the point of view of the Court, comparison is not merely an approach in a technical sense, because it may be seen as legitimising the Court's judicial discretion. This comes into play in situations where gaps exist in human rights law or the Court has a hard case on its hands. In practice, if the Court finds a sufficient degree of commonality in some State Parties' legal systems, then it may promote the evolution of norms under the European Convention on Human Rights in a previously unencountered situation. Using comparisons, the Court can demonstrate linkages between European human rights law and national legal systems simply by arguing that what the Court has adjudged is derived from the domestic jurisdictions of (some of) the State Parties. In other words,

⁷² *Frédéric Mégret*, *International Human Rights Law*, in: *Research Handbook on the Theory and History of International Law*, ed. by Alexander Orakhelashvili (2011) 199–231.

⁷³ *Besson*, *Comparative Law and Human Rights* (n. 11) 1249.

⁷⁴ On human rights comparativism, see, e.g.: *Judicial Comparativism in Human Rights Cases*, ed. by Esin Örüçü (2003); *Christopher McCrudden*, *Judicial Comparativism and Human Rights*, in: *Comparative Law: A Handbook*, ed. by Esin Örüçü / David Nelken (2007) 371–398.

the Court's judgment can obtain legitimacy indirectly through domestic jurisdictions. However, the manner in which the Court uses comparison is not without problems.⁷⁵

In any case, the ECtHR does apply some comparative approaches as a commonplace part of its judicial function. It is possible to discern at least four different ways comparative law comes into play as a part of the Court's reasoning. These can be labelled as cognitive, decorative, directional, and decisive.⁷⁶ The cognitive argumentative technique uses comparative points as part of the preliminary fact-finding stage but makes no further reference to them later in the judgment. This technique is about making the decision-making legal landscape understandable; it is about judicial rhetoric. The second argumentative technique is decorative, in the sense that comparative law material is briefly referred to without going into a deeper level of comparison.⁷⁷ The third argumentative technique, the directional, lets comparative law points gently steer the Court's interpretation in a certain direction. This type of reasoning typically entails open references to comparative material, and hence there is a link between the comparative material and the chosen interpretation. The fourth argumentative technique is to let comparative material play a decisive role; in other words, the Court openly notes that the chosen interpretation is a result of comparative law findings.

However, as pointed out by Paolo Carozza more than twenty years ago, comparative law is not an objective method that would yield "clear conclusions about the proper scope of uniform international standards".⁷⁸ On the other hand, comparative analysis of national systems has been relied on to flesh out the scope and content of the European Convention on Human Rights (ECHR) despite a far from well-grounded methodology.⁷⁹ In conclusion, it is possible to say that the comparative law approach as employed by the ECtHR does not differ from other result-driven, normatively focused ways of engaging in comparative law. However, in comparison the Court's way of using comparative law does appear subtler and more self-aware

⁷⁵ *Paolo G. Carozza*, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 *Notre Dame Law Review* 1217–1238 (1997/98).

⁷⁶ *Maija Dahlberg*, "The Lack of Such a Common Approach": Comparative Argumentation by the European Court of Human Rights, *FYBIL* 23 (2012/13) 73–112.

⁷⁷ *Jaakko Husa*, *Judicial Impartiality, Decorative Comparative Law and the Human Rights Court*, *MJ* 27 (2020) 387–396.

⁷⁸ *Carozza*, *Uses and Misuses of Comparative Law* (n. 75) 1219.

⁷⁹ Cf. *George Letsas*, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 *EJIL* 279–305, 282–283 (2004).

than the European Court of Justice's does.⁸⁰ From the viewpoint of comparative law scholarship, differences in the courts' notions of how to apply comparative law seem relatively insignificant. However, the above account must be treated with some caution, because describing the ECtHR's approach as overly result-oriented may be too much of a generalisation.⁸¹

4. Migration law

The need for a comparative approach is practically self-evident in such an internationally relevant special area of law as that concerning migration. Migration law is essentially connected to the State.⁸² This means it has an inherent link to such key international law notions as territory, sovereignty, and people. These notions are unavoidably affected when people are on the move and State borders become legally relevant thresholds and meeting places for laws of different sources.

Migration-related law controls the entry of people from one State into the territory of another. At heart, law that seeks to control any kind of migration is intimately connected to State sovereignty and, hence, to international law. Perhaps bafflingly, migration is necessarily also influenced by the legal systems of other countries. This inevitable interaction of legal systems is visible when a person, refused entry or expelled by one State, is returned to another. In practice, States seem quite unwilling to rely on binding international norms as they invoke the traditional sovereignty-focused notion of the State.⁸³ In this situation, comparative law may offer a tool for balancing sovereignty against the unavoidable international interdependence that migration creates. In the following discussion, refugee law (an area of migration law) will exemplify the merging of the comparative and the international.

⁸⁰ Overall, the quality and transparency of comparative research has increased since the Court became a full-time judicial organ and the establishment of the Research Division. This has meant that the use of comparative law by the Court has broadly speaking been more professional and thorough; *Peat*, *Comparative Reasoning* (n. 50) 155.

⁸¹ *Paul Mahoney / Rachael Kondak*, *Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?*, in: *Courts and Comparative Law*, ed. by Mads Andenæs / Duncan Fairgrieve (2015) 119–140 (comparative law method as a tool is an inherent part of the system of the European Convention on Human Rights; comparative references to national law have steadily increased in the case law of the ECtHR over the last decade).

⁸² International migration law can be defined “as the set of international rules and principles governing the movement of persons between states and the legal status of migrants within host countries”; *Vincent Chetail*, *International Migration Law* (2019) 7.

⁸³ This seems to explain the popularity of soft law here; states can handle migration without having to address legally binding forms; *Chetail*, *International Migration Law* (n. 82) 292.

Refugee law relies on two core instruments, namely the 1951 Convention Relating to the Status of Refugees as well as its 1967 Protocol.⁸⁴ Unlike some other specialised fields of international law, refugee law has been comparative in nature for quite some time. The leading authoritative book in the field is written from a comparative legal perspective as it deals with many countries' case law on the definition of a refugee.⁸⁵ More generally, it has been recognised that there is a need for transnational judicial dialogue in the area of refugee law.⁸⁶ This would, so it seems, justify relying on some kind of comparative law knowledge base. Now, a result-driven comparative technique could potentially play an integral role in certain areas of law that govern migration, especially in refugee law.⁸⁷ First, in order to interpret international treaties that affect refugees, comparison of domestic norms may help identify international customary law and demonstrate consistent State practice. Second, comparison can be utilised in the first stages of drafting international treaties.⁸⁸ In this case, different approaches to the same legal problem are looked at in order to create a sufficient knowledge base for drafting international rules. Nevertheless, despite the comparative approach's potential contribution to refugee law, it has been commonly recognised that comparative law has not played a significant role.⁸⁹ Lamenting the modest role of comparative law is indeed a regular feature of refugee law scholarship.

Because of the interdependence between systems, comparative points of view can also furnish inspiration when national or regional norms are drafted. Particular measures may serve as inspiration or perhaps even as models (in the sense of legal transplants) to be copied. There is even a possibility that comparative law could be used for "dark" purposes: States may adopt refugee law policies from other states that push the boundaries of what is acceptable under international law, as the United States and Australia have shown for example through their approaches to controlling and

⁸⁴ Convention Relating to the Status of Refugees of 28 July 1951, 189 United Nations Treaty Series (UNTS) 2545; Protocol Relating to the Status of Refugees of 31 January 1967, 606 UNTS 267.

⁸⁵ *James C. Hathaway / Michelle Foster*, *The Law of Refugee Status*² (2014).

⁸⁶ *Hélène Lambert*, *Transnational Judicial Dialogue, Harmonization and the Common European Asylum System*, (2009) 58 *Int.Comp.L.Q.* 519–543.

⁸⁷ See, e.g., *Kate Jastram*, *Regional Refugee Protection in Comparative Perspective: Lessons Learned from the Asia-Pacific, the Americas, Africa, and Europe* (2015).

⁸⁸ Comparative argument may come through judicial institutions, as was the case with the Common European Asylum System; see *Francesca Ippolito*, *The Contribution of the European Courts to the Common European Asylum System and its Ongoing Recast Process*, *MJ* 20 (2013) 261–281.

⁸⁹ *Lambert*, *Transnational Judicial Dialogue* (n. 86) 542.

detering asylum-seekers.⁹⁰ In this case comparative law facilitates oppressing rather than supporting refugees' rights, which in turn is contradictory to the ethos of international law scholarship. This is not about comparative law scholarship as such but about using foreign law models in legally designed policy transfers in some kind of race-to-the-bottom spirit. Transplanted legal ideas may concern various restrictive mechanisms copied from other jurisdictions, for instance landing taxes, passenger-per-ship limitations, and literacy tests.⁹¹

Finally, a word of caution is in order. At present, comparative refugee law is very much a field in the making, as it is even more of a niche field than comparative international law. In any case, the budding discussion in this area shows that comparative law clearly excites more interest among the ranks of international law scholars than it used to.⁹² Importantly, this interest goes well beyond the traditional international (or European) law view that sees comparative law strictly as a tool with a merely instrumental value.

V. Balancing act on a tightrope?

The pluralist challenge to convergence-universalism within comparative law may convey a message to those international law scholars who nurture a genuine interest in comparative law as a special field of knowledge rather than as a mere tool designed to weed out pluralism and diversity.⁹³ But herein lies the problem: to an international law-driven interest in comparative law, it is natural to regard comparison as something that seeks to lessen plurality and reduce differences.⁹⁴ For anyone familiar with comparative law scholarship, this is a well-known underlying assumption; it invokes the assumption of similarity, which is the most criticised of all theoretical assumptions

⁹⁰ See *Daniel Ghezelbash*, *Refuge Lost: Asylum Law in an Interdependent World* (2018).

⁹¹ For a more detailed discussion, see *Daniel Ghezelbash*, *Legal Transfers of Restrictive Immigration Laws: A Historical Perspective*, (2011) 66 *Int.Comp.L.Q.* 235–255.

⁹² See, e.g., *Lambert*, *Transnational Judicial Dialogue* (n. 86) 519.

⁹³ “[T]he vision of the comparative law perspective is the pluralistic vision. It is the richness of pluralism in law”; *Rodolfo Sacco*, *Quali scienze interessano il giurista?*, in: *Scienza e diritto nel prisma del diritto comparato*, ed. by Giovanni Comandé / Giulio Ponzanelli (2004) 27–34.

⁹⁴ To *Forteau*, *Comparative International Law Within* (n. 22) 500, an approach that regards differences as superficial seemingly “provides a relevant blueprint for a successful combination of comparative law and international law”.

held by the old comparative law paradigm.⁹⁵ As an innate foundational postulate, the assumption of similarity in modern comparative law has been all but buried.

Crucially, the difficulty international law scholars have in conceiving of comparative law scholarship's full scope rests on the fact that international law is a field of law with an inherent normative aspect at its core. Because of its embedded value-laden commitment, the idea of legal cultural diversity is difficult to integrate into international law scholarship. The tension between far-reaching pluralism and comparative law-interested international law scholarship is visible in the following quote from Mathias Forteau:

“So far as diversity is assessed with the specific purpose of reaching a consensus on the definition of international, common rules, comparative international law harmoniously supplements international law. On the other hand, if comparative international law were to be designed as a way to claim the existence of specific approaches to international law, there is a risk that it would eventually lead to the disintegration of the core idea of international law as the common law of humankind.”⁹⁶

There is an underlying, almost primal fear that bringing legal-cultural diversity fully on board would potentially lead to disintegration. From that perspective, taking comparative law scholarship fully into account would lead to the crumbling of the very core of international law scholarship inasmuch as it envisions international law as the common law of humankind. Pluralist comparative law scholarship, on the other hand, sees its own core as an antidote to the notion of normative universalism. These two views are, indeed, difficult to merge. And yet comparative judicial reasoning (by a court or tribunal) in international law is also inextricably linked to its historical and legal context even though it is based on universalism.⁹⁷ What is more, courts always face time and budget constraints that might preclude thorough comparative law research.⁹⁸ More importantly, study and analysis of international law is about distinguishing law from the other issues. Modern comparative law and traditional

⁹⁵ For a broader discussion, see *Jaakko Husa*, Farewell to Functionalism or Methodological Tolerance?, *RabelsZ* 67 (2003) 419–447; *Gerhard Dannemann*, Comparative Law: Study of Similarities or Differences?, in: Reimann / R. Zimmermann (n. 11) 390–422.

⁹⁶ *Forteau*, Comparative International Law Within (n. 22) 513.

⁹⁷ Cf. *Peat*, Comparative Reasoning (n. 50) 214.

⁹⁸ It can also be said that even if more thorough comparative law research were to take place, “it seems highly unlikely that such a voluminous work could or should be included in its entirety in the final judgment”; *Peat*, Comparative Reasoning (n. 50) 156.

international law scholarship conceive the notion of “law” differently. Pluralist comparative law seeks to highlight law in the context of “other issues”. The fundamental difference between traditional international law and comparative law can be seen clearly in the following quote from Alexander Orakhelashvili, who discusses the relationship between scholarship and international law in a substantive sense: “Confusing socio-political factors [...] with the analysis of legal rules inevitably leads to ignoring the basic nature of international law as the body of rules agreed upon by States”.⁹⁹ This Westphalian ideal is not an appealing one to modern comparatists who hold a broader view of law.

Yet difficulties beset both sides. Comparative law has always aspired to be two things at the same time: practically useful and academically sophisticated.¹⁰⁰ It may be impossible for comparative law to achieve both objectives. That notwithstanding, modern comparative law scholarship has been taking big steps away from a result-driven focus as its academic sophistication has grown. This sophisticated scholarship may not be practically useful for an international lawyer with normative interests. No doubt, it is also a hard thing to swallow for many comparative law scholars who are accustomed to justifying their field by arguing that it is practically useful.

In sum, international law scholarship’s interest in comparative law appears to respond to contrary temptations. On one side stands the temptation to understand and criticise the actual practices of international law in a non-universalising manner and use advanced comparative law scholarship as a method of doing so. On the other side stands the temptation to use comparative law as a technique to create uniformity and as a means to upset the potential disintegration of international law as the common law of humankind. On this basis, it is hard to avoid the conclusion that the two temptations are incompatible. Nevertheless, one might counter that it is an overreach to focus on scholars like Forteau and Orakhelashvili, who represent a kind of result-driven standard approach to comparative law among international legal scholars. Accordingly, it can be pointed out that there are more nuanced (and less universalising) approaches to comparative law.¹⁰¹ Regardless of these, the standard normative approach still seems to hold firm in international law scholarship.

⁹⁹ *Alexander Orakhelashvili, The Relevance of Theory and History – The Essence and Origins of International Law*, in: idem (n. 72) 3–22, 5.

¹⁰⁰ *Reimann, Comparative Law and Neighbouring Disciplines* (n. 6) 32.

¹⁰¹ *Peat, Comparative Reasoning* (n. 50) 133–137, 206–210. See also *Stephan W. Schill, International Investment Law and Comparative Public Law – an Introduction*, in: *International Investment Law and Comparative Public Law*, ed. by idem (2010) 3–38 (introduces comparative public law as a method for concretising and legitimating legal standards).

Nevertheless, international law's interest in comparative law is clearly not monolithic, as it encompasses multiple ideas ranging from understanding and appreciating difficulties to building normative arguments or dismantling colonial assumptions. This is not a surprise, because international law itself is a fragmented order made up of a plethora of inhomogeneous regimes and containing norms that are applied by numerous courts that lack the democratic constitutional framework of State law.¹⁰² To take it a step further, one may wonder why ambitious comparative law scholarship comes under discussion at all. The internal complexities of comparative law scholarship of the last few decades make it seem like wishful thinking to expect normative guidelines to assist international law scholarship. Overall, it is hard to avoid the impression that comparative law-minded international law scholars adopt its ideas and theories as a fragmentation-mending remedy. Alongside two other academic remedies – constitutionalism and pluralism – comparative law-related methodologies seem to be offered as healing responses to fragmentation.¹⁰³ For international courts and tribunals, comparative law techniques may shield them against criticism and strengthen their authority by showing that a judicial opinion is thoroughly researched.¹⁰⁴ Without the shadow of a doubt, result-driven comparative law may be useful for normative purposes because it has the capacity to enhance legitimacy. Comparative law scholarship in its modern pluralist form explained above is less useful as a tool for normative purposes, because it is interested in *law in context*, and because it understands law in a broad manner, detaching itself from what could be broadly characterised as legal positivism.¹⁰⁵

It would seem that the most crucial differences between the recent, renewed comparative international law and modern pluralist comparative law are twofold. First, contemporary scholarship reaches out to disciplines and methodologies outside law because they offer help at grasping the law in social and political contexts. And

¹⁰² *ILC*, Report of the Study Group of International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (UN Doc. A/CN.4/L.702) General Conclusions, 481–493.

¹⁰³ See *Martti Koskenniemi*, The Fate of Public International Law: Between Technique and Politics, 70 *Modern Law Review* 1–30 (2007).

¹⁰⁴ *Martin Gelter / Mathias M. Siems*, Citations to Foreign Courts: Illegitimate and Superfluous, or Unavoidable? – Evidence from Europe, 62 *Am.J.Comp.L.* 35–86, 82 (2014). Generally about motives and strategies in comparative reasoning, see *Jan Smits*, Comparative Law and its Influence on National Legal Systems, in: Reimann / R. Zimmermann (n. 11) 502–523, 518–520.

¹⁰⁵ Yet it should be noted that modern international law seems to be moving away from the inherited legal positivist mindset; see *Richard Collins*, Classical Legal Positivism in International Law Revisited, in: *International Legal Positivism in a Post-Modern World*, ed. by Jörg Kammerhofer / Jean d'Aspremont (2014) 23–49.

second, even comparative international law – as Roberts and others understand it – is still a field of law and is still bound to grasp the law in a narrow sense. As comparative law is not a field of law, the bond between normativity and comparative law scholarship is clearly looser. Essentially, *what counts as law* is different for modern comparatists and international law scholars. Now, there is no need to exaggerate this difference; but as argued here, it remains relevant and poses an obstacle to merging these two fields in a manner that would be embraced by both camps.

Of course, this article has not discussed the field of comparative international law exhaustively, as the focus has been on post-2000 scholarship. Undoubtedly, that is a somewhat narrow scope from the point of view of international law. Then again, the huge range of twentieth-century international law scholarship means that it would have been clearly too ambitious a goal to address all the writing on the subject within the confines of a single article. For the purposes of this article, a more generalised survey would not have been useful simply because, from the viewpoint of comparative law, the contributions by Koskenniemi and Roberts et al. are perhaps the most fruitful contributions to present-day international law scholarship. To be sure, they are certainly not the only scholars to have taken an interest in comparative law, and yet their effort to renew international law thinking so it could rise to the challenges of today's world makes their scholarly ambition stand out. For comparative law scholars, this kind of novel scholarship on international law seems increasingly relevant in its endeavour to bring on board key ideas from modern comparative law scholarship. Regardless of that, there are reasons to doubt whether modern context-oriented comparative law can genuinely contribute to normative international law and, if so, enhance its effectiveness as a body of legal rules. Comparatists tend to observe law from an external point of view, whereas international law scholars tend to observe law from an internal point of view.¹⁰⁶

Albeit that there are several relevant dimensions concerning comparative law and international law beyond those addressed above, suffice it here to mention three important features not yet discussed. The idea is to raise useful points for further discussion.

First, comparative international law emerged originally against the backdrop of the Cold War debates, as part of the politics of post-war comparative law.¹⁰⁷ When we discuss today's comparative international law, it is useful to keep in mind how the

¹⁰⁶ From the point of view of legal theory, see *Richard Schwartz*, *Internal and External Method in the Study of Law, Law and Philosophy* 11 (1992) 179–199.

¹⁰⁷ *Mamlyuk/Mattei*, *Comparative International Law* (n. 4) 417–426.

first merging attempts came about. Second, although private international law is virtually absent in the emerging field of comparative international law, it can be noted that Hersch Lauterpacht, one of the greats of twentieth-century international law, sought to develop international law on the basis of (comparative) private law.¹⁰⁸ The core of Lauterpacht's early research was in fact the private law foundations of international law.¹⁰⁹ Third, in this context one could also revive Ernst Rabel, who justified the need for comparative law on the basis that German lawyers needed to understand and interpret the Treaty of Versailles, which was a creature of international law; doing so necessitated legal knowledge of "the outer world".¹¹⁰ Now, even though these dimensions are not separately addressed in this article, it is beneficial to keep in mind that the present-day attempt to merge comparative law and international law has not come out of the blue. What is more, one can see that private international law roots are hidden under the more recent layers of a public international law scholarship which is now reforging the link between the international and the comparative.

As to the relation between the two scholarly fields, much depends on how one chooses to understand them. From the point of view of comparative law, much of the interest seems to be in instrumental value and seems to leave out the lion's share of recent scholarship. It is as if international law were just cherry-picking certain parts of comparative law and leaving the rest, especially its pluralist methodology, virtually untouched.¹¹¹ For the comparatist this looks like a misguided course to take. Then again, some of the recent interest in comparative international law seems different in that it appears to take comparative law more seriously than before. It has been pointed out that comparative international law as a field "cannot be reduced to a set of

¹⁰⁸ *Hersch Lauterpacht, Private Law Sources and Analogies of International Law* (1927).

¹⁰⁹ See *Ralf Michaels, Private Lawyer in Disguise? – On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work*, 27 *Temple International & Comparative Law Journal* 499–522, 502–504 (2013).

¹¹⁰ "Germany, you see, had learned by the war experiences what it means not to have proper knowledge of the outer world, not the least part of which proved to be foreign law. The mentality of the lawyers abroad became a daily more perceptible factor, as the Versailles Treaty was executed by that lawyer Monsieur Poincaré, and as we had to defend ourselves in thousands of odd lawsuits before the Mixed Arbitral Tribunals instituted by the same Treaty"; *Ernst Rabel, Experiences of a Comparatist*, *RabelsZ* 50 (1986) 282–311, 297.

¹¹¹ *Peat, Comparative Reasoning* (n. 50) 220, describes the comparative law-based methodological critique by saying that "it rests on the assumption that in order to be successful the comparative survey of domestic law must be exhaustive, or at least representative, to meet the requisite methodological standard".

fundamental unifying legal principles, methodological approaches, or disciplinary aspirations”.¹¹²

The growing complexity – or fear of it – may explain claims that the comparative approach is unnecessary and unrealistic in terms of identifying customary international law and general principles.¹¹³ Comparative law is not merely aware of legal pluralism; quite simply, modern comparative law embraces diversity, in many cases globally, and hopes to understand and explain it instead of striving toward uniformity. Because comparative law is not about rules, it is inherently more open to considering socio-political factors than to separating law from non-law according to some strict legal standard that is not relevant for comparative law scholarship.

The question that the above discussion brings forth is unavoidable. If comparative law has really relinquished the cosmopolitan idea of global law, then how is it possible to merge it, as a pluralist field, with international law? This might not be as impossible as it may seem at first glance. Even though comparative law has largely abandoned the ideal of uniform law and more readily accentuates pluralism, comparatists need not therefore have abandoned the cosmopolitan ideal. Rather, they would believe that their field serves humankind better when it seeks to understand and explain the diversity of the global legal sphere rather than create uniformity in all four corners of the world. This kind of cosmopolitanism means an interest in global topics without suggesting global uniformity.¹¹⁴ Nevertheless, if international law is conceived as a construct instead of as an objective reality, then pluralist comparative law and international law can be merged. This requires a constructivist understanding of international law as something that “depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation”.¹¹⁵

There is one further caveat: It is possible that distinguishing a novel comparative international law as different from the universalising mainstream is an oversimplified view. Earlier scholarship has already acknowledged that countries’ conceptions of international law differ. Accordingly, it is not suggested here that there have not been subtler approaches. However, they did not use the *vocabulary of modern comparative law* prior to the new comparative international law. The lack of explicit comparative law terminology is important to any assessment of the relationship between comparative law and international law scholarship. Still, framing the advent of comparative international law as a moment of emancipation from universalising

¹¹² Mamlyuk/Mattei, *Comparative International Law* (n. 4) 450.

¹¹³ See Forteau, *Comparative International Law Within* (n. 22) 498.

¹¹⁴ Cf. Siems, *Comparative Law* (n. 18) 405.

¹¹⁵ Roberts *et al.*, *Conceptualising Comparative International Law* (n. 29) 3.

tendencies for (some) international lawyers may overstate the importance of that project and fail to give sufficient credit to earlier international law scholars. On the other hand, from the point of view of comparative law scholarship it seems clear that only the recent comparative international law seems to take comparative law seriously.

VI. Conclusion

In sum, what is argued in this article is not meant to restrict international jurists' use of many kinds of purpose-driven comparisons. Courts and legislators may of course perform various comparisons as a part of their work regardless of legal academia. The fact that their way of using comparative law is different from that of comparative law as an academic field may not be such an obstacle after all. But if one seeks to merge these fields, then one cannot operate with a twentieth-century notion of comparative law. The older normative, instrumental view of comparative law and the more recent, intrinsically non-normative view collide such that they are hard to bring under one disciplinary roof. The Procrustean bed seems unavoidable: either comparative law is reduced to serving normative purposes, or one embraces modern, pluralist comparative law and shuns normativity.

And so what recent comparative international law and foreign relations law scholarship do seems like a possible way to marry the two fields. This approach is not without problems, because it may find itself between a rock and a hard place. In other words, when it takes seriously international law's different approaches, techniques, and substance, it may face criticism from international law because it abandons normative universalism. And as it still seeks to hold onto its epistemic view of international law as a body of rules, it may likewise face criticism from comparative law because it does not embrace diversity firmly enough. Comparative international law as an effort to decolonise avoids some of this criticism, but it does not take comparative law methodology as seriously as recent general comparative international law does. To conclude, a future for theoretically and methodologically advanced comparative international law seems possible only if it is accepted that there is no longer "a single hegemonic answer" to the question, What is international law?¹¹⁶ Comparative international law should allow for pluralism as modern comparative law has already, perhaps grudgingly, done.

¹¹⁶ *Koskenniemi, The Case for Comparative International Law* (n. 1) 4.