Publications de l'Institut suisse de droit comparé
Veröffentlichungen des Schweizerischen Instituts für Rechtsvergleichung
Pubblicazioni dell'Istituto svizzero di diritto comparato
Publications of the Swiss Institute of Comparative Law

70

Colin Picker / Lukas Heckendorn Urscheler /
Daria Solenik (eds)

Comparative Law and International Organisations

Cooperation, Competition and Connections

Schulthess §

Publications de l'Institut suisse de droit comparé
Veröffentlichungen des Schweizerischen Instituts für Rechtsvergleichung
Pubblicazioni dell'Istituto svizzero di diritto comparato
Publications of the Swiss Institute of Comparative Law

70

Colin Picker / Lukas Heckendorn Urscheler /
Daria Solenik (eds)

Comparative Law and International Organisations

Cooperation, Competition and Connections

Schulthess § 2014

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

ISBN 978-3-7255-7051-5

www.schulthess.com

Table of Contents

Colin B. Picker*

An Introduction to Comparative Legal Cultural Analyses of International Organizations

Table of Contents

1. Introduction

Legal systems, institutions and organizations comprise more than just rules, regulations and laws. They are also made up of individuals that create, implement and regulate those systems, institutions and organizations. Humans themselves, however, are not so easily compartmentalized and will tend to bring their home legal cultures into the international legal order. Additionally, they will tend to create new legal cultures within those international intergovernmental organizations ("IOs") and fields. But, the interactions and operations of those legal cultures—be they domestic or international, new or old, competing or complementing—will often have significant implications for the processes and functions of those different legal cultures, individually or together. Accordingly, examination of those legal cultures and their interactions is necessary to really understand the international legal order, on its own or in its interactions with domestic systems. This article will thus introduce the idea of applying comparative legal cultural

* Associate Professor, Law Faculty of the University of New South Wales, Sydney, Australia. A.B. Bowdoin College, J.D. Yale Law School.

analyses to the international legal order, and specifically to IOs—the backbone of the international legal order. Because such analyses are somewhat unusual and little known, this paper will also provide a methodological toolbox for those analyses.

It should be noted that this paper is part of a larger research project of the author that considers comparative legal cultural analyses from many perspectives, including from that of IOs, in which the World Trade Organization ("WTO") is employed as an example of such organizations.[1] As part of that project, and complementary to the work of the Swiss Institute of Comparative Law ("SICL"), this paper, in an earlier form was delivered at a conference entitled "Comparative Law and International Organizations: Cooperation, Competition and Connections" at the SICL in Lausanne, Switzerland.[2] Switzerland was an ideal location for such a conference given that it is home to twenty five IOs and hundreds of non-governmental organizations that work with the United Nations.[3] Indeed, while traditionally the subject of IOs has focused on the 250 or so international intergovernmental organizations,[4] there are also thousands of international non-governmental organizations that play important roles in the international legal order.[5] Many of those international non-governmental organizations ("INGOs"), such as the International Olympic Committee, headquartered in Lausanne, are considered to have international personality, whereby they can "speak" with states

[1] The research here is part of a larger study by the author that will be part of the author's PhD thesis. Some of it has already been published. *See*, *e.g.*, C. B. PICKER, A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization in E. Cashin Ritaine, S. P. Donlan & M. Sychold (eds.) *Comparative Law and Hybrid Legal Systems*, Zurich 2010, p. 117; C. B. PICKER, Comparative Law Methodology & American Legal Culture: Obstacles And Opportunities, *16 (2011) Roger Williams Univ L. Rev.,* p. 86; C. B. PICKER, WTO Governance: A Legal Cultural Critique in K Hirashima (ed.), *Governance In Contemporary Japan,* Tokyo 2011; C. B. PICKER, International Trade and Development Law: A Legal Cultural Critique, 4 (2011) *Law & Development Review*; C. B. PICKER, China, Global Governance & Legal Culture in J. Nakagaw (ed.), *China And Global Economic Governance: Ideas And Concepts,* ISS Research Series No. 45, Tokyo 2011; C. B. PICKER, A Legal Cultural Analysis of Microtrade, 5 (2012) *Law & Development Review*, No. 1, 101-128; C. B. PICKER, Anti-Poverty v. The International Economic Legal Order? A Legal Cultural Critique in K. Nadakavukaren Schefer (ed.), *Poverty and International Economic Law: Duties to the Poor,* Cambridge 2013; C. B. PICKER, International Investment Law: Some Legal Cultural Insights in L. E. Trakman & N. W. Ranieri (eds.), *Regionalism in International Investment Law,* Oxford 2013; C. B. PICKER, Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach, 1 (2013) *Chinese J. Comp. L.* 21-48.

[2] Swiss Institute of Comparative Law, 10-11 September 2009, Lausanne, Switzerland.

[3] See the website for the Swiss Federal Department of Foreign Affairs at http://www.eda.admin.ch/eda/en/home/topics/intorg/inorch.html (28 Dec. 2010).

[4] LEROY & OLIVER, p. 282.

[5] *Id.*, p. 282-283.

and enter into agreements with them.[6] Some, as a direct result of their inclusion in treaties, may even be considered quasi-intergovernmental organizations, such as the International Committee of the Red Cross.[7] For the most part, this paper will not be concerned with those INGOs, but with the 250-plus IOs. Nonetheless, much of this paper may be as applicable to the INGOs, as to the IOs. Furthermore, given the increasingly important role of the INGOs in the formation of international law,[8] application of the analyses suggested here may be as applicable to INGOs, with such analyses also being very valuable for the international legal order.

2. Comparative Legal Cultural Analyses

A comparative legal cultural analysis can be applied to international law in general, IOs, substantive fields within international law, and to states' domestic participation and implementation of international law and organizations.[9] While this paper's title suggests it is only introducing the methodology for purposes of comparative examinations of IOs, the fact is that the methodology, with some slight modifications, could apply to those other aspects of the international legal order. Nonetheless, throughout this paper's presentation of the methodology the paper will still use IOs in the general examples that highlight the methodology, in order to enrich the overall discussion of the comparative legal cultural analysis of IOs.

A comparative legal cultural analysis is a comparative method of understanding the legal culture of a legal system. Having previously defined "legal culture", I will here simply reproduce that definition:

> *The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions.*[10] *It*

6 *See* ETTINGER, p. 103-104.
7 SEYERSTED, p. 6-8.
8 *Id.*
9 *See generally* PICKER (IEL); PICKER (America), *see also* BIUKOVIC.
10 *See* GLENDON, p. 8.

> *should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behavior); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.*[11]

Typically, however, comparative law focuses on legal systems and legal traditions, and not on legal cultures. Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations."[12] Legal traditions, in contrast, are:

> *families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.*[13]

Thus, one can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. In contrast legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally typically describe broad groupings and more typically reflect formal sources of law. Consequently, a comparative legal systems analysis of IOs would focus on the formal rules within and across the organizations. Whereas a comparative analysis of the legal traditions of IOs, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an IO would usually analyze just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, the overlap. Consequently, this paper's suggested methodologies and approaches may also be a

11 *See* PICKER (China) (some citations omitted).
12 PICKER, (International), p. 1094.
13 MATTEI, fn 68 (citations omitted).

very useful first step before embarking on those other analyses, each of which is itself a critical method of inquiry in an examination of an IO.

3. The Employment of Legal Cultural Analysis in International Law

International organizations, as the backbone of the international legal order, have been a central part of the international legal order for almost two hundred years.[14] But, with the exception of occasional efforts to identify "general principles of law recognized by civilized nations",[15] IO scholars and practitioners rarely employ a comparative or legal cultural analysis, with the few exceptions being quite notable for their rarity.[16] This all the more perplexing given that the humans that work in and shape those institutions are not blank slates. IOs are shaped by those very people, domestic legal culture "and all". Furthermore, the legal side of those institutions will include people trained in domestic law schools, which, despite increasing international content, remain firmly anchored in domestic legal systems. Accordingly, despite the IOs' civil servants' duty of neutrality and "international loyalty"[17] they cannot stop the influence of their underlying legal cultures permeating the IO's in which they work. Thus, all those associated with IOs—the lawyers, officials, members of state missions, scholars and even the interns—will, often without even knowing it, come to work, bringing with them their legal culture. Yet that legal culture, their own and their colleagues, is almost always ignored or not noticed by those very same individuals.

The fact that this methodology has also essentially been ignored by IO scholars is all the more surprising given that IOs command a great deal of scholarly interest. Indeed, within international academic law societies there are individual sections on IO.[18] Today, in law faculties all over the world there are classes[19] and associated textbooks on the subject.[20] IOs have been the subject of study for a very long

14 *See* MULDOON, p. 102, 107, 120; AMERASINGHE.

15 *See* Statute of the International Court of Justice art. 38(1)(c); *See generally* FRIEDMANN.

16 Typically the analyses deal with international criminal law, and in particular the International Criminal Court. *See*, *e.g.*, SADAT, p. 151; CHRISTENSEN, p. 391; *see also* EHRENREICH.

17 LEROY & OLIVER, p. 416-417.

18 *See*, *e.g.*, the American Society of International Law's International Organization Interest Group website at http://www.asil.org/interest-groups-view.cfm?groupid=25 (last checked Jan. 6, 2011).

19 A brief Google search for courses on international organizations turns up numerous such courses offered at institutions all around the world.

20 *See*, *e.g.*, LEROY & OLIVER.

time.[21] Yet, a review of a large sample of those books and law journals found few comparative considerations of the role of legal traditions, systems and cultures in understanding IOs. Instead, scholars and others have considered, among other things:

– The organizational structures of IOs;
– The IO as corporation;
– IOs' interactions with other IOs;
– IOs' dispute settlement regimes;
– IOs' interactions with international, regional and domestic law;
– IOs' financial structures;
– The theoretical underpinnings of IOs; and
– Internal and organic law of IOs

Of these, only the dispute settlement analysis occasionally comes close to discussing issues that may be related to legal culture and traditions, but for the most part the analyses have been superficial.[22] In other words, a great deal of thought and energy has been spent exploring the workings, powers, competencies and internal administration of the large numbers of increasingly important IOs, but very little consideration has been given to the role of legal cultures and traditions in the creation, operation and development of IOs.

Understanding why this method of analysis is not applied to international law and its organizations by both international law and comparative law scholars, practitioners and officials is in fact a critical part of this introduction to the methodology. After all, the reasons why a methodology that is so beneficial can be effectively ignored for so long provides insights into potential obstacles to its application—now and in the future. One basic reason may be that IO scholars lack sufficient knowledge about or comfort with comparative law. It may also be that for those that are knowledgeable they would not even think to consider IOs through a comparative lens. Similarly, it may be that comparatists lack knowledge about or comfort with international law, and IOs in particular. Furthermore, even if they did have the knowledge, they would typically not apply their comparative law expertise to a consideration of IOs.[23]

A major source of these parochial behaviors lies in the fact that the "domain of things global" is artificially segmented into too many supposedly separate fields, including among others: public international law; transnational litigation; international arbitration; international economic law; comparative law; private

[21] *See*, *e.g.*, THE YEARBOOK OF INTERNATIONAL ORGANIZATIONS, founded in 1910 (see http://www.uia.be/yearbook).

[22] *See*, *e.g.*, ZAPATERO, p. 67 (focus on dispute settlement, and while excellent, too sparse on the issue of legal culture and traditions).

[23] *See generally*, REIMANN.

international law, international human rights, and so on. Each of those is then further segmented into subfields, so, for example, within public international law there are such areas as: international organizations; Space Law; and the Law of the Sea.[24] Within international economic law there is, among other subfields: international trade; international financial and monetary law; and international investment. Within comparative law there will be country specialists such as specialists on Japanese or German law, and there will be legal field specialists such, as experts on comparative commercial law or property law.[25] This specialization is not unique to comparative or international law. It is a phenomenon present throughout the law, and other academic fields. This trend is all the more disconcerting for non-domestic law fields given that modern movements inside and outside the law, such as "globalization", increasingly tie the different fields together. Nonetheless, there are simply too few attempts to span multiple fields—few wish to become the modern legal renaissance man or woman.[26]

With respect to legal academia, and to international and comparative law in particular, the possible reasons for this specialization are quite clear. As an initial matter, it is a long and hard educational process to become a legal polymath, with costs in terms of early recognition as an expert, both by failure to stake out a field and by the lost research productivity as time is employed in learning new fields.[27] Those stresses are compounded by the trend within academia, as in practice, towards rewarding increasing specialization—as a result of hiring and promotion practices that too often select new hires with proven expertise within but one field. The push towards specialization is even present in law schools which now face competitive pressures to offer students the opportunity to graduate with emphasis or certificates of specialization in discrete fields. It is often informally suggested to students that such specialization will lead to more job opportunities in the law firms that themselves increasingly force their attorneys into specialized practice.[28] All these factors reinforce the barriers to research that spans comparative and international law.

[24] For a larger list just consider the number of interest groups in the American Society of International Law. *See* http://www.asil.org/interest-groups.cfm (almost 30 sections, most of which reflect substantive subfields).

[25] Another on-going research project of the author suggests that within comparative law there is a strong preponderance of private law specialists, which means even fewer will then have knowledge of "public" international law, even as many comparatists are also experts in private international law (conflict of laws).

[26] The better term is a "polymath".

[27] I, in contrast, at great cost, am in the process of trying to become a transnational law polymath, through teaching and writing across the broad legal field that encompasses matters international and transnational.

[28] *See generally* CATÁ BACKER especially footnotes 1 and 2.

Another reason that international law fields will not have comparative law methodologies applied to them is the perception that international law's *sui generis* character precludes the relevance of a comparative analysis involving methods and examples from domestic legal traditions and systems.[29] While international law clearly has some elements that are unique, that in and of itself is not sufficient to rule out application of comparative law methodologies to international law. After all, every legal system is unique in that they do not exactly resemble any other legal system. But, if the *sui generis* characterization simply means it is unlike other legal systems in all respects, that is evidently not true. For sure, there are some characteristics and traits in international law that will not be found in other legal systems. For example, that the traditional subjects of international law are states and that individuals, traditionally, were merely the objects of international law. But then that is not so radically different from domestic systems as domestic systems do have states as subjects—either in the context of such issues as sovereign immunity or, quite frequently, through the regulation of foreign parastatals' business activities. Similarly, international law today does have individuals as the subjects of international law in such fields as human rights and international economic law, though it is still not quite the same relationship as is the case between citizens and their states. So, in fact in those two cases we can easily point to some level of comparability between domestic legal systems and international law—dispelling the idea that international law is so radically different as to be incapable of being subject to a comparative examination.

More specifically with respect to legal culture, part of the reason that comparative legal cultural analyses of international law issues have failed to garner much interest is that, as noted before, legal culture is frequently exhibited and expressed behind closed doors.[30] It is also all too often executed at the subconscious level—out of view.[31] Legal culture often takes place as a result of subliminal or reflexive actions by the negotiators, IO civil servants, state parties, dispute settlement arbitrators and so on. This will occur when a legally trained IO participant reaches into their mind to create or fix some issue—and employs a device or idea that is there as a result of their legal training or experience. That training and experience will be derived from a person's domestic as well as international law past, thereby further complicating the issue. Even non-legally trained participants in IOs will employ ideas and solutions that stem from the legal culture of their society or past experiences. Sometimes, as a result of the impact of foreign mass media, individuals may suggest ideas based on other legal cultures and not even realize those

[29] *See* PICKER (International), p. 1090.
[30] *See*, *e.g.*, PAULSSON, p. 16.
[31] *See* PICKER (WTO).

ideas are alien to their own legal culture.[32] Thus, importation of domestic legal culture may often take place without serious thought. There are, of course, some notable exceptions, such as the conscious consideration and use of law from different legal traditions and cultures that was employed to create the substance and procedure of the International Criminal Court.[33] But even in that case there are some concerns about the "fit" of the many legal devices imported from different traditions. Unfortunately it will take some years before that "fit" is fully understood. Nonetheless, for IOs in general, rarely is the issue of legal culture directly noted and confronted.

The fact that international law subjects have typically not been considered under comparative law analyses is hence no indication that such approaches are inappropriate. Rather, it is simply an indication of the historic myopia and parochialism present in both the international and comparative law fields. Critically, the lack of experience of such analyses does suggest that caution should be taken in the event scholars attempt to employ comparative methodologies to international law. The potential pitfalls are numerous. In addition to the usual ones that undermine normal comparative law analyses, there will also be unique snares related to the fact that international law fields are different to the domestic systems that are normally the subject of inquiry in comparative analyses.

4. Likely Pitfalls in a Legal Cultural Analysis of IOs

As powerful a methodology as it is, a comparative legal cultural analysis may also be subject to tremendous hazards—the novice comparatist or international law scholar must beware. In addition to the general or usual mistakes that can be made in any comparative legal cultural analysis, there are also ones specific to a legal cultural analysis of IOs. Each will be discussed briefly below.

4.1. General Errors in a Legal Cultural Analysis

Comparative law, essentially and simply, involves consideration of more than one legal system, tradition or legal culture. Even when the comparatist appears to just be discussing one legal system there is an intrinsic comparison going on between that legal system and other systems, whether the one under consideration is foreign or native to the comparatist. For the manner in which the examination develops, the issues chosen for focus, and the conclusions derived will all flow, con-

[32] Thus it may be that after having been exposed to American and British law-based television programs that constantly portray the use of juries in courts someone in a jurisdiction that does not employ the jury will think that juries are typically used in all legal proceedings, even in their own courts.

[33] *See*, *e.g.*, IONTCHEVA, p. 705-706.

sciously or subconsciously, from the difference between the system under observation and some other system or systems. Accordingly, in all cases comparability is critical. The things being compared, be they substantive law, legal actors, or institutions must be comparable or the comparison will fail. A common phrase in English denoting failed comparisons is that the two things are "like apples and oranges". But, along with the demand for comparability is an equally strong need for context to be taken into account. Thus, while certain external appearances may suggest radical differences between apples and oranges, they are in fact essentially the same thing from a scientific standpoint.[34] But, when being selected as a healthy snack, they are indeed quite different. So, their comparability depends on the context in which the comparison is being made. A more scholarly example was provided by the great comparatist and legal historian John Langbein when critiquing a comparative study of the number of judges in the United States and Germany.[35] In that critique he noted the failure of the comparatists to take into account the fact that the vastly different roles of the judges in each system explained the relative need for fewer judges in the United States than in Germany. In the United States the parties' lawyers handle many of the tasks that in Germany would be handled by the judge, resulting in the need for fewer judges.[36] Thus true comparability, taking into account context, is essential to a successful comparative analysis.

Context, however, includes many different issues, including the relevant history, language, ordinary culture, constitutional structure, politics, and so on. All very important, yet difficult to include in all cases and for all issues. Indeed, the fear of not taking everything into account can itself also lead to failure—the failure of the analysis to even be undertaken. In this case the methodological hazard is in the failure to engage in the analysis for a paralyzing fear of lack of expertise in the field, a failing which could deprive the field of many helpful insights. But, so long as it is understood that the analysis is preliminary, valuable lessons may still be learned from even superficial comparisons, though the superficiality must be noted. Indeed, it may even be the case that a comparatist's relative lack of expertise of a system may be a benefit, allowing the comparatist to see issues obscured to the expert that is swamped with too much information. This methodology has been described as the "*See the Forest, Not the Trees*" methodology.[37] Of course, such

[34] *See* SANFORD (scientifically "apples and oranges are very similar"); *see also* VALCKE, p. 720 (noting the comparability of apples and oranges in the context of comparing legal systems).

[35] *See* LANGBEIN, (Judges).

[36] *Id.* p. 50.

[37] *See* PICKER (China), text at fn 3. The name of this methodology is a paraphrase of the saying that one may not be able to see the "forest for the trees", which has been explained as describing "someone who is too involved in the details of a problem to

a macro consideration, such an examination from 40,000 meters (or even feet), will necessarily imply the use of simplifications and an end result that may itself be a generalization, but one that will nonetheless be of some value, so long as it is clear that the examination is based on generalizations. After all, characteristics at the simplified and generalized level still play a large role in "creating the overall legal culture which then wields its 'invisible hand' to shape the legal environment".[38]

Relatedly, another pitfall lies in wait for those that may not be aware of the larger and interconnected legal structure of either the foreign or home legal system, and in particular may not be aware of the relevant safeguards in each system. A safeguard is a device which offsets potential failings or inadequacies of other legal devices, procedures and rules in the same legal system. Safeguards are often hidden or not clearly tied to the device requiring the safeguard. An example is the role of evidentiary rules as a safeguard to offset some of the inadequacies of jury systems.[39] Similarly, and more visible, is the safeguard abilities of a judge to overturn a jury verdict or reduce damages in civil cases.[40] Any critique of the civil jury system without including consideration of those safeguards might lead to potentially erroneous insights. Similarly, any comparative analysis that recommends importation of legal concepts and ideas must ensure that the safeguards are imported as well, or that their safeguards' functions or the failings of the imported devices are otherwise addressed in the importing system.

Finally, though there are many other pitfalls not discussed here, another common comparative law problem is a failure to understand the vital role of perspective in comparative analysis—that two people may not see things the same way. This is a reflection of the idea that there may not be objective realities on which to base grand comparative analytical conclusions.[41] This is particularly true when members of one legal culture are working in another and often alien legal culture. Similarly, there may not be one correct methodological approach to a comparative law issue. Thus, the position that the researcher must be fluent in the language of the legal systems under examination may be overly strict and undermine good work that can be done by those lacking such language fluency. If linguistic fluency was a requirement for good comparative work then most comparative work would merely span two, rarely three jurisdictions, for it will be a rare comparatist that has working fluency in more than three languages. Also, an approach that required language fluency would also lock comparatists for their professional life into

look at the situation as a whole", *see* Dictionary.com at http://dictionary.reference.com/browse/can't+see+the+forest+for+the+trees (31.12.2010).

38 PICKER (WTO), p. 119.

39 LANGBEIN, p. 273.

40 *See*, *e.g.*, MARTIN, p. 688-689.

41 *See* PICKER (America).

only those jurisdictions for which they had linguistic fluency, a likely inefficient use of skilled comparatists. Also, some perspectives would be lost, as typically most people's second language is likely to be one of Chinese, English, French, German, Hindi, Russian or Spanish, with English as the one most likely to be a second language among scholars.[42] Consequently, the chances are that a Spanish comparatist would not have working fluency in Russian and would then be unable to consider the Russian legal system, yet they may have some insights of great value. Methodological and substantive perspective are accordingly two approaches that should be bought to bear in both comparative analyses of domestic systems as well as in those of systems in the international legal order.

4.2. Errors Unique to the Analysis of IOs

In addition to the usual comparative methodological errors, comparative analyses within the international legal order must be careful of some special issues not normally encountered in domestic comparative examinations. Indeed, despite earlier comments in this paper concerning the *sui generis* nature of international law, there are some different realities associated with the international legal order and with its studies that must be considered. Those realities are, however, amenable to many of the standard comparative approaches, albeit with some modifications.

Some of the problems likely to be encountered will arise when IO specialists engage in comparative analyses, while other difficulties apply when comparatists enter the world of IOs. One issue that applies to the IO specialist that seeks to use domestic systems for insights into an IO is the likely lack of comparative law training or experience of that specialist. Similarly, the comparatist seeking to consider an IO may not have the insiders' knowledge of the organization, and, given the lack of transparency in many IOs, that may be a serious handicap. These are far from insurmountable obstacles, but do need to be considered at the beginning of a comparative examination on an IO. The IO specialist, therefore, may need to consult with comparatists in order to learn comparative law methodologies,[43] while perhaps a little harder, the comparatist will need to develop contacts within the IO.

Another problem with a comparative analysis of IOs that is different from traditional comparative analyses is that the primary subjects of international law are states and states are not easily comparable to the primary subjects of domestic systems—humans. Indeed, even when domestic systems deal with foreign states they typically employ special rules and accord states special treatment, particular-

[42] *See Vistawide: World Languages and Cultures* webpage, available at http://www.vistawide. com/languages/top_30_languages.htm.

[43] *See* PICKER (America), (discussing comparative law training for non-comparatist academics, practitioners and officials).

ly when the state is acting in its public capacity.[44] For example, while individual punishment may make sense in a domestic system, when applied to individuals, it is considerably more complicated, conceptually and physically, when applied to states. Furthermore, there are major theoretical, qualitative and quantitative differrences between the relationship of individuals to states and that of states to international law. For example, the international legal order includes only a few hundred state subjects, compared to the millions of subject citizens in each state—a significant quantitative difference between the two. Furthermore, the correspondingly closer connection of the state to the international legal order leads to a very strong positivistic element in international law. Thus, unlike the case for citizens in states, specific and clear state consent is typically required for an international law to apply to a state.[45] Reflecting that reality, diplomacy, often in a form that is akin to extra-legal process, is still the main mechanism of state-to-state interaction and dispute resolution. Domestic "rule of law" systems are, for the most part, not like that though that suggests perhaps a greater comparability between international law and those legal cultures that are less litigious and more meditative.

Another issue of comparability between the international legal order and domestic systems relates to differences in the divisions, sources and fields of law within each legal system. International law is both narrower and broader. It is narrower in the sense that most of international law is public law—hence the name "public international law." Indeed, much of public international law might be thought of as similar to domestic state's "constitutional law" or administrative law, both in the sense that it regulates the international legal order's governmental structure and in the sense that it often concerns fundamental legal norms. That strong public nature suggests that comparability with non-public elements of domestic systems can be difficult. After all, in order to consider domestic system's "private law" in a comparative analysis of a part of the international legal order, one has to be creative, using imagination, analogy and lateral thinking. For example, the law of treaties may be with some imagination compared to contract law, while international economic law could be compared to commercial law.[46] While these are not exact matches, they may work well enough to provide interesting and potentially quite helpful insights.[47]

But, even as the public nature of international law may suggest it is more narrow than domestic systems, international law may employ greater use of other types of law than is often found in domestic legal systems, especially western legal sys-

[44] *See*, *e.g.*, the U.S. FOREIGN SOVEREIGN IMMUNITIES ACT of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.), and the U.S. judicially created Act of State Doctrine, first annunciated in *Underhill v. Hernandez*, 168 U.S. 250 (1897).

[45] Though there are exceptions, such as for jus cogens.

[46] *See* PICKER (International), p. 1117-1118, 1126, 1130-1133.

[47] *Id*.

tems. This is specifically the case with respect to the significant employment of customary law in international law.[48] Also, the explicit use of fundamental law, jus cogens, is also somewhat alien in western domestic legal systems. While there are natural law and fundamental principles within western domestic legal systems, they tend to figure rarely and less explicitly in those systems. But luckily for comparative analyses, jus cogens are not that large a part of international law, mainly comprising "prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and 'the principles of the United Nations Charter prohibiting the use of force.'".[49]

Another methodological problem relates to the fact that the international legal order is qualitatively different from most developed western legal systems. It is substantively diffuse and its lacks institutional centralization. It does not have an overarching authority (aside from the dysfunctional and generally ineffectual UN Security Council). Also, it may be relatively poorly funded and resourced when compared to developed western legal systems.[50] International law is also substantively uneven, making holistic analyses difficult. Parts of it are ancient,[51] while others of very modern vintage.[52] Some international law may be considered rather well developed,[53] while other parts are significantly underdeveloped.[54] Indeed, international law can be very slow to develop, especially when customary international law is being created (though on occasion that may be very fast indeed).[55]

[48] Customary law is found in western legal systems, but in most, though not all of those states, it is quite carefully circumscribed and easily displaced by the ever growing body of statutory law. *See* GLENDON/CAROZZA/PICKER, p. 226 n.2, p. 241, and p. 632-634.

[49] CRIDDLE & FOX-DECENT, p. 331-332 (citing Restatement (Third) of Foreign Relations of the United States § 702 cmts. d-i, § 102 cmt. k (1987)).

[50] Given the size of the justice establishments in developed countries, it is hard to believe that, outside the international law work carried out by those same civil servants in domestic jurisdictions, there is in any way an equivalent or proportionate number of international civil servants working directly with international law in the international organizations.

[51] *See* BEDERMAN, p. 12-15, 21, 24 (describing Greek and Roman recognition of the rights of embassies and envoys and treaties).

[52] For example, the birth of Space law with the launch of the Sputnik satellite in 1957. *See* BEEBE, p. 1738.

[53] Consular relations is a rather well developed part of international law. *See*, *e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261, TIAS No. 6820.

[54] International environmental law is still quite immature and un- or under-developed. *See* DRIESEN.

[55] *See* PICKER (View) p. 183-184. For example, it took only fifteen years for the development of the customary international law concerning continental shelf submarine resources. BEDERMAN (*International Law*), p. 3, 18.

It is visibly robust in some regions and quite absent in other regions of the world.[56] It strongly regulates some fields,[57] and leaves other fields relatively untouched.[58] Further confusing any analysis is that it may be interpreted differently in different international tribunals and in different national courts.[59]

Finally, because international law and its organizations have grown in an ad hoc and inorganic manner it is the case that different parts of international law reflect different legal traditions and legal cultures.[60] International law includes within it characteristics found in many different legal traditions, It is, however, for the most part solidly within the western legal tradition, with strong civil law aspects, but with increasing facets of Anglo-American/Common Law.[61] Indeed, it has been argued that the manner of that distribution is similar to those legal systems identified as "Mixed Jurisdictions", such as Scotland, Louisiana and Quebec.[62] Accordingly, comparatists and IO scholars engaged in a comparative analysis of international law should take into account international law's mixed nature, and consider the Mixed Jurisdiction legal systems as the comparable domestic systems.

The above are just a few examples of the ordinary and special considerations that must be taken into account when engaged in comparative analyses of aspects of the international legal order. Clearly there are many more, some will be specific to individual fields within the international legal order, while others will be of more general application. But, what not to do or what are the pitfalls is merely one part of what it is necessary to know when engaged in these analyses. Another significant part comprises the measures and approaches that should be undertaken in such analyses. The next section will provide some examples of such recommended actions.

[56] Compare the role and application of international law in the European Union and in the Horn of Africa.

[57] For example, international trade is heavily regulated through the World Trade Organization and hundreds of preferential and regional trade agreements.

[58] Competition law is relatively untouched by international law, despite its inclusion in the ill-fated Havana Charter, an attempted agreement to create an international trade organization in the immediate post-war period. *See* GERADIN.

[59] *See* SCHADBACH, p. 385-386. *Compare* E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) (finding no cover for emotional damages under the Warsaw Convention), with *id.* at 551 (referring to the only decision from another jurisdiction that held that the Convention should be read to include psychic injury damages (*citing* Air France v. Teichner, 38 (III) P.D. 785, 788 (1984) (Isr.).

[60] *See generally* PICKER (International).

[61] *Id.*

[62] *Id.*; *see also* PICKER (Beyond the Usual Suspects).

5. Some General Approaches for Legal Cultural Analyses of IOs

In many respects, the pitfalls noted above can be viewed as the mirror image of those tactics that should be employed in a comparative analysis of international organizations. Thus, the mistake of failing to take context into example, suggests context should be employed. Similarly, and as was explicitly noted above, the erroneous fear of simplification directly led to the "See the Forest, Not the Trees" approach. Nonetheless, those inferred methodologies are quite general and somewhat vague. This section will therefore suggest a few examples of concrete and specific approaches to a comparative legal cultural analysis of IOs.

While employment of simplification and generalization was suggested above, there was no specific direction provided as to how to employ a simplification and generalization method. As an initial matter, one helpful simplification in a legal cultural comparative analysis is to start with a focus on the primary legal tradition characteristics that may be present in the international legal issue under consideration.[63] That simplification is made just a little easier by the fact that most parts of the international legal order have been most strongly influenced by the legal cultures associated with the two dominant legal traditions of the world—the common and the civil law traditions.[64] Even as the differences between those two traditions may appear to be disappearing, their conventional characteristics and associated legal cultures still exert a fundamental influence on the international legal order.

But, one must at some point consider the role of other traditions. Indeed, for some parts of the international legal order it may make sense to very quickly turn to non-western legal traditions. For example, international development law, a part of international law, will need to consider the role on non-western legal traditions and cultures for many reasons.[65] In particular, this is because many of the states most impacted by development law will have non-western legal cultural aspects, despite, for the most part, formally employing a variant of the civil or common law traditions. That non-western content will have an impact on the legal culture of international development law through those states' engagements with the field in the diplomatic and dispute resolution arena. It will also be an issue when those states implement international development law into their domestic legal systems.[66]

Non-western legal traditions and cultures also should be considered when the IO handles issues related to family law, which is very often non-western in many

[63] *See*, *e.g.*, PICKER (WTO), p. 119.
[64] *See* PICKER (International), p. 1104-07.
[65] *See* PICKER (Development).
[66] *Id.*

countries, developed and developing.[67] Additionally, there are regions of the world with very strong formal as well as informal non-western traditions and legal cultures, and they should be taken into account. For example, the very strong presence of Islamic law, formally and informally in countries in the Middle East and Asia, should not be ignored. Finally, there are some very influential states in the international legal order, great powers one might say, that have exceptionally strong but informal non-western legal cultures. That non-western legal culture will likely impact those states' interaction with the international legal order, and consequently help to shape the legal culture of the different parts of the international legal order. For example, China has very strong non-western legal cultural characteristics, such as an enduring role for Confucianism.[68] That part of China's legal culture will likely have impacts on a whole host of China's understandings and interactions with IOs and will likely shape China's future contributions to the international legal order.[69]

Whether approaching the comparative legal cultural analysis of an IO from a civil, common or non-western legal tradition and cultural perspective, it should be borne in mind that some parts of a legal system may be more amenable than other parts to comparative analyses. For example, substantive characteristics may often be less relevant for comparative analyses than organizational, structural or systemic features. This is because domestic legal systems' substantive law are very often tailored to the specific domestic regulatory concerns of states and may not be as translatable to international law systems, and in particular may be inapplicable to IOs, which typically have quite different substantive concerns. As always, there are exceptions such as the U.S. dormant commerce clause, which may be highly relevant to the underlying substantive law of the WTO.[70]

Sometimes, identification of congruence of the IO with a systemic or organizational feature of another legal system suggests a broader legal cultural or tradition affinity between the two. For example, the primacy of codes, theory or doctrine within the substantive law of the IO may suggest a legal cultural affinity with the civil law systems, as those systems traditionally have elevated those features more than is typically the case for the "pragmatic" common law legal systems.[71] The same would be the case if in the IO there was a significant role for scholars and scholarship in the development and operation of the IO as historically the role of scholar has been greater in the civil than in the common law systems.[72] Similarly, divining the nature of dispute decisions (such as case law) can be insightful, for it

[67] *See*, *e.g.*, GOODMAN; ABU-ODEH.
[68] CHEN, p. 19.
[69] *See* PICKER (China).
[70] *See*, *e.g.*, FARBER & HUDEC.
[71] *See*, *e.g.*, WEISS, p. 435; STRAUSS, p. 240.
[72] GLENDON, p. 179, 432.

will suggest a common law character it they are akin to the common law's de jure precedential effect, as opposed to the typically de facto precedential effect of the civil law.[73] Likewise, if the IO has such a formal dispute settlement process the character and background of the arbitrators or judges may be instructive. For if the "judges" are civil servant-like and inquisitorial, then perhaps the IO is in those respects closer to the traditional character of civil law judges, as opposed to the more passive and practice-orientation characteristics of the common law judges.[74] Relatedly, one can infer a common or civil law like character from the role and behavior of the attorneys in dispute resolution—with traditionally a more aggressive and proactive style in the common law systems and a more passive and responsive behavior by attorney in civil law systems.[75] Recognition of these congruencies can be very helpful in the ultimate identification of the IOs legal culture.

Of course, there may be a place for a broad legal cultural analysis of the complete set of IOs across the international legal order. Yet, each of the IOs is different, perchance *sui generis*—with different constitutions, competences, and structures. There is, however, an acceptance of a common set of principles and concepts that are broadly applicable to IOs. Those include privileges and immunities, textual interpretations, responsibility and employment relations.[76] It has even been referred to as being "common to all IGOs (unless they exceptionally have deviating provisions) and is thus 'common law', both in the literal sense and in the Anglo-Saxon sense of customary law."[77] Those common principles, mechanisms and substantive laws would likely benefit from a comparative analysis with domestic systems, traditions and cultures. As such, the same concerns and approaches discussed above with respect to an examination of just one IO should also be considered with respect to IOs as a whole.

The above sections on methodological pitfalls and tactics represent just a few of the dangers and lines of attack that should be considered when undertaking a comparative legal cultural analysis of international organizations. Application of these lessons should facilitate identification of insights, questions and further lines of inquiry with respect to the legal culture(s) of the IO under examination. Those perceptions should provide greater understanding of the IO and its interactions with domestic systems as well as with the rest of the international legal order—particularly if the present and future legal cultural characteristics of the IO can be identified.

[73] *Id.* p. 244.
[74] *See* PICKER (WTO), p. 126-127; GLENDON, p. 167, 490.
[75] *See* PICKER (WTO), p. 129; *see also* LANGBEIN (Judges).
[76] *See generally*, SEYERSTED.
[77] *Id.* p. 4.

6. Identification of Legal Tradition & Culture Trends within IOs

While many insights can be gleaned from a comparative or legal cultural analysis of an IO, there is one critical issue that is worth identifying in each case—whether there is a noticeable trend or drift towards a particular type of legal tradition or culture. Indeed, such trends will be likely for IOs, for IO, like domestic legal systems, are not static and are in a constant state of development and change, with correspondingly important changes in legal culture. While these issues may seem more relevant to the older IOs, they are clearly relevant to the new IOs as they too grow and mature. Furthermore, it will also be relevant to the extent an IO is a successor organization, formally or informally, to a prior IO, as the WTO was to the GATT. For example, among other changes in legal culture that took place when the WTO succeeded the GATT was a change from a diplomacy-based to a rule-based organization. There is little question that change has had tremendous impact on the legal culture of the WTO. Plainly, the issue of transformation and change of an IO's legal culture is important to an understanding of the IO, today and in the future.

In my previous work I have argued that the legal traditions in international law have been undergoing substantial transformation.[78] I argued that while the international legal order historically was strongly civilian in character, it has over time, and particular during the last century, become ever more common law-like.[79] Identification of a trend for IOs should also be possible, though that trend may be different from that of the over-arching international legal order, and each IO will likely have its own unique legal cultural trend. Identification of the trend or direction of movement of the legal culture of an IO is critical for it will, among other things, permit states with similar legal cultures easier access to that IO, for there will be less cultural disconnects between those states and the IOs. For example, if the IO's dispute settlement panels become more common law-like then perhaps this will provide an advantage to the common law countries and their law firms, helping to solidify their already dominant position in the provision of global legal services.[80] Similarly, if the civil law becomes more dominant in an organization then that would provide an advantage to civil law system countries and their law firms.[81] Relatedly, the legal culture that emerges within the IO will also have an impact on the development of the organization's substantive law, favoring importation of ideas and doctrine from those traditions and legal cultures most similar to the IO's resultant legal culture.

78 *See* PICKER (International).
79 *Id.* p. 1105-1108; *see also* PICKER (WTO) p. 133.
80 *See*, *e.g.*, FAULCONBRIDGE/BEAVERSTOCK/MUZIO, p. 457; ALFORD, p. 81-82.
81 *See* PICKER (WTO), p. 135.

My past research into these issues has suggested that there are some common factors that can have a decisive impact of the development of an IO's legal culture. The discussion below will draw from that work[82] and further expand on it. The first is the fact that large numbers of IO officials, practitioners or scholars have pursued legal studies in law schools in common law countries.[83] Furthermore, even when law students do not attend common law system law schools, it will often be the case that their lecturers and advisors studied or have spent considerable time at universities in common law countries.[84] But, education institutions outside the common law world have now entered into competition with the common law universities for the valuable foreign student market—even going so far as to teach in English.[85] Indeed, there was a long history of civil law universities dominating western legal education and thought.[86] Furthermore, it is debatable just how much those civil law institutions can influence the common law scholars, practitioners, officials and students that attend those organizations. It is likely that there will not be the same large influence, due as much to the issue of language as anything else (more on the very important role of language below). Consequently the common law countries' education institutions' current domination may not be so easily displaced.[87]

Language, as noted above, is a critical factor in the development and sustenance of a legal culture. Language and legal tradition are closely tied together, with, for example, English associated with the common law and French, German, Spanish and Italian tied to the civil law tradition.[88] Furthermore, Chinese and Arabic are also typically associated with non-common law legal systems—be they civilian, socialist, or Islamic legal systems. Indeed, any major western language employed other than English will tend to end up reflecting more civilian, or rather, less Anglo-American and hence common law legal culture within the institution.[89] Whereas the use of English will tend to strengthen the emergence and perhaps dominance of a common law legal culture.[90] Of course, the ever increasing role of English, as the common second language of the world, suggests a continuing and potentially expanding influence of common law legal cultural characteristics. Though, with more civil law-origin authors writing in English, there is always the

82 *Id.* p. 133-135.
83 *Id.* p. 133; CLARK, p. 1061. *See generally* SILVER.
84 Many will also submit articles to the numerous and less demanding student run law reviews in the United States and thus will, to some extent, be forced to adopt to American legal culture in order to have their scholarship accepted.
85 *See* CLARK, p. 1075.
86 *See* GLENDON (*Foundations*), p. 56-57; *see also* CLARK, p. 1075 n. 165 (noting the dominance of German legal education as recently as the nineteenth century).
87 *See* CLARK, p. 1075.
88 *See* PICKER (International), p. 1124.
89 *Id.* p. 1123-1125; *see also* LOUBSER, p. 144-147.
90 *Id.* p. 107-108; *see also* ÖRÜCÜ, p. 102.

possibility that their writings may gradually ameliorate the impact of English as a vehicle for common law infusion. It may be wondered, however, whether the very use of English might not have the opposite impact and cause those civilians to employ ever increasing common law legal cultural attributes in their writings. There is also very little countervailing use of non-English languages by Anglophone scholars, practitioners and officials—a reflection of the foreign language deficit in common law countries.[91] Thus, language is visibly a very strong factor in predicting the trend and eventual legal culture and tradition of an IO.

Relatedly, another factor that may suggest a long term legal cultural trend in an IO will be the composition of the legal cultural background and legal education of the officials within the IOs. Of course, as noted above, given the potentially dominant role of common law legal system's post graduate training of civil law origin officials, there may be a built-in bias towards the common law legal culture despite the specific geographic composition of the IO. But, those factors will also be impacted by internal organization issues within the IOs. For example, it may be necessary to examine geographic quotas to see whether there is a bias towards officials from one or the other legal cultures.[92] Also, the entrance examinations or interview procedures within the IOs should be examined to determine whether they may favor one of the traditions or some of its specific legal cultural traits.[93] Similarly, internal style should be considered to see whether it may promote one of the legal cultures over the others. For example, an internal writing and presentation style guide that requires writing and analysis that is closer to the Anglo-American than the civilian legal cultures would be such an internal style. But, too often a lack of transparency in IOs means that internal processes in IOs are not visible to outside examination.

Internal workings are among the characteristics that may be apparent or derived from a consideration of the negotiations that set up the IO. So, if the organization was created as a subpart or under the aegis of another IO, that parent organization may have transferred its legal culture into the new IO. Or the overall trend towards a specific legal culture may have been foreordained by the role and imbedded influence of one or more countries or a region that dominated the original negotiations. It may even be that the supposedly "neutral" international civil servants or NGOs that staffed the negotiations could have, intentionally or unintentionally, influenced the subsequent legal cultural trend of the IO. Indeed, the location of the negotiations, as well as the eventual location of the headquarters can be vital clues, particularly if they are located in places with "over bearing"

91 *See* CLARK, p. 1076-1077
92 *See* ACEVES, p. 354-360.
93 *See* PICKER (WTO), p. 134.

legal cultures.[94] After all, the international civil servant will be living in that environment, and it is not unlikely that some of that legal culture will be absorbed. This may be especially the case for those international civil servants whose whole professional life is in the international arena. Also, those civil servants are likely not to have much, if any, practice experience in their home jurisdiction and so it may be that their knowledge and experience with their home legal culture is more academic and theoretical than practical. Also, given their career choice it may very have been the case that their training and interests were more public law and constitutional law than in those areas in which one may more typically find the heart of the legal culture. Thus, their legal background may be insufficient to ward off the infection of a strong foreign legal culture.

There may also visible trends towards a resultant legal culture discernible from the IO's substantive law—visible from both its internal and external law. If the IO's external law, the law related to its mission within the international legal order, is similar to the law of specific legal systems it may in the long term succumb to the influence of the legal culture in those systems.[95] Furthermore, some IOs work so closely with or in a state or region, they may necessarily absorb some of that local legal culture. It may also be worth considering whether the internal law of the IO is based on or related to national laws which would be infused with the legal culture of that state.[96] Indeed, headquarters agreements, while nominally unconcerned with the mission and substantive activities of the IOs, may be worth reviewing as well, for they can form the basis for very close relationships between the host state and the IO.[97]

Politics and power, of course, can not be ignored. The role of dominant players, and their legal cultures, within an IO can have a very profound impact on the

[94] The American legal culture could be described quite fairly as being "over bearing", which may be due to, among other things, the exceptionally strong role that law has in ordinary American society.

[95] For example, did the World Bank's post-war mission track the foreign policy goals of the United States quite closely, and if so might that have led to some infusion of American legal culture?

[96] It has been suggested that the internal law of IOs are "in substance more parallel to (public) national law of States than to public international law, but writers falsely apply principles of international law also to internal IGO law, instead of drawing them from national (public) law." SEYERSTED, p. 74.

[97] HQ Agreements can lead to close interaction between the IO staff and the host, often at the level of interpreting what constitutes local law. *See*, *e.g.*, Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, (Adoption: 07.06.2007, Entry into Force: 01.03.2008), Article 6 (5) ("The Court shall prevent its premises from being used as a refuge by persons who are avoiding arrest or the proper administration of justice under any law of the host State.").

eventual legal culture of that organization.[98] Those states' impacts may be detected through greater than expected involvements in the IO's policy development and implementation, as well as through greater than expected levels of participation in the IO's dispute settlement process. Specifically, the dominance and its impact within the dispute settlement process may be exhibited through the state's choice of cases (to prosecute or defend) as well as through the substantive arguments presented, all of which may then insert a legal cultural influence on the growth of the organization and its law. Those dominant players will often, but not always, be great or regional powers—with their own unique legal cultures.[99] China in particular will clearly continue to increase its position within international governance and as such will correspondingly increase its unique legal cultural influence.[100]

Finally, a critical issue to consider is whether there is a legal culture or tradition which may be more suitable to the needs of the IOs at issue.[101] For example, and just considering the general competition between the common and civil law traditions and their associated legal cultures, in some cases it might be that common law legal cultural characteristics, such as its pragmatism, may be more suitable to an IO's needs. Or, in some cases, it could be that a systematic, principled and code-based approach would fit an IO better, in which case legal cultural characteristics from the civilian legal traditions would be more suitable. Or as a general matter, it might be that a civil law legal culture is better suited to a diplomacy-based style of international law, while the common law might be more suited to a "rule of law" style of international law.[102] If the answers were known for each IO, or perhaps for IOs in general, perhaps there might be an effort to steer them towards the "better" tradition.[103]

7. Conclusion

While a comparative legal cultural analysis is a difficult task, involving numerous factors and pitfalls, the insights it can provide will be of great help in understanding IOs as they develop and mature. More concretely, identification of an IO's legal culture is important because knowledge of a system's legal culture

98 *See*, *e.g.*, PICKER (International), p. 1133 (discussing the role of the United States and Great Britain in the creation of the Bretton Woods institutions); *see also* VAN DORMAEL.

99 Among those powers one may find the EU (specifically the United Kingdom, Germany and France, as part of the EU or separately), the United States, Russia, China, Japan, India, Brazil, South Africa, Nigeria, Australia, Japan, Egypt, Saudi Arabia, Israel, Indonesia, and so on.

100 *See* PICKER (China).

101 *See* PICKER (WTO), p. 135.

102 *Id.*

103 *Id.*

allows one to understand the underlying fit of that IO with other legal systems—be they IOs or domestic, regional or international legal systems. It is then possible to identify which legal systems are similar or different to the IO, or which parts of different systems may be similar or different to specific aspects of the IO. Crucially, that knowledge then permits the organization the capability to import legal devices from those legal cultures that are similar, with a correspondingly better chance that the importation would work well within the organization. Indeed, that knowledge might even permit successful importation from dissimilar legal systems with different cultures, as the knowledge of the differences allows possible identification of any "fit" issues that can then be ameliorated.

The importance of identification of legal cultural characteristics within international legal systems is further accentuated when a system is a blend or mixture of different and sometimes competing systems, a situation that is all too common within the international legal order.[104] Additionally, understanding the legal cultural characteristics of a mixed system IO permits a better understanding of how or whether the system fits together within itself. In other words, whether different parts of the system have legal cultural characteristics that may be discordant or work in harmony together. Furthermore, if there are internal fit issues, or parts that are known not to work well, a knowledge of the legal culture may assist in determining whether and what replacement legal devices, including safeguards, should be imported and from which legal systems.

Another source of "mixity" comes from the fact that IOs comprise individuals from numerous and different legal cultural backgrounds. The resultant "Tower of legal Babel" will invariably result in miscommunication and misunderstandings.[105] But, an awareness of the issues of legal culture within an IO would facilitate better internal communications between the different legal cultures of the organization's officials and civil servants. It would also help communications between the IO and NGOs and state members' delegations, and between the different state members as they interact within the context of their IO obligations.[106] Additionally, the more IOs that understand legal cultural issues, then the better the communication between different IOs. All that improved communication should assist in the reduction in conflict that may be caused by legal cultural disconnects.

In conclusion, as international law becomes ever more "real", as international organizations take on more responsibility for the governance of the international legal order, the role of legal culture becomes ever more vital. Understanding an

[104] *See generally* PICKER (International).

[105] Interviews with officials from IOs repeatedly turned up the constant miscommunication and misunderstandings that took place. *See also*, WALD, p. 91.

[106] *See*, KOGAN, p. 521 (discussing the legal cultural clash between European and U.S. view on the precautionary principle).

IO's legal culture and those of competing legal systems, be they of other IOs or state legal cultures, should be an essential requirement for IO officials, practitioners and IO scholars. As such, the methods and approaches and the issues and questions raised here are ones that should be studied and further developed, in general and for specific international organizations and fields of international law.

Bibliography

- ABU-ODEH Lama, Egyptian Feminism: Trapped In The Identity Debate, 16 (2004) *Yale J.L. & Feminism* 145.
- ACEVES William J., Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution, (2001) 39 *Columbia Journal of Transnational Law* 299.
- ALFORD Roger P., The American Influence On International Arbitration, (2003) 19 *Ohio State Journal on Dispute Resolution* 69.
- AMERASINGHE C.F., *Principles of the institutional law of international organizations,* Cambridge Univ. Press 1996.
- BEDERMAN David J., Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis, (1996) 10 *Emory International Law Review* 1
- BEDERMAN David J., *International Law Frameworks,* New York 2001.
- BEEBE Barton, Note, Law's Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis*,* (1999) 108 *Yale Law Journal* 1737.
- BIUKOVIC Ljiljana, Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan, (2008) 11 *Journal of International Economic Law* 803.
- CATÁ BACKER Larry, Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State, (2001) 20 *Penn State International Law Review* 67.
- CHEN Jianfu, *Chinese Law: Context and Transformations,* The Hague (Martinus Nijhoff) 2008.
- CHRISTENSEN Robert, Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court, (2002) 6 *UCLA Journal of International Law & Foreign Affairs* 391.
- CLARK David S., American Law Schools In The Age Of Globalization: A Comparative Perspective, (2009) 61 *Rutgers Law Review* 1037.

- CRIDDLE Evan J. & FOX-DECENT Evan, A Fiduciary Theory of Jus Cogens, (2009) 34 *Yale Journal of International Law* 331.
- DRIESEN David M., Thirty Years Of International Environmental Law: A Retrospective And Plea For Reinvigoration, (2003) 30 *Syracuse Journal of International Law & Commerce* 353.
- EHRENREICH Brooks Rosa, The New Imperialism: Violence, Norms, and the "Rule Of Law", (2003) 101 *Michigan Law Review* 2275.
- ETTINGER David J., The Legal Status of the International Olympic Committee, (1992) 4 *Pace Yearbook of International Law* 97.
- FARBER Daniel A. & HUDEC Robert, Free Trade and the Regulatory State: A GATT's Eye View of the Dormant Commerce Clause, (1994) 47 *Vanderbildt Law Review* 1401.
- FAULCONBRIDGE James R., BEAVERSTOCK Jonathan V. & MUZIO Daniel, Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work, (2008) 28 *Northwestern Journal of International Law & Business* 455.
- FRIEDMANN Wolfgang, The Uses of "General Principles" in the Development of International Law, (1963) 57 *American Journal of International Law* 279.
- GERADIN Damien, The Perils of Antitrust Proliferation: The Globalization of Antitrust and The Risks of Overregulation of Competitive Behavior, (2009) 10 *Chinese Journal of International Law* 189.
- GLENDON Mary Ann, *Abortion and Divorce in Western Law,* Harvard 1987.
- GLENDON Mary Ann, CAROZZA Paolo G. & PICKER Colin B., *Comparative Legal Traditions: Texts, Materials And Cases On Western Law*, 3rd ed., St. Paul (Thomson West Publishing) 2007.
- GOODMAN Josh, Divine Judgment: Judicial Review Of Religious Legal Systems In India And Israel, (2009) 32 *Hastings International & Comparative Law Review* 477.
- IONTCHEVA Turner Jenia, Legal Ethics in International Criminal Defense, (2010) 10 *Chinese Journal of International Law* 685.
- KOGAN Lawrence A., The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without, (2008) 17 *Temple Political and Civil Rights Law Review* 491.
- LANGBEIN John H., The Criminal Trial Before the Lawyers, (1978) 45 *University of Chicago Law Review* 263.

- LANGBEIN John H., Judging Foreign Judges Badly: Nose Counting Isn't Enough, (1979) 18 *Judges Journal* 4; "Langbein (Judges)".
- LEROY Bennett A & OLIVER James K., *International Organizations: Principles and Issues*, 7th Edition, New Jersey (Prentice Hall) 2002.
- LOUBSER Max, Linguistic Factors into the Mix: The South African Experience of Language and the Law, (2003) 78 *Tulane Law Review* 105.
- MARTIN Shaun P., Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts, (1995) 28 *Creighton Law Review* 683.
- MATTEI Ugo, The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe, (2001) 75 *Tulane Law Review* 1053.
- MULDOON James P., Jr., *The Architecture of Global Governance,* Boulder, Colorado (Westview Press) 2004.
- ÖRÜCÜ Esin, The Judge and Jurist in Scotland: On the Verge of a Second Renaissance, (2003) 78 *Tulane Law Review* 89.
- PAULSSON J., Cultural Differences in Advocacy in International Arbitration, in R. Doak Bishop & Edward G. Kehoe (eds.) *The Art of Advocacy in International Arbitration*, 2nd edition, Huntington (Juris Publishing) 2010, p. 16.
- PICKER Colin B., A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization in E. Cashin Ritaine, S. P. Donlan & M. Sychold, (eds.), *Comparative Law and Hybrid Legal Traditions,* Zurich/Basel/Geneva 2010, p. 117; "Picker (WTO)".
- PICKER Colin B., Comparative Law Methodology & American Legal Culture: Obstacles and Opportunities, (2011) 16 *Roger Williams University Law Review* 86; "Picker (America)".
- PICKER Colin B., International Trade and Development Law: A Legal Cultural Critique, 4 (2011) *Law & Development Review* 4; "Picker (Development)".
- PICKER Colin B., China, Global Governance & Legal Culture in J. Nakagaw, (ed.), *China and Global Economic Governance: Ideas and Concepts* (ISS Research Series No.45), Tokyo 2011; "Picker (China)".
- PICKER Colin B., Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach, (2013) 1 *Chinese Journal of Comparative Law* 21-48; "Picker (IEL)".
- PICKER Colin B., International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, (2008) 41 *Vanderbilt Journal of Transnational Law* 1093 "Picker (International)".

- PICKER Colin B., A View from 40,000 Feet: International Law and the Invisible Hand of Technology, (2001) 23 *Cardozo Law Review* 149; "Picker (View)".
- PICKER Colin B., Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond, (2008) 3 *Journal of Comparative Law* 160; "Picker (Beyond the Usual Suspects)".
- REIMANN Mathias, Beyond National Systems: A Comparative Law for the International Age, (2001) 75 *Tulane Law Review* 1103.
- SADAT Leila Nadya, The Nuremberg Paradox, (2010) 58 *American Journal of Comparative Law* 151.
- SANFORD Scott A., Apples and Oranges--A Comparison, 1 *Annals of Improbable Research*, May/June 1995, available at http://www.improbable. com/airchives/paperair/volume1/v1i3/air-1-3-apples.html (scientifically "apples and oranges are very similar").
- SCHADBACH Kai, The Benefits of Comparative Law: A Continental European View, (1998) 16 *Boston University International Law Journal* 331.
- SEYERSTED Finn*, Common Law of International Organizations,* The Hague (Martinus Nijhoff Publishers) 2008.
- SILVER Carole, Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers, 14 (2006) *Cardozo Journal of International and Comparative Law* 143.
- STRAUSS Peter L., The Common Law and Statutes, 70 (1999) *University of Colorado Law Review* 225.
- VALCKE Catherine, Comparative Law as Comparative Jurisprudence--The Comparability of Legal Systems, (2004) 52 *American Journal of Comparative Law* 713.
- VAN DORMAEL Armand, *Bretton Woods: Birth of a Monetary System*, London (Macmillan) 1978.
- WALD Patricia M., The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court, 5 (2001) *Washington University Journal of Law and Policy* 87.
- WEISS Gunther A., The Enchantment of Codification in the Common-Law World, 25 (2000) *Yale Journal of International Law* 435.
- ZAPATERO Pablo, Modern International Law and the Advent of Special Legal Systems, (2005) 23 *Arizona Journal of International and Comparative Law* 55.