Comparativism and Colonizing Thinking in International Law

Le comparativisme et la pensée colonisatrice en droit international

JEAN D'ASPREMONT

Abstract

Comparison is a very common tool for international lawyers. In fact, international law is built around, and draws upon, constructions necessitating an exercise of comparison. In recent years, however, calls have been made to turn the familiar tool of comparison into a central way to engage with international law. This is the idea of those spearheading the rise of a new field called comparative international law. This article critically examines the promotion of comparison as a central mode of engagement with international law and scrutinizes some of the main features of the comparativist project. It particularly shows that the comparativist project, far from laying bare the plurality of international legal thought and practice, enables a thought-colonizing enterprise. The article ends with some reflective observations on the possibility of limiting colonizing thinking in international legal studies. In doing so, it argues that it must remain possible for international lawyers to engage with

Résumé

La comparaison est un instrument très ordinaire pour les internationalistes. En effet, le droit international s'articule autour d'un certain nombre de constructions qui nécessitent un exercice de comparaison. Ces dernières années, certains internationalistes ont proposé d'aller plus loin et de faire de la comparaison un outil central d'analyse en droit international. Cette idée se retrouve dans le projet de droit international comparé. C'est ce projet comparativiste qui retient l'attention ici. Cet article examine en effet les choix et les caractéristiques du projet comparativiste et cherche à démontrer en particulier que le projet comparativiste, bien loin de promouvoir un certain pluralisme de la pensée et de la pratique en droit international, favorise une pensée colonisatrice. Cet article offre par ailleurs une série de réflexions sur la possibilité de limiter, tant que faire se peut, la pensée colonisatrice dans le droit international. Il démontre qu'il doit être possible pour les internationalistes de se pencher sur l'altérité d'une

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alterity in a way that does not unilaterally manufacture the "other," silence it, and speak on its behalf. This approach is called counter-comparability.

Keywords: Colonizing thinking; commensurability; comparative international law; comparative law; comparativism; international law; international legal theory; legal pluralism; modernism.

manière qui ne fabrique pas unilatéralement l'"autre," le condamne au silence et parle en son nom. Cette approche est dénommée la contre-comparabilité.

Mots-clés: Commensurabilité; comparativisme; droit comparé; droit international; droit international comparé; modernisme; pluralisme juridique; raisonnement colonisateur; théorie du droit international.

Introduction

International lawyers have always had a strong affinity with comparison.[1] Comparison seems to be one of those intellectual operations that international lawyers must be capable of undertaking when they invoke and apply international law. In fact, international law is built around, and draws upon, constructions necessitating an exercise of comparison.[2] It suffices to mention here the well-known use of comparison in, for instance, the ascertainment of general principles of law,[3] the evaluation of the practice and *opinio juris* of states and international organizations for the sake of identifying custom,[4] the application of the standard of due diligence,[5] and the

[1] In the same vein, see William E Butler, "Comparative Approaches to International Law" (1985) 190 Rec des Cours 9 at 30 [Butler, "Comparative Approaches"].

[2] For an overview, see *ibid* at 33–45. See also the literature cited by Anthea Roberts et al, "Conceptualizing Comparative International Law" in Anthea Roberts et al, eds, *Comparative International Law* (Oxford: Oxford University Press, 2018) 3 at 4, n 7 [Roberts et al, "Conceptualizing"; Roberts et al, *Comparative International Law*].

[3] See *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 38(1)(c). On the idea that general principles of law do not constitute a source, but, rather, a mode of interpretation by analogy, see Jean d'Aspremont, "What Was Not Meant to Be: General Principles of Law as a Source of International Law" in Riccardo Pisillo Mazzeschi & Pasquale De Sena, eds, *Global Justice, Human Rights, and the Modernization of International Law* (Cham, Switzerland: Brill, 2018) 163.

[4] See International Law Commission, "Draft Conclusions on Identification of Customary International Law with Commentaries" in *Report of the International Law Commission on the Work of its Seventieth Session*, UN GAOR, 73rd Sess, Supp No 10, Addendum, UN Doc A/73/10 (2018) at 137: "In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides." See also *Case of the S.S. "Lotus" (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 21.

[5] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, [1949] ICJ Rep 4. See generally Sarah Heathcote, "State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility" in Karine Bannelier, Theodore Christakis & Sarah Heathcote, eds, *The ICJ and the Evolution of International Law: The Enduring Impact of the "Corfu Channel" Case* (New York: Routledge, 2012) 295; Patrick Jacob, "Le contenu de la responsabilité de l'État négligent" in

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enforcement of the obligation to make full reparation in the law of international responsibility.[6] The use of analogies with domestic law, which was praised early on as a tool for the development of international law,[7] similarly involves a comparison between domestic legal systems.[8] The margin of appreciation, which international courts rely on to calibrate the normative requirements of international human rights law, also entails a comparison between the domestic legislation of states.[9] Likewise, the law of international organizations is commonly studied through a comparison between the various practices of international organizations with a view to extracting some common principles or institutional patterns.[10] Mention can also be made of those studies on compliance that are similarly based on a systematic comparison between an idealized standard and actual state behaviour as well as between the behaviour of states themselves.[11] Scholarly reform projects

Société française pour le droit international & Sarah Cassella, eds, *Le standard de due diligence et la responsabilité internationale (Journée d'études franco-italienne du Mans)* (Paris: Pedone, 2018) 281.

[6] See International Law Commission, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at c IV, para 76, art 31. See *Case Concerning the Factory at Chorzów (Germany v Poland)* (1928), PCIJ (Ser A) No 9 at 47 ("reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"). For some remarks, see Brigitte Stern, "The Obligation to Make Reparation" in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 563.

[7] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Hamden, CT: Archon Books, 1927).

[8] For an overview as well as some critical remarks, see Fernando Lusa Bordin, "Analogy" in Jean d'Aspremont & Sahib Singh, *Concepts for International Law* (Cheltenham, UK: Edward Elgar, 2018) 25.

[9] For some criticisms of the use of comparative law methods to determine the normative standard applied by the European Court of Human Rights, see Paolo Carozza, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights" (1997) 73 Notre Dame L Rev 1217. For some critical remarks on the exercise of comparison in international human rights law, see Samantha Besson, "Comparative Law and Human Rights" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law*, 2nd ed (Oxford: Oxford University Press, 2019) 1222.

[10] Henry Schermers & Neils Blokker, *International Institutional Law*, 6th ed (Leiden: Brill Nijhoff, 2018) at 4 ("we aim to offer a general framework for a better understanding of the (similarities and differences between) institutional rules of international organizations").

[11] For an overview as well as some critical remarks, see Ingrid Wuerth, "Compliance" in d'Aspremont and Singh, *supra* note 8, 117.

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like global constitutionalism,[12] or scholarly projects concerned with the reconceptualization of global governance, like global administrative law,[13] require the use of comparison as well. Comparison is thus a very common tool for international lawyers.

In recent years, however, calls have been made to turn the familiar tool of comparison into a central way to engage with international law. Indeed, spearheaded by a few established anglophone scholars, the idea of a new field of study called comparative international law (which I refer to hereafter as "the comparativist project"), which makes comparison the main mode of engagement with international law, has attracted enormous attention and enthusiasm in the international legal literature.[14] Claiming to draw on modes of inquiry borrowed from comparative law and comparative politics, the comparativist project has been promoted as a new "approach" to international law[15] that brings to the surface "similarities and differences in how international law is understood, interpreted, applied, and approached by different national and international actors," thereby offering a better knowledge of its functioning.[16]

This article critically examines the promotion of comparison as a mode of engagement with international law and scrutinizes various features of the comparativist project. After a brief presentation of the comparativist project, this article shows that this new scholarly venture perpetuates a very modernist idea of international law, while resting on a presumption of the permanent comparability of all legal artefacts, institutions, and practices across time and space, which is called here "commensurability thinking."

[12] See Erika de Wet, "The Constitutionalisation of Public International Law" in Michel Rosenfeld & Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1209; Erika de Wet, "The International Constitutional Order" (2006) 55 ICLQ 51; Anne Peters, "The Merits of Global Constitutionalism" (2009) 16 Ind J Glob Leg Stud 397; Anne Peters, "Are We Moving towards Constitutionalisation of the World Community?" in Antonio Cassese, *Realising Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 118; Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" (2006) 19 Leiden J Intl L 579.

[13] See e.g. the studies on global administrative law by Benedict Kingsbury, Nico Krisch & Richard Steward, "The Emergence of Global Administrative Law" (2005) 68:3–4 Law & Contemp Probs 15 at 29; Carol Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17:1 EJIL 187.

[14] See e.g. Martti Koskenniemi, "The Case for Comparative International Law" (2009) 20 Finnish YB Intl L 1 [Koskenniemi, "Case for Comparative International Law"]. See also the foreword of Martti Koskenniemi in Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017) xiii [Roberts, *Is International Law International?*].

[15] On the comparativist project's self-portrayal as an "approach," see Anthea Roberts, "Is International Law International? Continuing the Conversation," *EJIL:Talk!* (9 February 2018) [Roberts, "Continuing the Conversation"].

[16] Roberts et al, "Conceptualizing," *supra* note 2 at 4.

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Drawing on these two features of the comparativist project, this article goes on to develop its main criticism by showing that the comparativist project, far from laying bare the plurality of international legal thought and practice, enables a thought-colonizing enterprise. The article ends with some reflective observations on the possibility of limiting colonizing thinking in international legal studies. In doing so, the last part of this article argues that it must remain possible for international lawyers to engage with alterity in a way that does not unilaterally manufacture the "other," silence it, and speak on its behalf. This possibility is what is called counter-comparability.

The Comparativist Project in International Law

Comparativism is not unprecedented in international legal thought, and claims about the emergence of comparative international law as a new field or area of study are not new. It suffices to mention, for example, William Butler's courses on comparative approaches to international law taught at University College London in the 1970s[17] and at the Hague Academy in 1985,[18] as well as the regular calls by legal scholars during the Cold War for greater attention to the domestic context informing one's approach to international law.[19] It could even be argued that the importance of an awareness of differing national engagements with international law has been cultivated since the inception of the discipline of international law[20] and at least since the creation of national learned societies dedicated to international law as well as national international law yearbooks or journals.[21] From the perspective of dominant histories of international law, for example, comparativism can also be witnessed in those texts that international lawyers

[17] This is mentioned by Boris Mamlyuk & Ugo Mattei, "Comparative International Law" (2011) 36 Brook J Intl L 385 at 388.

[18] Butler, "Comparative Approaches," *supra* note 1.

[19] See William Butler, *International Law in Comparative Perspective* (Alphen aan den Rijn: Brill, 1980); Edward McWhinney, "Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems" (1964) 50 Virginia L Rev 36; William Butler, "American Research on Soviet Approaches to Public International Law" (1970) 70 Colum L Rev 218 at 223–24. See also the work of Evgeny Korovin discussed by Mamlyuk & Mattei, *supra* note 17 at 394–406.

[20] On the professionalization of international law, see generally Stephen C Neff, *Justice among Nations* (Cambridge, MA: Harvard University Press, 2014) 304; Jean d'Aspremont, "The Professionalization of International Law" in Jean d'Aspremont et al, *International Law as Profession* (Cambridge: Cambridge University Press, 2017); Anne Orford, "Scientific Reason and the Discipline of International Law" (2014) 25 EJIL 369 at 373; Benjamin Allen Coates, *Legalist Empire. International Law and American Foreign Relations in the Early Twentieth Century* (Oxford: Oxford University Press, 2016) at 18–21, 61–68.

[21] The point is made by Mamlyuk & Mattei, *supra* note 17 at 427.

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came to elect as foundational for the discipline and that read as comparison between theological, philosophical, scientific, and legal discourses.[22]

Although this article acknowledges this long affinity of international lawyers with comparison, the comparativist project discussed in this article stands out due to the particularly central place it gives to the exercise of comparison. In the comparativist project, comparison is no longer simply the instrument used, for example, to identify international legal rules, to extract common international institutional principles and practices, to calibrate human rights obligations, and to study constitutional or administrative convergences in international law. In the comparativist project, comparison becomes the principal mode of engagement with international law.[23] The elevation of comparison to the central mode of engagement with international law in the comparativist project is born of a long-expressed desire to account better for "local idiosyncrasies" and the pluralistic nature of international law.[24] In this sense, comparison as a mode of engagement with international law can be seen as a continuation of the contestation of universalist narratives about international law initiated by Third World approaches to international law (TWAIL), gender studies, and critical

[22] Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck (Indianapolis: Liberty Fund, 2005), book I at 98, 341; book II at 776, 1093. Various explanations have been provided as to why Grotius was chosen as one of the fathers of international law in the nineteenth and twentieth centuries and preferred to other writers. See e.g. Martti Koskenniemi who has referred to his "naturalist, scientifically-orientated way to look at the universe" as being instrumental in his success in the nineteenth and twentieth centuries. Martti Koskenniemi, "Histories of International Law: Significance and Problems for a Critical View" (2013) 27 Temple Intl & Comp LJ 215 at 217. Michael Lobban has argued that making Grotius and Emer de Vattel central markers was a way to respond to the attack of John Austin against international law. Michael Lobban, "English Approaches to International Law in the Nineteenth Century" in Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi, eds, *Time, History and International Law* (Leiden: Brill, 2007) 80. It is noteworthy that, in 1946, Lauterpacht had already sought to explain the external and internal contingency that was conducive to the elevation of Grotius as a towering figure. See Hersch Lauterpacht, "The Grotian Tradition in International Law" (1946) 23 Brit YB Intl L 1 at 18–19. For Alain Wijffels, the success of Alberico Gentili and Grotius can be explained because their work could be read as "general handbooks of the law of nations in the modern sense," thereby making international law a specialized branch of the law in its own right. They were the first authors to deal comprehensively with the law of nations. See Alain Wijffels, "Early-Modern Scholarship on International Law" in Alexander Orakhelashvili, ed, *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar, 2011) 23 at 42–44. For some recent critical remarks on how Grotius navigated several discourses, see Martti Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition'" (2019) 30 EJIL 17.

[23] That comparison is the central mode of engagement with a certain legal practice or legal subject is not unheard of. This is, for instance, the case of comparative human rights law. See the remarks of Besson, *supra* note 9.

[24] Koskenniemi, "Case for Comparative International Law," *supra* note 14 at 8; Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) at 17.

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theory.[25] The centrality of comparison in the comparativist project is also informed by an endeavour to make international law, which is held as standing at an important "inflection point" amidst the globalization of legal practice,[26] more "responsive to diversity within the international legal system."[27] Last but not least, comparison as a central mode of engagement with international law is meant to "uncover power dynamics that privilege certain actors and their preferred interpretations of international law."[28] Accordingly, unlike those earlier discussed exercises of comparison in international legal thought and practice, comparison is turned into the main mode of engagement with international law in the comparativist project in order to achieve these particular goals.

The functions of comparison in the comparativist project also warrant an observation. In the comparativist project, comparison, as a key mode of engagement with international law, is given descriptive, analytical, and explanatory functions. The authors of the project say that "comparative international law entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law."[29] Such comparison-based identifications, analyses, and explanations seek to produce a new type of knowledge,[30] which is itself constitutive of a new "field,"[31] a "field of research,"[32] or a "developing field."[33]

It is also noteworthy that the elevation of comparison to a central mode of engagement with international law in the comparativist project rests on a few epistemological and methodological choices, which are spelled out explicitly.[34] For instance, the comparativist project is presented by its authors as being predicated on the idea that the profession of international law is "transnational," for the professionals populating it constantly cross borders

[25] Anthea Roberts et al, "Comparative International Law: Framing the Field" (2015) 109 AJIL 467 at 467–68 [Roberts et al, "Framing"].

[26] Roberts, *Is International Law International?*, *supra* note 14 at 17. See also Malksoo, *supra* note 24 at 1.

[27] Roberts et al, "Framing," *supra* note 25 at 473.

[28] *Ibid.*

[29] *Ibid* at 469–70. See also Roberts et al, "Conceptualizing," *supra* note 2 at 7.

[30] Roberts, *Is International Law International?*, *supra* note 14 at 17. See also Malksoo, *supra* note 24 at 20.

[31] Roberts et al, "Framing," *supra* note 25 at 469; Roberts et al, "Conceptualizing," *supra* note 2 at 4, 6.

[32] Roberts et al, "Conceptualizing," *supra* note 2 at 6.

[33] Roberts et al, "Framing," *supra* note 25 at 469.

[34] See generally Roberts et al, "Conceptualizing," *supra* note 2; Roberts, *Is International Law International?*, *supra* note 14 at 19–50.

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and owe allegiance to both domestic and international circles.[35] Likewise, the project clearly recognizes its methodological debt to comparative law and comparative politics from which it extensively borrows.[36] Finally, the comparativist project acknowledges the "promises and perils" of the exercise of comparison[37] and recognizes the fact that the project occasionally fails on its own terms.[38] The result of these various explicit epistemological and methodological choices is a well-rounded and well-designed academic enterprise that has quickly secured a very impressive presence in the academic discursive space.

The foregoing only provides a sketch of the comparativist project.[39] The following parts probe the comparativist project further by zeroing in on some specific and mutually reinforcing dimensions thereof. They show that, albeit geared towards a better account of the local intricacies of globalized legal practices, the comparativist project promotes an engagement with international law akin to colonizing thinking.

The Modernism of the Comparativist Project

As indicated earlier, the comparativist project aims at "identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law."[40] It is submitted here that the descriptive and analytical ambitions of the comparativist project, despite claims to the contrary,[41] bespeak orthodoxy and can be construed as a very sophisticated modernist endeavour. The modernist dimension of the comparativist project can be demonstrated as follows.

First, the comparativist project is a cartographic enterprise committed to achieving a better identification of "the existence and content of international law"[42] and a "more compelling portrait"[43] of international law based

[35] Roberts, *Is International Law International?*, *supra* note 14 at 8–9, 23–27.

[36] *Ibid* at 17. See also Malksoo, *supra* note 24 at 12–20; Roberts et al, "Framing," *supra* note 25 at 471–72.

[37] Roberts, "Continuing the Conversation," *supra* note 15.

[38] *Ibid*.

[39] The foregoing solely bases itself on the research monograph, the edited collection, the seminal article, and the series of symposiums that have been dedicated to comparative international law.

[40] Roberts et al, "Framing," *supra* note 25 at 469–70. See also Roberts et al, "Conceptualizing," *supra* note 2 at 7.

[41] Roberts, *Is International Law International?*, *supra* note 14 at 11; Roberts, "Continuing the Conversation," *supra* note 15.

[42] Roberts et al, "Framing," *supra* note 25 at 470 ("comparative law methods may be relevant in identifying the existence and content of international law").

[43] Roberts, *Is International Law International?*, *supra* note 14 at 48.

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on identity and difference. Such cartographic exercise is meant to allow the production of a more refined "knowledge" of international law,[44] the functioning of which the comparativist project seeks to improve.[45] There is no doubt that thinking in terms of identity and difference is itself very modern.[46] So too is the pursuit of new knowledge.[47] In that sense, the comparativist project boils down to yet another modernist descriptive and explanatory project as it attempts to produce "naturalized knowledge"[48] about a "reality" described through identity and difference.[49]

Second, the modernism of the comparativist project manifests itself in its enduring commitment to universalism.[50] Indeed, notwithstanding claims that it threatens the universality of the field,[51] the comparativist project seems to do the exact opposite for it postulates that there can be a universally shared and definite account of international law and of its diversity.[52] For instance, the comparativist project claims to attempt to offer a better

[44] It speaks of the "knowledge derived from comparative analysis." Roberts et al, "Framing," *supra* note 25 at 473. See also Roberts et al, "Conceptualizing," *supra* note 2 at 4, 6.

[45] Roberts et al, "Framing," *supra* note 25 at 473 (it "can help to design treaties and international institutions that are more responsive to diversity within the international legal system").

[46] On the idea that modernity generalized modes of thinking articulated around identity and differences, see Michel de Certeau, *L'écriture de l'histoire* (Paris: Gallimard, 1975) at 59; Michel Foucault, *Les mots et les choses* (Paris: Gallimard, 1966) at 68 [Foucault, *Les mots*]. See more generally Bruno Latour, *Nous n'avons jamais été modernes. Essai d'anthropologie symétrique* (Paris: La Découverte, 1997).

[47] On the modern idea of the irreversibility of the learning process, see Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, translated by Frederick Lawrence (Cambridge: Polity Press, 1987) at 84.

[48] Judith Butler, *Gender Trouble*, 2nd ed (New York: Routledge, 2007) at xxiii [Butler, *Gender Trouble*].

[49] See e.g. Roberts et al, "Conceptualizing," *supra* note 2 at 20–27. See also Anthea Roberts, "The Parochialism of Western Cosmopolitanism in a Competitive World Order," *EJIL: TALK!* (7 February 2018) [Roberts, "Parochialism"] (comparative international law seeks to "provide a framework for understanding and analyzing … experiences that many international lawyers have had and yet are often not spoken about").

[50] For a similar argument, see Andrea Leiter, "Review Essay of Anthea Roberts, *Is International Law International?*" (2018) 19 Melbourne J Intl L 1. See also the critical remarks of Hilary Charlesworth, "Comparative International Legal Methods" (Presentation at the 2018 Public Law Conference, Melbourne Law School, 11–13 July 2018).

[51] On the idea that the comparativist project threatens the field's universalist assumptions, see Mathias Forteau, "Comparative International Law within, Not against, International Law: Lessons from the International Law Commission" (2015) 109 AJIL 498 at 499. For praise of the comparativist project for threatening the field's universalism, see Koskenniemi, "Case for Comparative International Law," *supra* note 14 at 3.

[52] See e.g. Roberts, *Is International Law International?*, *supra* note 14 at 11–17; Roberts et al, "Conceptualizing," *supra* note 2 at 6–8.

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knowledge of the functioning of international law, thereby assuming that there is a thing out there called international law to which all actors respond and whose functioning can be known.[53] The same universalism permeates the comparativist's argument that international lawyers cannot make any serious claims about cosmopolitanism as long as they do not account for the diversity of understandings, interpretations, applications, and approaches in international legal thought and practice, which again presupposes that diversity is itself a thing out there that can be the object of a universal mapping.[54] In this respect, it is noteworthy that the promoters of the comparativist project have themselves defended its universalism and its facilitation of the "sensational convergence" in the argumentative practice of international law.[55]

Third, the comparativist project uses the nation-state as one of the categories to apprehend transnational social phenomena.[56] Indeed, the great variety of applications and interpretations of international law are thought to be located and organized along state bordering. In the same vein, the spatial universe of international law (and of the discipline of international law) is one that is articulated around the state construed as the interface between international and national spheres.[57] This aspect of the comparativist project is also very modern because it perpetuates a state-based spatial organization of the world inherited from modernity.[58]

In light of the above, it can be said that, notwithstanding some claims to the contrary by its architects, the comparativist project does not stand out as a disruptive project.[59] After all, it resembles all other modern discourses that seek to produce universal knowledge through differences of opinions and

[53] Roberts et al, "Framing," *supra* note 25 at 473.

[54] Roberts, "Continuing the Conversation," *supra* note 15. In the same sense, see Koskenniemi, "Case for Comparative International Law," *supra* note 14 at 4.

[55] Roberts et al, "Framing," *supra* note 25 at 472–73. They also add: "[I]t is possible to see instances where the system is successful in spreading general norms as well as examples of where international law rules give rise to local adaptation or noncompliance."

[56] Roberts et al, "Conceptualizing," *supra* note 2 at 9. *Cf* the use of "culture" as a pre-comparative tertium in comparative philosophy as critically discussed by Ralph Weber, "How to Compare: On the Methodological State of Comparative Philosophy" (2013) 8 Philosophy Compass 593.

[57] Roberts, *Is International Law International?*, *supra* note 14 at xxi, 25.

[58] For some criticisms of state-based bordering, see Vera Rusinova, "Can International Law Be More International?" *EJIL:TALK!* (8 February 2018). For a criticism that this aspect of the comparativist project comes with the risk of "reproducing identity politics of nationalism," see Leiter, *supra* note 50. For a similar rejection of the claim that comparative international law exacerbates identity politics of nationalism, see Koskenniemi, "Case for Comparative International Law," *supra* note 14 at 7.

[59] Roberts, *Is International Law International?*, *supra* note 14 at 11–17.

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perspectives.[60] It does not even denote a type of cynical modernism that has ceased to believe in its own epistemology and that nonetheless clings to it out of self-interest.[61] Rather, it perpetuates a belief in the possibility of simply knowing reality in all of its diversity.[62]

The Commensurability Thinking at the Heart of the Comparativist Project

Another salient feature of the comparativist project lies in its articulation around what is called here "commensurability thinking."[63] Albeit expressing

[60] See Hayden White, *Tropics of Discourse. Essay in Cultural Criticism* (Baltimore: Johns Hopkins University Press, 1986) at 1. On the idea that modernity simultaneously makes a universalist claim and a perspectivist claim, see Paul Ricoeur, *La mémoire, l'histoire, l'oubli* (Paris: Seuil, 2000) at 386–87.

[61] Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (London: Verso, 2015) at 20. See more generally Peter Sloterdijk, *Critique of Cynical Reason* (Minnesota: University of Minnesota Press, 1987).

[62] On the modernism associated with the idea of comparative law and reminiscence of the 1900 Congrès international de droit comparé, see Hélène Ruiz Fabri, "From Babel to Esperanto and Back Again: The Fate of International Law (or of International Lawyers?)," *EJIL:TALK!* (8 February 2018). On the idea that comparative legal studies are themselves narratives of the making of "modern law," comforting a Euro-American world, see Horatia Muir Watt, "Globalization and Comparative Law" in Mathias Reimann & Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2007) 575 at 580, 596 [Muir Watt, "Globalization"]. See also Pierre Legrand, "The Same and the Different" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 240 [Legrand, "The Same and the Different"]; Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity" (2006) 1 J Comparative L 365 [Legrand, "Comparative Legal Studies"].

[63] In the literature, the notion of commensurability is usually discussed through its antithesis — namely, incommensurability. The notion of incommensurability is said to originate in Greek mathematics to designate the situation where the ratio of the lengths of two line segments is irrational. This notion is commonly attributed to the Pythagoreans. See Ruth Chang, "Introduction" in *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA: Harvard University Press, 1997) 1 [Chang, *Incommensurability*]. See also H Patrick Glenn, "Are Legal Traditions Incommensurable?" (2001) 49 Am J Comp L 133 at 133. The notion resurfaced, in the twentieth century, in the philosophy of science in relation to the inability to translate one theory in terms of another theory (see Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970) at 85ff, 150ff) as well as in moral philosophy where it has been extensively discussed in relation to the incommensurability of values (see generally Chang, *Incommensurability*, *ibid*). On the effect of equally valid, but mutually exclusive, values and the tragedy of human life, see Alasdair MacIntyre, *After Virtue* (London: Bloomsbury, 1981) at 204. Mention of incommensurability has occasionally been made in legal theory. For example, Joseph Raz has sought to show the logical possibility of incommensurability: Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 322, 334, ch 13. See also Cass Sunstein, "Incommensurability and Valuation in Law" (1994) 92 Mich L Rev 779; Nick Smith,

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a similarly modernist posture, this feature of the comparativist project warrants separate examination.[64] In this article, commensurability thinking refers to the presumption of permanent comparability between all legal artefacts, legal institutions, legal practices, and interpretations thereof falling under the purview of the comparativist project, irrespective of their location and time.[65] Commensurability thinking corresponds to what has been called in comparative philosophy the postulation of a pre-comparative tertium, being a point of commonality that is posited or asserted in the determination of the objects being compared.[66] In other words, commensurability thinking refers to the making of a pre-comparative claim of resemblance between the legal artefacts, legal institutions, legal practices, and legal interpretations being compared by virtue of which they are all deemed to belong to a similar spatial, historical, and normative universe. It is thus the postulation of a "universal transcendent measure"[67] based on the postulation of a transcendental legal phenomenon across time and space.[68]

It is submitted here that the comparativist project mobilizes a great deal of commensurability thinking and constantly presumes spatial, historical, and normative comparability. Indeed, using national traditions as the pre-comparative tertium, the comparativist project postulates that all national traditions are various expressions of the same transnational legal phenomenon of which components can be permanently compared across space and time. Commensurability thinking is the very move that allows the comparativist project to "connect the work of different scholars on different

"Incommensurability and Alterity in Contemporary Jurisprudence" (1997) 45 Buff L Rev 503; Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information" (1999) 40 Harv Intl LJ 221. In the legal theory context, incommensurability is sometimes associated with a form of epistemic constitutional pluralism. See e.g. Neil Walker, "The Idea of Constitutional Pluralism" (2002) 65 Mod L Rev 317 at 338–39 (where Walker speaks of the incommensurability of authority claims).

[64] On the idea that commensurability thinking is inherited from the eighteenth and nineteenth centuries, see Alasdair MacIntyre, *Three Rival Versions of Moral Inquiry: Encyclopedia, Genealogy, and Tradition* (Notre Dame: University of Notre Dame Press, 1990) at 172 [MacIntyre, *Three Rival Versions*].

[65] For a similar use of Kuhnian commensurability, see Sahib Singh Sahib, "Narrative and Theory: Formalism's Recurrent Return" (2014) 84 Brit YB Intl L 304 at 317–18.

[66] Weber, *supra* note 56 at 596.

[67] Plato, *Phaedo*, Oxford World's Classics (Oxford: Oxford University Press, 2009) at 100e–101a.

[68] *Cf* Sundhya Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law" (2013) 1 London Rev Intl L 63 at 65–66 ("[i]n this ready-made world, one variant of jurisdiction is 'law' *tout court*, a limited range of authority is seen as law-giving, and the elements, objects, and subjects of that law are already formed, and have a status which pre-exists the law").

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continents and across different generations."[69] It can even be said that, whilst all comparative international law projects necessitate to certain degrees commensurability projects,[70] the comparativist project maximizes such presumption of permanent comparability by extending it not only to rules, institutions, and practices of international law but also to all of the ways in which such rules, institutions, and practices are understood, conceptualized, and experienced. It is argued here that the comparativist project is commensurability thinking at its peak.

Interestingly, despite the reasonable methodological self-awareness demonstrated by the proponents of the comparativist project,[71] commensurability thinking has not been acknowledged. This silence is particularly surprising given the recurrence of debates on commensurability thinking in the comparative law literature, the insights of which the authors of the comparativist project claim to use.[72] In fact, the comparative law field stands out as denoting a greater awareness of the articulation of comparison around the postulation of a single container universe.[73] Some famous comparative lawyers, for instance, have examined the presumptions of the knowability of law,[74] the presumption of comparability,[75] the moves of decontextualization and recontextualization,[76] the reduction of law to inert rules,[77] the persistence of the descriptive category of legal families,[78] and the assumption that laws and institutions are part of an overarching cultural system.[79] Likewise, there appears to be significant awareness in comparative

[69] Roberts et al, "Framing," *supra* note 25 at 474.

[70] Other comparative enterprises similarly perpetuate normative commensurability thinking. See e.g. Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019).

[71] See the first part of this article.

[72] Roberts et al, "Conceptualizing," *supra* note 2 at 4, 12–16.

[73] This contributes to the subversive dimension of comparative law. See generally Horatia Muir Watt, "La fonction subversive du droit comparé" (2000) 52 RIDC 503; George Fletcher, "Comparative Law as a Subversive Discipline" (1998) 46 Am J Comp L 683.

[74] See the discussion of Roderick Munday, "Accounting for an Encounter" in Legrand & Munday, *supra* note 62, 3 at 19–20.

[75] Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)" (1991) 39:1 Am J Comp L 1 at 6–7.

[76] Günter Frankenberg, "Constitutional Transfer: The IKEA Theory Revisited" (2010) 8 Intl J Constitutional L 563 at 575.

[77] Richard Abel, "Law as Lag: Inertia as a Social Theory of Law" (1982) 80 Mich L Rev 785.

[78] Günter Frankenberg, "Critical Histories of Comparative Law" in Markus Dubber & Christopher Tomlins, eds, *Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018) 43 at 54.

[79] William Twining, "Diffusion of Law: A Global Perspective" (2004) 36 J Leg Pluralism & Unofficial L 1 at 33.

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law about the confinement of any claim of difference and resemblance to a single container universe.[80] Such acknowledgements of the centrality of commensurability thinking in the comparative law literature have even led some comparative lawyers to recognize that comparative law cannot emancipate itself from the standpoint of the defining subject,[81] which always imposes a single way of defining the different and the resembling "other"[82] as well as a single value.[83] Moreover, the finding of differences and similarities in comparative law can usually be anticipated.[84] No such sensitivity informs the comparativist project in international law as it postulates a permanent comparability between all legal artefacts, legal institutions, legal practices, and interpretations thereof without ever explicitly appreciating it.

The Colonizing Thinking of the Comparativist Project

It must be emphasized that the two previous features of the comparativist project, when taken in isolation, are rather benign. After all, most projects of reinvention of international law denote a remarkable modernism as well as some unacknowledged commensurability thinking.[85] Yet, taken together, these two dimensions of the comparativist project provide all of the ingredients for its transformation into a thought-colonizing enterprise,[86] whereby an "other" is unilaterally defined, silenced, and spoken on behalf of.[87] It is argued in this part that by producing a new knowledge about differences and similitudes between approaches to international law, as was discussed in the second part, and producing such naturalized reality by virtue of a self-

[80] Mitchel Lasser, "The Question of Understanding" in Legrand & Munday, *supra* note 62, 197 at 218–19; Yves Dezalay & Bryant Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars" in David Nelken & Johannes Feest, eds, *Adapting Legal Cultures* (Oxford: Hart, 2001) 241; Glenn, *supra* note 63 at 143.

[81] Lasser, *supra* note 80 at 219.

[82] David Nelken, "Towards a Sociology of Legal Adaptation" in Nelken & Feest, *supra* note 80, 7 at 16.

[83] Glenn, *supra* note 63 at 145 ("if we can compare and commensurate, we are vulnerable to imposition of the large, single value in the process of such comparison or commensuration").

[84] Lasser, *supra* note 80 at 204. See also Legrand, "The Same and the Different," *supra* note 62 at 246.

[85] For an overview, see David Kennedy, "The Mystery of Global Governance" (2008) 34 Ohio NUL Rev 827.

[86] On the idea of the colonizing gesture, see Butler, *Gender Trouble*, *supra* note 48 at 18. On a similar use of the idea of colonizing, see also Timothy Mitchell, *Colonising Egypt* (Cambridge: Cambridge University Press, 1991).

[87] On discourses silencing the "others" that they have created, see de Certeau, *supra* note 46 at 15–20; Butler, *Gender Trouble*, *supra* note 48 at 2–4; Jacques Derrida, *The Beast and the Sovereign*, vol 1 (Chicago: University of Chicago Press, 2011) at 5 [Derrida, *Beast and the Sovereign*, vol 1].

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confirming postulated spatial, historical, and normative comparability, as was discussed in the third part, the comparativist project carries the potential to unilaterally manufacture otherness, to silence it, to speak on its behalf, and to present it as a "naturalistic necessity."[88]

Shedding light on the potential for colonizing thinking in the comparativist project does not merely boil down to putting emphasis on the project's performativeness and the fact that it ends up producing the very differences and similarities it anticipates. That could be said of all legal discourses.[89] What is at stake here is the fact that the comparativist project allows one to subject a unilaterally defined "other" to intelligibility frameworks and a pre-comparative tertium that are alien to it,[90] to produce claims about its differences and resemblances with a "self" that corresponds to a naturalistic reality, and to produce a new knowledge. Indeed, by deploying a "prediscursive" that is made in the First World to apprehend alterity,[91] the comparativist project produces a knowledge that possesses its object and prohibits alternative discourses on difference.[92] That is, it enables a type of intellectual engagement whereby the "other" is unilaterally defined through the frame of reference of the "self" and silenced by the latter who then speaks on the specificities of the former. From this angle, the comparativist project could be seen as part of what has been called the "postcoloniality" of international law as it continues the ethnocentric ordering of the world by absorbing all spaces, histories, and practices in the dominant intelligibility frameworks and pre-comparative tertia of the First World.[93]

The alarming depiction of the comparativist project here will certainly astonish those international lawyers familiar with the comparativist project. Indeed, the comparativist project has often depicted itself with a veil of modesty, claiming, for instance, that it boils down to an "approach,"[94] which can get the "conversation started."[95] Moreover, the comparativist project has been inclusive of many contributions by scholars outside the West in order to "provide more detailed consideration of court practices in certain

[88] On the idea of naturalistic necessity, see Butler, *Gender Trouble*, *supra* note 48 at 45.

[89] See Derrida, *Beast and the Sovereign*, vol 1, *supra* note 87 at 8–9.

[90] This is a charge made by Pierre Legrand against traditional comparative law studies. See Legrand, "Comparative Legal Studies", *supra* note 62 at 426. For further remarks on traditional comparative law studies, see discussion later in this article.

[91] Butler, *Gender Trouble*, *supra* note 48 at 10.

[92] Derrida, *Beast and the Sovereign*, vol 1, *supra* note 87 at 279.

[93] Sundhya Pahuja, "The Postcoloniality of International Law" (2005) 46 Harv Intl LJ 459.

[94] On the comparativist project's self-portrayal as an "approach," see Roberts, "Continuing the Conversation," *supra* note 15.

[95] Roberts, "Parochialism," *supra* note 49. See also Anthea Roberts, "Is International Law International? Continuing the Conversation," *Opinio Juris* (9 February 2018); Roberts, "Continuing the Conversation," *supra* note 15.

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non-Western states."[96] The point made here, however, is not that the authors of the comparativist project, who themselves acknowledge that language limits the capacity of imagination,[97] have ever contemplated putting into place a thought-colonizing enterprise. Rather, it is that their conceptual and philosophical casualness makes the whole comparativist project vulnerable to recuperation and, in particular, to a use thereof to manufacture diversity in the world by reference to the image that the First World makes of itself and through the intelligibility frameworks and pre-comparative tertia defined by it.[98]

The conceptual and philosophical casualness of the authors of the comparativist project, and their facilitating the turning of the latter into a thought-colonizing enterprise, is even more surprising given that the pitfall of turning a comparative law exercise into a thought-colonizing project is well known to some comparative lawyers. In the comparative law literature, there has been some insistence on the extent to which claims of difference and resemblance are always "self-confirming" in that they confirm the very terms on which the comparison is premised and through which it is conducted.[99] By the same token, some comparative lawyers recognize that nothing is fully autochthonous or foreign[100] and that the "foreign" is always construed as "like or unlike home" or as "derivative or opposite" of home.[101] This echoes the claim that the otherness studied in comparative law studies is most of the time reduced to what we know of the "other"[102] and that the "other" is often reduced to a vehicle for the recovery of the "self."[103] Some comparative lawyers similarly recognize that "[t]he other is methodologically 'admitted' as another in so far, and in so far only, as he proves compatible with the comparatist's ontological premises."[104]

It is also acknowledged in international comparative law studies that claims of difference and resemblance are made within the "already-understood

[96] See generally the contents of Roberts et al, *Comparative International Law, supra* note 2 at 11.

[97] Roberts, *Is International Law International?, supra* note 14 at 46 (citing Wittgenstein).

[98] This is not to mention the possibility of the comparativist project facilitating definitions of resemblances and differences in the world by reference to a privileged self, which is a question that is not addressed here. This is a point I owe to one of the anonymous reviewers.

[99] Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" (1985) 26 Harv Intl LJ 411 at 422 [Frankenberg, "Critical Comparisons"].

[100] Legrand, "Comparative Legal Studies," *supra* note 62 at 422.

[101] *Ibid* at 412, 423.

[102] See also Legrand, "The Same and the Different," *supra* note 62 at 287.

[103] *Ibid* at 307–08.

[104] *Ibid* at 261.

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world" of the comparatist[105] and are marked in advance by representation and historically constituted categories.[106] For this reason, it is said by the same comparative law scholars that the act of comparison in comparative legal studies is "an act of totalization that neutralizes the other,"[107] allowing pre-comparative frameworks deployed by comparative legal theorists to reproduce patterns of dominance.[108] Said differently, the pre-comparative tertium censors what alterity can possibly mean.[109] Taking into account the location of the main centres where comparative law studies are conducted, some of these critical comparative lawyers have even gone so far as to emphasize the resilience of neo-colonial and imperialistic definitions of difference and the perpetuation of a Western-centric conception of geography in comparative law studies.[110] They have, in the same vein, recognized that comparative law contributes to the "exoticization of legal cultures"[111] and that there is a silencing in comparative law, which is part of a "colonial inheritance."[112]

It is of the utmost importance to realize that the transformation of the comparativist project into an exercise of unilateral definition of differences and similitudes as "like or unlike" the First World is not a remote possibility. In fact, the repeated statements by the authors of the comparativist project about the importance of understanding "the perspectives and approaches of those coming from unlike-minded states"[113] and the need to "delve more deeply into the understanding of, and approaches to, international law of lawyers from a variety of unlike-minded states" are themselves tainted with colonizing thinking.[114] Indeed, such statements presuppose a "them" and

[105] See also *ibid* at 255 ("it is impossible for the comparatist-as-observer ever to demonstrate sameness non-ethnocentrically because any understanding on his part assumes integration into his already-understood world, a world he cannot actually reflect himself out of").

[106] Michael Werner & Bénédicte Zimmermann, "Beyond Comparison: *Histoire Croisée* and the Challenge of Reflexivity" (2006) 45 History and Theory 30 at 34.

[107] Legrand, "The Same and the Different," *supra* note 62 at 300.

[108] Muir Watt, "Globalization," *supra* note 62 at 603.

[109] Legrand, "The Same and the Different," *supra* note 62 at 308.

[110] See generally Upendra Baxi, "The Colonialist Heritage" in Legrand & Munday, *supra* note 62, 46; Frankenberg, "Critical Comparisons," *supra* note 99 at 422; William Twining, "Social Science and Diffusion of Law" (2005) 32 JL & Soc'y 203 at 207, 239.

[111] Pierre Giuseppe Monateri, "Black Gaius: A Quest for Multicultural Origins of the 'Western Legal Tradition'" (2000) 51 Hastings LJ 479; Muir Watt, "Globalization, *supra* note 62 at 596.

[112] See Baxi, *supra* note 110 at 50–51. See also the discussion of this question in Muir Watt, "Globalization, *supra* note 62 at 595–603.

[113] Roberts, *Is International Law International?*, *supra* note 14 at 5.

[114] *Ibid* at 17.

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an "us."[115] The irony is that, although the comparativist project pursues a greater awareness for the parochialism of one's understanding of the universalist discourse of international law,[116] it may end up being used to do the exact opposite. That is, the project may universalize a unilateral definition of differences and similitudes through the intelligibility frameworks and pre-comparative tertia of the First World.

Lastly, the thought-colonizing dimension of the comparativist project would be significantly exacerbated by any attempt to construe the comparativist project as one of the modes of expression of, and realization of, legal pluralism.[117] The result of such an association between the comparativist project and legal pluralism would be that the comparativist project, while conducting comparison along the intelligibility frameworks and pre-comparative tertia of the First World, would not only leave colonizing thinking unchecked and unfettered but also powerfully govern discourses and thinking about the world under the name of pluralism.[118]

Beyond Colonizing Thinking: A Plea for Counter-Comparability in International Legal Studies

The danger of any engagement with alterity is that it colonizes alterity in absorbing and silencing the "other" through one's predefined intelligibility frameworks and pre-comparative tertium. The comparativist project that has been discussed in the previous parts epitomizes this danger and shows that, in international legal studies, colonizing thinking is no remote possibility. And, yet, it is argued in this final part that it must remain possible for international lawyers to engage with alterity in a way that does not unilaterally manufacture the "other," silence it, and speak on its behalf.[119] This final part sketches an approach to the study of alterity in

[115] For a similar criticism with respect to comparative legal studies, see Legrand, "Comparative Legal Studies," *supra* note 62 at 371.

[116] Roberts, *Is International Law International?*, *supra* note 14 at 11.

[117] It is interesting to note that the concept of legal pluralism is never directly invoked by the authors of the comparativist project but found in the works they rely on. See, however, *ibid* at xxi.

[118] The idea that comparative law is a means to order pluralism is not new. See Mireille Delmas-Marty, "Comparative Law and International Law: Methods for Ordering Pluralism" (2006) 3 U Tokyo JL & Politics 43.

[119] See Koskenniemi, "Case for Comparative International Law," *supra* note 14 at 5 ("[t]he question remains how to identify and compare autochthonous forms of thinking about inter-community relations that would not necessarily be subsumable under European legal categories but would stand on their own and thus also provide a wider comparative perspective under which European categories could be examined as equally 'provincial' as others").

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international legal studies that promotes an engagement with the "other" that keeps colonizing gestures within bounds. This approach is called counter-comparability.

Before elucidating the idea of counter-comparability, two caveats are necessary. First, it must be acknowledged that the possibility of a non-colonizing engagement with alterity is not unexplored territory and that it has drawn the attention of philosophers since at least the nineteenth century. This is why the few observations offered here, though they suffice to demonstrate some of the merits of counter-comparability in international legal studies, are inevitably cursory. Second, the following is certainly not an invitation to reject comparison. It should rather be read as a call for a greater awareness of the pre-comparative tertium that necessarily infuses any exercise of comparison and about which international lawyers seem to have been surprisingly nonchalant.

For the purposes of the argument made in this article, counter-comparability refers to an attitude that refuses to define the "other" according to the categories of the "self," let alone silence it and speak on its behalf. In that sense, counter-comparability refrains from absorbing and appropriating the "other" and is an anti-totalizing approach to alterity.[120] It is true that, for international lawyers who have been trained in producing unitary knowledge about difference and resemblance by virtue of some predefined doctrines held as universal,[121] such an anti-totalizing attitude will seem counter-intuitive, if not preposterous. It must also be acknowledged that potential reservations on the part of international lawyers *vis-à-vis* the counter-comparability advocated here would not be entirely unwarranted. Indeed, a complete repudiation of one's intelligibility frameworks is not a discursive possibility for anyone, let alone for international lawyers engaging with alterity.[122] In fact, as was discussed in the third part, comparison always presupposes a great deal of commensurability thinking articulated around some pre-determined intelligibility frameworks and a pre-comparative tertium.[123] One cannot be fully outside the "self," nor can one fully immerse

[120] For a similar plea with respect to private international law, see Horatia Muir Watt, "Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité): Cours général de droit international privé" (2018) 389 Rec des Cours 363 [Muir Watt, "Discours"]. For a similar plea with respect to comparative law, see Legrand, "The Same and the Different," *supra* note 62 at 250, 307, 369, 373.

[121] See note 29 above. On the idea that the correspondence of the self's apprehension of the "other" with the "other" also constitutes a very modern characteristic of knowledge, see Legrand, "Comparative Legal Studies," *supra* note 62 at 396.

[122] In the same vein, see Legrand, "Comparative Legal Studies," *supra* note 62 at 427; see also Legrand, "The Same and the Different," *supra* note 62 at 251.

[123] In the same vein, see Glenn, *supra* note 63 at 139.

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oneself in the "other."[124] Some minimal commensurability, especially in terms of time, space, and materiality,[125] always precedes the making of any evaluative claim, even those that concern the experience of incommensurability.[126] In other words, findings of incomparability are themselves grounded in pre-existing intelligibility frameworks and pre-comparative tertia.[127] The inescapability of a pre-comparative tertium in the production of discourses and the impossibility of posing an interpretive act with a veil of ignorance have been widely acknowledged in moral philosophy,[128] linguistics,[129] critical theory,[130] postcolonial studies,[131] queer theory,[132] legal sociology,[133] and the theory of interpretation.[134] This is why the anti-totalizing dimension of the counter-comparability advocated here cannot simply amount to a rejection of all intelligibility frameworks and

[124] See also Legrand, "The Same and the Different," *supra* note 62 at 251–52. See also Legrand, "Comparative Legal Studies," *supra* note 62 at 427.

[125] Jacques Derrida, *The Beast and the Sovereign*, vol 2 (Chicago: University of Chicago Press, 2011) at 9 [Derrida, *Beast and the Sovereign*, vol 2]; Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'État* (Paris: La Découverte, 2004) at 294 [Latour, *Fabrique du droit*].

[126] Michel Foucault, *L'archéologie du savoir* (Paris: Gallimard, 1969) at 204 [Foucault, *L'archéologie*]; Derrida, *Beast and the Sovereign*, vol 2, *supra* note 125 at 140; Stanley Fish, *Doing What Comes Naturally* (Durham, NC: Duke University Press, 1989) at 143. *Contra* on the possibility of a metaphysical difference and of incommensurability, see Emmanuel Levinas, *Totalité et infini* (The Hague: Martinus Nijhoff, 1971).

[127] See also Legrand, "The Same and the Different," *supra* note 62 at 250, 281–82.

[128] MacIntyre, *Three Rival Versions*, *supra* note 64 at 13, 171. See also Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988) at 375–79.

[129] George Steiner, *After Babel: Aspects of Language and Translation*, 3rd ed (Oxford: Oxford University Press, 1998) at xiii–xiv ("it is the constructive powers of language to conceptualize the world which have been crucial to man's survival in the face of ineluctable biological constraints, that is to say in the face of death. It is the miraculous … capacity of grammars to generate counter-factuals, 'if'-propositions and, above all, future tenses, which have empowered our species to hope, to reach far beyond the extinction of the individual").

[130] Jean-François Lyotard, *La condition postmoderne* (Paris: Éditions de Minuit, 1979) at 59; Foucault, *Les mots*, *supra* note 46 at 381.

[131] Edward Said, *The World, the Text, and the Critic* (Cambridge, MA: Harvard University Press, 1983) at 26.

[132] Butler, *Gender Trouble*, *supra* note 48 at xxvi.

[133] Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (Cambridge, MA: Harvard University Press, 2013) at 370. See also Latour, *Fabrique du droit*, *supra* note 125 at 235.

[134] Hans-Georg Gadamer, *Truth and Method* (London: Bloomsbury, 2013) at 55, 338. See also Stanley Fish, *Is There a Text in This Class?* (Cambridge, MA: Harvard University Press, 1980) at 360.

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pre-comparative tertia.[135] Instead, counter-comparability embraces one's postulated and internalized intelligibility frameworks and pre-comparative tertium and makes the situatedness of comparison its starting point. Comparability thus requires a serious work of introspection into one's internalized intelligibility frameworks and pre-comparative tertium.

Raising awareness about one's internalized intelligibility frameworks and pre-comparative tertium does not suffice to conduct counter-comparability and allow a non-totalizing engagement with alterity.[136] Indeed, introspection into one's intelligibility frameworks and pre-comparative tertium is only the prerequisite for counter-comparability, the main ambition of which is to induce forgetfulness about one's postulated and internalized spatial, historical, and normative universe.[137] In that sense, counter-comparability, as it is construed here, is an attitude of induced forgetfulness *vis-à-vis* one's internalized intelligibility frameworks and pre-comparative tertium. It could also be seen as a postulation that the commensurable world is always a fiction.[138] Such induced forgetfulness or postulated fiction of commensurability echoes what has been famously called a move of "unlearning"[139] or "miscognition"[140] of one's

[135] What is more, transcending the situatedness of any knowledge or experience of alterity would manifest the same modernist ambition for true knowledge as that informing the comparativist project. See the second part above.

[136] Legrand, "The Same and the Different," *supra* note 62 at 297 ("[t]he immediate goal, therefore, must be to move toward a variation on what feminists refer to as 'standpoint epistemology' — a standpoint implying a keen awareness of the material and social circumstances under which knowledge emerges and, thus, being understood as 'a hard-won product of consciousness-raising and social-political engagement' as regards the fabrication of knowledge-claims, which insists not only on context, but also on contextualization or complexification of context, that is, on the particularization of the social and institutional practices within which knowledge is formed or produced").

[137] *Cf* the notion of "hospitality" developed by Jacques Derrida, *De l'hospitalité* (Paris: Éditions Calmann-Levy, 1997). For some reflections on the idea of "hospitality" in private international law, see Muir Watt, "Discours," *supra* note 120.

[138] Latour, *Fabrique du droit*, *supra* note 125 at 294; Derrida, *Beast and the Sovereign*, vol 2, *supra* note 125 at 8–9.

[139] Roland Barthes, *Leçon* (Paris: Seuil, 1978) at 46.

[140] The idea of "mis-cognition" was coined by Pierre Bourdieu in "A Lecture on the Lecture" in Pierre Bourdieu, *In Other Words: Essays towards a Reflexive Sociology*, translated by Matthew Adamson (Stanford, CT: Stanford University Press, 1990) 177 at 183, 189. See also the definition of mis-cognition by Richard Terdiman in his introduction to the translation of Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 Hastings LJ 805 at 813: "*Miscognition* is the term by which Bourdieu designates induced misunderstanding, the process by which power relations come to be perceived not for what they objectively are, but in a form which renders them legitimate in the eyes of those subject to the power. This induced misunderstanding is obtained not by conspiratorial, but by structural means. It implies the inherent advantage of the holders of power through their capacity to control not only the actions of those they dominate, but also the language

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intelligibility frameworks or an act of "de-position"[141] or "self-distanciation."[142] Counter-comparability also reflects what has been described in comparative philosophy as a move towards inter-paradigmaticy.[143] Using a more self-explanatory metaphor, it could be said that counter-comparability is a venture into alterity in the sense that Jacques Rancières described as the capacity to be the "*maître ignorant*." That is, it is a venture without securing domination by mobilizing any prior ready-made knowledge in one's relation to an "other."[144]

Concretely, the induced forgetfulness contemplated by counter-comparability entails a constant suspicion of any perception of symmetry between the "self" and the "other," any recognition of the "self" in the "other," any move geared towards an appropriation of the "other" by the "self,"[145] or, more generally, any image of convergence between the "self" and the "other."[146] But counter-comparability is more than a mere posturing of suspicion. It is an attitude of pockmarked resistance towards any anticipation of meaning.[147] Counter-comparability is a quest for what anthropologists have called moments of "disconcertment" — that is, moments of

through which those subjected comprehend their domination. Such miscognition is structurally necessary for the reproduction of the social order, which would become intolerably conflicted without it." Bourdieu's concept of miscognition is distinct from Charles Taylor's concept of misrecognition by which he refers to the absence of recognition of others. See Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton, NJ: Princeton University Press, 1994) 25. As was usefully pointed out to me by an anonymous reviewer, although Charles Taylor's perspective is (group) identity, whereas Bourdieu's focus is on knowledge, it cannot be denied that, to a large extent, identity and knowledge are two faces of the same coin.

[141] Legrand, "The Same and the Different," *supra* note 62 at 242.

[142] See also *ibid* at 250.

[143] Xianglong Zhang, "Comparison Paradox, Comparative Situation and Inter-Paradigmaticy: A Methodological Reflection on Cross-Cultural Philosophical Comparison" (2010) 1 Comparative Philosophy 90 at 99–100 ("[t]he so-called 'inter-paradigmaticy' is a conscious state that, although abiding in one paradigm, is strongly aware of the heterogeneous and even threatening presence of other paradigms; an awareness prior to the so-called 'fusion of horizons', and nevertheless manages to maintain a marginal albeit authentic existence at the interval of paradigms by certain non-conceptual, non-universalistic means, such as, various forms of language-games (including translation) or spontaneous modes of conscious acts").

[144] Jacques Rancière, *Le maître ignorant: Cinq leçons sur l'émancipation intellectuelle* (Paris: Fayard, 1987) at 46, 52.

[145] Legrand, "The Same and the Different," *supra* note 62 at 304, 307.

[146] It is different from the strategy of promoting re-appropriation of the global by the local. See generally Muir Watt, "Globalization," *supra* note 62 at 588ff.

[147] Jacques Derrida, *L'écriture et la différence* (Paris: Éditions du Seuil, 1967) at 46 [Derrida, *L'écriture*].

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realization that knowledge frameworks do not meet.[148] Counter-comparability can thus be construed as an attitude that cultivates and pursues misunderstanding while promoting some conscious and selected suspension of one's (and parts of one's) pre-comparative tertium and intelligibility frameworks.[149] The result of such suspension is a series of new images and experiences of alterity that are sought not for their contribution to any kind of knowledge about the world but, rather, as a source of meaning that has not yet been anticipated.[150]

The induced forgetfulness pursued by counter-comparability can only allow a non-totalizing engagement with alterity as long as the creation of moments of "disconcertment" are conducted in a non-essentialist fashion. This means that the disruption of one's internalized intelligibility frameworks and pre-comparative tertium does not postulate an essential "self," an essential "other," and an essential difference between them. In fact, counter-comparability assumes no fixed "self," no fixed "other," and no fixed difference between them.[151] Any essentialist posturing would make counter-comparability collapse into another totalizing engagement with alterity.

The foregoing should suffice to show that the induced forgetfulness sought after by the counter-comparability promoted here is bound to remain unachieved. As discussed, one will never fully evade one's internalized intelligibility frameworks and pre-comparative tertium in the production of discourses and one cannot pose an interpretive act with a veil of ignorance. And, yet, counter-comparability must be constantly and relentlessly undertaken. It is an endless struggle.[152] It is a resistance that must be continued as far as possible. It is an eternal quest for an impossible incommensurability.[153] It is argued here that the Sisyphus condition that comes with counter-comparability is what it takes to salvage international lawyers' engagement with alterity from the colonizing thinking afflicting the comparativist project examined here.

[148] See Helen Verran, "Engagements between Disparate Knowledge Traditions: Toward Doing Difference Generatively and in Good Faith" in Lesley Green, ed, *Contested Ecologies: Dialogues in the South on Nature and Knowledge* (Cape Town: HSRC Press, 2013) 141; John Law & Wen-Yuan Lin, "Cultivating Disconcertment" (2010) 58 Sociological Rev 135.

[149] Foucault, *L'archéologie*, *supra* note 126 at 41–44.

[150] *Cf* the idea of making the "other" an "interlocutor." See Legrand, "The Same and the Different," *supra* note 62 at 250. *Cf* also the idea of "hosting" discussed by Muir Watt, "Discours," *supra* note 120 at 379–95.

[151] On the idea that difference is "inexhaustible," see Legrand, "The Same and the Different," *supra* note 62 at 285, 298.

[152] *Ibid* at 297 ("comparatists must attempt to struggle out of their characteristic — and characteristically, in their case, rule-oriented — social position and condition").

[153] *Cf ibid* at 283.

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International lawyers should make no mistake. As is illustrated by the comparativist project examined in the first four parts of this article, colonizing thinking always returns in international legal studies. Only the promotion of a perpetual resistance,[154] patterned after the counter-comparability advocated in this final part, can enable discourses and thinking on alterity that are not solely the unilateral projection of a "self" located in the First World.

[154] See Derrida, *L'écriture*, *supra* note 147 at 46 ("[d]ans ce langage, il faut donc tenter de s'affranchir. Non pas tenter de s'en affranchir, car c'est impossible sans oublier notre histoire. Mais en rêver. Non pas de s'en affranchir, ce qui n'aurait aucun sens et nous priverait de la lumière du sens. Mais de lui résister le plus loin possible. Il faut en tous cas ne pas s'abandonner à lui de cet abandon qui est aujourd'hui la mauvaise ivresse du formalisme structuraliste le plus nuancé").

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