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International Law's Mixed Heritage: A Common/Civil Law Jurisdiction

Colin B. Picker

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International Law's Mixed Heritage: A Common/Civil Law Jurisdiction

Colin B. Picker*

ABSTRACT

This Article provides the first application of the emerging mixed jurisdiction jurisprudence to a comparative analysis of international law. Such a comparative law analysis is important today as the growth and increasing vitality of international juridical, administrative and legislative institutions is placing demands on international law not previously experienced. International law is unsure where to look for help in coping with these new stresses. In significant part this isolation can be attributed to a general view among international law scholars that international law is sui generis, and hence there is little to be gained from national legal systems. This Article seeks to rectify this problem by showing substantial congruence between international law and those national legal systems that may share many characteristics. The Article argues that those states that fit best with international law are those that have been classified as mixed jurisdictions. The result of this showing will be to open international law to the lessons learned over the centuries by

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such mixed jurisdictions as Scotland, Louisiana, Quebec, South Africa and Israel.

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I. INTRODUCTION

International law is supposedly unlike other legal systems. By conventional wisdom, it is *sui generis*—unique.¹ Conventional wisdom, however, should always be challenged; for even if it turns out to be accurate, the confrontation will improve our understanding and knowledge, supporting or further refining the basis for that so-called wisdom. An investigation into the uniqueness of international law and the findings from that investigation fall into the field of comparative law, which considers the characteristics of legal systems as a whole.²

Comparative scholars often analyze specific issues *within* international law but have performed little to no comparative analysis of international law *as a whole*.³ This is not to belittle these

1. William E. Butler, *International Law and the Comparative Method*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* 25, 28 (William E. Butler ed., 1980).

2. *Id.*

3. See, e.g., Mark W. Janis, Remark, *Comparative Approaches to the Theory of International Law*, 80 AM. SOC'Y INT'L L. PROC. 152 (1986); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545; William E. Butler, *Introduction*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE*, *supra* note 1, at 1, 1–2 (examining different aspects of international law and seeking to apply comparative legal analysis to the resolution of international legal problems, and examining the relationship between comparative law and international law). Some scholars have expressed “deep skepticism” about any relationship between comparative law and international law. See Butler, *supra* note 1, at 1–2; see also Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999) [hereinafter Bhala I]; Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999) [hereinafter Bhala II]; Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001) [hereinafter Bhala III] (exploring the use of precedent in international trade law). *But see* H. Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31, 61–62 (1931) (considering, and ultimately rejecting, an alleged difference in approach to international law by Anglo-American and Continental legal scholars and jurists). Lauterpacht also considers the civil and common law character of international law. His analysis, however, predates the significant growth of public

previous and very important contributions to international law, but rather to suggest that the subject has been approached piecemeal and not as a whole. In part, this may be because most international law scholars are not comparatists; rather, most comparatists study domestic legal systems, primarily their private law dimensions, and not the international legal system as a whole.⁴ Additionally, to the extent that some insightful historic considerations of this issue exist, they have been rendered incomplete due to significant developments within international law during the last half century.⁵

Of course, a comparative analysis presupposes that international law fits into one of the traditional legal families and can legitimately be analyzed under the same rubric typically applied to national legal systems. Indeed, one reason this examination has not previously been undertaken is, as mentioned above, that international law has been considered to be *sui generis*, and, therefore, the lessons of the many legal systems around the world were simply not thought to be applicable to international law.⁶ But, as this Article argues, if one applies the comparative tools developed for domestic legal analysis to international law—properly understood and with its characteristics and nature laid bare—one might be able to classify international law. Based on this classification, one could apply lessons from comparable legal systems to make the international legal system and its institutions function better. This Article argues that the systems most suitable as sources of such comparative legal analysis are the “mixed jurisdictions,” including, among many others, Louisiana, Scotland, and Quebec.⁷

The benefits that may be gained from such a holistic comparative examination of international law must, however, be weighed against the problems inherent in an inevitably generalized analysis. This is a particularly acute concern because international law is a diffuse legal system. International law, unlike domestic law, is not propagated from one central body and often not even from related or connected

international legal institutions and accordingly is less applicable to today's international law.

4. Butler, *supra* note 3, at 1.

5. See BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 3–8 (Rene Provost trans., 1993) (describing the various developments in international law).

6. Butler, *supra* note 1, at 28 (stating that most comparativists “exempt[] international law from their purview”); see also John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 11 (1997).

7. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000) [hereinafter Tetley, *Mixed Jurisdictions*].

bodies.⁸ Additionally, different nations and their international legal practitioners and scholars often do not view international law the same way—there may be few common reference points among the many international jurists.⁹ Not surprisingly, and further compounding the problem, distinct domestic legal systems often apply international law differently.¹⁰ Still, despite all these differences, there is enough consistency and uniformity in different bodies' application and interpretation of international law to identify and explicate the nature of international law.

This is more than an academic exercise. The consequences of failing to understand the nature of international law, and thus the inevitable importation of different common law and civil law substantive and procedural devices to solve novel problems under international law, are significant. While explored in greater detail throughout this Article, a few examples here will set up the subsequent discussion.

An initial and timely example of the consequences of marching forward blindly in international law can be seen in the development and operation of the International Criminal Court (ICC). While it is still too early to know if the mix of legal traditions in the ICC will be problematic, the operation of previous international criminal tribunals suggests that difficult issues will arise. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) mixed the common and civil law power distributions between prosecutors and judges in such a way that each system's protections against prosecutorial and judicial abuse are largely absent in the

8. "The international system lacks a central legislature to enact legislation; there is no executive to apply or enforce the law that is made; and there is no centralized judiciary to interpret the law and adjudicate disputes." JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 35 (2d ed. 2006); see *id.* at 35–105 (discussing how international law is created in a decentralized system through the use of treaties, customs, and norms of conduct).

9. See Janis, *supra* note 3, at 152–53; see also Ian Brownlie, Remark, *Comparative Approaches to the Theory of International Law*, 80 AM. SOC'Y INT'L L. PROC. 152, 154–57 (1986) (finding a middle ground between the two positions). *But see* Lauterpacht, *supra* note 3, at 46–47 (arguing that there was no real difference in the way jurists viewed international law in the inter-war period, and providing abundant evidence of the long-standing concern about this issue among the wider international law community).

10. See Kai Schabach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 385–86 (1998). Compare *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991) (holding that the Warsaw Convention does not cover damages for emotional distress), with *id.* at 551 (noting the sole decision from a sister signatory court concerning recovery for mental damages found that Article 17 should be read expansively to include damages for psychic injuries (citing *Air France v. Teichner*, 38 (III) P.D. 785, 788 (1984) (Isr.))).

mixed system.¹¹ Furthermore, lessons from earlier tribunals suggest that the mixture of different legal traditions in the ICC will prove awkward for defense counsel, with all that implies for the accused, unless the defense counsel is accustomed to practicing in such a mixed jurisdiction.¹² Thus, the merger of the two traditions in the ICC may have an impact on the justice afforded the accused, and, consequently, that afforded victims and humanity in general.¹³

Nor is it only institutional and procedural issues that may be understood and improved by considering the nature of international law, but substantive international legal issues also. It has been suggested that the common law and civil law approaches to interpretation produce conflicting understandings of the substantive obligations of international law.¹⁴ For example, one explanation for the difference between the U.S. and the European and Latin American perspectives on the legality of the U.S. Helms-Burton law is rooted in the "distinct reasoning techniques, different rules of statutory construction, and inconsistent legal doctrines concerning the territorial application of national legislation."¹⁵

Another substantive example relates to the Convention on Contracts for the International Sale of Goods (CISG).¹⁶ The CISG provides that national courts should interpret and apply it similarly around the world.¹⁷ However, signatories frequently interpret the

11. See Robert Christensen, *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*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 405–08 (2004); see also *id.* at 400–04 (discussing the substantive and procedural criminal law differences between the common and civil law archetypes).

12. See Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute*, 41 VA. J. INT'L L. 164, 184 (2000) (suggesting "only two areas of the world where counsel [is] adequately familiar with both [civil and common law legal] systems . . . Quebec and Cameroon") (citing *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶ 204, U.N. Doc. A/54/634 (1999)).

13. See Christensen, *supra* note 11, at 394.

14. See, e.g., Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L L. 51 (1998).

15. *Id.* at 53. Ultimately, the article rejects that these differences constitute the primary reason for the difference, instead finding other explanations, such as politics. *Id.* at 54. Nonetheless, the issue warrants further consideration and an attempt at resolution.

16. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> [hereinafter CISG].

17. *Id.* ¶ 13.

treaty differently.¹⁸ While there may be a variety of reasons for the differences, perhaps one of the most important is that the civil and common law jurisdictions have different perspectives as well as different approaches to interpretation.¹⁹ These differences in interpretation and application may result from the different sources employed by judges in the two traditions to resolve CISG issues and even from the vastly different forms and styles of judges' written opinions.²⁰

It has even been suggested that states' legal responses to international crises can be traced in significant part to the differences in their legal traditions.²¹ For example, the different approaches taken by the United States and France to Iraq's alleged development and possession of weapons of mass destruction may be explained in part by their different legal traditions.²²

In addition to a better understanding of States' different positions on international legal issues, the further benefits of comparative analysis are likely to be tremendous. They include improving the workings of international institutions, drafting treaties that better reflect the realities of international law, and providing guidance to international arbiters faced with conflicting demands of counsel from different legal systems. At present, international law develops largely without regard for the consequences of its relationship to the common and civil law traditions. The continued failure of international legal thinkers to deal effectively with the relationship of international law to these two main traditions will interfere with its smooth operation.²³

Such comparative legal analyses are inherently risky enterprises. So long as the inherent problems of context and breadth are kept in mind, however, dangers such as overgeneralization may be sufficiently avoided.²⁴ Finally, a complete comparative analysis of international law is a lengthy undertaking that is beyond the scope of this Article, which simply endeavors to begin that process.

18. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 66 (2001).

19. See *id.* at 66–67.

20. *Id.* at 67–68.

21. See Dana Zartner Falstrom, *Thought Versus Action: The Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 338 (2006); see also Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. 292 (2006).

22. Falstrom, *supra* note 21, at 371.

23. Indeed, the failure of international law to deal appropriately with the other legal traditions of the world will also continue to plague the development and operation of international law.

24. See John H. Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, 18 JUDGES J. 4, 50 (1979).

With these caveats in mind, this Article will examine in some detail the nature of international law, arguing that it is not *sui generis* but rather has characteristics of both of the dominant Western legal traditions. Further, this Article will show that the style and character of this “mix” of two traditions within international law bears some resemblance to those legal systems called mixed jurisdictions. The Article concludes by discussing the utility of the conclusion that international law resembles a mixed jurisdiction, showing the benefits both for international law and for mixed jurisdictions. But, more importantly, and as previously noted by William Tetley in his examination of American maritime law’s mixed heritage, one fails to take this mixed nature into account at one’s own “peril.”²⁵

II. ATTACKING THE CONVENTIONAL WISDOM

A. *The Diminishing Uniqueness of International Law*

Conventional wisdom holds that international law is *sui generis*.²⁶ But that uniqueness is perhaps overstated and is diminishing; what is left of its *sui generis* character does not stand in the way of an effective comparative analysis.

The perception that international law is *sui generis* has many origins.²⁷ As an initial matter, the fact that international law is the only source of law for nation-states perforce makes it unique. Domestic legal systems, in contrast, have some unique characteristics but are, for the most part, similar to other domestic legal systems; certainly their goals are the same: the regulation of individuals’ relationships with each other and with the state.²⁸

Furthermore, the uniqueness of international law may also be related to the fact that its subjects, individual states, play a more direct and fundamental role in the creation and maintenance of international law. For example, they may directly opt out by refusing to sign treaties or by persistently objecting to customary international law.²⁹ Also, the enforcement of international law depends, to a significant extent, on state self-regulation. Unlike in domestic legal

25. William Tetley, *Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317, 319 (1999) [hereinafter Tetley, *Maritime Law*].

26. *Sui generis* is defined as “[o]f its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1475 (8th ed. 2004).

27. See, e.g., Butler, *supra* note 1, at 25.

28. See generally MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* (2003) (exploring the basic goals of public law irrespective of a particular jurisdiction).

29. See DUNOFF ET AL., *supra* note 8.

systems, international law typically has no supreme authority; rather, each state is sovereign.³⁰ At the least, a positivist notion of international law would support this proposition—the states create the law and are themselves only bound to the extent they agree to follow it.³¹ While such a theory might apply to domestic systems, the reality is that the individual's relationship to national law is considerably more attenuated than that of the state to international law. Thus, international law is rightfully considered unique among legal systems. However, that uniqueness, especially today, need not be an obstacle to the application of comparative legal tools to international law.

As an initial matter, in contrast to earlier periods in the development of modern international law, some of the characteristics of international law traditionally considered to be unique have eroded in recent decades. For example, the concept of state sovereignty in international law has eroded with the growth of *jus cogens*, the fundamental preemptory norms that apply to states regardless of their consent.³² In this way, states are becoming more like individuals in domestic systems, and international law is becoming more like domestic legal systems. In addition, states increasingly surrender their sovereignty through membership in international economic institutions such as the WTO and international criminal institutions such as the ICC.³³ Furthermore, the increasing web of binding treaties, especially in the commercial context—e.g., the vast number of bilateral investment treaties (BITs)—has resulted in a de facto surrender of sovereignty to these legal institutions.³⁴

An increasingly pronounced factor undermining the *sui generis* character of international law is an increased reliance on existing domestic legal systems for development of substantive international law.³⁵ This is not, however, an entirely new phenomenon. International law developed over the centuries through the work of jurists who were themselves schooled in their own legal traditions;

30. *Id.* at 35. The UN's Security Council may be considered in some ways a supreme authority, though such a characterization is obviously far from exact.

31. See Paul Lermack, *The Constitution Is the Social Contract So It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1410–16 (2007) (discussing various theories of “social contract”).

32. See, e.g., Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

33. DUNOFF ET AL., *supra* note 8, at 25–26.

34. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 228 (1994).

35. See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 32 (2002) (stating that “the new line of cooperation . . . is not the traditional liberal internationalist organization and treaty” but rather is an “agency-to-agency cooperation address[ing] domestic laws . . . in a globalizing world”).

they were first and foremost products of their own legal systems and only secondarily international jurists.³⁶ As such, when creating international law they would necessarily resort to concepts and structures with which they were familiar.³⁷

Another avenue through which domestic law has colored the development of international law is the direct use of substantive domestic law in creating international law. This can be clearly seen from an examination of Article 38 of the Statute of the International Court of Justice (ICJ), which is generally considered to lay out the sources and evidence of international law.³⁸ It provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.³⁹

The connection to domestic legal systems is immediately apparent when considering these sources. For example, conventions, treaties, and other international agreements are essentially contracts between states.⁴⁰ Regardless of the substance of such agreements, which may be particular to the special relationships and circumstances between states, what is relevant here is how the agreements are interpreted and applied. International treaty interpretation is not all that unique; it tends to reflect domestic legislative and contract interpretation methodologies.⁴¹ Similarly,

36. See Christopher Weeramantry, *The Grotius Lecture Series at the American Society of International Law, A Response To Berman: In The Wake Of Empire*, 14 AM. INT'L L. REV. 1555, 1557 (1999).

37. *Id.*

38. See MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 20 (3d. ed. 2006) (describing Article 38 as a formal source of international law).

39. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> [hereinafter ICJ Statute].

40. See Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 826 (2007) ("The Supreme Court has long stated that treaties adopted under Article II of the Constitution are not acts of 'legislation' but rather 'contracts' between sovereign nations.").

41. See, e.g., Schabach, *supra* note 10, at 386 n.321 (noting that the methods of construction in articles 31 and 32 of the Vienna Convention on the Law of Treaties

another of the international law sources noted above, "general principles of law recognized by civilized nations," contains, by definition, principles from domestic legal systems.⁴² Likewise, the "teachings" of scholars and judicial decisions spring from domestic legal systems, even when they are teachings and writings on international law. After all, they are created by jurists trained and immersed in their own domestic legal systems, bringing their domestic legal cultures to bear, even if subconsciously, on matters of international law.⁴³ Finally, the source of law known as *ex aequo et bono* is in significant respects similar, in concept if not in availability, to equity—a concept long practiced within many domestic legal systems.⁴⁴ Thus, a preliminary consideration of the sources of international law clearly shows their domestic pedigree.

Admittedly, there are some sources of international law that do not resemble domestic sources of law at first glance. Customary international law—the obligations created by a combination of state practice and state acceptance—does not initially appear to have a comparable equivalent within domestic legal systems. However, there are areas of domestic law that do resemble customary international law, such as the treatment of custom as a source of law within commercial law.⁴⁵ Similarly, another source of international law, *jus cogens* peremptory norms, also appears alien to domestic legal systems. But, in fact, *jus cogens* norms are much like natural law—a concept not readily admitted in modern positivist legal systems, nonetheless often present, whether implicitly as the underlying basis of a law or explicitly as in the constitutional law of some countries.⁴⁶ Thus, an examination of the sources of international law suggests that its uniqueness, to the extent it exists,

"corresponds with the way civil law countries, notably Germany, construe their national statutes").

42. See generally Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963).

43. See, e.g., Weeramantry, *supra* note 36, at 1556–57.

44. See Mark W. Janis, *The Ambiguity of Equity in International Law*, 9 BROOK. J. INT'L L. 7, 9–14 (1983) (noting the differences in availability and substance between *ex aequo et bono* and equity); Phaeton John Kozyris, *Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality Around the Islands*, 26 DENV. J. INT'L L. & POL'Y 319, 330 n.38 (1998); see also Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, 36 STAN. J. INT'L L. 253, 255 n.8 (2000). However, because no ICJ decision has employed *ex aequo et bono* law, the Author remains unsure of the scope of this concept.

45. See, e.g., U.C.C. § 1-103(a)(2) (2004); see also MARY A. GLENDON, PAOLO CAROZZA & COLIN PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* 241, 633 (3d ed. 2007).

46. For example, the "perpetuity clause" of the German Constitution states that the principles of human rights embodied in article 1, and of a democratic and social state laid down in article 20, may not be amended. Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 79(3) (F.R.G.); see S.E. FINER ET AL., *COMPARING CONSTITUTIONS* 17 (1995).

should not be an obstacle to a comparative examination of international law.

B. *Legal Traditions and International Law*

A comparative analysis of international law starts by considering whether international law has any congruence with other legal traditions or systems. This is necessary because legal systems are generally classified into legal traditions.⁴⁷ Legal systems may be said to be the composite of the legal institutions, rules, laws, regulations, and legal actors of specific political units—usually states or sub-state entities.⁴⁸ Similar legal systems have largely the same characteristics—the same rules and institutions. Traditions, in contrast, are not characterized by identical rules and institutions so much as by historical attitudes toward the law that have vitality in the present.⁴⁹ A tradition's attitude is then reflected in the institutions and actors, their perceived goals and roles, and the character and organization of the substantive law of that tradition's members.⁵⁰

Of course, such classifications fail to truly reflect the complexities involved, but they are necessary for comparative analysis to proceed.⁵¹ Indeed, classification of a legal system into a tradition allows an understanding of how the system operates, where it comes from, and how it is likely to respond to new developments in law and society. Furthermore, such classification enables a deeper comparative examination and an understanding of how a legal concept and rule might be transferred from one system to another. International law, like ordinary domestic legal systems, has much to gain from this comparative law methodology.⁵² At the same time, the potential for oversimplification must be kept in mind throughout the comparative process. Additionally, the classifications are discussed here in terms of their classical characteristics, even as many of those characteristics are fading or spreading into other systems.⁵³

47. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 1 (3d ed. 2007).

48. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 1 (2d ed. 1985).

49. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 12 (2d ed. 2004).

50. MERRYMAN & PÉREZ-PERDOMO, *supra* note 47, at 2.

51. See Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 *TUL. L. REV.* 151, 171 (2003).

52. Butler, *supra* note 1, at 29.

53. See GLENDON ET AL., *supra* note 45, at 799. *But see* Curran, *supra* note 18, at 71–72 (noting the enduring fundamental differences between the common and civil law systems).

Caveats and complexities aside, at the global level, the world's legal systems roughly fall into two groups: those of the Western legal tradition—namely the common⁵⁴ and civil law⁵⁵ traditions—and those of the non-Western traditions, such as Islamic law, Hindu law, and tribal or indigenous law. As a first step, this Article will consider whether international law falls into one of these two groups.

1. International Law Is Part of the Western Legal Tradition

It is usually asserted that international law is Western, though this is more a claim of Western control and direction of the development and institutions of international law than of the inherent character of international law.⁵⁶ This Article, however, is more concerned with the inherent characteristics of the law than the overarching political realities—though they too contribute to the Western character of international law.

An examination of the characteristics of the Western legal tradition shows that international law is a part of that tradition. As described by Alan Watson and others in the field, the Western legal tradition exhibits, among others, the following characteristics:

- (1) a distinction between legal and other institutions, with law having an independent existence and identity from the other institutions;
- (2) a theoretical separation of politics and morals from law;
- (3) administration of the law by trained specialists—lawyers and judges;
- (4) legitimate contributions of legal scholarship to the development of law;
- (5) growth and change of law as part of a pattern of development;
- (6) supremacy of law over political authorities;
- (7) a view of the competing legal systems and jurisdictions as independently legitimate; and

54. Examples of the common law tradition include the English and U.S. legal systems, as different as they are, though they are no longer so pure in this age of statutes and codifications. *See, e.g.*, GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). For a general overview of the characteristics and history of the common law see Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 *LA. L. REV.* 677 (2005).

55. "Civil law" is also sometimes referred to as "Continental law." It includes, among most of Europe, the German, French, Italian, Austrian, and Swiss legal systems. Other countries throughout the world have adopted variants of civil law. For example, Japan adopted the German form over one hundred years ago. Of course, there are vast differences between the different systems within the traditions. For a general overview of the characteristics and history of civil law see Barnes, *supra* note 54.

56. *See generally* BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

(8) endurance of the legal tradition even when legal systems are overthrown.⁵⁷

Of course, these are theoretical and ideal characteristics, and pessimists or realists may debate the extent to which these qualities are truly present in even the most Western legal system.

By contrast, non-Western legal traditions may include some, but not all, of these characteristics. For example, the concept of legal change as part of development is considered by many to be alien to the religious legal systems of the world, thus removing them from the Western legal tradition,⁵⁸ even though those legal systems may have contributed to the development of the Western tradition.⁵⁹ The question, then, is whether international law shares enough of these characteristics to be included within the Western legal tradition.

The first criterion is whether international law distinguishes between legal institutions and other institutions. In other words, the courts, executive branches, legislatures, religious institutions, and so on, must be separate and generally independent of each other.⁶⁰ In the international realm, it is generally the case that lawmaking, executive, and dispute resolution functions are kept separate.⁶¹ Thus, there is a difference between the UN General Assembly or Security Council and the International Court of Justice (ICJ), and a distinction between the Council of Europe and the European Court of Human Rights (ECHR).

A legal system within the Western legal tradition also must observe a theoretical distinction between the law and politics and morals. Thus, in the domestic context it is traditionally considered unacceptable for politics to decide a legal question, and morality, although involved in the legislative process, is traditionally considered to be outside the realm of judicial decisions in Western positivist societies.⁶² In international law, politics play a part in the

57. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 7–10 (1983).

58. See Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (With Some Reference to Jewish and Islamic Law)*, 28 *CARDOZO L. REV.* 53 (2006).

59. See, e.g., WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 51–59 (Michael Byers trans. and rev., Walter de Gruyter 2000) (1984); see also *id.* at 194 (“Grotius held fast to the theological foundation of his legal theory. For him too, God was the supreme source of natural law and the Holy Scripture was an essential basis of cognition, along with, and to the same degree as reason.”).

60. Note, however, that many of the original courts grew out of royal councils, and there are still occasional legislatures that serve as courts, such as the UK House of Lords (until the new UK Supreme Court starts within the next few years). See GLENDON ET AL., *supra* note 45, at 411; see also Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 *GEO. WASH. L. REV.* 735 (1999).

61. See DUNOFF ET AL., *supra* note 8, at 25–26.

62. BERMAN, *supra* note 57, at 8, 37.

legislative process, whether through UN Security Council resolutions or the negotiation of WTO provisions.⁶³ However, on the judicial side—whether in the WTO Appellate Body, international criminal tribunals, or the ICJ—politics and morals are not, as a theoretical matter, acceptable bases for a judgment; decisions involving politics and morals are criticized.⁶⁴

In the Western legal tradition, a special corps of experts typically carries out the administration of legal issues—normally a separate judiciary and professional lawyers, as opposed to the lay prosecutors or counsel used, for example, in societies that employ village elders to carry out judicial functions.⁶⁵ International law, like the Western legal tradition, relies upon specialists both to negotiate and to litigate.⁶⁶ International tribunal judges are typically experts, trained either in the law of their own countries or by experience and specialized training for the international court at issue.⁶⁷ Furthermore, in the Western legal tradition, legal learning informs and shapes the law.⁶⁸ So too in international law, the role of scholars and treatises in the development of international law is significant; from the beginning of modern international law, scholars such as Grotius created the concepts that remain vital in today's international law. Indeed, Article 38 of the ICJ Statute explicitly refers to the role of these scholars.⁶⁹

Additionally, the Western legal tradition requires that law grow and respond to changes in society. Clearly, international law satisfies this criterion. There is little in international law that is permanent. While the growth of *jus cogens* concepts, or peremptory norms, suggests some obstacles to this requirement, the coverage of *jus cogens* is very narrow.⁷⁰

63. See, e.g., Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001).

64. See, e.g., Michael J. Kelly, *Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier*, 29 FORDHAM INT'L L.J. 181, 181 (2005) (criticizing the political influence in the ICJ's advisory opinion on the wall in the occupied Palestinian Territory).

65. BERMAN, *supra* note 57, at 8, 37, 52.

66. But see, e.g., Kurt Taylor Gaubatz & Matthew MacArthur, *How International Is 'International' Law?*, 22 MICH. J. INT'L L. 239, 240 (2001) (arguing that the majority of international law practitioners before the ICJ are from North America and Western Europe, thus international law is not really as well anchored in other parts of the world as is claimed).

67. See Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 225–26 (2004).

68. BERMAN, *supra* note 57, at 8–9.

69. See ICJ Statute, *supra* note 39, art. 38(1)(d).

70. *Jus cogens* generally covers “genocide, slavery, forced disappearances, and torture or other cruel, inhuman, or degrading treatment or punishment.” Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 314 (2006).

The Western legal tradition's concept that law is supreme over political authorities is also present in international law, though it is less clearly visible. State leaders at least pay lip service to international law—even when egregiously violating it.⁷¹ In the vast majority of cases, political leaders comply with international law.⁷² When a clear violation occurs, it either is eventually rectified according to prevailing law,⁷³ or it signals the emergence of a new norm of customary international law.⁷⁴ In defense of state leaders charged with violating it, international law is not always crystal clear, especially when those leaders must respond to novel issues.⁷⁵

The Western legal tradition also embraces legal pluralism, accepting the existence of competing legal systems and jurisdictions.⁷⁶ This concept does not apply as easily to international law. International law certainly does not accept a competing overarching international law, because international law must perforce cover and apply to all states to be effective.⁷⁷ Within international law, however, pluralism is almost axiomatic. After all, the many sources of international law allow for different laws covering the same issues. Thus, a treaty between two parties may be radically different from a treaty covering similar issues between two other parties.⁷⁸ Also, customary international law may be defeated by the persistent objector, or may apply only regionally—this is legal pluralism in action.⁷⁹ Furthermore, international law does accept the

71. See Stephen M. De Luca, *The Gulf Crisis and Collective Security Under the United Nations Charter*, 3 PACE Y.B. INT'L L. 267, 271–72 (1991).

72. See DUNOFF ET AL., *supra* note 8, at 30–31, 960–61.

73. Saddam Hussein's very clear violation of Kuwait's sovereignty was, for example, eventually rectified through the actions of the UN Security Council and those states acting pursuant to its injunction. See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

74. The gradual extension of coastal state control over their waters is a good example of violative conduct eventually resulting in new law. See JAMES C.F. WANG, HANDBOOK ON OCEANS POLITICS AND LAW 96–97 (1992) (describing state practices on the breadth of the territorial sea that led to extending the territorial sea from three miles offshore to twelve nautical miles offshore).

75. Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 175–78 (2001) [hereinafter Picker, *40,000 Feet*] (discussing the novel issues associated with the use of outer space and the international issues associated with new technology).

76. BERMAN, *supra* note 57, at 10.

77. See, e.g., Gaubatz & MacArthur, *supra* note 66, at 243–44 (discussing the long history of claims that international law is “universal”).

78. See generally Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT'L ECON. L. 267 (2005) [hereinafter Picker, *Regional Trade Agreements*] (comparing the coverage and rules that exist among the many different regional trade agreements).

79. JANIS & NOYES, *supra* note 38, at 102–04 (describing the lasting contribution of the *Asylum Case* as its proposition that there can be a regional or

power and authority of other legal systems—namely, the many domestic legal systems.

The final characteristic examined here is that the Western legal tradition endures even when legal systems are overthrown.⁸⁰ Thus, following the many revolutions in the West, despite momentary periods of non-application and statements to the contrary, Western countries' legal systems survived those often cataclysmic events, eventually reasserting themselves and continuing their steady development.⁸¹ Similarly, international law has remained relatively unchanged in its development from its earliest days. It has survived revolutions, demographic changes, world wars, and challenges to its legitimacy, all while retaining the core values first articulated in the modern period by such early international law scholars as Grotius⁸² or in seminal early international agreements such as the Treaty of Westphalia.⁸³ True, international law has developed and now includes many aspects that Grotius and Bentham would have found surprising. Nonetheless, the international legal system has survived many revolutions and the rise and fall of many different empires, including those of Napoleon, the Third Reich, and the Communists, in Europe, Asia, and throughout the world.

Accordingly, although international law is global, upon examination it appears to be solidly within the Western legal tradition. This is not to suggest that international law has not grown in other regions and at other times in the absence of the Western legal tradition. Indeed, some of the earliest international legal norms developed in decidedly non-Western legal environments.⁸⁴ This is not to say that non-Western legal systems are without contributions to the origins and growth of international law,⁸⁵ nor that there are serious disconnects between modern public international law and many of the world's legal cultures.⁸⁶ Rather, it is to say that the dominant character of modern international law is Western. However, these other influences on international law have receded dramatically as the world has gradually been forced to accept the

particular rule of customary law (citing *The Asylum Case*, (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20))).

80. BERMAN, *supra* note 57, at 10.

81. *Id.* at 16, 25.

82. See also Picker, *40,000 Feet*, *supra* note 75, at 162–63. See generally HUGO GROTIUS, *THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (James Brown Scott ed., Ralph van Deman Magoffin trans., Oxford University Press 1916) (1633).

83. Treaty of Westphalia: Peace Treaty between the Holy Roman Empire and the King of France and their Respective Allies, Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

84. See Picker, *40,000 Feet*, *supra* note 75, at 163 n.35.

85. *Id.*

86. See, e.g., Gaubatz & MacArthur, *supra* note 66, at 244–45.

Western view of international law.⁸⁷ This examination should not be read to support any normative statement about the Western versus non-Western nature of international law. It is simply a description of the results of the historical development of international law. Nonetheless, it is a particularly useful description in understanding the makeup of international law and a key step in the development of this Article's thesis: international law is akin to a mixed jurisdiction.

2. Does International Law Belong to One of the Sub-Traditions Within the Western Legal Tradition?

Within the Western legal tradition there are many sub-traditions that are typically referred in their own right as full-fledged legal traditions.⁸⁸ These different traditions are a result of the Western legal tradition's long history and geographic dispersement since its emergence in the second millennium.⁸⁹ The two primary traditions are the civil law and the common law traditions. Thus, a finding that international law is part of the Western legal tradition is merely the first step in the analysis. The next step is to place the system within one of these two main strands of the Western legal tradition. International law, however, does not fit neatly into either one of these traditions. Indeed, it is possible to show that international law is not a part of the common law or the civil law tradition by identifying one or two critical characteristics of each and then showing that those defining characteristics are absent from international law.

A critical characteristic of civil law is the overriding separation and distinction between public and private law.⁹⁰ In contrast, within public international law there is necessarily little emphasis on such a distinction.⁹¹ Indeed, traditionally private international law was a clearly distinct field from public international law.⁹² Although some developing aspects of international law may one day be similar to the civil tradition's private law, it is doubtful that their role and the corresponding distinction will ever rise to the traditional level of the public-private law distinction found in civil law systems.⁹³

87. See, e.g., Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267, 270-72 (2000).

88. BERMAN, *supra* note 57, at 11-13, 25.

89. *Id.*

90. GLENDON ET AL., *supra* note 45, at 294.

91. See Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Disclosure*, 23 B.C. THIRD WORLD L.J. 57, 61 n.9 (2003) (noting that all international law is "public international law").

92. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (noting how the public/private distinction was brought into the core of legal discussion by the evolution of the market as the central legitimating institution).

93. Cf. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349-57 (1982).

Nonetheless, those private law aspects of international law will be discussed in more detail in Part III.D.'s consideration of whether international law is akin to a mixed jurisdiction.

Another traditional characteristic of civil law is the effort to systematize the law through overarching codes and the significant role played by doctrine and theory.⁹⁴ While certain projects within international law resemble this civil law characteristic, such as the efforts of the International Law Commission (ILC), the reality is that much, if not most, of international law results from the practical necessities of state-to-state interaction and pragmatic responses to the real world.⁹⁵ This results in ad hoc legal development, creating new international law in a style that appears to lack a coherent system or logic.

Similarly, international law cannot be considered to be like the common law systems. For example, a critical characteristic of common law is that judges make law and their opinions are primary sources of law.⁹⁶ In international law it is simply not the case that, as a formal matter, case law makes new international law. Indeed, Article 38 of the ICJ Statute provides that case law is merely relevant as "subsidiary" authority.⁹⁷ Furthermore, the concept of binding precedent runs counter to the positivist notion of international law, whereby states must explicitly agree to be bound by the law rather than by the legal conclusions of judges or arbitrators involved in extraneous disputes involving other states.⁹⁸ Another critical characteristic of common law is the role of the jury.⁹⁹ There simply is no place for a jury in the international law system. Indeed, outside the areas of human rights and war crimes, individuals are not tried as international criminals; the civil jury, disappearing already in some of the common law world, is also absent from international law, where cases are resolved by panels of judges or arbitrators.¹⁰⁰

More instances of the dissonance between international law and the common and civil law traditions will be apparent from the discussion below, but these few examples are sufficient to show that international law does not fit perfectly within the two sub-traditions of the Western legal tradition. What, then, is international law, if it is Western but neither common nor civil? Perhaps the answer lies somewhere between the two. The next part of this Article proposes a

94. See generally GLENDON ET AL., *supra* note 45, at 228–41.

95. See DUNOFF ET AL., *supra* note 8, at 1, 15–18.

96. CALABRESI, *supra* note 54, at 4.

97. ICJ Statute, *supra* note 39, art. 38(1)(d).

98. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

99. Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 298 (2003).

100. See Amy Powell, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. REV. 2341, 2341–43 (2004).

way to classify international law based on its similarity to those legal systems known as mixed jurisdictions.

III. MIXED JURISDICTIONS AND INTERNATIONAL LAW

Showing that international law is not a typical member of the common or civil law tradition may support an argument that its *sui generis* character defies comparative analysis. However, the comparative analysis in this Article need not stop at that point. Rather, the failure to establish a direct and consistent link between international law and either of the two sub-traditions within the Western legal tradition—the civil law or common law—is an opportunity to determine whether international law is more closely related to another family of legal systems in both style and character. Such a family must be one in which the systems employ a mix of the characteristics of common law and civil law but are not dominated by one or the other. The mixed jurisdiction is such a family.¹⁰¹

A. *The Mixed Jurisdiction*

Mixed jurisdictions were first defined more than one hundred years ago as “legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law.”¹⁰² The origin of mixed jurisdictions typically lies in the many transfers of colonial power, usually from French or Dutch to British control and from Spanish to American control:¹⁰³

Mixed jurisdictions were often the products of failed colonialism, when territories originally settled by the Spanish, French, or Dutch fell into the hands of the British or the Americans. If the Dutch had not settled, and then lost, the Cape and Sri Lanka, or the French, Quebec, it would hardly be possible today to speak of a group of mixed jurisdictions. The resulting dispersal reflects the trade routes and strategic aspirations of Europeans of the seventeenth and eighteenth centuries. From a European perspective, indeed, mixed jurisdictions were for export only, and Scotland is unusual as a mixed jurisdiction left behind, unaccountably, at home.¹⁰⁴

101. See Goldstein, *supra* note 99, at 291 (noting that the mixed jurisdiction is unique from common law and civil law jurisdictions).

102. Tetley, *Mixed Jurisdictions*, *supra* note 7, at 679 (quoting Maurice Tancelin, *Introduction* to F.P. WALTON, *THE SCOPE AND INTERPRETATION OF THE CIVIL CODE 1* (Butterworths 1980) (1907)); see Frederick Parker Walton, *The Civil Law and the Common Law in Canada*, 11 JURID. REV 282, 291 (1899) (“In Scotland, as in Quebec and Louisiana, the law occupies a position midway between the Common Law and the Civil law. It has drawn largely from both sources.”).

103. Kenneth G. C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 7 (2003).

104. *Id.*

The mixed jurisdiction family is typically thought to include the following legal systems: Scotland, Quebec, Louisiana, Sri Lanka, Israel, Puerto Rico, the Philippines, South Africa, Zimbabwe, Namibia, Lesotho, Swaziland, St. Lucia, Mauritius, and the Seychelles.¹⁰⁵ Many argue that all legal systems are “mixed”,¹⁰⁶ however, the reason for classifying these specific systems separately lies in the fact that they are mixed in a similar manner and to a comparable degree.¹⁰⁷ That similarity allows for useful and legitimate comparative work among those systems.

Professor Vernon Palmer, one of the foremost scholars in this field, has recently argued that there are three general characteristics of the systems within this “new” legal family:

- (1) The “basic building blocks” of these systems derive from the civil and common law traditions;
- (2) Their dual character, the civil and common law duality, is objectively apparent; and
- (3) In mixed jurisdictions, as a general matter, the public law is common law in style, while the private law is more like civil law.¹⁰⁸

In addition to these overarching general characteristics, Professor Palmer has identified other more precise traits—namely, that mixed jurisdictions share similar

- (1) origins,
- (2) judicial characters,
- (3) linguistic issues,
- (4) approaches to precedent and legal sources,

105. Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 4–5 (Vernon Valentine Palmer ed., 2001) [hereinafter Palmer, *Introduction*]; see also H. Patrick Glenn, *Mixing It Up*, 78 TUL. L. REV. 79, 80 n.2 (2003) [hereinafter Glenn, *Mixing It Up*] (listing additional mixed or mixing jurisdictions, including the Basque Country, Australia, Turkey, the Russian Federation, the Tyumen Region, Hong Kong, Algeria, Malta, Japan, Slovenia, Germany, and the European Community (citing STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Örüçüet et al. eds., 1996))).

106. At the Second Worldwide Congress of Mixed Jurisdiction Jurists, held in Edinburgh, Scotland, in June 2007, there was much discussion of other collections of countries that might be grouped together as mixed jurisdictions. Vernon Valentine Palmer, *Two Rival Theories of Mixed Legal Systems*, Address at the Second World Society of Mixed Jurisdiction Jurists Conference (June 27–30, 2007), in 12.1 ELECTRONIC J. COMP. L. 3–5, available at <http://www.ejcl.org/121/papers121.html>. There is without doubt great value in consideration of those different definitions and groupings; this Article will, however, stick with this “classical” or “Palmerian” characterization of mixed jurisdictions as the one most applicable to international law.

107. Reid, *supra* note 103, at 19; Daniel Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 78 TUL. L. REV. 41, 46–47 (2003). For an overview of mixed jurisdictions, see GLENDON ET AL., *supra* note 45, ch. 19.

108. Palmer, *Introduction*, *supra* note 105, at 7–9. The Author relies on Palmer's excellent book for what is this Article's working definition of and required characteristics for mixed jurisdictions, noting that there may be differences of opinion of the exact contours of such a definition.

- (5) receptions of the common law,
- (6) receptions of Anglo-American procedure, and
- (7) styles of commercial law.¹⁰⁹

Of course, these traits are merely one distinguished scholar's assessment of the common characteristics of mixed jurisdictions and their relationships to the common and civil law traditions. Other scholars have identified other criteria.¹¹⁰ Indeed, "[i]t goes without saying that some mixed jurisdictions are also derived partly from non-occidental legal traditions: the North African countries, Iran, Egypt, Syria, Iraq, and Indonesia, for instance."¹¹¹

Nonetheless, the traits identified by Professor Palmer serve as a good starting point in the comparative analysis of international law. It must be borne in mind that Professor Palmer, in his studies of mixed jurisdictions, has found that not all such jurisdictions satisfy all of these criteria.¹¹² Accordingly, in its pursuit of international law's heritage, this Article will engage in a detailed consideration of whether the identified general and specific mixed jurisdiction characteristics can be found within international law.

B. *International Law and the Overarching Characteristics of Mixed Jurisdictions*

1. The Civil Law and Common Law Are the "Basic Building Blocks" of International Law

After establishing in Part II that international law fits solidly within the Western legal tradition, whose two primary sub-traditions are the common and civil law traditions, this characteristic should not prove difficult to satisfy. Nonetheless, it merits a careful analysis. As an initial matter, it is understood for the most part that civil law-trained jurists created modern international law,¹¹³ despite

109. *Id.* at 76–80.

110. See Reid, *supra* note 103, at 21–25.

111. William Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)*, 78 TUL. L. REV. 175, 183 (2003) [hereinafter Tetley, *Nationalism*].

112. It has been argued that each of the mixed jurisdictions was itself "born one of a kind." Palmer, *Introduction*, *supra* note 105, at 3; see also Fassberg, *supra* note 51, at 155–60 (noting the many differences between Israel and the other mixed jurisdictions); Vernon Valentine Palmer, *A Descriptive and Comparative Overview, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY*, *supra* note 105, at 17, 54 [hereinafter Palmer, *Comparative Overview*] (noting Israel and Quebec as exceptions to the fifth characteristic, receptions of the common law).

113. These civil law-trained fathers of modern international law include Hugo Grotius (1583–1645), Francisco de Vitoria (1486–1546), Alberico Gentili (1552–1608), Francisco Suarez (1548–1617), and Samuel Pufendorf (1632–1694). *E.g.*, JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 3 (1978) ("The civil law was the legal tradition familiar to

the fact that the term "international law" was coined by a jurist from the common law world, Jeremy Bentham.¹¹⁴ Of course, theoretically, the jurists responsible for creating the ideas and institutions of international law could have done so in isolation from their domestic legal environments. In fact, however, jurists necessarily borrowed and adopted existing institutions and mechanisms from their existing civil law systems—sometimes subconsciously, and perhaps even despite explicit efforts to reject civil law notions.¹¹⁵ It is only natural that they created international law in the image or shadow of civil law. Thus, from its earliest stage, international law developed among civil law ideas, with the predictable result that it reflected those very ideas.¹¹⁶

The influence of common law jurists, not felt as strongly in the early period of modern international law, is noticeable over the last one hundred years, and particularly so during the last sixty years, since the end of the Second World War.¹¹⁷ In that time, international law has slowly absorbed various common law ideas and institutions,

the Western European scholar-politicians who were fathers of international law [I]t is the work of people trained in the civil law tradition."'). *But see, e.g.*, Onuma Yasuaki, *The History of International Law: Universality and Particularity - The Birth of International Law as the Law of International Society*, 94 AM. SOC'Y INT'L L. PROC. 44 (2000) (arguing that international law only came into being once the Western notion of international law was applied to Africa, through colonization, and once China accepted Western international law at the end of the nineteenth century).

114. See Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 408 (1984).

115. See, e.g., David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 EMORY INT'L L. REV. 1, 20–21 (1996).

116. See H.C. Gutteridge, *Comparative Law and the Law of Nations, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE*, *supra* note 1, at 15, 15 ("[S]ince the age of Grotius, when the law of Rome was the basic element in almost the whole of the law of Europe and was universally regarded as the standard by which justice should be measured."). Perhaps there never really was any choice but for international law to develop in a civil law style. A common law style requires a strong judiciary to create the law, as well as an elevation of problem solving over theory. International law, the organizer of international relations, did not have any courts to create law or judges that could feel legitimate in expounding the law for a nation to follow—international law was always the province of statesmen. Why would those statesmen then allow judges to usurp the lawmaking power? Furthermore, international law, while first reflected in the practice of states, was initially articulated by scholars who employed the devices of scholarship—theory and logic—to advance their arguments, rather than developing the law as the result of a succession of cases. Also, perhaps using cases to determine law would be antithetical to international law, as the cases would be peculiarly local and would result in inconsistency, thus undermining the notion that the law was international. In the absence of international courts, the only way for international law to develop was through the slow acceptance of theory.

117. See, e.g., Lauterpacht, *supra* note 3 (employing many examples taken from the inter-war period to support his thesis that Anglo-Americans (both scholars and jurists) consistently defer to continental law-based legal norms).

ones that might very well have been antipathetic to its original civil law character.¹¹⁸

Indeed, as international law continues to develop, it will continue to borrow concepts and ideas from common and civil law systems. This is to be expected because, as in its beginning stages, international law today is, for the most part, a product of the ideas and thoughts of jurists, scholars, and practitioners trained in the Western tradition.

Furthermore, these developments make sense in light of the fact that, as a part of the Western legal tradition, international law could not easily have borrowed ideas and concepts from non-Western Legal Traditions. This would have been especially difficult when international law sought ways to react to modern developments that were themselves typically of Western origin, such as colonialism, sectarian wars in Europe, the growth of transoceanic commerce, and the horrors of the nineteenth and twentieth century wars. Employing ideas from Western legal systems meant importing ideas from its building blocks—the civil law and common law traditions. Furthermore, the powerful geopolitical position of the West throughout the last four hundred years must have contributed to the development of an international law molded on the Western tradition.

This geopolitical ordering of international law has been further reinforced by the fact that the vast bulk of the day-to-day operations of international law take place within domestic legal institutions¹¹⁹ of which the majority are systems derived from either the civil or common law tradition.¹²⁰ Nonetheless, despite this borrowing from the civil and the common law, international law has some unique aspects that reflect the fact that its primary subjects are states.¹²¹ Likewise, each of the mixed jurisdictions possesses significant unique features.¹²²

118. *Id.*

119. See JANIS & NOYES, *supra* note 38, at 180 (“In most instances, when international legal rules are applied in practice, they are applied by municipal courts.”).

120. See GLENDON ET AL., *supra* note 45, at 68–72 (global distribution of civil law), 320–24 (global distribution of common law).

121. See JANIS & NOYES, *supra* note 38, at 424 (“Although individuals and a variety of non-state entities shape and are affected by international law, states have been central components of the international legal system, at least since the Peace of Westphalia in 1648.”).

122. See Visser, *supra* note 107, at 47 (describing the characteristics of a mixed system); Esin Örucü, *The Judge and Jurist in Scotland: On the Verge of a Second Renaissance*, 78 TUL. L. REV. 89, 90 (2003); see also Barnes, *supra* note 54, at 683–88 (2005) (“All but three of the one hundred ninety-one nations of the world have some form of either civil law or common law.” (footnote omitted)).

2. It Is Objectively Apparent That International Law Has a Dual Character

This characteristic of mixed jurisdictions really constitutes two separate and distinct requirements:

- (1) The system must have a "dual" character, i.e., not solidly or predominantly part of either the common or the civil law tradition; and
- (2) The dual character must be objectively apparent.¹²³

a. International Law Is a Dual System

There is a wide degree of support for the proposition that civil law has served as the most significant influence on international law; some would even argue that international law is essentially a civil law system.¹²⁴ This is particularly understandable given that civil law is the predominant sub-tradition within the Western legal tradition—more countries employ a legal system in the civil law tradition than in the common law tradition, and the vast majority of the world's population live in civil law countries.¹²⁵ It thus makes sense that civil law *should* have been the dominant influence on international law.

123. See Palmer, *Introduction*, *supra* note 105, at 7–9 (stating that the first feature of a mixed jurisdiction is that the system is built upon dual foundations of common law and civil law materials, and the second feature is that the presence of the dual elements will be obvious to an ordinary observer).

124. See Luz Estella Nagle, *Maximizing Legal Education: The International Component*, 29 STETSON L. REV. 1091, 1092 (2000) ("It is the civil-law traditions that have most widely influenced international law, international organizations . . ."); Schadbach, *supra* note 10, at 385 ("The study of civil law concepts is particularly helpful to the common law lawyer working with public international law, which is largely based on civil law and natural law principles."); MERRYMAN & CLARK, *supra* note 113, at 4 ("It is difficult to overstate the influence of the civil law tradition on the law of specific nations, the law of international organizations, and international law.").

125. See Barnes, *supra* note 54, at 684 (showing that 51 nations utilize common law systems, whereas 115 nations have civil law systems). Civil law systems include most of Europe, save Ireland and England, and also include Russia, China, Mexico, South and Central America, and significant parts of Africa. In contrast, the common law systems include the United States, Anglo-Canada, England, Ireland, Australia, some African countries, most of south Asia (although family law tends to be based on religious law), and a few other countries around the world. See *id.* at 685.

Common law (exclusive of any civil law), whether in "pure" or "mixed" form, is utilized by some fifty-one nations, or 26.7% of all nations of the world. These nations account for 34.81% of the world's population. . . . Civil law (exclusive of any common law), whether in "pure" or "mixed" form, is utilized by some 115 nations, or 60.21% of all nations of the world. These nations account for 59.01% of the world's population.

Today, however, the civil law character of international law is under constant assault. The world and its legal environment is, in so many ways, a different place than it was four hundred years ago, indeed even than it was forty years ago.¹²⁶ It is almost as though the civil law tradition imbued throughout traditional international law is under attack by the legal imperialism of the common law countries—primarily the United States and the United Kingdom.¹²⁷ It has been suggested that international law is undergoing “Americanization.”¹²⁸

While international law remains in significant respects like civil law, there is sufficient common law influence that international law can fairly be characterized as a dual system. A few brief examples should suffice to support this assertion.

i. Example 1: International Law Sources Exhibit Dual Characteristics

Simply, and perhaps a bit anachronistically, it may be said that the sources of civil law emanate from a combination of theoretical principles and carefully structured legislation.¹²⁹ Civil law systems traditionally legislate in anticipation of the need for law—they are proactive.¹³⁰ Although this is less and less the case today,¹³¹ it is an acceptable generalization.

Another characteristic of civil law sources is that they are often systematically codified.¹³² Codification of a body of law entails more than just the enactment of policy through legislation or a systematic compilation of the law into, say, the U.S. Code. Rather, it is an attempt to make law that covers the *entirety* of a legal field, if not in

126. By 1968, Europe's role in shaping world legal culture was already significantly reduced from even the low following the postwar period, and certainly from what it had been at the beginning of the twentieth century. Consider that in 1907 the great world events centered on France, Germany, and the United Kingdom, yet, fifty years later, France and the UK saw their international power sharply reduced following the debacle of the Suez Crisis.

127. The influence of the United Kingdom tends to be of a common law nature, despite the fact that the UK includes Scotland, a system not purely within the common law. See GLENDON ET AL., *supra* note 45, at 956–60. But, within international affairs, it is the common law character of the much larger England (and of the public law of Scotland) that has influenced and continues to influence international law. *Id.* An interesting avenue of research would be to consider how much the civil law part of Scotland influences British interactions with the international law system—including its interaction with the European Union and the Council of Europe.

128. See Raj Bhala, *Five Theoretical Themes in the World Trade Organization Adjudicatory System*, 6 ILSA J. INT'L & COMP. L. 437, 442 (2000) [hereinafter Bhala, *WTO*] (comparing globalization in WTO decisions to Americanization).

129. See Barnes, *supra* note 54, at 731 (providing a summary of the civil law system).

130. See *id.* at 717–21 (explaining the legislation system in civil law jurisdictions).

131. See GLENDON ET AL., *supra* note 45, at 73–74.

132. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000).

minute detail, at least covering all the necessary concepts.¹³³ Furthermore, the codification should contain consistent terminology and no internal contradictions. In an ideal world, there would be no need for further law on the subject after codification.¹³⁴ Moreover, historically and as a theoretical matter, civil law judges should merely *apply* the law, not *make* the law.¹³⁵ The reality is different as a result of “gap filling” and other intrusions by everyday life into complex, sophisticated legal systems.¹³⁶

In contrast, the pragmatic common law is a combination of legislatively *and judicially* created law, usually born out of a specific problem or dispute.¹³⁷ Thus, legislatures enact law that tends to be narrowly focused on resolving specific issues, with less attention to the law’s interaction with preexisting law and doctrine.¹³⁸ Indeed, the idea of existing doctrine may be alien to many common law legislatures. Additionally, common law judges use their interpretive and applicative powers to make new law where there are gaps in statutory law—in some fields more than others, but less frequently today than was historically the case.¹³⁹ Indeed, one meaning of “common law” is “judge-made law.”¹⁴⁰ Thus, in the common law world, judicially created law, or case law, is typically viewed as a primary source of law. Of course, this is a simplification,¹⁴¹ but it

133. *Id.* at 448.

134. *Id.* at 449.

135. *Id.*

136. See Curran, *supra* note 18, at 98 (explaining that judicial creation of law in civil law cultures helps complete a code when issues arise that eluded the drafters). See generally GLENDON ET AL., *supra* note 45, at 248–93.

137. Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240 (1999).

138. *Id.* at 242–43; Weiss, *supra* note 132; see Curran, *supra* note 18, at 75 (explaining that the common law European Union Member States have influenced the civil law Member States because European legal progression is occurring in reaction to new circumstances imposed on the European Union).

139. See CALABRESI, *supra* note 54, at 5–7 (explaining that current American statutes are frequently intended to be the primary source of law whereas earlier codifications of the law were more general leaving more room for judicial gap-filling).

140. BLACK’S LAW DICTIONARY 276 (8th ed. 2004). Also note some of the other meanings of common law: (1) Anglo-American law; and (2) that part of the law within Anglo-American law that is not equity. *Id.*

141. The view that there is a fundamentally different function of judicial precedent between the two systems seems to be based more on form rather than substance. Lauterpacht, *supra* note 3, at 52–54.

It disregards the fact that, on the one hand, no formal provision of the law and no form of judicial organization can prevent judicial precedent from constituting a powerful factor of positive law, and that, on the other hand, the power of judicial precedent is in the long run not greater than the inherent value of the legal substance embodied in it.

does represent the traditional character of each of the systems and will serve the purposes of this comparative exercise.¹⁴²

Reflecting its mixed nature, sources of international law exhibit aspects of sources of both the common and the civil law. As an initial matter, the influence of civil law is apparent in Article 38 of the ICJ Statute.¹⁴³ Examination of these “official” sources of international law reveals those sources to have a dual nature, sharing aspects of common and civil law.¹⁴⁴ The sources of international law that particularly show its dual character are treaty law, judicially created law (“judicial decisions”), and scholarship (the “teachings of the most highly qualified publicists of the various nations”)—the three main sources of international law today, even though two are merely “subsidiary” or secondary.¹⁴⁵ This dual nature will be explored more specifically in the remainder of this Article. In contrast, *jus cogens* includes such little substance that it is not useful to this discussion.¹⁴⁶ “Principles” are similarly difficult to pinpoint and tend not to be a major issue in international law; because general principles tend to reflect the lowest common denominator of the world’s laws, they are rarely sufficiently detailed for serious application.¹⁴⁷ It should, however, be noted that because these principles are drawn from the legal systems of the world, they will necessarily possess a dual common/civil law nature that reflects each of the two main traditions.

Treaties, the most common source of international law, also reflect the dual nature of international law, with both civil and common law characteristics. Treaties, like civil law codes, are often attempts to create a systemized body of law in anticipation of issues likely to arise in a specific, substantive area.¹⁴⁸ They also often provide a definitive source of law for state action and for the

Id. at 52; see also Horacio Spector, *The Future of Legal Science in Civil Law Systems*, 65 LA. L. REV. 255 (2004) (discussing trends in both civil and common law not expected from the historical view of these traditions).

142. See Fassberg, *supra* note 51, at 171 (noting that “traditional descriptions of legal families are in some sense caricatures. But they are in some sense very apt . . .”).

143. See *supra* Part III.B.1.

144. As observed above, while some of these forms—customary international law and perhaps *jus cogens*—are not as easily related to domestic legal systems, the remaining sources are variants of the traditional sources of civil law and common law. See Barnes, *supra* note 54, at 678–79 (explaining that the two primary legal systems of the world are civil law and common law).

145. ICJ Statute, *supra* note 39, art. 38.

146. See Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 590 (1988) (“[T]he concept *jus cogens* in international law surely conceals substantive emptiness . . .”).

147. See JANIS & NOYES, *supra* note 38, at 107–08.

148. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (a treaty created by the desire to settle all issues relating to the law of the sea).

resolution of disputes.¹⁴⁹ Indeed, the modern trend is towards civil law-like “codes” covering all areas of international law, with the UN International Law Commission as the primary facilitator of this international codification movement.¹⁵⁰ This new style of treaty, like the civil law, seeks to distill the law from first principles and from analysis of past practice so as to provide guidance for the future.¹⁵¹

There are, however, many treaties, perhaps the vast bulk, whose purpose is to solve specific problems between states.¹⁵² These treaties are ad hoc arrangements, often created without taking into account the full context of the field they will affect.¹⁵³ This is similar to the common law approach to legislation, in which little consideration may be given to how new legislation fits into the larger body of law in an area.¹⁵⁴ International treaties thus embody two forms of positive law, one like the civil law code, and the other reactive and pragmatic like common law. They sit side by side, reflecting the dual nature of international law.

Judicial decisions are secondary to treaty law according to the ICJ statute, but, in reality, they lie somewhere between the common law view that judicial decisions can be primary law and the civil law view that they are secondary law.¹⁵⁵ While judicially created international law—i.e., reliance on precedent based on the principle of *stare decisis*—is not binding as a *de jure* matter, judicial decisions are increasingly *de facto* binding.¹⁵⁶ For example, studies of the use of precedent in the WTO Appellate Body, the most dynamic of the present-day international tribunals, show the increasing use and

149. See, e.g., *id.* (providing definitive laws pertaining to the seas and oceans prompted by a desire to resolve disputes among states).

150. See International Law Commission, <http://www.un.org/law/ilc/> (“[T]he International Law Commission’s mandate is the progressive development and codification of international law . . .”) (last visited Sept. 24, 2008).

151. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 4 (1994) (describing the role of the International Law Commission); Tetley, *Mixed Jurisdictions*, *supra* note 7, at 701 (describing the civil law doctrine’s function).

152. See Schachter, *supra* note 151, at 4 (explaining that some treaties are addressed at solving problems such as health, food, education, human rights, pollution, transportation and television).

153. See generally Picker, *Regional Trade Agreements*, *supra* note 78, at 287–94 (showing the conflict between the many regional trade agreements, their dispute settlement systems, and the WTO’s text and jurisprudence).

154. Of course, there are some attempts at common law-style codification, but they are rare and often imperfectly created or implemented. The Uniform Commercial Code is one such attempt, undermined by ad hoc amendments and piecemeal implementation by states. See Weiss, *supra* note 132, at 520 (describing how the U.C.C. was codified).

155. ICJ Statute, *supra* note 39, art. 38; see Schachter, *supra* note 151, at 2–3 (discussing the authority of treaties).

156. See Bhala, *WTO*, *supra* note 128, at 441.

importance of judicial decisions.¹⁵⁷ Nor is this a new phenomenon. Professor Hersch Lauterpacht commented on the use of precedent during the interwar period, both in international arbitration and in the Permanent Court of International Law, the precursor to today's World Court.¹⁵⁸ Thus, judicially created international law reveals the dual nature of international law: although theoretically held in check by the civil law roots of international law, its increasing use suggests the influence of the common law tradition.

Finally, modern international legal scholarship cannot help but reflect the two main branches of the Western legal tradition, in which most scholars are trained. Even international law scholars in non-Western regions have often received Western-style legal training as law students outside their home countries. Furthermore, most countries, even non-Western countries, have legal systems of Western origin.¹⁵⁹ Japanese scholars of international law, for instance, should reflect their civil law-based legal system with its overlay of U.S.-style regulatory law, though they have unique perspectives on international law as a result of Japan's culture and history. Accordingly, international law scholars around the world tend to come from one of these two traditions, and the most distinguished scholars often have experience in both traditions.¹⁶⁰ Thus, these scholars further reinforce the dual nature of international law.

ii. Example 2: Dual Common and Civil Law Styles of the International Law Judiciary

The dual nature of international law is also apparent from an examination of the character of international adjudication bodies, including judges and arbitrators. The characteristics present in international adjudicatory bodies reflect the two quite different traditional characters of the common and civil law judicial traditions and of the judges within those traditions.¹⁶¹

This dual nature is clear from a comparison of the characteristics of the civil law, common law, and international judiciaries. The civil law judicial structure is traditionally diffuse, employing specialized

157. *Id.*; see also Olav A. Haazen, Book Note, 38 HARV. INT'L L.J. 587, 587-88 (1997) (reviewing MOHAMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT (1996), and explaining that in the International Court of Justice the rule of *stare decisis* does not apply; however, judges still strive to reconcile different positions).

158. Lauterpacht, *supra* note 3, at 57, 59.

159. See generally BERMAN, *supra* note 57 (discussing the formation and influence of Western legal tradition).

160. See REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 111 (2001) (explaining the benefits of understanding both traditions).

161. Haazen, *supra* note 157, at 587 ("International law is neither Civil law nor Common law, and the International Court of Justice ('ICJ'), commonly referred to as the 'World Court,' cannot be said to stand distinctly in either one of these traditions.").

courts such as administrative or labor law courts.¹⁶² In contrast, the common law judiciary tends to be centralized, with courts of general jurisdiction.¹⁶³ There is no centralized judiciary in international law. Furthermore, most international law tribunals or courts are specialized—e.g., the International Centre for Settlement of Investment Disputes (ICSID),¹⁶⁴ and the various war crimes tribunals, such as the International Criminal Tribunal for Rwanda (ICTR).¹⁶⁵ The structure of international adjudication thus resembles civil law in its specialization and diffusion. Nonetheless, even as international adjudicatory bodies remain specialized and independent, there is some indication of a move toward centralization in some fields of international law. For example, in the international criminal law context, the creation of the ICC may eventually result in the demise of many tribunals.¹⁶⁶ Similarly, many international courts have begun to move beyond their original areas of competence toward a more general jurisdiction—the WTO's Dispute Settlement Body (DSB) now handles environmental issues along with their trade-related effects.¹⁶⁷

The picture of the international judiciary is not complete without considering the international adjudicators themselves. They apply the laws and establish the character of dispute resolutions, in the process controlling the litigants and their representatives. The question is whether international adjudicators—be they arbitrators, arbitration panelists, international court judges, or otherwise—are similar in background to civil or common law adjudicators, to the extent that there is a typical adjudicator in each of those systems. Typical civil law judges tend to be recruited directly from law schools, trained at “judge schools,” and then work their way up the hierarchy as civil servants.¹⁶⁸ In contrast, common law judges tend to be

162. GLENDON ET AL., *supra* note 45, at 121–23; see Palmer, *supra* note 112, at 35–37 (describing how mixed jurisdictions differ from civil law jurisdictions, stating the judges are legal generalists rather than specialists).

163. GLENDON ET AL., *supra* note 45, at 375–76. But note the growth of specialized courts, such as the commercial law courts in England, and the increasing role of specialized administrative tribunals. *Id.* at 417–19, 683.

164. See International Centre for Settlement of Investment Disputes, <http://www.worldbank.org/icsid/> (last visited Sept. 25, 2008) (official website of ICSID).

165. See International Criminal Tribunal for Rwanda, <http://69.94.11.53/default.htm> (last visited Sept. 25, 2008) (official website of the ICTR).

166. One of the reasons for the establishment of the ICC was dissatisfaction at the proliferation of specialized tribunals, such as those for Rwanda and the former Yugoslavia.

167. See Appellate Body Report, *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* (“*Shrimp-Turtle*”), WT/DS58/AB/R, (Oct. 12, 1998) (adopted Nov. 6, 1998) [hereinafter, WTO, *Shrimp*] (allowing amicus briefs); see also Picker, *Regional Trade Agreements*, *supra* note 78, at 268 (suggesting that the DSB take on greater control over the many dispute settlement systems of the hundreds of regional trade agreements).

168. GLENDON ET AL., *supra* note 45, at 167–69.

recruited from the practicing bar.¹⁶⁹ As in common law, judges and arbitrators in international adjudicatory bodies also tend to be recruited from the practicing bar, though sometimes from state judicial systems or from state administrations—not directly from law school.¹⁷⁰ Also, unlike many civil law judiciaries, the international judiciary is not like a civil service system; as such, international adjudicators may more closely resemble common law judges than civil law judges in their personalities and egos.¹⁷¹ In this way, the international judicial structure reflects a common law character.

In other respects, however, the international judiciary more closely resembles the civil law judiciary, particularly with respect to the manner in which the international judiciary traditionally relates to the law it is charged to divine and apply.¹⁷² The role of the international judiciary is more like civil law in its deference to the letter of the law and in its self-imposed restraint.¹⁷³ Even here, though, there is some evidence of international judges increasingly engaging in activist conduct.¹⁷⁴ Nonetheless, that conduct is sufficiently unusual that it has attracted considerable comment,

169. *Id.* at 490–91; Palmer, *Comparative Overview*, *supra* note 112, at 37.

170. *See* Wald, *supra* note 67, at 225–31 (explaining how judges get to international courts); Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 BERKELEY J. INT'L L. 534, 541 (2006) (stating that appellate body members “have come from a variety of backgrounds, and include retired government officials and judges, international law academics, international lawyers, international courts and tribunals’ judges, et cetera”); *see also* C.F. Amerasinghe, *Judging with and Legal Advising in International Organizations*, 2 CHI. J. INT'L L. 283, 288 (discussing the composition of the World Bank Administrative Tribunal).

171. *See* Palmer, *Comparative Overview*, *supra* note 112, at 31–37 (describing the differences between the civil law and common law judicial institutions); *see also* Fassberg, *supra* note 51, at 171 (discussing judicial character and its relationship to civil law and common law by stating that humility and restraint of judges goes together with civil law and judicial greatness and creativity goes together with common law).

172. *See* Amerasinghe, *supra* note 170, at 289 (stating that the World Bank Administrative Tribunal was influenced by the efforts of other International Administrative Tribunals to compile jurisprudence and authoritative academic opinion in the field).

173. *See also* Edward McWhinney, *The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy*, 5 CHINESE J. INT'L L. 3 (2006) (discussing the implications of the antinomy between judicial activism and self-restraint for international tribunals). *See generally* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response To Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

174. *See* Ghias, *supra* note 170, at 544–51 (describing the judicial lawmaking of the WTO Appellate Body “by explaining how it incorporated the Vienna Convention into its jurisprudence and declared that the general principles of international law are applicable to disputes involving WTO law”); *see also* David D. Caron, *International Decisions*, 99 AM. J. INT'L L. 222, 228 (2005) (explaining that the European Court of Human Rights in *Assanidze v. Georgia* cast aside its self-restraint concerning remedial competence and directed the state to adopt certain measures to remedy violations of the European Convention).

much of it negative.¹⁷⁵ Such judicial activism does not typically excite extraordinary comment in the common law world, aside from political comment.¹⁷⁶

At a more prosaic level, and yet too complex for consideration in this Article, the dual common/civil law judicial style is arguably apparent in how judges convey their findings—in the opinions they issue.¹⁷⁷ For example, civil law opinions are traditionally, although not uniformly, shorter and more formalistic.¹⁷⁸ Common law opinions show a range of length, though the trend, particularly in the United States, is toward ever longer opinions.¹⁷⁹ International law opinions are as detailed as, albeit slightly more formalistic than, any common law opinion.¹⁸⁰ Similarly, international decisions apply a wide range of doctrines and of styles and methods of reasoning, covering the gamut of those found in common and civil law opinions.¹⁸¹ Thus, international adjudicators, like those in mixed jurisdictions, are not easily pigeonholed into either of the great legal traditions but rather display a dual nature.¹⁸²

There are many other aspects of judicial behavior that could be discussed in furtherance of this thesis, but the size of this Article precludes such a discussion.¹⁸³ The foregoing sufficiently shows that the international judiciary has important characteristics that

175. See Ghias, *supra* note 170, at 544 (explaining that member states are taking steps to control the Appellate Body because the court is asserting judicial independence).

176. Of course, judicial activism may excite political comment, though that commentary, typically negative, is frequently inconsistent and motivated by political views, not legal theory. See Barnes, *supra* note 54, at 697–99 (describing the glorification of judge's in the common law system).

177. See Fassberg, *supra* note 51, at 162–68 (discussing opinion styles and their relationship to sources of law and language, and noting the different styles of opinions across systems).

178. Tetley, *Mixed Jurisdictions*, *supra* note 7, at 702; cf. GLENDON ET AL., *supra* note 45, at 877.

179. Tetley, *Mixed Jurisdictions*, *supra* note 7, at 702 (“[C]ivil law decisions are indeed shorter than common law decisions . . .”).

180. See Fassberg, *supra* note 51, at 162–68 (discussing opinion styles in mixed jurisdictions). This difference actually reflects deep structural and philosophical roles of the judiciaries. This issue is beyond the scope of the paper right now, but in short may relate to issues of legitimacy and separation of powers.

181. See Tetley, *Mixed Jurisdictions*, *supra* note 7, at 701–03 (discussing the different styles of civil and common law opinions).

182. See, e.g., Fassberg, *supra* note 51, at 168 (noting the Israeli mixed styles of opinion writing).

183. For example, such an examination could consider the use of transcripts versus judicial control of the record. See, e.g., ICJ Statute, *supra* note 39, art. 47 (using judicially controlled minutes and not a transcript). Another issue that could be considered is the behavior of the judges—whether they are active and inquisitorial like civil law judges, or more passive like common law judges, allowing the parties to run the cross examinations and evidence presentations. It is not clear, however, that there is sufficient uniformity across the many different international law tribunals and courts and arbitrations to reach generally valid conclusions.

alternately reflect elements of a civil and of a common law nature—further evidence of the dual civil/common law nature of international law.¹⁸⁴

b. The Dual System Is Objectively Apparent

Another requirement of a mixed jurisdiction is that its dual character should be objectively apparent.¹⁸⁵ In some sense, if the system is shown to be a dual system (as in the immediately preceding Part III.B.2.a), then it should follow that its dual nature is objectively apparent. In reality, this requirement of objectivity is also an independent criterion. This objective criterion suggests that a subjective standard is inappropriate and, therefore, that the determination of a system's mixed nature cannot be made solely by participants in that system. Thus, a country's belief that its own legal system has a dual character is insufficient to establish its duality.

For a domestic system, finding a mixed or dual character is not necessarily problematic. Inasmuch as the character or legal tradition of the system is something frequently considered, within and without such domestic systems, the "obvious" will be noticed. The dual origins of the legal systems of Quebec, Scotland, Israel, Louisiana, and the other mixed systems have been the focus of much attention for decades, sometimes centuries.¹⁸⁶

In contrast, for international law, such comparative examinations are less common; hence, even the obvious has been missed. This myopia is, as discussed in Parts I and II.A, a consequence of the usual view that international law is *sui generis* and not susceptible to comparative analysis. As such, the issue of membership in a legal family, let alone whether it has a dual character, typically does not come up. This Article, however, by subjecting international law to a comparative analysis, lifts the veil obscuring the nature—obvious or not—of international law.

Once the comparative analysis is performed and the evidence even marginally mustered, as is undertaken in this Article, it becomes objectively clear that the civil and common law traditions have contributed significantly to the style and character of international law. Furthermore, it is also clear that neither

184. The next logical step after a discussion of international adjudicators would be to discuss the characteristics of international lawyers, for there is an emerging bar of such attorneys. Once again, the size limitations of this Article preclude such a discussion at this time.

185. See Fassberg, *supra* note 51, at 154 (arguing that what makes a jurisdiction mixed is that it has legal sources and legal phenomena characteristic of at least two legal families).

186. See generally Tetley, *Nationalism*, *supra* note 111 (citing the historic origins in various countries).

predominates in influence or in representation throughout international law; as such, the common law and civil law traditions are the two primary components of international law today. Thus, when viewed correctly, through a comparative lens, it is objectively apparent that international law is a dual system of civil and common law.¹⁸⁷

3. Common Law Public Law, Civil Law Private Law

Recent examinations of mixed systems show that their private law tends to be more like civil law and their public law tends to be more like common law.¹⁸⁸ This is not obviously a characteristic of international law, which is essentially public law; indeed, it is referred to as “public international law.”¹⁸⁹ This is in contrast to “private international law,” which, in the United States, would be called “conflicts of laws.”¹⁹⁰ This characteristic may not be an insurmountable barrier for international law. With some imagination, it is nonetheless possible—if a bit contrived—to consider international law from a few perspectives that suggest an emerging pattern of common law attributes within the so-called public side and civil law attributes within the so-called private side of international law.

As an initial matter, one can attempt to place international law into a public and private law framework by analogy to the parts of domestic systems that fall into these divisions. In domestic systems, public law involves the government or other public bodies.¹⁹¹ By analogy, in the international system, the “public” aspect involves international institutions. Correspondingly, in the domestic theater, private law involves private party interactions, and so, in an international law context, that “private” law would regulate the

187. For mixed jurisdiction jurists, such a way of looking at things comes as second nature, and yet for jurists from single-tradition legal systems, that “lens” is not usually in place—hence the push for increased and improved teaching of comparative law at law schools in the United States. See, e.g., Michael P. Waxman, *Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy*, 51 J. LEGAL EDUC. 305 (2001).

188. Palmer, *Introduction*, *supra* note 105, at 8–10.

189. See Ochoa, *supra* note 91, at 61 n.9 (citing various authorities that state that all international law is “public international law”).

190. See, e.g., Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 16 TUL. J. INT’L & COMP. L. 467, 502 (2008) (“In ratifying the CISG, the United States made a declaration to exclude CISG applicability through private international law conflict-of-laws analysis.”); BLACK’S LAW DICTIONARY 835 (8th ed. 2004) (referring to “conflict of laws” in defining “private international law”).

191. See BLACK’S LAW DICTIONARY 1267 (8th ed. 2004) (defining “public law” as “[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself”).

interactions between states—the subjects of international law.¹⁹² Under this framework, international law exhibits a division between public and private law similar to that of mixed jurisdictions.

A common law-like character is discernible in the “public law” relationships between international institutions and their state members. That character is visible in the independence of the “judiciaries” of the international institutions, in the “separation of powers,” in the methods of selection of the “judges” (from practice, not from judge school), and in international law’s direct application to the new subjects of international law: individual victims of violations of human rights, free speech, due process of law, and freedom from arbitrary arrest.¹⁹³ These characteristics are all thought to be particularly like common law and are all found within mixed jurisdictions.¹⁹⁴ The “private law” relationships between states exhibit the qualities of civil law. Those relationships are typically based on treaty obligations, which are interpreted according to the civil law-like Vienna Convention on the Law of Treaties.¹⁹⁵ Admittedly, this is a crude approximation of the public/private law split within domestic legal systems that deserves more attention, but it nonetheless provides some basis for the contention that international law is similar to the mixed jurisdictions in this regard.

Another imaginative approach to the public/private law issue is to consider how international law directly affects states’ internal laws. Intrastate regulation occurs sometimes to further the interstate regulatory function of international law, and at other times to enforce international legal norms on state subjects of international law.¹⁹⁶ Intrastate regulation, however, tends to influence domestic public law more than domestic private law.¹⁹⁷ This proposition may be explained by the fact that intrastate regulation by international law tends to impact such domestic areas as the administrative side of

192. See Ochoa, *supra* note 91 at 62 (“Private international law, on the other hand, refers to resolutions for conflicts of law and establishes the principle of comity for a country’s domestic laws in foreign courts.”).

193. Palmer, *Introduction*, *supra* note 105, at 9–10.

194. *Id.*

195. See Schadbach, *supra* note 10, at 386 n.321.

196. An example of international interference in domestic law to further interstate regulation is the Dispute Settlement Body’s requirement of the removal of a discriminatory economic law as a violation of the state’s WTO obligations. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, art. 23 (1994) [hereinafter Dispute Settlement Understanding]. An example of the enforcement of international norms on intrastate domestic law is when international law forces a state to stop the execution of minors pursuant to an international law human rights covenant. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

197. See Schadbach, *supra* note 10, at 387 (describing use of regulation to influence public behavior).

state functions and the criminal or judicial procedure side of human rights issues.¹⁹⁸ Furthermore, the nature of that impact tends to be common law-like. For example, international human rights doctrine tends to encourage such traditional common law characteristics as judicial review and separation of powers.¹⁹⁹ In contrast, international law tends not to reach domestic private law matters, including tort or delict, contract, and succession—particularly when there is no international nexus.²⁰⁰ Additionally, given that the majority of the world's private law is civil law-based, the civil law character of those states' private law tends to be preserved from international interference.²⁰¹ Interference by international law with domestic law, in the aggregate and across all states, accordingly leaves states' private law more like civil law and states' public law less like civil law. While the public/private division characteristic of mixed jurisdictions fits international law only roughly, the result is nonetheless telling, though precisely what it indicates beyond applying the concept of mixed jurisdictions to international law remains to be seen.

Imaginative devices aside, this characteristic of mixed jurisdictions does not easily lend itself to international law, particularly as international law undergoes some fundamental transformations.²⁰² Indeed, these transformations suggest that international law is insufficiently mature as compared to domestic legal systems. Furthermore, until such time as international law has a greater private law component, as it has in the area of contracts or treaties, this mixed jurisdiction characteristic is not perfectly applicable to international law. Regardless, the inability to apply this characteristic to international law should not stand in the way of

198. *See id.*

199. *See* Stephen Goldstein, *Israel, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY*, *supra* note 105, at 448, 452 (explaining that first generation Israeli judges pushed the common-law protection of human rights beyond that of traditional English law).

200. International law's impact on transnational private law is discussed below in Part III.C.7. Indeed, that impact can even reach into common law countries. For example, in pursuance of the ideal of separation of powers, arguably required by Article 6 of the European Convention on Human Rights, the British are removing their final court of appeal, the Judicial Committee of the House of Lords, from the legislature where it sits to an independent Supreme Court for the United Kingdom. *See* GLENDON ET AL., *supra* note 45 at 411.

201. *See, e.g.*, Palmer, *Introduction*, *supra* note 105, at 8–10.

202. Indeed, so-called public international law now involves private parties and their private relations. Increasingly private parties are having direct involvement with international law, *e.g.*, through human rights laws and international contract laws. Thus, tort-like actions could fall under international law—though a public component must also be involved. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Private contracts between parties of different nationalities may also be covered by treaty law. *See, e.g.*, CISG, *supra* note 16, art. 1; Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608 (the Hamburg Rules).

determining whether international law is akin to a mixed jurisdiction; it has at least been suggested that the public/private law division is not an indispensable mark of mixed jurisdictions.²⁰³

C. Specific Characteristics of Mixed Jurisdictions

One might expect the more specific characteristics of mixed jurisdictions to be more difficult to apply to international law than the general characteristics discussed in Part III.B. Tellingly, however, the specific characteristics apply rather well to international law—a very strong indication of the merit of this Article's thesis. Once again, Professor Palmer has identified the following specific characteristics common to mixed jurisdictions:

1. Similar mixed origins
2. Similar judicial characters
3. Similar linguistic issues
4. Similar approaches to precedent and legal sources
5. Similar receptions of common law
6. Similar receptions of Anglo-American procedure
7. Similar styles of commercial law.²⁰⁴

This Article will consider the applicability of each of these characteristics to international law individually.

1. Similar Genesis of the Mix

Mixed jurisdictions are usually the offspring of a common law country's conquest of a civil law colony or the product of a long-term relationship between a weak civil law system and an overbearing common law system.²⁰⁵ The history of modern international law can

203. Visser, *supra* note 107, at 47.

204. See Palmer, *Comparative Overview*, *supra* note 112, at 76–80. Another specific characteristic proposed by Palmer is related to the creativity of the mixed jurisdictions. *Id.* at 61–63. But this criterion is less a definitional requirement and more a description of the creativity that accompanies the mixing of the two primary Western legal sub-traditions. *Id.* Unique devices are necessarily created through the interaction of the two bodies of law. *Id.* An example is the Scottish form of a trust, which does not divide equitable and legal ownership. *Id.* at 64. International law has no shortage of unique devices, some of which are a consequence of the interaction of the two traditions. *Id.* For example, it has been argued that the rules of procedure for the new International Criminal Court are “unique” and are the result of the two traditions blending into a system that does not belong to either. Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 604–05 (2003).

205. See Palmer, *Comparative Overview*, *supra* note 112, at 18–19. Most such systems arose from conquest; Scotland's, however, was formed as a result of its intensive interaction with its southern neighbor. See Hector L. MacQueen, *Mixed Jurisdictions and Convergence: Scotland*, 29 INT'L J. LEG. INF. 309, 309 (2001); Tetley, *Mixed Jurisdictions*, *supra* note 7, at 688–92. The other unusual member of the mixed

be characterized in similar fashion. The original impact of civil law on modern international law in the sixteenth and seventeenth centuries is analogous to the civil law colonies that later became mixed jurisdictions.²⁰⁶ The analog of the common law conquest is the reduction of civil law countries' influence on international law following their defeat or impoverishment after the First and Second World Wars, with the corresponding elevation of the influence of Anglo-American common law on international law. This common law influence has only increased in the period of international institution building, as those bodies increasingly adopt common law devices, often at the behest of the common law-based United States. This is occurring despite the influence on the development of international law of the European Union's powerful countervailing civil law system—itsself internally conflicted due to the EU's own powerful common law member, the United Kingdom.²⁰⁷

Even long after conquest, mixed jurisdictions are often racked by internal disputes between those trying to preserve the original civil law systems and those supporting the common law influence, with both sides employing the twin weapons of language and culture.²⁰⁸ Indeed, the war has no ceasefire or armistice, and the conflict continues to some degree in every mixed jurisdiction. The participants include the “purists” (“keep the common law out”), the “pragmatists” (“if a common law idea works, let's use it”), and the “pollutionists” (supporting common law because “it is better law” or “it is what I know”).²⁰⁹

These same “turf battles” are present within international law.²¹⁰ International law purists condemn the expansion of robust international courts and *stare decisis*—those aspects of the common law system invading the traditional civil law.²¹¹ Pragmatists seek to resolve current issues, especially those that appear novel to

jurisdictions is Israel, which purposely adopted aspects of civil law after it became independent. See Palmer, *Comparative Overview*, *supra* note 112, at 5; Fassberg, *supra* note 51, at 155–58.

206. See Palmer, *Comparative Overview*, *supra* note 112, at 18–19.

207. Perhaps the involvement of Ireland and the United Kingdom in the EU will eventually turn the EU into a mixed jurisdiction. See Tetley, *Nationalism*, *supra* note 111, at 206–08. Indeed, the EU's situation has become immensely complicated with the inclusion of many new members from the former Eastern Bloc, whose newly minted legal systems include imports from both traditions. See *id.* at 206 (“The European Union is already a mixed jurisdiction or is rapidly becoming one.”). Future efforts to discern a common legal tradition within the EU or the impact of these different systems on the EU will present a considerable challenge.

208. Palmer, *Comparative Overview*, *supra* note 112, at 18.

209. *Id.* at 31–33.

210. Indeed, some criticism of this Article may be motivated by those seeking to preserve a civil law-like international law in the face of common law incursions.

211. See generally Bhala I, *supra* note 3 (providing a detailed discussion of the origins, myths, and arguments concerning the use of precedent in international law).

international law or are adjudicated by new international legal institutions, by using common law techniques and norms.²¹² Pollutionists in international law tend to be common law practitioners and jurists importing their traditions simply as the “better” system, perhaps ignorant of the civil law aspects of international law and of the perception of common law as an alien invasion.²¹³ This last importation channel is prominently the case when powerful common law countries, believing their traditions to be the better law, seek to apply them to newly created international institutions.²¹⁴ In these ways and others, international law bears substantial similarity in its origin and development to that of the mixed jurisdictions.

2. Similar Judicial Character

Mixed jurisdictions tend to centralize power in courts of general jurisdiction.²¹⁵ In contrast to the stereotype of judges in civil law systems, the judges of mixed jurisdictions wield greater power, even law making power, and are typically drawn from the practicing bar.²¹⁶ The question, then, is whether international judiciaries share some of the mixed jurisdictions’ common law judicial characteristics.²¹⁷

The international judiciary tends to have characteristics of both the civil and common law traditions.²¹⁸ International law courts tend to be both specialized and diffuse, and not centrally organized or controlled from above.²¹⁹ Furthermore, the use of precedent is new and, while prevalent in some courts, still considered problematic.²²⁰ Despite this mixture at the institutional level, international judges themselves increasingly resemble common law judges more so than civil law judges; international judges often come from practice and academia rather than from civil service, and they increasingly view themselves as significant, if not equal, participants in the growth and development of international law. For example, international law courts, like common law courts, tend to take powers for themselves

212. See Bhala III, *supra* note 3, at 882–83 (providing one such pragmatic response, that of adopting a stare decisis-like doctrine for the global trading system).

213. See Palmer, *Comparative Overview*, *supra* note 112, at 31–33.

214. See, e.g., Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 856–58 (2005) (noting that the procedural rules for the International Criminal Tribunal for Yugoslavia reflected adversarial notions largely due to the role of the United States).

215. Palmer, *Comparative Overview*, *supra* note 112, at 37–38.

216. *Id.*

217. See, e.g., *id.* at 36.

218. See generally Bhala I, *supra* note 3 (explaining the dual characteristics of the judiciary and civil and common law traditions in general).

219. See *id.* at 848 (discussing the different styles of the judiciary).

220. See *id.* at 852.

that they view as necessary—the creation of procedural or other rules—contradicting the view that legislatures (or, in the case of international law, state parties to a treaty regime) are the sole source for such rules. This practice increases as courts mature. For example, the WTO DSB controversially decided on its own to accept amicus briefs, to the consternation of many WTO members.²²¹ Similarly, the European Court of Human Rights, now a mature court, has also started to expand its reach into areas that it originally argued were beyond its competence.²²²

These characteristics of the international judiciary are telling, but not conclusive. Perhaps the most that can be said today is that the international judiciary is beginning to resemble those of the mixed jurisdictions.²²³

3. Similar Linguistic Issues

Mixed jurisdictions typically have serious linguistic issues as a consequence of their checkered colonial pasts.²²⁴ It is common for mixed jurisdictions to have multiple official or working languages, including an indigenous language associated with the civil law tradition (from the original colonial power) and one associated with the common law (English, if the colony was subsequently conquered by the United States or UK).²²⁵ So long as both the civil and common law languages remain viable and jurists have a working knowledge of both, the dual character of the system is sustainable. Problems arise when the knowledge and use, official and otherwise, of the languages changes. Typically, that change occurs when the language associated with the civil law ceases to be well known among jurists, lawyers, and

221. See, e.g., WTO, *Shrimp*, *supra* note 167; see also Padideh Ala'i, *Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24 FORDHAM INT'L L.J. 62 (2000) (discussing the criticism the WTO received from various members); Joseph Keller, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments*, 33 INT'L J. LEGAL INFO. 449 (2005); C.L. Lim, *Asian WTO Members and the Amicus Brief Controversy: Arguments and Strategies*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 85 (2006); Andrea K. Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87 (2001).

222. See Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57 (2005).

223. See GLENN, *supra* note 49, at 85–86 (discussing the idea that systems can transform from one tradition to another—e.g., Michigan today bears little trace of its civil law heritage).

224. *Id.* Linguistic issues may also arise from other unique circumstances of a mixed jurisdiction's creation (e.g., Israel, whose citizenship originally comprised migrants from all around the world). See Palmer, *Comparative Overview*, *supra* note 112, at 41. It should be reiterated that the existence of multiple languages within a system does not make the system mixed, but rather the interplay between and among the legal traditions within that system. See Fassberg, *supra* note 51, at 154.

225. See Palmer, *Comparative Overview*, *supra* note 112, at 41–45.

members of the government.²²⁶ Such a change can only hurt the position of the civil law within a mixed jurisdiction.²²⁷

This linguistic characteristic of mixed jurisdictions is indeed apparent within international law. Like mixed jurisdictions, international law has been susceptible to linguistic changes. Historically, the primary languages of modern international law were Latin and French; though the English, and later the Americans, attempted to make English a primary language of international law.²²⁸ International jurists' proficiency in these original languages enabled them to use the primary and secondary legal sources in those languages—historically sources from civil law systems.²²⁹ English, however, has increasingly become the primary international language today, with a concomitant rise in the use of, and reliance on, English-language writings, legal opinions, and texts.²³⁰ The use of English-language sources will necessarily result in the increased influence of the common law tradition.²³¹ While English has become the universal second language, even across civil law countries, a working knowledge of the traditional civil law languages (e.g., French, Spanish, Italian, and German) is largely confined to international jurists working within those specific countries.²³² The fact that international law shares these linguistic stresses with mixed jurisdictions further reveals the dual nature of international law.

226. See, e.g., Max Loubser, *Linguistic Factors into the Mix: The South African Experience of Language and the Law*, 78 TUL. L. REV. 105, 144–47 (2003). Of course, the loss of a working knowledge of the indigenous language has significant consequences for the indigenous legal tradition, aspects of which may have survived the various conquests, often in the fields of family and succession law. *Id.* Additionally, loss of the indigenous language and its replacement by the colonial language can have far reaching consequences on the indigenous population, and efforts to rectify this issue, as are presently underway in South Africa, face significant problems. *Id.*

227. See, e.g., Öricü, *supra* note 122, at 102 (noting a potential problem in Scotland where “there are no longer ‘civilian trained’ lawyers, nor are foreign languages well known”).

228. See Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 613–15 (1997).

229. See Fassberg, *supra* note 51, at 153 (discussing the civil law systems and their historical primacy).

230. See, e.g., Cesare P.R. Romano, *The Americanization of International Litigation*, 19 OHIO ST. J. ON DISP. RESOL. 89, 115–16 (2003).

231. See Loubser, *supra* note 226, at 107–08 (noting that the language structure may itself influence the development of the law and using German as an example of a language whose structure may have contributed to the style of the German legal system).

232. See Fassberg, *supra* note 51, at 153. An additional problem is the global trend towards completion of a second or third law degree in common law countries, with the United States and England as the primary recipients of these students. Following their common law education, these common law-infected jurists return to their civil law homes and then work on international matters, potentially making international law all the more like common law and less like civil law. See, e.g., Carol Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1050 (2002).

4. Precedent and Legal Sources in Mixed Jurisdictions

In light of the different roles that precedent plays in civil and common law systems, it is not surprising that the use of precedent is a defining characteristic of mixed jurisdictions. Mixed jurisdictions use precedent at least as a *de facto* primary source of law and in many cases as a *de jure* source of primary law.²³³ A system that does not employ precedent as a primary source of law, at least at a *de facto* level, cannot be considered a mixed jurisdiction in the Palmerian sense.

This Article has explored, in Part III, the role of judicially created law—specifically, precedent and *stare decisis*—as an example of the dual nature of international law.²³⁴ This investigation showed that international law, like mixed jurisdictions, employs an approach to precedent that is, as a practical matter, somewhere between common law and civil law, but nearer to the common law approach. Consequently, international law appears to exhibit this defining characteristic of mixed jurisdictions.

5. The Common Law's Reception in Mixed Jurisdictions

Given that almost all mixed jurisdictions began as civil law systems that were later suffused with common law elements, a relevant question is whether there is a pattern to their reception of the common law tradition. Have only specific parts of the common law tradition been adopted, e.g., its civil procedure but not its contract law, and have common law elements tended to appear only within certain areas of the original civil law system?²³⁵ Indeed, such an examination shows that in mixed jurisdictions, the common law has influenced some areas more than others, with the greatest impact in the area of delict and the least in property law.²³⁶ Of course, international law is less amenable to this approach because there are

233. Palmer, *Comparative Overview*, *supra* note 112, at 45–46.

234. See Bhala I, *supra* note 3, at 852–53 (discussing the dual nature of international decisions).

235. Palmer, *Comparative Overview*, *supra* note 112, at 53. Usually it is common law that is received into mixed jurisdictions on top of an existing civil law system, due to the nature of the origin of the mixed jurisdictions through colonial conquest. Again, Israel is an exception. See *id.* at 41. Once the connection with the civil law system is severed following conquest by a common law imperial power, it is hard to recapture that connection with civil law. Furthermore, there is usually a disconnect between the civil law in mixed jurisdictions and that in civil law states; civil law systems have continued to develop, and the version of civil law in civil law countries today is quite different from that left behind in mixed jurisdictions. Reid, *supra* note 103, at 36.

236. See Palmer, *Comparative Overview*, *supra* note 112, at 57 (stating that “tort (*delict*) absorbed the greatest amount of common-law influence” yet property did not); Fassberg, *supra* note 51, at 156 (describing similar reception during the English UN Mandate over pre-independence Israel); see also Reid, *supra* note 103, at 25.

few exact correlations between domestic and international legal fields.²³⁷ By focusing, however, on the style and patterns of reception rather than on specific fields, it is possible to find correlations between the reception of common law in mixed jurisdictions and in international law.

Consideration of the reception of common law in mixed jurisdictions has only recently begun. Nonetheless, some trends are visible, such as the fact that the reception takes place when the civil law field is, relatively speaking, both general and vague.²³⁸ Consequently, within mixed jurisdictions one finds greater common law intrusion in areas such as negligence.²³⁹ Another trend, at the opposite end of the spectrum, is that common law less commonly gains traction in those fields where the civil and common law concepts are diametrically opposed, such as in property law.²⁴⁰ Similarly, common law is not well received in areas of law with strong cultural aspects, such as family law.²⁴¹

The question is whether such trends are apparent in the importation of aspects of common law into international law. It may be that the most visible and significant intrusion of common law into international law concerns judicial behavior. This intrusion can be explained in such a way that it conforms to the pattern of common law reception in mixed jurisdictions. International judicial bodies are relatively new, and the expectations of international judges' behavior are vague.²⁴² Article 38 of the ICJ Statute notwithstanding, the role of international judges is far from clear. Moreover, even with clear standards of appropriate behavior, controlling their actions raises further issues.

Like the reception patterns in mixed jurisdictions, those areas of international law that are specific or closed are less influenced by the common law. For example, the law of interpretation of treaties—the functional international equivalent of private contract law—is very specific, as embodied in the Vienna Convention on the Law of Treaties,²⁴³ and, aside from some customary law at the edges, is a closed system.²⁴⁴ As a result, treaty interpretation law has been less receptive to common law influence than other, less well-established

237. Indeed, Palmer notes that both Israel and Quebec do not meet this criterion because of some of their unique aspects. Palmer, *Comparative Overview*, *supra* note 112, at 54.

238. *Id.* at 59.

239. *Id.* at 57.

240. *Id.*

241. *Id.* at 57–59.

242. Sang Wook Daniel Han, Note, *Decentralized Proliferation of International Judicial Bodies*, 16 J. TRANSNAT'L L. & POL'Y 101, 105 (2006).

243. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

244. ICJ Statute, *supra* note 39, art. 38.

areas of international law.²⁴⁵ International law appears to have experienced the most common law contamination in areas in which the law is general and vague, and less contamination in areas that are closed and specific—as has largely been the case in mixed jurisdictions.

The other pattern of reception not yet discussed relates to cultural barriers as obstacles to the reception of common law. The role of culture in international law is an awkward issue. Leaving aside the thorny and contested issue of cultural relativism in international law, the role of culture generally is a difficult concept within a body of law that purports to cover all the world's cultures. Even confining the scope of international law to the Western traditions, cultural differences are many, wide, and deep.²⁴⁶ Nor is argument by analogy, employed so liberally in this Article, of much use here since a concept like a single or dominant culture within international law is not easily identified. Nonetheless, one possibility, raised but not examined here, is that where international law has arisen from specific historical factors, it might be less amenable to the trend of Americanization present in many parts of international law. In other words, history might be used as a surrogate for culture. However, consideration of that issue is beyond the scope of this Article.

Regardless of the role of culture or history, international law—like mixed jurisdictions—has shown a pattern of being more receptive to common law in general and vague areas of law than in structured and specific areas. Thus, international law satisfies this characteristic of mixed jurisdictions.

6. Reception of Anglo-American Procedure

The substance of civil procedure in mixed jurisdictions is an issue that bears consideration in its own right. Palmer points out that the “juxtaposition of civil law in alien procedural surroundings is a phenomenon unique to [the mixed jurisdictions].”²⁴⁷ That alien procedure is, of course, the common law style of procedure.²⁴⁸ One can only imagine the consequences that result from substantive civil law flowing through a common law procedural system!²⁴⁹

245. See generally Vienna Convention on the Law of Treaties, *supra* note 243.

246. See James H. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 568 (1997).

247. Palmer, *Comparative Overview*, *supra* note 112, at 63. Goldstein, however, notes that Scotland is anomalous in this regard. Goldstein, *supra* note 99, at 292.

248. One might argue that the difference between civil and common law procedure is more a matter of degree than of quality. See, e.g., Goldstein, *supra* note 99, at 296 (noting the similarities between civil and common law procedure).

249. Palmer, *Comparative Overview*, *supra* note 112, at 63, 66.

Elements of common law procedure commonly found in mixed jurisdictions include adversarial proceedings (with a larger role for attorneys than traditionally found in civil law systems), cross-examination of witnesses, the finality of the first instance judgment, the limited role of appeals courts, the “various writs,” and, of course, the ever-present jury—whether or not it is actually employed.²⁵⁰ Each of the mixed jurisdictions employs these and other common law procedural devices to varying extents due to the different histories of the systems—the penetration or reception of common law procedural mechanisms depends on the system’s stage of development when subjected to common law influences, e.g., conquest by a common law colonial power.²⁵¹ Professor Goldstein has argued that the “primary explanation” for conquerors’ installation of common law procedure “is the emotional, almost religious attachment of the adherents of the common law procedure to their system.”²⁵² Are those involved in international law who hail from common law systems so attached to their procedure? If so, has this attachment affected such procedure as exists within international law?

Procedure is a matter of domestic law that is not well suited to consideration within an international law context. Because there is no central system of international adjudication but rather a large number of unconnected and unique bodies, it is difficult to identify consistent procedural rules within international law.²⁵³ Nonetheless, it is possible with some imagination and lateral thinking to apply this mixed jurisdiction characteristic to international law—by considering the *process* by which international bodies form their procedural rules, rather than any particular body of rules.

International adjudicatory bodies typically create their procedural rules through one of two methods:

- (1) The parties to a tribunal, usually states, decide on the procedure through a treaty, such as the WTO’s Dispute Settlement Understanding (DSU), or through ad hoc arbitration by mutual agreement;²⁵⁴ or
- (2) When it is not possible for all, or even any, procedural issues to be resolved ahead of time—e.g., when it is not feasible to get the state parties to agree on changes to previously

250. *Id.*; Goldstein, *supra* note 99, at 297.

251. Palmer, *Comparative Overview*, *supra* note 112, at 63–65.

252. Goldstein, *supra* note 99, at 293; *see also* Curran, *supra* note 18, at 78–79 (arguing that procedure is central to the common law worldview).

253. *See generally* Amerasinghe, *supra* note 170 (discussing the ad hoc development of the procedures for the UN and World Bank Administrative Tribunals).

254. *See, e.g.*, SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 81 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003).

agreed-upon procedures, such as those memorialized in a multilateral treaty—the court itself creates the procedure.²⁵⁵

The first method, the creation of rules by the parties themselves, will usually result in a procedural system that mixes common and civil law ideas, because the parties will likely be from different or mixed systems.²⁵⁶ In other words, international law will adopt some common law procedural devices.²⁵⁷

The second method, the creation of rules by the international adjudicators or judges themselves, resembles common law;²⁵⁸ it will also necessarily introduce Anglo-American procedure into international law, because often the arbitrators or judges are trained in common law procedure and, therefore, might feel “passionately” about the superiority of common law procedure over that of civil law.²⁵⁹ Indeed, the idea that the court can establish its own procedural rules is like judge-made common law and is typical of mixed jurisdictions.²⁶⁰

Although the substance of an international procedural system is difficult to pinpoint, it is possible to identify a few common international procedural devices that can be compared to common law procedures. Even in the absence of a jury and the attendant difference in rules of evidence,²⁶¹ an examination of international bodies' procedural systems reveals a common law influence. For example, the limited role of appeals in the WTO accords well with the common law notion of limited appeals. The WTO Appellate Body, as a formal matter and as its primary method of practice, typically only hears appeals of law, not of the facts developed at an initial panel hearing.²⁶²

255. José E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT'L L. REV. 591, 596 (2008).

256. Jennifer E. Costa, *Double Jeopardy and Non Bis In Idem: Principles of Fairness*, 4 U.C. DAVIS J. INT'L L. & POL'Y 181, 192 (1998) (“The Draft Statute for an International Criminal Court embodies both common law and civil law principles. The drafters incorporated elements of both legal systems and blended them together to fashion an international law satisfactory in both civil law and common law countries.”).

257. For example, the UN and World Bank Administrative Tribunals do not typically employ dissenting and concurring opinions, reflecting the civil administrative law that forms the basis of those tribunals; and yet, one of the original architects of the two systems—a common law-trained attorney—has vigorously advocated the adoption of those “foreign” devices. See Amerasinghe, *supra* note 170, at 293.

258. Palmer, *Comparative Overview*, *supra* note 112, at 65.

259. Goldstein notes that this passion is even evident in the use by common law attorneys of the pejorative “inquisitorial” to describe civil law procedure. GOLDSTEIN, *supra* note 99 at 293.

260. Palmer, *Comparative Overview*, *supra* note 112, at 65.

261. *But see generally* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006).

262. Dispute Settlement Understanding, *supra* note 196, art. 17.6; *see also* Alan Yanovich & Tania Voon, *Completing the Analysis in WTO Appeals: The Practice and its*

Despite some notable examples of common law procedure, civil law still has a strong and enduring influence on the procedures employed in international courts.²⁶³ Furthermore, as with all legal systems, some features of the international system are unique.²⁶⁴ The procedures found in international law are frequently of a common law style; however, this characteristic of mixed jurisdictions requires a significant presence of common law procedure. Thus, although international law may have tendencies that satisfy this mixed jurisdiction characteristic, overall international law does not satisfy this requirement because its procedure is not entirely or even mostly like common law procedure.

Not all mixed jurisdictions satisfy every criterion. Indeed, Israel and Scotland do not satisfy this procedural reception characteristic because they have never employed a civil style of procedure that later suffered an incursion of common law procedure.²⁶⁵ Accordingly, the failure of international law to satisfy this characteristic should not be fatal to this Article's attempt to find commonalities between international law and mixed jurisdictions as a whole.

7. Mixed Jurisdictions' Common Law Commercial Law

Mixed jurisdictions have characteristically adopted common law commercial law, often going so far as to completely replace their civil law-based commercial law.²⁶⁶ Unlike colonizers' imposition of much of public law, common law-based commercial law was in effect voluntarily incorporated.²⁶⁷ Other non-public law, including major areas of the private law, was not similarly adopted.²⁶⁸ The difference arises from a pragmatic understanding that adopting significant elements of the Anglo-American commercial law—the law of the conqueror and perhaps of the dominant economies of the world—was

Limitations, 9 J. INT'L ECON. L. 933, 933–35 (2006). *But see id.* at 937 (“The limitation of WTO appeals to issues of law, coupled with the absence of remand authority, is at the root of the problem that the Appellate Body has sought to resolve using the technique it has called ‘completing the analysis.’”).

263. The EU, for example, relies heavily on civil law procedures. *See Curran, supra* note 18, at 81. Indeed, if one were to look to the EU as a harbinger of future development, then the likelihood of a strong common law character in international procedure is certainly questionable. *See Anna Gardella & Luca G. Radicati di Brozolo, Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 616 (2003) (finding that there has been remarkably little common law influence on the civil law-dominated EU law on conflicts of jurisdiction).

264. SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS, *supra* note 254, at 81.

265. Palmer, *Comparative Overview*, *supra* note 112, at 64–65.

266. *Id.* at 66.

267. Palmer examines this voluntary adoption in great detail for many of the mixed jurisdictions. *Id.* at 67–76.

268. Palmer, *Introduction*, *supra* note 105, at 9.

in the financial self-interest of the mixed jurisdiction.²⁶⁹ Thus, over time the common law form of commercial law replaced the pre-conquest civil law form of commercial law, which was often derived from the European law merchant.²⁷⁰

Once again, this Article considers a mixed jurisdiction characteristic that is generally domestic in nature. And again, there are imaginative ways to apply this characteristic to international law. One way to apply this characteristic in the international context is to look at existing international law that regulates individuals' transnational commercial interactions; indeed, it is not too much of a leap to use this body of law as the surrogate for commercial law, for this is international commercial law. The second, more imaginative method involves substituting states for the private actors that are the subjects of domestic commercial law and considering the development of the law that affects commercial relations between states—the international equivalent of domestic commercial law.

Historically, international commercial law—the law merchant or *lex mercatoria*, developed by merchants for merchants outside the control of public courts—was largely immune to the formal law.²⁷¹ Gradually, however, commercial law was brought into the public realm, where it became influenced by the civil law tradition of most of the world's commercial jurisdictions.²⁷²

Later, with the growth and increasing influence of Anglo-American economies, the common law influence on international and transnational commercial law expanded, particularly as the U.S. economy assumed a dominant place in the world economy during the twentieth century.²⁷³ Evidence of that trend is apparent in the contrast between the great difficulties of the universal adoption of the Hamburg Rules—a set of rules for bills of lading, arguably civil law in character—and the success of the arguably common law-like Hague-Visby Rules.²⁷⁴ This growing common law influence is somewhat

269. Palmer, *Comparative Overview*, *supra* note 112, at 76.

270. *Id.* at 80.

271. BERMAN, *supra* note 57, at 333, 346–47. *But see* Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39, 40–42 (2004) (critiquing Berman's depiction of the history of the law merchant and arguing that the state played an earlier and larger role).

272. BERMAN, *supra* note 57, at 348.

273. For discussion of the United States' declining to enter into private law treaties based on civil law ideas, see Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954); *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1242 n.551 (2000) (“Private international law treaties provide a good example: the United States, like the British, long resisted joining because the conventions were based upon civil rather than common law premises.”).

274. William Tetley, *Uniformity of International Private Maritime Law—The Pros, Cons, and Alternatives to International Conventions—How to Adopt an*

predictable; the movement toward a more common law-like commercial law probably reflects the strength of the common law economies and the other economies' interest in harmonizing with them in order to take full advantage of the common law markets. It does, therefore, appear that international law shares this mixed jurisdiction characteristic—a common law form of commercial law—although the influence of common law is still emerging.

The problem with the preceding argument, however, is that it falls into the realm of private law, governing the relationships between individuals. While there are treaties between states that set the bounds of this private international law, the substantive provisions do not typically relate to state behavior, which is the usual subject of public international law as well as the subject of this Article.²⁷⁵ This problem can be handled with, once again, a little imagination: the private actors in the domestic model are analogous to the states in the international law model. The issue, then, is to identify the functional public law equivalent of domestic commercial law—i.e., the law that regulates economic relations between states. This law is known as “international economic law,” consisting of the very large, powerful, and expanding rules and regulations found within the WTO and the other Bretton Woods Institutions (the International Monetary Fund and the World Bank institutions), numerous bilateral investment treaties, hundreds of regional and preferential trade agreements, and so on.²⁷⁶ The next task is to address whether this international economic law, to the extent it can be viewed as a whole, exhibits more common law than civil law features.

A direct application of this characteristic of domestic commercial law in mixed jurisdictions to the context of international economic law is not possible; the way forward is, again, to go behind the characteristic to discover which aspects of the common law commercial law are being adopted and why they were adopted by the

International Convention, 24 TUL. MAR. L. J. 775, 802 (2000); see also Tetley, *Maritime Law*, *supra* note 25, at 349.

[T]he civil law drafting style of the Hamburg Rules is one of the major reasons why many common law states have so far refused to adopt them, fearing to lose the “certainty” supposedly afforded by the precision and detailed enumerations of Hague and Hague/Visby, as interpreted by the courts over the years.

Id.

275. See, e.g., CISG, *supra* note 16 (creating a public international law which regulates state behavior within the international sale of goods context by providing that national courts interpret and apply it similarly around the world).

276. See Symposium, *International Economic Conflict and Resolution*, 22 NW. J. INT'L L. & BUS. 311, 312–13 (2002) (“International economic law encompasses many areas, including international trade law, international monetary law, the law of international commercial transactions, competition/antitrust law, intellectual property law, law and development among other fields.”).

mixed jurisdictions. Mixed jurisdictions did not really endure a battle between common and civil law forms of substantive commercial law; it was instead simply an effort to harmonize the mixed jurisdictions' commercial interests with U.S. and English commercial interests.²⁷⁷ The important aspects of the common law commercial law that were adopted were those relevant to the harmonization between the mixed jurisdiction and the Anglo-American economies.

Applying this understanding—that the reception of common law commercial law was all about harmonization and access to common law economies—to international law does indeed yield a workable test: whether international economic law has moved toward acceptance of Anglo-American rules and values. Although a full consideration of this issue is beyond the scope of this Article, it is possible to identify some preliminary indications that international economic law has been adopting or is presently adopting Anglo-American concepts. For example, it is clear that the post-World War II, post-Cold War, and Bretton Woods eras are periods of significant economic influence by the United States and Great Britain. London's place as the financial capital of the world, and the United States' grip on the Bretton Woods institutions and overpowering economy have deeply affected the development of international economic law.²⁷⁸ Furthermore, the common law countries had a large role in shaping the WTO.²⁷⁹ That role continues today. For example, the United States heavily influences accession agreements for new members. China's entry into the WTO took place only after it had acceded to American demands;²⁸⁰ indeed, any new member of the WTO must secure the agreement of the United States and the European Union before it can truly take advantage of the benefits of WTO membership.²⁸¹ While this does not necessarily lend a specifically common law character to international economic law, it certainly imparts a peculiarly Anglo-American focus. As such, international law is similar to the mixed jurisdictions at least in this regard: both

277. Palmer, *Comparative Overview*, *supra* note 112, at 66–67.

278. See generally ARMAND VAN DORMAEL, *BRETTON WOODS: BIRTH OF A MONETARY SYSTEM* (1978) (discussing the impact of Bretton Woods and subsequent financial systems on development of international economic law).

279. The role of Canada, America, the UK, New Zealand, and Australia in the Uruguay Round leading to the birth of the WTO and beyond cannot be overstated. See Understanding the WTO—The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Sept. 25, 2008) (describing the difficulties presented at the Uruguay round).

280. See, e.g., China, U.S. Release Press Communique on China's WTO Entry, <http://www.china-embassy.org/eng/zf/wto/t36892.htm> (quoting press communique of Nov. 15, 1999) (last visited Sept. 25, 2008) (illustrating that ongoing negotiations between U.S. and China is prerequisite to China's entry into WTO).

281. See, e.g., How to Join the WTO: The Accession Process, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Sept. 25, 2008).

mixed jurisdictions and international law have generally adopted their economic law to Anglo-American rules and expectations.

D. *International Law Is Akin to a Mixed Jurisdiction*

In Part III, this Article has held international law up against the general and specific characteristics of classical mixed jurisdictions. Because some of the characteristics are peculiarly domestic in nature, the comparison often required imagination and argument by analogy. Ultimately, some of the general and specific characteristics of mixed jurisdictions are readily apparent in international law, while other characteristics are merely emerging, and a few are absent entirely.

Those emerging characteristics may still indicate that international law has the nature of a mixed jurisdiction. The notion of "emerging" mixed jurisdictions posits that some legal systems are in the process of becoming mixed jurisdictions, reflecting the dynamism and change intrinsic to legal systems in the Western tradition.²⁸²

What about those characteristics that are absent from international law? This failure is not unprecedented for mixed jurisdictions, for each legal system of the mixed jurisdiction family satisfies most, but not all, of these criteria. Nor are these criteria the sole measure of a mixed jurisdiction. Some scholars have identified other specific criteria that are common to all or to a sufficient number of mixed jurisdictions.²⁸³ In fact, according to William Tetley, mixed jurisdictions are those "where debate over the subject takes place."²⁸⁴ While that debate is not presently taking place in international law, it is among this Article's goals to set the stage for that debate.

In short, this examination shows that international law and mixed jurisdictions are sufficiently comparable to allow international legal scholars to use mixed jurisdictions as a source for solutions to the issues confronting international law today.

IV. CONCLUSIONS: THE BENEFITS OF THIS COMPARATIVE EXAMINATION

The Author has previously argued that mixed jurisdiction jurisprudence can be extended to systems outside those countries typically considered mixed jurisdictions.²⁸⁵ This in itself is a worthy conclusion for the comparative examination undertaken in this Article. The mixed jurisdiction jurisprudence and scholarship is a

282. Glenn, *Mixing It Up*, *supra* note 105, at 79–80.

283. See Reid, *supra* note 103, at 21–25 (stating specific criteria of mixed jurisdictions to include one of three "levels of mixedness" (either methodology, codification, or private law), disparate components, and component recognition).

284. Tetley, *Mixed Jurisdictions*, *supra* note 7, at 680.

particularly powerful form of comparative analysis—it is the study of live systems that daily confront the merger of the two primary legal traditions of the world, a story gradually being played out in all legal systems of the world. There are thus leaders—trailblazers—to whom the world's legal systems can look as they confront the convergence of the common and civil law traditions.

This Article, however, is focused on the benefits to international law. Thus, this Article's comparative analysis was at a much greater level of detail than that provided elsewhere. There is little doubt that the attempt to compare international law with mixed jurisdictions is a difficult enterprise, fraught with obstacles both conceptual and concrete. Nonetheless, the congruence between the characteristics of international law and mixed jurisdictions is sufficient to support productive comparative analysis. In particular, that analysis may be used to support the borrowing of ideas from mixed jurisdictions in order to help resolve emerging issues in international law.

Of course, the mixed jurisdictions from which international law might learn lessons and borrow ideas are not typically considered to be among the world's significant geopolitical players. Indeed, some are not even countries but rather sub-federal entities—states, provinces, and whatever Scotland is after the devolution of the Scotland Act of 1998.²⁸⁶ Thus, if this comparative analysis is successful, all it has done is place international law alongside a few of the more far-flung and smaller legal systems of the world. But their geographic location and size truly undersell the role and significance of these living legal laboratories.²⁸⁷

Furthermore, the goal of this Article is not simply to have international law admitted to the “mixed jurisdiction club.” After all, it would be a somewhat anomalous member, with no central government, no centralized judiciary, no law schools, and so on.

285. See Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 12.1 ELECTRONIC J. COMP. L. 1, 2 (2008), available at <http://www.ejcl.org/121/abs121-18.html> (forthcoming at 2 J. COMP. L. (2008)).

286. See Colin B. Picker, “A Light Unto the Nations”—*The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multi-Ethnic States*, 77 TUL. L. REV. 1, 57 (2002) (arguing that “British devolution may be considered to be a legitimate form of federalism”).

287. Some of the mixed jurisdictions are, in fact, often at the center of world affairs, such as South Africa and Israel. Others have issues that command the world's attention, such as the future of Quebec in Canada, the ongoing civil war in Sri Lanka, or even the calamitous events flowing from Hurricane Katrina. Furthermore, other mixed jurisdictions have played a role in the development of the modern world significantly beyond what their small sizes and populations would have suggested—such as Scotland, “where civilization was born.” See, e.g., ARTHUR HERMAN, *HOW THE SCOTS INVENTED THE MODERN WORLD: THE TRUE STORY OF HOW WESTERN EUROPE'S POOREST NATION CREATED OUR WORLD & EVERYTHING IN IT*, at vii (2001) (“A large part of the world turns out to be ‘Scottish’ without realizing it.”).

Rather, the goal is to provide an additional tool for international law as it continues to develop its institutional and enforcement structures, an additional and important tool that will allow international law to learn from the mistakes and successes of the many mixed jurisdictions. This is especially important in light of the fact that international legal institutions rely to a significant extent, often unconsciously, upon national legal systems for much of their present development in areas from substantive norms to procedural rules. And yet, borrowing concepts and procedures from domestic legal systems that are part of different legal traditions is a risky endeavor—all the more reason to identify suitable legal systems from which international law can borrow ideas and concepts.²⁸⁸ For a change, the lessons will come from comparisons not of apples and oranges, but rather of oranges and tangerines.²⁸⁹

Additionally, this comparative analysis could not be more timely. International law is in a crisis. That crisis is due to the fact that international law is finally entering the difficult period of institutionalization and enforcement.²⁹⁰ As so aptly described by Judge Buergenthal in the human rights context, but equally applicable throughout international law, there are three phases of development: norm creation, institution building, and enforcement.²⁹¹ The last two are perhaps the most problematic and hence the source of much of the present crisis in international law.

The first of the phases of development, norm creation, began seriously in the seventeenth century; while still ongoing, the norm

288. The effectiveness and suitability of these borrowed devices may only become clear many years later, too late to correct any inadequacies. Thus, for example, only after many years of analysis might we be able to understand the role and effectiveness of the present rules of evidence in the ICC, or the use of precedent at the WTO, or even the appropriate behavior of judges at the World Court.

289. But in fact apples and oranges are largely the same when scientifically compared, despite differences in appearances. See Scott A. Sanford, *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> (finding that, when scientifically compared, “apples and oranges are very similar”); see also Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 720 (2004) (discussing the comparability of apples and oranges within the context of comparing legal systems). Mixed jurisdictions have also suffered from a lack of comparable systems because of mutual isolation, a situation perhaps extinguished following the creation of the World Congress of Mixed Jurisdiction Jurists and the resultant conferences and publications. Mixed jurisdictions may now learn from each other. Reid, *supra* note 103, at 37.

290. See, e.g., DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 207 n.911 (2001); see also David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 841 n.1 (1986).

291. See generally Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703 (1997).

creation phase is to a significant extent mature and complete.²⁹² The other two phases, however, are in various stages of development, with the institution building phase of international law slightly, but only slightly, ahead of the general enforcement of international law.²⁹³ Nonetheless, these two stages are presently the focus of much attention, from the creation of the International Criminal Court to the enforcement of international trade laws before the WTO Dispute Settlement Body. But, because they have special needs and problems, these two stages of development are still struggling to reach that level of stability and consistency necessary to a fully functioning legal system. For example, the increasing vitality and implementation of international juridical and legislative institutions is placing demands not previously experienced or considered upon international law. Those demands include:

Increasing coverage of substantive areas not traditionally a part of international law;²⁹⁴

Increasing participation of countries of varied legal traditions and development;²⁹⁵

Applying international law in ever greater instances as globalization takes hold;²⁹⁶

Increasing application of international law to nontraditional subjects such as individuals and NGOs;²⁹⁷ and

Pressure on international institutions to act like and be as effective as domestic legal institutions.²⁹⁸

292. *Id.*; see also Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 496 (2005).

293. For a discussion of the evolution of international law see Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331 (2007).

294. See, e.g., David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1095–97 (1998) (discussing the growth in both scope and substance of international health law since the formation of the World Health Organization).

295. See, e.g., David P. Fidler, *Revolt Against or from Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L L. 29, 38–39 (2003) (describing the increasing participation of developing countries in international law).

296. See, e.g., Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 492–95 (2005) (discussing the growing reliance of common law courts and civil law countries on foreign and international judicial decisions).

297. See, e.g., Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 339–40 (1996) (stating that non-state actors are increasingly becoming recognized subjects of international law).

These developments are putting international law under great stress. Those involved in the development of international law must figure out how best to respond to these pressures. This Article suggests that this is best achieved by observing other systems and how they have responded to similar issues, and applying the fruits of such observations to international law. For that endeavor to be successful, international law must first itself be subject to a comparative analysis in order to know just which legal systems and which lessons from other systems may be applicable. The availability of these mixed jurisdictions as sources for international law is of fundamental significance for the future of international law.

At a more concrete or micro level, the comparative analysis in this Article could also be invaluable for the smooth *operation* of international law—reducing predictable tensions in its implementation and operation that result from the mixing of common and civil law in international institutions. For example, as pointed out by U.S. Court of Appeals Judge Wald when she sat as the U.S. judge on the International Criminal Tribunal for Yugoslavia, a court with panels of common and civil law judges: “The lack of a common legal culture tends to produce frequent, small irritations and tensions throughout the trials.”²⁹⁹ Nor was this the first incidence of this problem. The judges at Nuremburg experienced similar issues,³⁰⁰ while it has been reported that problems reflecting the different traditions were clearly apparent within the UN Administrative Law Tribunal and the World Bank’s Administrative Tribunal.³⁰¹ Indeed, these problems will occur more and more often now that international law is becoming more institutionalized.³⁰² A solution might come

298. See Borgen, *supra* note 293, at 334 (acknowledging that coercion and expectations from international agreements and customary international law are problems).

299. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 91 (2001); see also Amerasinghe, *supra* note 170, at 288.

As for the members of the Tribunal, some judges were effective, while some were indeed disappointing. Many of the latter were from common law jurisdictions, and had no experience or education in international law or in administrative (particularly civil service) law, though they may have been high court judges or practitioners in their jurisdictions.

Id.

300. *The Fifth Annual Ernst C. Stiefel Symposium: 1945–1995: Critical Perspectives on the Nuremburg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 479 (1995) (“[The trials] had all the drawbacks of adversary proceedings unfamiliar to the German defendants and defense counsel, without the mitigating safeguards of an impartial jury.”).

301. See Amerasinghe, *supra* note 170, at 288, 292.

302. A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT’L L. 225, 266 n.167 (2001) (noting the confusion in deciding which legal

from application of the mixed jurisdictions to international law. Perhaps an examination of how the Canadian Supreme Court functions with a mix of civil and common law judges will turn out to be useful in formulating solutions to the inevitable tension in international tribunals.³⁰³ The result of such an examination is left for another time; it is sufficient to show that this may be a fertile path. Thus, this comparative methodology may prove to be applicable outside the exact confines of mixed jurisdictions themselves.

Unfortunately, as already noted, this Article cannot take the time or space to extend the "mixed jurisdiction as applied to international law" methodology to its logical conclusion: applying it to the many and varied problems facing international law today. Rather, this Article simply introduces the methodology, leaving for others the application and the discovery of the many useful comparative lessons that lie in wait for international law, lessons coming from the long histories of the many mixed jurisdictions.

Of course, in addition to the other more instrumental benefits, placement of international law in the mixed jurisdiction context also sets international law in the center of one of the most exciting and potentially significant areas of comparative law. Mixed jurisdictions have started to gain a great deal of attention in recent years, even as comparative law is gaining greater interest.³⁰⁴ In part, this is due to the emergence of a European legal system that comprises a mix of civil and common law characteristics.³⁰⁵ But it is also due to a renewed vigor by those comparatists living in mixed jurisdictions. Indeed, the first ever World Wide Congress of Mixed Jurisdiction Jurists was held in 2002 in New Orleans, Louisiana, and the second in 2007 in Edinburgh, Scotland.³⁰⁶ Those mixed jurisdiction scholars and jurists have realized that there is value in examining each other's legal systems and learning from each other how to respond to the

tradition to follow when mixed common and civil law panels encounter real-life problems but where the traditions differ in approach, in a case rejecting a defense to a murder charge allowed under civil law but not under common law).

303. See Mark C. Miller, *A Comparison of Two Evolving Courts: The Canadian Supreme Court and the European Court of Justice*, 5 U.C. DAVIS J. INT'L L. & POL'Y 27, 38 (1999) (stating that Canada, while not itself a mixed jurisdiction, faces some of the same problems as a result of its inclusion of Quebec, a mixed jurisdiction).

304. Reid, *supra* note 103, at 17–18.

305. *Id.* at 18 (Reid also suggests that the reemergence of South Africa onto the world stage is spurring interest in mixed jurisdictions); see also Vernon Valentine Palmer, *Saliency and Unity in the Mixed Jurisdictions: The Papers of the World Congress*, 78 TUL. L. REV. 1, 3 (2004).

306. See Symposium, *Saliency and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities*, 78 TUL. L. REV. 1 (2003) (publication of papers of the first World Wide Congress of Mixed Jurisdiction Jurists in New Orleans); see also The World Society of Mixed Jurisdiction Jurists, <http://www.mixedjurisdiction.org/wc06.htm> (last visited Sept. 25, 2008) (stating that the Second Worldwide Congress was held on June 27–30, 2007)

often difficult issues raised in a dual legal system. Furthermore, even comparatists outside the mixed jurisdictions are seeing the value of these laboratories of comparative law.³⁰⁷ It is thus expected that mixed jurisdiction jurisprudence will serve a dynamic role in comparative law in the foreseeable future. International law jurists should likewise become involved in the study of mixed jurisdictions as they have both much to offer and much to gain through their involvement in the emerging jurisprudence of mixed jurisdictions.

307. Reid, *supra* note 103, at 26 (mixed jurisdictions “demonstrate some of the possibilities for selection, combination, and rationalization of existing rules drawn from a variety of sources”); *see also* Tetley, *Maritime Law*, *supra* note 25, at 350 (noting the value to the world of considering the “mixed” common and civil law American maritime law).