Legal comparison, municipal law and public international law: terminological confusion?

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Abstract

The ever-increasing interaction between and intertwining of municipal law and public international law have profound consequences for legal comparison. This is particularly evident when one looks at the overlapping of a number of terms and concepts in these two areas of law. The distinctiveness of some and the similarity of others, are a source of confusion and uncertainty that may hamper legal comparison and even produce unreliable results. This contribution aims to identify some difficulties that may be encountered when engaging in legal comparison involving municipal and public international law.

INTRODUCTION

In 2002 James Rosenau[1] described the characteristics of the so-called 'new global order' as follows:

> [W]orld affairs can be conceptualized as governed through a bifurcated system – what can be called the two worlds of world politics – one an interstate system of states and their national governments that has long dominated the course of events, and the other a multicentric system of diverse types of other collectivities that has lately emerged as a rival source of authority with actors that sometimes cooperate with, often compete with, and endlessly interact with the state-centric system … . Viewed in the context of proliferating centres of authority, the global stage is thus dense with actors, large and small, formal and informal, economic and social, political and cultural, national and transnational, international and

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[1] Rosenau 'Governance in a new global order' in Held & McGrew (eds) *Governing globalization: power, authority and global governance* (2002 repr 2010) 72–73.

> subnational, aggressive and peaceful, liberal and authoritarian, who collectively form a highly complex system of global governance.

Rosenau is at pains to point out that these developments do not in any way imply the disintegration and demise of nation states.[2] The important issue as far as this article is concerned, is the establishment of different spheres of authority with concomitant sets of rules regulating their operation. Therefore, one may refer to the plurality of the spheres of authority as well as the plurality of legal rules applied by these spheres. On an international level, the plurality of regimes is often equated with the fragmentation of public international law, due to the fact that global problems are not necessarily regulated by a single regime, and that, as a result, one may find conflicting norms between regimes giving rise to ongoing diversity, uncertainty, pluralism, and fragmentation.[3] One of the most pressing problems in managing different legal regimes, is effective coordination. This presupposes a clarity of terms, concepts, and notions.

The new world order must be seen against the background of globalisation.[4] Although this term can be defined in many ways, it should not be treated as a single process implying world domination, but rather as 'a complex plural phenomenon whose economic elements may be dominant, but encompass all other aspects of life, including law'.[5] Movements in favour of globalisation, nevertheless promote uniformity of laws, as conflicting rules must be

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2 *Id* at 73.

3 Young 'Regime interaction in creating, implementing and enforcing international law' in Young (ed) *Regime interaction in international law: facing fragmentation* (2012) 85.

4 In this regard Markesinis & Fedtke *Engaging with foreign law* (2009) 374 make the following remarks concerning internationalisation: 'The bulk of national courts seems to be developing this internationalist spirit because of enhanced contact between judges, courts, universities and, of course, the part of the legal profession that finds itself at the cutting edge of the globalisation phenomenon and deals with an array of commercially flavoured issues which have strong international elements. Individually and taken together, these factors will go on enhancing this trend, and we see no sign of a reserve movement developing that would push courts back to a state of intellectual self-sufficiency.' When it comes to legal comparison in a globalised world, Twining 'Globalisation and comparative law' in Örücü & Nelken (eds) *Comparative law: a handbook* 2007 (71) is of the view that one should understand the concept of law extensively to include the following forms of law: supra-state (*eg* international, regional) and non-state law (*eg* religious law, transnational law, chthonic law, *ie* tradition/custom) and various forms of soft law.

5 See Menski *Comparative law in a global context: the legal systems of Asia and Africa* (2ed 2006) 10. See also Ferreira-Snyman & Ferreira 'Global good governance and good global governance' (2006) 31 *SAYIL* 52–94.

accommodated to promote peaceful existence.[6] The question to be asked is to what extent uniformity between international law and municipal law is feasible? The so-called 'internationalisation' of constitutional law, and the simultaneous 'constitutionalisation' of international law, are, after all, clearly discernable trends which may lead to greater uniformity.[7]

An important issue for the theme of this article is the relationship between public international law and municipal law.[8] Broadly speaking, states are traditionally viewed as the subjects of public international law, whereas individuals are the subjects of municipal law.[9] With international and national human rights becoming ever more significant, these two areas of law have moved closer to each other in the sense that they both aim to

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6 Nicholson 'Globalisation v glocalisation: no contest; legal comparison, mixed legal systems and legal pluralism' (2012) XLV *CILSA* 260.

7 See in this regard Ferreira & Ferreira-Snyman 'The constitutionalisation of public international law and the creation of an international rule of law: taking stock' (2008) 33 *SAYIL* 147–167. Rajagopal 'The role of law in counter-hegemonic globalization and global legal pluralism: lessons from the Narmada Valley struggle in India' (2005) 18 *Leiden Journal of International Law* 387 emphasises that 'there is no single, coherent "international" legal sphere that is separated from a coherent "domestic" sphere. Instead, what we have are multiple legal orders, a situation of global legal pluralism, in which it is impossible to tell in advance which normative order will better serve the cosmopolitan ideals of international law, for example by protecting human rights. The answer to that question can only be answered, I suggest, by a painstaking, case-by-case post hoc evaluation of the actual deployment of normative orders by social movements and states'. For an analysis of the processes at work in the globalisation of constitutional law, see Tushnet 'The inevitable globalization of constitutional law' (2009) 49 *Virginia Journal of International Law* 985.

8 Shelton 'International law in domestic systems' in Brown and Snyder (eds) *General reports of the XVIII*th *congress of the International Academy of Comparative Law* (2012) 539 comes to the following conclusion on the relationship between international law and municipal law: 'The relationship between international law and domestic legal systems is increasingly complex, reflecting the growing complexity of the international legal system itself. With the growth of international organizations, emergence of the European Union, and the proliferation of international courts, domestic legal systems have adapted in various ways to accommodate the new realities. There is a growing democratic participation in the treaty-making and approving process, but also a recognition of the existence and need for informal or executive agreements that do not follow the normal treaty-making procedures. Given the continuing evolution in this regard, any conclusions about the incorporation of international law into domestic legal systems remains uncertain and fraught with difficulties.'

9 See for example McCorquodale 'An inclusive international legal system' (2004) 17 *Leiden Journal of International Law* 504 who strongly argues for an inclusive conceptual approach to the international legal system that would acknowledge that non-state actors have values, identities, and roles distinct from the geographic limitations of states and that these are reflected both in their daily lives and in the international legal system. See also Paust 'Nonstate actor participation in international law and the pretense of exclusion' (2011) 51 *Virginia Journal of International Law* 977.

protect and promote the human rights of individuals. This presents one of the most important common denominators between these fields of the law.[10] The growing importance of human rights on the domestic level, and especially their recognition and protection in constitutional bills of rights, have further resulted in the distinction between public and private law becoming less important.[11]

At the same time, however, it must be pointed out that the ever-increasing internationalisation of human rights may conflict with a pluralist approach supported by the principle of subsidiarity.[12] Subsidiarity, as applied in the European Union, means that 'European institutions ought to take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.[13] Closely related to the concept of subsidiarity, is the idea of complementarity, created by the Rome Statute of the International Criminal Court (1998), in terms of which priority should be given to national judicial institutions, even in the enforcement of international criminal law.[14]

In the following section, a brief analysis of a number of concepts that are inter-connected but also closely related to the phenomenon described by Rosenau, is undertaken. These may eventually have a specific effect on the comparative activity in municipal and international law. It is important to note that nowadays legal comparison is not limited to private law, but has evolved to include public law, and even has a role to play in the development

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10 See Mills *The confluence of public and private international law: justice, pluralism and subsidiarity in the international constitutional ordering of private law* (2009) 264–271.

11 *Id* at 92–94. This phenomenon is more prevalent in some legal systems than in others. See Venter *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states* (2000) 191.

12 Mills n 10 above at 269.

13 *Id* at 105 explains the advantages of the concept of subsidiarity, also on the international law level, as follows: 'It has a dual character, simultaneously acknowledging the value of pluralism, acting in support of local mechanisms of accountability and legitimacy, as well as acting as a justification where necessary, for universal recognition.' See also a 5 of the EC Treaty (2002).

14 *Id* at 104 argues that this margin of appreciation in international human rights law recognised by article 17 of the Rome Statute of the International Criminal Law (1998), 'acknowledges that respect must be given to the legitimate variation in national interpretation and implementation of some rights'. On the uncertainty concerning the meaning of complementarity see Ebobrah 'Towards a positive application of complementarity in the African Human Rights System: issues of functions and relations' (2011) 22 *European Journal of International Law* 666–667.

of international trade law and transnational law.[15] Unfortunately, as Menski points out, many comparativists remain reluctant to accept that they are operating in a truly global context.[16] The following observation by Nollkaemper illustrates the fact that public international law and its relation to municipal law, may have a profound influence on the outcomes of any comparative legal research:[17]

> As international law becomes more meaningful and decisive for national legal systems, and increasingly prescribes and supervises national law with a view to achieving common aims, that process will trigger processes of divergent interpretations. In some respects public international law may start to resemble private international law.[18]

With reference to Church, Schulze and Strydom,[19] it is important in this context to view comparative law not merely as a body of rules or a method, but as an activity that 'should present a new perspective that allows the comparatist, in the process of comparison, critically to "illuminate" a legal system either his or her own or that of another'. It therefore seems imperative that before undertaking comparative research, the vocabulary employed is clearly defined in order to achieve effective and reliable results. Both national and international law use terms and concepts which, directly or indirectly, classify legal systems and norms. These terms and concepts may, at times, partly overlap or differ totally in meaning, or even be viewed as synonyms. Thus, against this background, the following exposition attempts to point out difficulties that could have a direct bearing on the comparative activity.

LEGAL REGIMES

In the preceding section reference was made to the bifurcated system of world politics – on the one hand, the international state-centric system, and on the other, a multi-centric system of diverse types of other collectivities,

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15 Church, Schulze & Strydom *Human rights from a comparative and international law perspective* (2007) 22–23.

16 Menski n 5 above at 49.

17 Nollkaemper *National courts and the international rule of law* (2011) 222.

18 Menski n 5 above at 48 observes that 'comparative law's claim that it can promote understanding of foreign peoples made it particularly attractive for public international lawyers'.

19 Church, Schulze & Strydom n 15 above at 7. In this exposition the term comparative activity is employed rather than comparative law.

constantly interacting with each other. Rosenau describes the result of this constant interaction as follows:[20]

> [D]espite the vast differences among them, what the disparate collectivities in the two worlds of world politics have in common is that they all sustain rule systems that range across the concerns of their members and that constitute the boundaries of their SOAs[21] … . When the collectivities in the two worlds cooperate across the divide between them, as often they must, to advance shared interests in particular issue areas, the hybrid institutions they form to coordinate their SOAs are considered to constitute a "regime" … .

Weiss presents a simplified definition, and suggests that 'according to the accepted definition, regime means a totality of rules, measures, and norms aimed at achieving a certain goal'.[22] It is suggested that in this context, the term regime can also be used to describe at least a part of what is generally known as a legal system. Depending on how widely one wishes to stretch the boundaries of a regime, it can also be equated with a legal system as a whole and not only as part of such a system.[23] A number of regimes are sometimes

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20 Rosenau n 1 above at 73.

21 SOA is an acronym for spheres of authority. *Id* at 72. In this regard reference is sometimes made to the 'autonomy' of groups (and even individuals). Champagne 'Indigenous self-government, cultural heritage and international trade: a sociological perspective' in Graber, Kuprecht & Lai (eds) *International trade in indigenous cultural heritage* (2012) 43–44 explains the sociological reasons behind this phenomenon as follows: 'Indigenous peoples often are reluctant to assimilate culturally and politically into nation states. Submitting to international and nation state law and culture often runs directly against indigenous beliefs of their own religious and political autonomy. Indigenous demands for political and cultural autonomy are often seen as threatening the roots of nation state status. Most likely, indigenous peoples do not see it in the same way. … Indigenous peoples want respectful relations with nation states, and often are willing to accept full citizenship, but not as a trade for abandoning indigenous society. Rather, indigenous groups are willing to accept citizenship but want the right to participate in and uphold the autonomy of their own cultural communities.' It is interesting to note that Bomhoff 'Comparing legal argument' in Adams & Bomhoff (eds) *Practice and theory in comparative law* (2012) 88 emphasises that in the Western tradition law, in order to *qualify* as law, has to be to some extent separate from morality, economics, religion, subjective preferences of individuals, or other sources of conceptions of value. However, for law to be *acceptable* as law it must be completely divorced from either social reality or ideals.

22 Weiss (ed) *Environmental change and international law: New challenges and dimensions* (1992) par 13.II to be found at: http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee12.htm#ii.legalregime (last accessed 28/03.2013).

23 Merry 'Legal pluralism' in Berman (ed) *The globalization of international law* (2005) 29 (Reprinted from (1988) 22 *Law and Society Review* 869–896) points out that 'given a sufficiently broad definition of the term legal system, virtually every society is legally

equated collectively with a legal framework.[24] Koskenniemi describes the formation of regimes.[25] Since the end of the Cold War in 1989, a complex set of regulatory (managerial) terms and concepts (a vocabulary) has emerged without any hard-and-fast rules, or reference to the sovereignty of states. Rather, they reference the objectives, values, and interests behind the rules. He suggests that one should not regard rule complexes in terms of formal public law institutions, but as 'informal "regimes", that is norms, practices and expectations within specific "issue-areas", defined by the distribution of available technologies of knowledge production'. He contrasts the law of international institutions with regime theory by arguing that the former focuses on formal competence, representation, and accountability, whereas the latter is more functional by comparing outputs against inputs with reference to alternative behavioural models in order to 'derive testable hypotheses about what would explain co-operation under which conditions and in what circumstances.'[26] He emphasises that regimes are not established through formal procedures, but come about as a result of converging practices and consolidating knowledge patterns, and cites examples such as environmental regimes, human rights regimes, as well as trade and security regimes A world consisting of many functional regimes, is described by Koskenniemi as[27]

> a world nervously characterised by international lawyers through the language of 'fragmentation', articulating (as the word always did) a sense of loss of the secure ground of tradition, memory of the time when everything still seemed somehow coherent (and international lawyers held the Prince's ear). By contrast, regimes act as special systems of truth and value, idiolects ready to encompass the whole world, but from their own perspective, with their own (structural) bias.

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plural, whether or not it has a colonial past'. She cautions, however, on 31 that one runs the risk of defining the term legal system so broadly that all social forms of control are included in the definition. McEvoy 'Descriptive and purposive categories of comparative law' in Monateri (ed) *Methods of comparative law* (2012) 154 uses the term legal system to denote 'both a closed and a homogeneous whole, not an open agglutination of heterogeneous rules'.

24 Nafziger 'Introduction' in Nafziger (ed) *Cultural heritage law* (2012) xiv–xvi.

25 Koskenniemi *The politics of international law* (2011) 318–320.

26 *Id* at 319. See also Hurrell 'International society and the study of regimes: a reflective approach' in Rittberger and Mayer (eds) *Regime theory and international relations* (1995) 55.

27 *Id* at 320.

In order to decide difficult issues cropping up between regimes, Koskenniemi suggests[28]

> a superior system, a regime of regimes – a 'constitution' in the legal idiom. There is none, however. This is why regimes will continue to deal with whatever they can lay their hands on. In the end, that regime will win whose application will, for whatever reason, no longer be challenged. The world of regimes is a world of hegemony, of pure power.

Jackson uses the term regime in both the municipal and international law contexts. In his discussion of legal pluralism, he finds it ironic that national governments would accept the development of regulatory regimes above or outside their jurisdiction (for example, the international *lex mercatoria*), but often seem to view regulatory regimes (for example Islamic law) that exist and develop within their territorial boundaries, as a threat to the 'dictates of legal centralism and the integrity of the Nation-State'.[29]

FRAGMENTATION OF LEGAL NORMS

In recent years, the fragmentation of public international law has become a hotly debated issue. The International Law Commission's report on the topic,[30] is indicative of this statement. The causes of fragmentation are manifold. According to Fauchald and Nollkaemper, it is not a new phenomenon and can be ascribed to a multitude of factors common to traditional international law, such as the sovereign equality of states, the lack of centralised organs, specialisation of law, different structures of legal norms (for example, hierarchical and non-hierarchical), parallel and sometimes competing regulations, an expanding scope of international law, and different dynamics for rule development.[31] The authors also point out that in the international legal order. a certain degree of fragmentation is inevitable insofar as states from time to time, have to address various global challenges according to priorities determined by different political systems.[32]

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28 *Ibid*.

29 Jackson 'Legal pluralism between Islam and the nation-state: romantic medievalism or pragmatic modernity' (2006/2007) 30 *Fordham International Law Journal* 175–176.

30 International Law Commission *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* Report of the study group of the International Law Commission finalised by Koskenniemi A/CN 4/L 682.

31 Fauchald and Nollkaemper 'Introduction' in Fauchald and Nollkaemper (eds) *The practice of international and national courts and the (de-)fragmentation of international law* (2012) 4.

32 Fauchald and Nollkaemper 'Conclusions' in Fauchald and Nollkaemper n 31 above at 343. Martineau 'The rhetoric of fragmentation: fear and faith in international law' (2009) 22 *Leiden Journal of International Law* 4 describes the different meanings of

It could, therefore, be argued that, in this sense, the absence of a single, uniform, coherent body of international law norms, would actually benefit of the international community of states insofar as individual states are free to react to international issues and problems as they see fit without being bound by any pre-existing norms previously agreed upon by states. On the other hand, it should be abundantly clear that the unqualified persistence of this phenomenon, would inevitably result in large scale legal uncertainty because of the creation of an ever-increasing number of conflicting international legal norms, without any procedures and institutions available to resolve these conflicts.[33] Since 1996, several judges of the International Court of Justice have expressed concern over the ever increasing proliferation of international courts and tribunals, and the consequent fragmentation of international law.[34] For example, in his review of the work of the International Court of Justice in 1997, Sir Robert Jennings remarked that conflicts arising from those areas of international law that can be linked directly to the position of individuals – such as international human rights law and international environmental law – are increasingly being left to the jurisdiction of specialised adjudicating bodies. According to him, the consequences of these developments are that the International Court of Justice is increasingly being isolated from very important areas of international law. He expressed his concern that this proliferation took place without a general plan, thereby posing a risk that international law as a whole might become fragmented and unmanageable.[35] This pessimism

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fragmentation as follows: 'Nowadays the term "fragmentation" is commonly used to refer to the slicing up of international law "into regional or functional regimes that cater for special audiences with special interests and special ethos". Yet this is not the only possible meaning: in addition to fragmentation as a process ('international law being sliced up'), the term has been used to refer to the so-called primitive character of international law ('international law is still fragmented').' The meaning underlying the current discourse is the first: '[T]he prevalent view suggests that we are facing a new and somewhat paradoxical situation in which world disorder is that of an anarchical society whose progress is impaired not by an underdevelopment of law but rather by its overdevelopment.'

33 See Prost & Clark 'Unity, diversity and the fragmentation of international law: how much does the multiplication of international organizations really matter?' (2006) 5 *Chinese Journal of International Law* 340 who claim that as international organisations are shapers rather than makers of international law, 'their multiplication is therefore not a source of increased chaos in the international normative puzzle'.

34 See in this regard the overview of Koskenniemi & Leino 'Fragmentation of international law? Postmodern anxieties' (2002) 15 *Leiden Journal of International Law* 553–556.

35 Jennings 'The role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 59–60.

voiced by Sir Jennings, is not shared by various commentators. Charney explains as follows:[36]

> The establishment and use of other forums to decide questions of international law means that more international issues are being resolved authoritatively pursuant to international law-based judgments and awards. This will add to the body of authoritative international law decisions by third party forums upon which the international community can rely. … As a whole, these alternative forms complement the work of the ICJ and strengthen the system of international law, notwithstanding the risk of some loss of uniformity.[37]

International law, when applied by municipal courts, can lead to either fragmentation or uniformity. For example, Moore refers[38] to the American Supreme Court's decision in *Sosa v Alvarez-Machain,*[39] in terms of which the court recognised customary international law and treaties to be part of federal common law, thereby creating a uniform doctrine regarding the domestic status of international law. The role of the so-called *stare decisis* principle is also worth mentioning in this context. In terms of this principle, lower courts must adhere to the decisions of higher courts, which contributes substantially to the uniformity of international law and avoids fragmentation, on the domestic level at least.[40] However, a survey in 2002 by Miller has shown that on the international law level, the operation of a system of precedent with regard to the jurisprudence of international adjudicating

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36 Charney 'Is international law threatened by multiple international tribunals?' (1998) 271 *Recueil des Cours* 351. See also Koskenniemi and Leino n 34 above at 574–579; Stephens 'Multiple international courts and the "fragmentation" of international environmental law' (2006) 25 *Australian Year Book of International Law* 228–234.

37 On international law as a system see Craven 'Unity, diversity and the fragmentation of international law' (2003) XIV *Finnish Yearbook of International Law* 6–15 where he argues (on 7) that international doesn't have to be articulated in terms of a system. According to him it may be understood as 'a domain of discourse between significant agents; as an empirical array of practices; or perhaps merely as the vocabulary employed by a community of scholars and practitioners'. See also Boyle & Chinkin *The making of international law* (2007) 263–266.

38 Moore 'An emerging uniformity for international law' (2006) 75 *The George Washington Law Review* 1–4.

39 542 US 692 (2004).

40 On the meaning of precedent see Gascón 'Rationality and (self) precedent: brief considerations concerning the grounding and implications of the rule of self precedent' in Bustamante and Pulido (eds) *On the philosophy of precedent: proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy 2009 Vol III* (2012) (*Archiv für Rechts- und Sozialphilosophie* Beiheft 133). See also Komárek 'Reasoning with previous decisions' in Adams and Bomhoff n 21 above at 67 who defines precedent as 'a previous judicial decision that has normative implications beyond the context of a particular case in which it has been delivered'.

bodies, is not uncommon.[41] He comes to the conclusion that international tribunals do interact with each other, although not 'at the robust level found in domestic legal systems, and that this should, to some extent, allay the fears of those concerned about the fragmentation of international law.[42] Because fragmentation is judged by some to be a crisis in international law, or at best a flaw that needs immediate rectification, the natural response is to propagate greater universalisation, despite the fact that there may be a serious difference of opinion over whether it is attainable or desirable.[43] Universalisation presupposes some form of harmonisation, but as Mills points out, 'harmonisation … could, however, only be achieved at the cost of diversity … and is thus itself in tension with the principle of subsidiarity.'[44] Benvenisti and Downs refer to the negative effects achieved as a result of increasing fragmentation by explaining as follows in their introductory summary:[45]

> Fragmentation accomplishes this in three ways. First, by creating institutions along narrow, functionalist lines and restricting the scope of multilateral agreements, it limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence. Second, the ambiguous boundaries and overlapping authority created by fragmentation dramatically increase the transaction costs that international legal bodies must incur in trying to reintegrate or rationalize the resulting legal order. Third, by suggesting the absence of design and obscuring the role of intentionality, fragmentation frees powerful states from having to assume responsibility for the shortcomings of a global legal system that they themselves have played the major role in creating. The result is a regulatory order that reflects the interests of the powerful that they alone can alter.[46]

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41 Miller 'An international jurisprudence? The operation of "precedent" across international tribunals' (2002) 15 *Leiden Journal of International Law* 498–499.

42 *Id* at 499 argues that his research results are indicative of 'a complex, if not explicit or centrally organized, structure of relationships among international tribunals'.

43 Mills n 10 above at 95.

44 *Id* at 288. De Cruz *Comparative law in a changing world* (3ed 2007) 510–517 explains the various modes of convergence in order to attain unification of legal systems, namely active programmes for the unification of law, transplantation of legal institutions, and natural convergence.

45 Benvenisti & Downs 'The empire's new clothes: political economy and the fragmentation of international law' (2007) 60 *Stanford Law Review* 595–596.

46 The International Law Commission in its report on the fragmentation of international law (n 30 above at par 12) views international law as a system. For a critical analysis of the Commission's viewpoint see Singh 'The potential of international law: fragmentation and ethics' (2011) 24 *Leiden Journal of International Law* 30–33.

In contrast, Koskenniemi is not as pessimistic about the phenomenon of fragmentation.[47] He does not see it as a problem that must be done away with, but argues that the proliferation of autonomous or semi-autonomous normative regimes, is an unavoidable reflection of a postmodern social condition and, to some extent, a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation are reflections of the shifts of political preference.[48] Craven indicates that fragmentation appears to be a phenomenon particularly associated with international law, and does not intrude directly into domestic law, notwithstanding the argument that it is simply a characteristic of a legal system's emergent maturity or its growing complexity.[49] Although its use is mainly confined to public international law, there is certainly no prohibition on the use of the term in domestic law. International law is, at least to a certain extent and depending on whether a municipal legal system is monist or dualist, a part of domestic law. In fact, the rigid distinction between municipal law and public international law in dualist domestic legal systems is, in a certain sense, indicative of the fragmentation of legal norms. Rautenbach and Du Plessis[50] apply the concept of fragmentation to South African municipal law insofar as they refer to the fragmented and divisive state structures[51] under apartheid, and the horizontal and vertical fragmentation of cultural governance, including the incoherent involvement of traditional authorities, non-governmental organisations, and international actors.[52] Yet, in almost the same breath, they refer to South Africa as home

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47 Koskenniemi n 25 above at 265.

48 Casanovas *Unity and pluralism in public international law* (2001) 245 describes the risks of fragmentation as follows: 'The risk of fragmentation of International Law does not derive from the multiplicity of international judicial organs, which is only a consequence, but rather from the development of international material regimes, which is the cause. The most developed international material regimes have their own dispute settling mechanisms and these include specific international courts. In themselves the international material regimes do not constitute a threat of fragmentation of international law, even less so the specified international courts. It is suggested that the risk could lie in the specialized character of their jurisdictions at a time of globalization of international relations. When resolving suits falling within their specific jurisdictional ambits, these courts may have to decide collateral issues which do not so fall.'

49 Craven n 37 above at 31.

50 Rautenbach & Du Plessis 'Fragmentation: friend or foe in the effective implementation of the Cultural Diversity Convention in South Africa' (2009) 34 *South African Yearbook of International Law* 132–137. On 132 they define fragmentation as follows: 'Generally, fragmentation means the separating, scattering or dividing of things. Fragmentation in the context used here refers to horizontal, vertical and legislative fragmentation in the domestic context.'

51 Rautenbach & Du Plessis n 50 above at 134.

52 *Id* at 136.

to a pluralistic society.[53] It seems, therefore, that they view fragmentation as a result or consequence of the regulation of cultural pluralism in South Africa.

LEGAL PLURALISM

Rights-based constitutionalism often appears to be the most appropriate way of curbing state power in a liberal democracy. This is indeed the case, provided that the population is more or less homogeneous. In societies divided along cultural, religious, linguistic, and racial lines, this is not necessarily true. Harvey and Schwartz explain as follows:[54]

> In divided societies … the communitarian meaning of rights-based constitutionalism is more problematic. On the one hand, a common framework of rights might be unifying, a medium for a divided society to articulate a vision for a shared future. On the other hand, a common framework of rights may be in conflict with the recognition of difference. Indeed, the framework of rights may be a source of division in its own right, a relic of a contested constitutional history or the perceived property of one political tradition to the exclusion of others. In the case of national or ethno-national conflicts, for example, the constitutive role of rights may be seen as a kind of domination.

Grenfell shows that legal pluralism can be detrimental to the rule of law in those instances where the local, customary (indigenous) law is separated from national, constitutional norms which are largely based on international law. In order for the rule of law to be best served, the former must enjoy recognition by the latter, and should be monitored to ensure its full compliance with the applicable constitutional provisions.[55] In this respect, the South African Constitution in section 211 explicitly recognises customary law (indigenous law) subject to the provisions of the Constitution. As a concept, pluralism can be used to denote the fact that the population in a particular state may differ with regard to certain characteristics like culture, language, religion, or race. In other words, pluralism in this context relates to different (usually) minority identities within a state.[56] Brinkel

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53 *Id* at 134.

54 Harvey & Schwartz 'Introduction' in Harvey & Schwartz (eds) *Rights in divided societies* (2012) 3.

55 Grenfell 'Legal pluralism and the rule of law in Timor Leste' (2006) 19 *Leiden Journal of International Law* 307.

56 Smith 'Legal reason, human rights and plural values' in Soeteman (ed) Pluralism and law: proceedings of the 20th IVR World Congress Amsterdam 2001 Vol 3: Global problems 2004 *Archiv für Rechts- und Sozialphilosophie Beiheft* 90 25 remarks in this

warns that attempts to accommodate different identities (plurality) in the same state, may 'result in fragmentation of society or even in the end of the existing state formation as a result of secession.'[57] But, in almost the same breath, he suggests that fragmentation 'can be prevented by accommodating the desire to be different and by nourishing the confidence among minorities that agreements made in this respect will be maintained'. He emphasises that diversity should be seen and defended as a common good[58] which ought to be supported by tolerance and mutual respect.[59] The terms pluralism and cultural diversity are thus sometimes used in the same breath. With regard to international trade in indigenous cultural heritage, Scott and Lenzerini,[60] for example, propose the establishment of systems relating to the effective realisation of indigenous rights which would result in the development of a world society truly based on pluralism and cultural diversity. The term pluralism can also be used to refer to the variety of (often conflicting) legal norms applicable to a certain situation.[61] In this regard, Woodman defines pluralism as 'the class of situations in which a population observes more

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regard as follows: '[P]luralism has been presented as an antidote to excessive and abstract individualism and cultural imperialism.' On 27 she warns that, 'while the idea of pluralism has been useful for pointing out intolerance and discrimination … it can be rather highly susceptible to abuse. … Defending a culture as a whole may protect injustices in it.' In addition she states on 27 that pluralism as such focuses on the differences and not as much on the similarities between people. Pluralism should be used to recognise and respect these differences between people rather than to conquer or subordinate those who display them. Örücü *The enigma of comparative law: variations on a theme for the twenty-first century* (2004) 126–127 remarks that '[m]oral pluralism, value pluralism, ethnic pluralism and cultural pluralism are part of social reality and have to be not only tolerated but preserved'. The translation of these into legal pluralism may unfortunately not necessarily be in the best interest of 'achieving a universal, comprehensive, internally reconcilable moral or political monism'.

57 Brinkel *Nation building and pluralism: experiences and perspectives in state and society in South Africa* (2006) 116.

58 See in this regard Brugger 'The common good and pluralism in the modern constitutional state' in Soeteman n 56 above at 32–43.

59 Brinkel n 57 above at 137.

60 Scott & Lenzerini 'International indigenous and human rights law in context of trade in indigenous cultural heritage' in Graber, Kuprecht & Lai n 21 above at 87.

61 See in this regard Maduro 'Europe and the constitution: What if this is as good as it gets?' in Weiler & Wind (eds) *European constitutionalism beyond the state* (2003) 98 where he argues with reference to pluralism in the European Union that forms of reducing or managing any potential conflicts between legal orders need to be conceived in a situation where the relationship between the said legal orders is non-hierarchical. This is an issue prevalent in particularly international and regional law. In many municipal legal systems such as the South African constitutional dispensation, conflicts arising from a plurality of legal systems are dealt with in terms of a superior constitution that provides a yardstick in the form of a bill of rights against which all legal norms must be tested by municipal courts.

than one law'.[62] Law, in this sense, may be understood as a legal system.[63] Merry employs a general definition of legal pluralism and describes it as 'a situation in which two or more legal systems co-exist in the same social field'.[64]Pluralism can also be internal or external.[65] Internal pluralism simply refers to a particular legal order where multiple sites of power coexist, are mutually recognised, and may not necessarily be organised in a non-hierarchical relationship. External pluralism, in turn, is a result of the ever-increasing communication and dependence among different legal orders, including state, supra-national, and international orders.[66]

Fragmentation and pluralism seem to be linked insofar as recognition of the latter as a normal phenomenon may lead to an escalation of the former, and the recognition of the former as an unavoidable and acceptable consequence, which in turn, may lead to an increase in the creation of instances of the latter. Ziegler[67] discusses the relationship between international law and EU law with reference to pluralism, fragmentation, and hegemony, and explains as follows:

> Pluralism can imply simply competition and power struggle and result in disengagement between competing authorities or those claiming to be authorities (closed or disengaged pluralism – or simply fragmentation). Or it can incorporate a notion of openness and engagement with other authorities (open or engaged pluralism). Disengaged pluralism puts the ball in the other side's court and might be considered a demonstration of strength. It is still pluralism rather than hegemony if competing claims to authority are recognised as such, at least in their own sphere. Engaged pluralism, in contrast, will need to persuade substantively. It may, therefore,

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62 Woodman 'Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of land law' in Mostert & Bennett (eds*) Pluralism and development: studies in access to property in Africa* (2011) 36.

63 *Id* at 37.

64 Merry n 23 above at 30.

65 Maduro 'Courts and pluralism: essay on a theory of judicial adjudication in the context of legal and constitutional pluralism' in Dunoff & Trachtman (eds) *Ruling the world? Constitutionalism, international law and global governance* (2009) 356–358.

66 With regard to both municipal law and public international law, the important role of a diversity of non-governmental organisations cannot be ignored. This in itself constitutes a particular form of pluralism. See Weiss & Gordenker 'Pluralizing global governance: analytical approaches and dimensions' in Weiss (ed) *Thinking about global governance: why people and ideas matter* (2011) 217. The same phenomenon is described by Weiss, Carayannis and Jolly 'The "third" United Nations' in Weiss n 66 at 128 as the so-called new multilateralisms and policy networks.

67 Ziegler 'International law and EU law: between asymmetric constitutionalisation and fragmentation' in Orakhelashvili (ed) *Research handbook on the theory and history of international law* (2011) 318–319.

> be more likely where the relationship between competing authorities is more fragile or evenly balanced. And it might lead to better reasoning.

Koskenniemi views legal pluralism within the international law context, as an alternative to the constitutionalisation of international law.[68] Both these concepts are abstract responses to the emergence of multiple legal regimes, and Koskenniemi summarises their value as follows:[69]

> Constitutionalism and pluralism[70] are generalising doctrines with an ambivalent political significance. Each may support and challenge the existing state of affairs. Together they provide alternative orientations to deal with, and to reduce, complexity. This is why I think of them as two tendencies in a single set of problems: the need for centralism and control on the one hand, diversity and freedom on the other. In practice, they often converge in intermediate forms: federalism, limited autonomy, interpretations reconciling the particular with the general – 'systemic integration'. But they are external, academic vocabularies that remain at a birds-eye distance from law as professional commitment, even a "calling".[71]

When referring to legal pluralism in an international context, it is extremely important to take into account that there is, in the words of Koskenniemi, 'disappointingly little by way of comparative international law',[72] as a result of the view that 'there is a single, universal international law with a homogeneous history and an institutional-political project [which] emerges from a profoundly Eurocentric view of the world'.[73] A reason for this lack of comparative analyses of the different local, regional, and national approaches to international law could be an underlying fear that the international character of international law might be undermined.[74] The fact

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68 Koskenniemi n 25 above at 350.

69 *Id* at 354.

70 *Id* at 353–354 explains his difficulty with the concept of legal pluralism: 'The problem with legal pluralism lies in the way it ceases to pose demands on the world. Its theorists are so enchanted by the complex interplay of regimes and a positivist search for an all-inclusive vocabulary that they lose the critical point of their exercise. … I like to think of this as a hegemonic move on the part of international relations experts as an effort to occupy the voice of normativity previously held by lawyers. … Pluralism's main contribution lies in the awareness it brings of the biases of different legal vocabularies; but it cannot sustain a project of law in its own right.'

71 On the influence of legal pluralism on the role of courts, see in general Maduro n 65 above at 356–379.

72 Koskenniemi 'The case for comparative international law' (2009) 20 *Finnish Yearbook of International Law* 3.

73 *Id* at 4.

74 *Id* at 3.

that different approaches to international law exist, cannot be divorced from the fact that the binding nature of international law depends on the consent of states to be bound, and consequently on their particular interpretation of international law norms. In this regard there is a clear difference between municipal law and international law insofar as the former is binding, irrespective of the will of those subjected to it

MIXED LEGAL SYSTEMS

Some municipal legal systems can be aptly described as mixed, in the sense that they developed from a number of different systems. A case in point is the South African legal system.[75] At its foundation is Roman-Dutch law, heavily influenced by English law. In addition, in section 22, the Constitution of the Republic of South Africa, 1996 recognises customary law as it is observed by traditional authorities, and determines that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. In terms of the international law rule which provides that the laws of a conquered country continue in force until they are altered by the conqueror,[76] Roman-Dutch law remained the applicable law in South Africa (it was never replaced by English law) despite South Africa being a colony of the United Kingdom until 1961 when it attained full independence as a republic.

In this regard it is important to note the following remark by Palmer:[77]

> The term 'mixed jurisdiction' should not and cannot be identified exclusively with the interaction of common and civil law within the private-law sphere. That legal sector is perhaps the best known field of encounter, but it has no monopoly over the phenomenon. The mixed jurisdiction must be approached more organically to include the sectorial interaction of a distinct public law and its legal ideology upon a hybrid private law.[78]

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75 See in this regard Nicholson n 6 above at 265: 'It has been accepted that South Africa presents a mixed legal system, identified as such because it is crossbred and has suffered the isolation common to the other mixed legal systems separated from each other, geographically, culturally and in a diversity of other ways.'

76 Palmer 'A descriptive and comparative overview' in Palmer (ed) *Mixed jurisdictions worldwide: the third legal family* (2ed 2012) 27; 31–33.

77 Palmer 'Conclusions' in Palmer n 76 above at 612.

78 Leyland 'Oppositions and fragmentations: in search of a formula for comparative analysis' in Harding & Örücü (eds) *Comparative law in the 21st century* (2002) 217 emphasises that 'it has been widely acknowledged that comparative work is of particular importance in public law'. See also Bell 'Comparing public law' in Harding & Örücü *op cit* 235–247.

Mixed legal systems, according to Palmer,[79] display three characteristics. First, these systems are based upon the dual foundations of common law and civil law systems. He emphasises that 'only in "mixed jurisdictions" do we find, notwithstanding the presence of other legal elements as well, that common law and civil law constitute the basic building blocks of the legal edifice'.[80] Secondly, the presence of these dual elements should be obvious to the ordinary observer. Palmer explains as follows: 'In the mixed-jurisdiction family one expects a large number of principles and rules to be of distinguishable pedigree, even including non-substantive aspects of the law, such as the nature of institutions and the style of legal thinking.'[81] Thirdly, in many mixed jurisdictions the private-law sphere has the outward appearance of a pure civil law system, whereas the public law sphere seems to be typically Anglo-American. Palmer states that he has never found any example of a reverse allocation of these respective spheres.[82]

Palmer argues that these criteria could be used as a means of differentiating between mixed jurisdictions, and a wide variety of hybrid and pluralist systems.[83] A question that immediately springs to mind, is whether the phenomena of mixed legal systems and plural legal systems may be linked in any way, and even whether they could be synonyms. In this regard, Saidov explains that 'the reasons for legal pluralism or mixed legal systems may be various',[84] thereby apparently regarding the two concepts as synonyms. However, Church, Schulze and Strydom hold a different view insofar as they insist that a clear distinction be made between mixed legal systems, legal pluralism, and legal dualism.[85] They conceptualise these phenomena as follows: A mixed legal system consists of 'at least two diverse components having substantive attributes … derived from two or more systems generally recognised as being [an] independent system'.[86] Legal pluralism also displays 'the attributes of two or more legal systems existing in the same country', although 'the basis for this phenomenon is the occurrence of such systems within different cultural or religious groups of people'.[87] Included in legal pluralism, are the laws of a cultural or religious group, whether

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79 Palmer 'Introduction to the mixed jurisdictions' in Palmer n 76 above at 7–11.
80 *Id* at 8.
81 *Id* at 9.
82 *Id* at 9 n 24. See also 10.
83 *Id* at 11.
84 Saidov *Comparative law* Translated from the Russian by Butler (2003) 326.
85 Church, Schulze & Strydom n 15 above at 49–50.
86 *Id* at 49.
87 *Ibid*.

officially recognised by the state or not. Legal dualism concerns 'the official application of two legal systems alongside each other'.[88] It usually takes the form of one dominant and one subservient system, for example the general law of the land and the personal law of a particular group.

Where does public international law fit into mixed legal systems? When it comes to comparative law, it certainly has an important role to play. Örücü states that comparative law is of particular use in the formulation and interpretation of international conventions and agreements.[89] The general principles of law recognised by civilised nations, and customary rules of public international law,[90] are discovered through the comparative method. This is also true in a regional context such as the European Union.[91] McEvoy even refers to hybrid comparative law, and explains that 'comparative law is … hybrid when it considers how EU law … has affected the domestic laws of … Member States …'.[92] Palmer emphasises that mixed jurisdictions should not and cannot, be identified exclusively with the interaction of common and civil law within the private law sphere.[93] Mixed jurisdictions should be viewed more organically to include the interaction of public and private law. It is suggested that public law in this context, may include public international law, depending on whether a particular jurisdiction follows a monist or a dualist tradition.

HYBRID LEGAL SYSTEMS

Although not necessarily hybrid, some legal systems can be described as multi-layered[94] consisting of a textual, a doctrinal, judge-made law, and a fundamental constitutional rights layer. Pokol takes the view that in an ideal arrangement, these layers together, will provide a unified legal system. In this context, South African law can be described as a multi-layered system.[95]

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88 *Id* at 49–50.

89 Örücü 'Developing comparative law' in Örücü and Nelken n 4 above at 55. Also see Saidov n 84 above at 121–125.

90 General principles of law recognised by civilised nations and custom are both sources of public international law listed in a 38 of the Statute of the International Court of Justice.

91 Örücü n 89 above at 56.

92 McEvoy n 23 above at 149.

93 Palmer n 79 above at 612.

94 See Pokol 'The concept of the multi-layered legal system' in Soestman (ed) *Pluralism and law: proceedings of the 20th IVR World Congress Amsterdam 2001 Vol 4: Legal reasoning* (2004) (*Archiv für Rechts- und Sozialphilosophie Beiheft* 91) 168.

95 In his discussion of the legal position of indigenous peoples, Van Genugten 'Protection of indigenous peoples on the African continent: concepts, position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 55 refers to the 'layered structure of the South African legal system' consisting of international,

In a certain sense, this may also be true of public international law. Public international law, regional law, sub-regional law, and the perspectives of the different municipal legal systems on the interpretation of a specific legal norm, may present a layered view of the legal position.

It would seem that mixed systems are sometimes equated with hybrid systems. Örücü, for example, states that recently there has been an increased interest in 'mixed, or hybrid systems'.[96] Within the context of comparative law in South Africa, Markesinis and Fedtke explicitly link mixed jurisdictions to hybrid systems.[97] They emphasise the importance of the role played by comparative law in South Africa. Apart from the fact that the South African Constitution, in section 39, allocates a specific role for comparative law, they also view it as important

> due to the hybrid character of the legal system, which is rooted not only in Roman-Dutch but also in the English common law. The mixed jurisdiction of the country thus seems to help it in adopting an open mind (and, of course, the mixture there was even greater for, alongside the so-called 'western' influences, one found and had to cope with indigenous, often customary ideas and notions).

Money-Kyrle and Hodges explain the meaning of hybrid legal systems as follows:[98]

> Hybrid systems are influenced by common law and civil traditions, usually as a consequence of a mixed history and colonialism. Examples include … South Africa and Indonesia (Dutch/Roman law, common law and customary law elements).[99]

As indicated above, McEvoy refers to 'hybrid or familial comparative law'.[100] As an example, he cites the comparison between different legal

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national and indigenous law.

96 Örücü n 56 above at 136.

97 Markesinis & Fedtke n 4 above at 374.

98 Money-Kyrle and Hodges 'European collective action: towards coherence?' (2012) 19 *Maastrict Journal of European and Comparative Law* 481.

99 On the relationship between English law and African customary law see Toufayan 'When British justice (in African colonies) points two ways: on dualism, hybridity, and the genealogy of juridical negritude in Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 377–410.

100 McEvoy n 23 above at 149. It is interesting that Venter n 11 above at 41 doubts the usefulness for purposes of legal comparison to devise a range of families of constitutional systems.

systems of the same family of legal systems (for example the common law family or the civil law family). This form of comparative law can also be classified as both internal (insofar as the different systems belong to the same family), and external (insofar as it concerns different systems).

MONIST AND DUALIST LEGAL SYSTEMS

No study of the relationship between public international law and municipal law would be complete without reference to the issue of monism and dualism.[101] Broadly stated, monism means that international law and the municipal law of a particular state are viewed by the courts of that state as a single system of legal norms and applied as such. This implies that there is no need for the transformation of international law into municipal law before it can be applied by a municipal court. Under dualism international law and municipal law are seen as two separate norm systems and international law must be transformed through one or other prescribed mechanism, before it may be applied freely by a municipal court. In South Africa both approaches are applied in different respects. In terms of section 232 of the Constitution, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, while section 231(4) determines that an international agreement becomes law in the Republic when it is enacted into law by national legislation.[102] In addition, section 233 provides that when interpreting an Act of Parliament, an outcome that is in line with public international law must be followed, rather than an outcome that is in violation of public international law. Seen against this background, the multi-faceted nature of the relationship between public international law and municipal law (in this case, South African law) becomes clear. It displays characteristics of both a monist system (with regard to customary international law), and a dualist system (with regard to treaty law). Shelton points out that it is rare to find a system that is entirely the one or the other.[103]

The dichotomy between monism and dualism has been debated extensively, and is generally accepted as a theoretical perspective with real and specific consequences. Mills points out that both these perspectives ignore certain

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101 See Dugard *International law: a South African perspective* (4ed 2011) 42–43.

102 Rautenbach & Du Plessis n 50 above at 133 n 19 observe that 'South Africa follows a dualist approach to the incorporation of international law, which in essence requires the formal transformation of international law into domestic law' without in any way referring to the distinction between customary international law and treaty law in terms of the provisions of ss 231 and 232 of the South African Constitution. This is inaccurate.

103 Shelton n 8 above at 510.

realities. Monists ignore 'the reality that states, at least to some extent, choose how to mediate the interface between the international and national, the specific effect that international law is given in the domestic sphere' while dualists ignore 'the reality that the boundary between the international and the national is increasingly porous, and rules of national and international law are mutually influential in complex ways'.[104]

Cassese suggests a form of monism referred to as moderate monism. This entails[105] the establishment of an international judicial body with compulsory jurisdiction; the setting up of an enforcement body entrusted with verifying states' effective compliance with international decisions; the inclusion in national constitutions of a provision that would automatically nullify national legislation conflicting with international law decisions; and the possibility of a preliminary ruling by an international court in case of doubt as to the compatibility of domestic law norms with international law and internationally binding decisions.[106]

Rosas cites Von Bogdandy, who proposes that monism and dualism should be done away with as doctrinal tools, when discussing the relationship between international law and internal (municipal) law.[107] This can be ascribed to the fact that the distinction between the international and the national spheres has become increasingly blurred as a result of the interspersion of, and interaction between, the international, regional, national, and local law.[108] In addition, it must be pointed out that the determination and application of customary international law norms by municipal courts in both monist and dualist systems, do not present a coherent picture. The differences between municipal legal systems are

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104 Mills n 10 above at 89.

105 Cassese 'Towards a moderate monism: could international rules eventually acquire the force to invalidate inconsistent national laws?' in Cassese (ed) *Realizing utopia: the future of international law* (2012) 191–192.

106 See for a critical appraisal of so-called moderate monism Francioni 'From utopia to disenchantment: the ill fate of "moderate monism" in the ICJ judgment on *The Jurisdictional Immunities of the State*' (2012) 23 *European Journal of International Law* 1127.

107 Rosas 'The death of international law?' (2009) 20 *Finnish Yearbook of International Law* 223 refers in this regard to Von Bogdandy 'Let's hunt zombies!' in *ESIL-SEDI Newsletter* (Guest editorial) September 2009. See also Mendelson 'The effect of customary international law on domestic law: an overview' (2004) 4 *Non-State Actors and International Law* 85 who also doubts that the question concerning the effect of customary international law on domestic law can be solved in terms of the monist-dualist dichotomy which he describes as an intellectual dead-end.

108 Rosas n 107 above at 222–223.

unavoidably reflected in the determination and application of customary international law norms, resulting in a further fragmentation of international law.[109]

Regional law, *in casu* European Union law, seems to move away from a dualist approach towards a monist one, with regard to its relationship with public international law.[110] Whereas in *Kadi v Council of the European Union and Commission of the European Communities,*[111] the European Court of Justice held the view that European Union law and public international law were two separate and distinct systems, the same court, in *Hungary v Slovak Republic,*[112] found that these two systems of law were intertwined. The latter decision may have far-reaching consequences for those member states of the European Union, such as the United Kingdom, that adhere to a dualist approach with regard to the domestic applicability of international law. Because European Union law is directly applicable in member states, and because European Union law and public international law are intertwined, the latter may find direct application even in those member states following a dualist tradition.[113]

Menski argues that the legal comparative activity should be performed in a global context, taking into account the plurality of norms ('the coexistence of different bodies of norms within the same social space').[114] Legal pluralism may, in this sense, be in conflict with 'the monist excesses of modernist legal analysis', and should therefore be careful not to become too diffuse.[115]

HIERARCHY OF LEGAL NORMS

A complicating factor in the relationship between international law and municipal law, is the phenomenon of a hierarchy of legal norms. In international law the concepts of *jus cogens* norms, and obligations *erga*

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109 Mendelson n 107 above at 75–85.

110 See 'Case C–364/10, *Hungary v Slovak Republic*, 2012 ECJ EUR–Lex LEXIS 2465 (Oct 16, 2012)' 2013 (126) *Harvard Law Review* 2425 for a discussion of this (emerging) trend.

111 *Kadi v Council of the European Union and Commission of the European Communities* Joined cases C–402/05 P & C–415/05 P 2008 ECR I–6351.

112 *Hungary v Slovak Republic* Case C–364/10 2012 ECJ EUR–Lex LEXIS 2465 (Oct 16, 2012).

113 N 110 above at 2434.

114 Menski n 5 above at 83.

115 *Id* at 85.

omnes, are well-known.[116] The former can be described as peremptory international law norms from which no derogation is permitted, while the latter is defined as an international law obligation owed by one state to the rest of the international community of states. In some municipal law systems a similar situation is found insofar as most constitutions containing a Bill of Rights determine that its human rights are the highest law of the land, and that all legislation must conform with the Bill of Rights. To this must be added the constitutional duty placed upon South African courts to take into account applicable international law when interpreting a provision in the Bill of Rights.[117] Hierarchy of legal norms is thus a reality in both public international law and municipal law.

The South African Constitution largely ignores the particular status of *jus cogens* norms and *erga omnes* obligations. Sections 231 and 232 explicitly stipulate that a rule of municipal law enjoys precedence over a treaty provision, and a customary international law norm with which it is in conflict with the Constitution or an Act of Parliament. At the same time, section 233 determines that South African legislation should be interpreted to correspond to, rather than be in conflict with, public international law. This can, of course, create conflict. Say an act of parliament is in violation of a *jus cogens* norm or an *erga omnes* obligation. According to the constitutional provisions, the municipal norm should enjoy precedence, but simultaneously the particular Act of Parliament should be interpreted to comply with public international law. It is suggested that the obvious solution would be to give precedence to *jus cogens* norms and *erga omnes* obligations, for the binding force of these higher norms and obligations do not depend on the consent of states.[118]

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116 See Dugard n 101 above at 38–41. The exact relationship between the concepts of *jus cogens* and *erga omnes* obligations is not particularly clear. For purposes of this contribution the viewpoint of Orakhelashvili *Peremptory norms in international law* (2006) 268–269 is accepted, namely that both these concepts appear to be but two sides of the same coin. They both relate to the concern of all states. It must however, be kept in mind that while *erga omnes* obligations flow from *jus cogens* norms, the opposite is not necessarily true.

117 Section 36 of the Constitution of the Republic of South Africa 1996.

118 With regard to *jus cogens* Shelton 'Normative hierarchy in international law' (2006) 100 *American Journal of International Law* 323 argues that the extent to which the system of international law may impose global public policy on non-consenting states is highly debatable, 'but the need for limits on states' freedom of action seems to be increasingly recognized. International legal instruments and doctrine now often refer to the "common interest of humanity" or "common concern of mankind" to identify broad concerns that could form part of international public policy. References are also more frequently made to "the international community" as an entity or authority of collective action. In addition, multilateral agreements increasingly contain provisions that affect nonparty

Jus cogens norms and *erga omnes* obligations must not be confused with so-called *lex specialis.* The latter is a concept used by international courts to explain the relation between one body of law and another, or one rule and another.[119] It aims at avoiding conflict or hierarchy by identifying the more specific rule as the governing or decisive norm. In some instances the practical result of applying *lex specialis* is nonetheless that more general rules are excluded or trumped by more specific ones. In this sense one can probably speak of at least a form of hierarchy of norms insofar as priority is given to one set of norms over another.

HEGEMONY AND SPHERES OF AUTHORITY

It is a fact that, despite the assurance of the Charter of the United Nations in article 2(1) that all member states enjoy sovereign equality, some states are, in terms of political and military power, much more 'superior' than others. Since the demise of communism in 1989/1990, the United States of America has been and remains the only real 'hegemon' in the international community of states.[120] This has resulted in commentators referring to hegemonic international law.[121]

This phenomenon (hegemony) also presents itself in municipal law systems. South African law could serve as an example in this regard. Although indigenous law enjoys constitutional protection, it cannot really compete with the established 'western law' of South Africa. The further development of indigenous law is heavily dependent on the provisions of the Constitution

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states, either by providing incentives to adhere to the norms, or by allowing parties to take coercive measures that in practice require conforming behavior of states that do not adhere to the treaty'. See also Charney 'Universal international law' (1993) 87 *American Journal of International Law* 529 and 543 who refers in this regard to 'universal international law' and states on 541 that *jus cogens* norms are 'based on natural law propositions applicable to all legal systems, all persons, or the system of international law'. Orakhelashvili n 116 above at 550 explicitly states as follows: 'While the principle that every national act that conflicts with international *jus cogens* must be seen as null and void is certainly correct as a matter of international law, the practice of national courts has not always followed this principle as a matter of national law. The doctrine of the primacy of national statutes over international law is the factor that accounts for this.' It must be emphasised that *all forms of domestic law* (including national statutes, common law and indigenous law) should be subject to *jus cogens*.

119 Boyle & Chinkin n 37 above at 252–253.

120 See in general Orakhelashvili 'International law, international politics and ideology' in Orakhelashvili n 67 above at 341–343.

121 See Vagts 'Hegemonic international law' (2001) 95 *The American Journal of International Law* 843–848 who evaluates the position of the United States of America as a so-called hegemon and comes on 845 to the conclusion that the United States does not have the political and psychological infrastructure hegemony calls for. See also Buckel & Fischer-Lescano 'Gramsci reconsidered: Hegemony in global law' (2009) 22 *Leiden Journal of International Law* 437.

of the Republic in South Africa, 1996 as the highest law of the land. In this sense, one can probably refer to 'western law' as the 'hegemon' in South African municipal law.

Koenig-Archibugi defines hegemony and its relation to monopoly in the context of global governance as follows:[122]

> Hegemony means that governance is 'supplied' by one single public actor. The hegemon might choose to delegate the management of these rules to an independent agency, for instance in order to make them more acceptable to the passive participants of the regime.[123] Similarly, monopoly means that governance is 'supplied' by one single private actor. The monopolist might choose to administer the system through independent agencies.

The distinction between hegemony and monopoly, according to Koenig-Archibugi, therefore, appears to relate to the fact that the former presents itself in the public sphere, while the latter is more visible in the private sphere.

Koskenniemi describes the hegemonic technique as hegemonic contestation, and explains the latter concept as follows:[124]

> By 'hegemonic contestation' I mean the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents. In law, political struggle is waged on what legal words such as 'aggression', 'self-determination', 'self-defence', 'terrorist' or *jus cogens* mean, whose policy will they include, whose will they oppose. To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*.[125]

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122 Koenig-Archibugi 'Mapping global governance' in Held & McGrew n 1 above at 52–53.

123 Koenig-Archibugi refers in this regard (n 122 above at 66 n 10) to Keohane and Nye *Power and interdependence* (3ed 2001) 38 who describe hegemony as the situation in which 'one state is powerful enough to maintain the essential rules governing interstate relations, and willing to do so. In addition to its role in maintaining a regime, such a state can abrogate existing rules, prevent the adoption of rules that it opposes, or play the dominant role in constructing new rules'.

124 Koskenniemi n 25 above at 222.

125 *Id* at 223 further argues as follows: '[F]or every understanding of a rule, there is a counter-understanding or an exception, for every principle a counter-principle and for every institutional policy a counter-policy. Law is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles, and

CONCLUSION

The above exposition brings one to the following conclusions:

The overall impression created by the different terms and concepts surrounding the relationship between South African law and international law against the background of legal comparison, is one of confusion as a result of overlapping and vagueness. It is imperative that, in order to achieve a sensible description of the relationship between municipal law and public international law, terms and concepts be used with a clear an unambiguous meaning. At the same time, a comparative study should avoid creating a so-called *Begriffsjurisprudenz*[126] when dealing with the relationship between international and municipal law in comparative context.

The said terms and concepts are, in several instances, strongly linked to a rigid dichotomy between private law and public law in a municipal law system, and between municipal law itself and public international law. It is suggested that a strong case can be made for these concepts to be employed generally and not exclusively in either private law, public law, or public international law. This approach conforms to the blurring lines of distinction between, on the one hand private and public law, and on the other hand, municipal and public international law.

Greater clarity with regard to the meaning and applicability of the vocabulary employed to describe the relationship between municipal law and international law, will be of particular benefit to comparative lawyers. Within the current context of municipal and international law developments, it is not advisable, or even possible, to conduct comparative legal research without reference to applicable international legal norms. In this sense one can, with reference to the relationship between municipal and international law, for example declare that all legal systems are plural, hybrid, mixed, or fragmented. Today municipal legal system can seriously claim total independence or immunity from the influences of international law. This is particularly true in the case of *jus cogens* norms and *erga omnes* obligations. To leave international law totally out of the (comparative) equation, more specifically the different municipal law interpretations of relevant

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institutions on their side, making sure they do not support the adversary. In order to bring that perspective into focus, analysis must be shifted from rules to broad themes of legal argument within which hegemonic contestation takes place.'

126 The term *Begriffsjurisprudenz* can be translated as a jurisprudence of concepts.

international law norms, would lead to an incomplete picture of the legal situation which is unacceptable.

The international protection of human rights on the one hand, and globalisation on the other, have brought about a clash between two important issues: the recognition and realisation of the rights of particular groups of people such as cultural, religious, and linguistic societies; and the inevitable trend towards greater uniformity. These developments complicate the comparative activity.

It would be a good beginning for the comparative scholar to define clearly the meaning of the relevant terms and concepts employed and to provide a proper description of the areas of their application. It is hoped that this will eventually lead to the development of a generally accepted vocabulary underpinning the comparative activity.