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**KEEPING UP APPEARANCES: MAY THE LAW OF
INTERNATIONAL RESPONSIBILITY BE CONSTRUED
THROUGH THE ‘COMPARATIVE LAW’ METHODS?**

Abstract: The article analyses the possible employment of comparative law methodology for the codification, progressive development and the interpretation of the law of international responsibility. It argues that ‘comparative law’ methodology should be used during this process as it would enhance the legitimacy and understanding of the work of the International Law Commission. The use of legal English involves the reference to common law ideas whether it is consciously admitted or not by the users of legal rules drafted in that language. This concept is presented by the reference to the way the language is used in the process of creating and interpreting rules in the area of international responsibility. It also plays an important role during the construction of multicultural international legal concepts within that field. Last but not least, the use of ‘comparative law’ seems to be an indispensable apparatus in the codification process in the area of international responsibility consisting of general principles of law and customary law. The ‘comparative law’ methods are invaluable tools

* The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any institutions/agencies with which he cooperates.

for all those who take part in creation of international responsibility rules, as well as their application and interpretation.

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1. Introduction

Comparative law is nowadays a fashionable legal concept that is commonly used in many branches of law.¹ It seems to be a direct consequence of globalization and establishment of many transboundary relationships between actors in different legal orders. Interestingly though, the comparative methodology has been rarely employed as a tool in the area of international law. This area remained outside of the main studies probably for the belief that '[c]omparative lawyers compare the legal systems of different nations'.² Perhaps many additional explanations may also be found for this state of art but the most convincing seems the idea as to the unitary character of general international law and one of its subsystems – the law of international responsibility.³ Another, even more telling reason is to be found in the nature of the sources of international law – general principles of law and customary rules – they are usually not written down and thus tend to be vague in content and without visible embodiment (in any durable legal instrument) which may be construed and applied in everyday practice. Nevertheless, the comparative law approach has its own advantages and disadvantages which are widely disputed in legal writing but, as claimed in this paper, as a rule it might serve as a useful device to provide for the practical implementation of rules of international responsibility in multicultural settings, as well as a finding of more

¹ In this article the term 'comparative law' is used to denote a set of methods employed to evaluate an outcome between the examined legal order and a reference legal orders.

² K. Zweigert, H. Kötz, *An Introduction to comparative law*, OUP, Oxford 1992, p. 4.

³ For one of the first views see H.C. Gutteridge, *Comparative Law and the Law of Nations*, [in:] W.E. Butler (ed.), 'International Law in Comparative Perspective', Sijthoff & Noordhoff, Alphen aan den Rijn/Germantown 1980, p. 13.

acceptable and understandable solutions to transnational and international legal problems.

The crux of this paper is the argument that it would be beneficial to the quality and legitimization of international law if it is to be analyzed and applied through the ‘comparative law’ lenses or at least the rules belonging to this part of law should be screened from the ‘comparative law’ perspective. This should be regarded as indispensable tool assisting in codification and progressive development of international law by the International Law Commission (the ILC) that may enhance the acceptance of its projects by states.

It must be acknowledged that the need to use comparative law seems to run counter to the widely-spread views in the literature on public international law. *The Cambridge Companion to Comparative Law*, one of the leading comparative law textbooks, neatly summarizes popular beliefs that comparative law is of no use or of a very little value for public international law practitioners.⁴ It mentions only a few areas of comparative law suitable for use in the field of public international law: identifying general principles of law as specified in Article 38(1)(c) of the Statute of International Court of Justice or interpreting and drafting of treaties.⁵ The author has foreseen some ‘potential’ for comparative law only in some specialized fields as human rights or contribution to the understanding between different legal cultures.⁶ Bearing that in mind, even more intriguing may be the fact that the general principles of law have rarely been looked at from the point of view of comparative law. Apparently, there were some voices calling for the use of comparative law methodology, but in practice it is still absent from the reasonings of international tribunals. Only recently can one find in legal writing unequivocal proponents of the use of comparative law for identifying the existence and content of international law, determining the differences in the application of international law and for understanding of different national approaches to international law.⁷

⁴ Cf. M. Reimann, *Comparative law and neighboring disciplines*, [in:] M. Busani, U. Mattei (eds.), ‘The Cambridge Companion to Comparative Law’, CUP, Cambridge 2012, p. 18.

⁵ *Ibidem*, 18–19. See also K. Zweigert, H. Kötz, *An Introduction...*, p. 8.

⁶ M. Reimann, *op. cit.*, p. 20.

⁷ A. Roberts, P.B. Stephens, P.H. Verdier, M. Versteeg, *Comparative International Law: Framing the Field*, ‘American Journal of International Law’ 2015, vol. 109, no. 4, p. 467, pp. 470–471. Attention should also be brought to the pioneering work in this field of W. Butler – see W. Butler, *Introduction* [in:] W.E. Butler (ed.), *op. cit.*, p. 34, and colloquia at

This paper claims that application of international law necessarily involves employing comparative law techniques whether it is consciously admitted by its users or not. However, the author rather avoids concentrating only on the most popular approach taken within the academia to elucidate on comparing the spirit and style of different legal systems (i.e. *macrocomparison*). Without doubt it has its merits, but the article elucidates on interpreting and drafting of some specific legal institutions (*microcomparison*)⁸ entangled with linguistic and cultural problems connected with the involvement in this process of the representatives of different nations operating within the supranational legal order (international law). Therefore, the research hypothesis would be that practical problems with interpretation of legal terms (microproblems), some even may say, ‘not important technicalities’, might heavily influence it’s outcome (macroproblems) when undertaken without the reference to the ‘comparative law’ methods of research to substantiate that claim that the sample of the law of international responsibility will be utilized. Still, the reasoning applied in this field is also valid within the other areas of international law.

The example of that part of international law seems to match to a very extent the needs for professional application of comparative methods during the codification stage and at the level of its application in the process of adjudication. The author is of the view that ordinary ‘comparing’ legal institutions has its own merits – probably that is why it became so popular in the process of drafting and construing legal terms.⁹ Nevertheless, the methods that are particularly useful are functional equivalence, analytical and structural method – but all through the lenses of empirical legal research.¹⁰

Regulated almost exclusively by general principles and customary law, the rules and principles of international responsibility were in the state of fuzziness. Indeed, it was difficult to determine their extent and

Max Planck Institute for Comparative Law – see e.g. K. Hailbronner, *Ziele und Methoden völkerrechtlich relevanter Rechtsvergleichung*, ‘Zeitschrift für ausländisches öffentliches Recht und Völkerrecht’ 1976, pp. 190–225.

⁸ K. Zweigert, H. Kötz, *op. cit.*, p. 5.

⁹ It is interesting to note that in ‘comparative law’, nearly everything has been criticized by scholars as being methodologically flawed – starting from the name of the discipline through the use of methods of comparison.

¹⁰ M. van Hoecke, *Methodology of Comparative Legal Research*, ‘Law and Method’ 2015, pp. 8 and 18.

precise legal meaning. Therefore, they were regarded exclusively as being the result of the legal practice of various States and international adjudicatory bodies. This perception changed dramatically with the very moment the International Law Commission (ILC) started its works on the topic of State responsibility. This resulted in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),¹¹ accompanied by the Articles on Responsibility of International Organizations (both cited as the ILC Articles) soon afterwards.¹² There is, however, a continuous debate how to treat the results of the ILC's work – as a codification of custom and general principles of law or as a progressive development of international law. Paradoxically enough, the ILC Articles have been being commonly regarded as a binding legal text and they are regularly applied as an authoritative source of law by various dispute resolution bodies.¹³ At the moment when rules on international responsibility appeared as a written instrument they have become prone to the process of interpretation and analysis as to their normative value. Releasing the rules to the public in such a form revealed their legal content and they have been being used like a 'normal' treaty text most of the times.

So far one may say it resembles a typical international law-making process. But as the ILC Articles are not embodied in a treaty form and generally only their English forms are used in practice, it begs the question whether the law of international responsibility involves legal concepts that are really detached from their domestic context meaning and may be regarded as a kind of general international law (not originating from State legal orders) not favoring any legal order. These elements would be scrutinized further to check whether they may be omitted as irrelevant for interpretation and application of the international law and the codification process at the international fora.

¹¹ Yearbook of the International Law Commission, 2001, vol. II, Part Two.

¹² Yearbook of the International Law Commission, 2011, vol. II, Part Two.

¹³ D.D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 'American Journal of International Law' 2002, vol. 96, no. 3, p. 857.

2. The influence of language usage on legal rules

Since the work of F.C.K. von Savigny, it has become obvious that language usage determines the creation of legal rules.¹⁴ This seems to be even more true in light of the works of linguistic scholars and comparatists.¹⁵ It goes without saying that English is the predominant language in international relations and that which is commonly the blueprint for drafting of international conventions, as well as applying transnational and international legal rules. There is no denying the fact that other languages also play an important role during diplomatic conferences and in international courtrooms. However, for practical reasons, the communication is established typically in English and afterwards other language versions are usually adjusted to the main text by means of translation.¹⁶ It might also be claimed that the use of French for legal purposes is still quite significant, but the analysis of this language will be omitted in this paper for it encompasses similar mechanisms and difficulties which are to be presented in this paper.

It is relatively rarely admitted by international lawyers, judges and arbiters sitting in dispute resolution bodies that the usage of particular language in the process of decoding legal rules necessarily involves referring back firstly to the native legal and language culture and secondly, to the particular legal order which is the creation of that language. This means that (even unconsciously) common law legal systems automatically become the first reference orders to denote the meaning of specific legal terms. It may be argued that this operation might be omitted for scientific purposes because nothing is easier than to use a legal dictionary. Nevertheless the fact that the use of legal dictionaries is an established practice (for obvious reasons) in legal reasoning is a clear example of shifting authority in interpretation to the author of a dictionary (which is usually a linguist and very rarely, a lawyer) instead of taking the responsibility for interpretation.

¹⁴ F.C.K. von Savigny, J. Grimm, *Juristische Methodenlehre*, 1802/3, (lecture recorded and elaborated by J. Grimm, first published by G. von Wessenberg, Stuttgart, Koehler 1951), p. 15.

¹⁵ Amongst many M.V. Onufrio, *Harmonisation of European contract law and legal translation: a role for comparative lawyers*, p. 4, http://www.indret.com/pdf/429_en.pdf (accessed: 2.1.2021)

¹⁶ The disadvantages related to this method are sometimes omitted by bilingual parallel drafting which is typical for some bilingual states like e.g. Canada in case of Quebec.

It is therefore fairly claimed in legal writing that employing English for designating legal concepts creates initially the necessary reference to common law legal institutions,¹⁷ and, eventually, may lead to the decline of influence of legal ideas by legal orders other than common law.¹⁸ This is due to the fact that the process of understanding an English term starts from unconscious practice of referring back to the original meaning of *designatum* that was developed to describe the abstract term in common law systems.¹⁹ It is only after that ascertainment that it is possible to make any determination about its actual content and possible equivalent terms in different legal orders, including public international law.

This process is strictly related to another problem that is specific for international law only. The point of reference i.e. the meaning of the term in a given legal order might not exist in the system of international law that is supposed to be a separate order, detached from domestic legal orders.²⁰ This may be, however, only a theoretical problem because it might have been valid only for the very beginning of the creation of the legal order, and, at the moment, there are some developed legal concepts with an established scope of the meaning that are susceptible for being the point of reference in international law. Apparently, these are the product of international courts and tribunals that typically tend to put emphasis on the autonomous meaning of terms of arts used in public international law.

Another advocated solution to the abovementioned problem is the creation of a quasi-supranational language.²¹ An attempt to rely on this way may be traced in the EU legal order, as this has developed some kind of

¹⁷ Ł. Augustyniak, R. Gąszczyk, *Tłumaczenie nazw wybranych instytucji prawa cywilnego (w odniesieniu do terminologii common law)* [Translation of selected terms of civil law (with regard to the common law terminology)], 'Państwo i Prawo' 2010, no. 9, p. 72; C.B. Picker, *International Investment Law: Some Legal Cultural Insights*, [in:] L.E. Trakman, N.W. Ranieri (eds.), 'Regionalism in International Investment Law', OUP, Oxford 2013, p. 43.

¹⁸ C.B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 'Journal of Comparative Law' 2009, vol. 3, no. 1, p. 169.

¹⁹ Cf. C.B. Picker, *An Introduction to Comparative Legal Cultural Analyses of International Organizations*, [in:] C.B. Picker, L. Heckendorn Ursheler, D. Solenik (eds.), 'Comparative law and international organizations: cooperation, competition and connections', Zurich 2014, p. 31, as to the influence of English and common law.

²⁰ M.V. Onufrio, *op. cit.*, pp. 8–10.

²¹ See e.g. *Commission v. Germany*, Case no. C-103/01, Judgment of 22.5.2003, ECLI:EU:C:2003:301, para. 33.

‘euro jargon’. The validity of such an approach has actually been questioned in scholarly writing as a legal fiction of uniform language application in different jurisdictions,²² but, nevertheless, it has also some proponents at the supranational level.²³ Similar argument advances development of some kind comparative second-order language.²⁴

To the author’s mind, the usage of legal language without the reference to the legal culture is to fail, because it resembles legal transplants that are without the accompanying sociological rules, meanings and *mentalité*.²⁵

So far it has merely been a description of the linguistic difficulties and one might be tempting to ask where there is room for comparative law methodology during this process? The answer to the insurmountable obstacles in communication between various legal cultures may be found in the usage of comparative law methods. These seem to be indispensable for the sake of correctness of determining the meaning of legal concepts in the process of legal translation (as well as during distilling of legal rules from any durable instrument), yet it is not enough to apply just the equivalence based on similar linguistic forms, rather, it should be based on functionality. It has been noted long time ago that the determination of the true content of legal concepts is possible only through the prism of their assessment by means of functional equivalence. This presupposes taking into account the cultural differences in legal orders, as well as the meaning which is not conveyed explicitly through the use of particular words, but which also stems from a legal context, jurisprudence, case law and, even more importantly, from different sociological approaches to the practical application of law. The last element is conveyed in quite a good way by the term *mentalité* – understood as an incommensurable attitude and a unique expression of a legal culture.²⁶

The codification process, as well as progressive development of international law resembles in some kind the difficulties usually related

²² K. McAuliffe, *The Limitations of a Multilingual Legal System*, ‘International Journal for Semiotics of Law’ 2013, vol. 26, p. 881.

²³ F. Prieto Ramos, *International and supranational law in translation: from multilingual lawmaking to adjudication*, ‘The Translator’ 2014, vol. 20, no. 3, p. 318.

²⁴ M. van Hoecke, *op. cit.*, p. 28. See also J. Hendry, *Legal comparison and the (im)possibility of legal translation*, [in:] S. Glanert (ed.), ‘Comparative Law – Engaging Translation’, Routledge 2014, p. 95.

²⁵ I refer to the term coined by P. Legrand.

²⁶ See P. Legrand, *European Legal Systems Are Not Converging*, ‘International and Comparative Law Quarterly’ 1996, vol. 45, no. 1, pp. 60–64.

with the legislative process in capturing the spirit of the law by ordinary words in multilingual States. In multicultural environments (like the ILC cooperating in UN languages) when codifiers must agree on their positions, communicating in many languages is even more difficult because every process of translation may cause some distortion in meaning. One of the solutions is to conduct a debate in a working language, but this leads only to the shifting of the responsibility for the proper translation of an issue to the speaker if he/she does not speak in native tongue.²⁷ This seems to be of minor importance for international law scholars, but it has serious consequences in uniform (or lack of it) understanding and interpretation of legal rules.

The practical consequences of these problems may be illustrated by the controversies that appeared from the very beginning when the ILC started its work on the matters concerning the international responsibility. The unexpected bone of contention, which is still somehow reminiscent in legal writing, is related to the use of different words as designations of different topics, namely the terms 'responsibility' and 'liability'. As claimed by some authors, these terms have different meanings in legal English and therefore should be used to describe separate codification topics.²⁸ This distinction has led to the forceful debate even within the ILC itself where special rapporteurs presented divergent views on this problem.²⁹ The same is true for scholarly writings in which some authors employed the terms interchangeably,³⁰ while some others tried to find differences between them. For example A. Boyle tried to convince the scholarly community that 'liability' is used in relation to private law obligations while 'responsibility'

²⁷ YBILC 1996, vol. II (Part Two), p. 94, para. 216.

²⁸ Cf. e.g. the topics *State responsibility* and *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)*, <http://legal.un.org/ilc/guide/gfra.shtml>. For the sake of brevity, I omit the discussion on other possibly relevant English terms *answerability* and *accountability*.

²⁹ See R.Q. Quentin-Baxter, *Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law*, UN Doc. A/CN.4/334 and Add.1 & Corr.1 and Add.2, p. 250, paras. 10–13 and J. Barboza, *Second report on international liability for injurious consequences arising out of acts not prohibited by international law*, UN Doc. A/CN.4/402 and Corr.1, Corr.2 (S only) to 4, pp. 145–146, para. 2.

³⁰ C. Ryngaert, H. Buchanan, *Member State responsibility for the acts of international organizations*, 'Utrecht Law Review' 2011, vol. 7, no. 1, p. 133.

is relevant for the obligations in the area of public international law.³¹ The other view seeks in 'responsibility' an indicator of a duty or legal standard and, accordingly, perceives 'liability' as a designation of the consequences of failure to perform the duty or fulfill the required standards.³² Even if one considers this controversy settled over the many years of discussions, it clearly shows how various initial approaches would determine the legal institutions.

This debate also found its way into the international courtrooms and was subject to the analysis of the International Tribunal of the Law of the Sea. Here, it was noted that the approach taken by the ILC as a rule is not compatible with the terms used in United Nations Convention on the Law of the Sea (UNCLOS). Remarkably, the meaning ascribed to the term's 'responsibility' and 'liability' in this Convention was exactly the opposite to the concepts applied by the ILC. Accordingly, 'liability' is to denote secondary obligation i.e. the consequences of breach of primary obligation (secondary obligation by the methodology applied by the ILC), while responsibility relates to the breach of primary obligation.³³ It is quite significant that the Tribunal had to engage in comparative interpretation of different language versions of the UNCLOS Convention in order to reach consensus as to the proper meaning of English notions that appeared to have different meaning to that employed in non-binding ARSIWA. This may seem as only a dispute of minor relevance, but it has to be remembered that the use of term 'responsibility' in a manner proposed by the ILC somehow automatically implies reasoning in the direction of wrongful act and the term 'liability' into the realm of acts not prohibited by international law. These are two completely different sub-systems, so the results achieved in the application of their rules might differ considerably.

³¹ A.E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: a Necessary Distinction?*, 'International and Comparative Law Quarterly' 1990, vol. 39, no. 1, p. 9. Cf. T. Gehring, M. Jachtenfuchs, *Liability for Transboundary Environmental Damage. Towards a General Liability Regime?*, 'European Journal of International Law' 1993, vol. 4, no. 1, p. 104.

³² L.F.E. Goldie, *Concept of Strict and absolute liability and the ranking of liability in terms of relative exposure to risk*, 'Netherlands Yearbook of International Law' 1985, vol. XVI, p. 180.

³³ ITLOS No. 17, Advisory opinion of 1.2.2011, *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, ITLOS Reports 2011, para. 66.

Be it as it may, this linguistic difference has been derived from and is based only on one language – English, and it might admittedly have established meaning in some common law legal orders. It is, of course, an open question whether the comparable distinction exists in other languages and even if it does, as claimed by some, its functional equivalence is debatable. That leads to the neglected element of typical legal discourse – the relevance of translation. Usually, it is avoided by the use of established legal *argot*, as well as some kind of clichés repeated in legal reasoning or used by referring to the English text without looking at any other discrepancies or possible meanings. But it holds true as long as the meaning is not questioned by one of the parties to the dispute.³⁴

The case is even more problematic when there are no equivalents of English *designatum* in other jurisdictions.³⁵ It is apparent that employing certain terminological expressions automatically triggers a debate on the legal concepts connected with these terms and their legal contexts in particular legal sub-system, like e.g. ‘strict liability’.³⁶ Apparently finding a functional counterpart necessarily involves referring to comparative law methods in order to determine the scope of its meaning, i.e. in English speaking common law systems, because in different legal regimes different concepts may be applied. How does one know that ‘aid or assistance’ means the same as *Beihilfe*? Without using the comparative methods, one may easily fall into the trap of making a methodological error – describing the legal concepts of one legal system by employing the terms relevant only for another legal system.³⁷ This reasoning is valid also for other languages because the process of perception would occur in the same way. The main problem is that the described process mostly takes place at the subconscious

³⁴ F. Prieto Ramos, *op. cit.*, p. 323.

³⁵ See in that regard Report of the International Law Commission on the work of its forty-third session (29.4-19.7.1991), UN Doc. A/46/10, p. 51, para. 3, in which ILC admits difficulties in cross-cultural comparisons.

³⁶ Quite illustrative are the examples provided by R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, Martinus Nijhoff, The Hague 1996, pp. 14–16.

³⁷ I am greatly indebted to Roman Gąszczyk who acquainted me with this obvious conclusion and reminds me all the time of its relevance. For the requirement of *tertium comparationis* see M. van Hoecke, *op. cit.*, p. 27 and G. Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, ‘Harvard International Law Journal’ 1985, vol. 26, no. 2, p. 412. As to the importance of that concept at the level of international law see J. Crawford, *State Responsibility. The General Part*, CUP, Cambridge 2013, p. 3, footnote 62, who describes *liability* by referring to the *common law* concepts.

level of the interpreter and it is brought to the public attention only when somebody questions this kind of denoting. From that point of view, this way of thinking leads to the typical catch-22: as there is no clear matrix of established legal terms in the law of international responsibility, members of the ILC tend to perceive them from the perspective of the conceptual matrices of their own municipal legal systems.

International dispute settlement bodies are not free from such prejudice while rendering awards and apparently introducing specific domestic (but not perceived consciously) perspectives and contributing to the development of the practice of international responsibility. Legal English is the most popular language used internationally, therefore, its legal terminology has a profound impact on the creation of international law institutions (which promotes only a Western approach to the legal institutions). International law, however, offers a method of reconciling the existing differences in legal texts and legal rules, namely systemic and autonomous interpretation. This is based on the standard assumption that all language versions of legal instruments are presumed to have the same meaning and that international law notions should be interpreted autonomously without the recourse to domestic law systems. Autonomous concepts derived, for instance, from the ECHR jurisprudence might also be useful tools in cases of international instruments aimed at managing different municipal legal orders.³⁸

Obviously, such an approach has its advantage, but it should be noted that the Articles produced by the ILC are not legislative instruments negotiated by States and international organizations so it is unclear in which manner customary rules on treaty interpretation might be applied to them. So far it has not been analyzed extensively by the adjudicating bodies and the academia.³⁹ But the unanswered question remains – how far does the formulation of the Articles in English influence the outcome of the works of the International Law Commission? Nevertheless, even if applying the standard process of interpretation, one has to refer to the meaning of the terms established for the legal orders, using a specific language. It has to be noted that the interpretation of specific institution with the reference to one legal family (common law) would clearly run counter to the spirit of

³⁸ Cf. G. Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 'European Journal of International Law' 2004, vol. 15, no. 2, p. 286.

³⁹ See G. Gaja, *Interpreting Articles Adopted by the International Law Commission*, 'British Yearbook of International Law' 2016, vol. 85, no. 1, pp. 10–20.

law of international responsibility. Moreover, the research of instruments undertaken only in one language or within the same cultural systems (e.g. Western countries) might create a false impression of universality.⁴⁰

3. Codification of legal concepts

It has been claimed in scholarly writing that '[i]nternational law is not only English international law.'⁴¹ This is an alluring metaphor, but the question is whether it is true in reality when it comes to the codification and progressive development of legal rules. Linguistic difficulties are just the tip of an iceberg in this matter. Leaving aside terminological inadequacies, anyone wishing to construe the legal term must resort to some cultural backgrounds. Without doing so, the words would be just empty labels devoid of any real meaning. Although it is quite obvious truth for any linguistic terminology – the precise delineating of legal terms is even more difficult. In such case there is a need for defining the precise meaning and scope of application of the normative framework that is determined ultimately by case law or other authoritative interpretative tools. To substantiate this claim, I shall refer to a few examples taken from the law of international responsibility that appeared relevant during work on international responsibility.

The first and the most telling example is the discussion in the ILC on the meaning of 'governmental authority'. It was held that 'what is regarded as 'governmental' depends on the particular society, its history and traditions'.⁴² Therefore, even when acknowledging the use of the notion 'governmental' in English, one needs to undertake a comparative study and find equivalents of that word in other languages. This notion is thus a kind of *aggregate designatum* – it is fulfilled with meaning only by reference to the specific context in the sourced domestic legal orders. Despite the veracity of this assertion it may be wondered whether in-depth comparative surveys could still help to construct an appropriate definition that should be wide

⁴⁰ M. van Hoëcke, *op. cit.*, p. 3.

⁴¹ M. Forteau, *Comparative international law within, not against, international law: lessons from the International Law Commission*, 'American Journal of International Law' 2015, vol. 109, no. 4, p. 506.

⁴² ARSIWA, p. 43, para. 6. It may be noted that e.g. the English term *governmental* has wider meaning than Polish notion *rządowy*.

enough to cover any differences existing as to this notion in domestic legal orders. On the one hand, a substantial definition of a State organ has been delegated to the domestic level – according to Article 4(2) ARSIWA, an organ includes any person or entity that has that status in accordance with the internal law of that State. The formulation of such a term brings into attention an important inconvenience – the term ‘organ’ is meaningful only to this legal order that rely on the theory of organs and may be devoid of any significant meaning in legal systems based on theory of agency (mainly common law family). On the other hand, it is supplemented by regulations providing that the exercise of governmental authority by other entities than (formal) State organs should also be regarded as an act of State (Article 5 ARSIWA), as well as the conduct of a person or a group of persons directed or controlled by a State (Article 8 ARSIWA) is attributed to that State. Conceptually, in the latter case there is even no clear requirement of acting on instructions or under the direction or control in the area of governmental authority. This may suggest that what is governmental is sometimes defined by the internal order of the State and sometimes it is regulated by international law. This situation must lead to hybrid definition of an act of State and consequently governmental authority itself. So, without a detailed comparative analysis of the most important legal families, it is difficult to formulate a comprehensive definition. Therefore, it seems that the ILC left it rather in an open-ended fashion to be fulfilled with the normative mining in practice and case law.

Another remarkable example revealing the problems in understanding on the normative dimension of specific legal concepts are approaches to the breach of international obligation. According to Article 2 ARSIWA, there are two elements of internationally wrongful act: the conduct is attributable to a State under international law and constitutes a breach of an international obligation of that State. Such an approach involved controversies in doctrinal debates that sometimes find their roots in cultural differences. They already emanate from the official commentary to the Articles referring to its earlier distinction on subjective element (attribution) and objective element (breach of obligation).⁴³ Perhaps the intention of coining the second condition as ‘subjective’ was to refer to the ‘subjects’ of international law (i.e. States). However, the term ‘subjective’ has an established meaning in legal English and refers rather to the mental state of an entity committing wrong (*mens rea*). Therefore, this distinction was discarded by the ILC as misleading

⁴³ Yearbook of the International Law Commission, 1973, vol. II, p. 179, para. 1.

because it is claimed that the final version of the Articles avoids references to the fault, intent or knowledge in Article 2.⁴⁴

The normative dimension of breaching international obligation is one of the most controversial solutions proposed by the ILC and not only because of elimination of damage as another precondition. There is an obvious tendency in legal writing to perceive the notion of breach through domestic legal perspectives. Probably an exhaustive description of different approaches would exceed the limits of this paper and require separate study, but as an illustration, the dichotomy between civil law and common law systems might be brought into attention. The main divide between these legal systems lies in the divergent approach to rights and freedoms. The basic legal notions are defined differently from the very beginning: civil law families perceive the legal status of an entity from the perspective of its rights which give rise to specific legal consequences (exemplified by Latin: *ubi ius, ibi remedium*), in contrast, common law families are based on remedies from which the existence of specific rights may be inferred (*ubi remedium, ibi ius*).⁴⁵ This is one of the biggest differences in legal perception that will have to have bearing on any other legal concept – specifically noting that concepts of remedy and rights (usually understood as *subjective rights, subjektives Recht*) are irreconcilable – that they should be always taken into account during the drafting of legal instruments.⁴⁶ Cultural divergences in understanding the concept of *subjektives Recht*, which is probably untranslatable into English, lead to misunderstanding on the level of rough translations like ‘subjective right’.⁴⁷ That might have been the source of confusion expressed by the special rapporteur for State responsibility who wrote that responsibility is always subjective, i.e. in

⁴⁴ Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 34, para. 3.

⁴⁵ See further D. Friedmann, *Rights and Remedies*, [in:] N. Cohen, E. McKendrick (eds), ‘Comparative Remedies for Breach of Contract’, Portland 2005, p. 3 and H. Dedek, *The Relationship between Rights and Remedies in Private Law: A Comparison between the Common and the Civil Law Tradition*, [in:] R.J. Shape, K. Roach (eds), ‘Taking Remedies Seriously’, Canadian Institute for the Administration of Justice 2009, pp. 63–84. With reference to international law – Ch. Grey, *Is There an International Law of Remedies?*, ‘British Yearbook of International Law’ 1986, vol. 56, pp. 25–47.

⁴⁶ It is evident from the comment of J. Crawford, *Responsibility to the International Community as a Whole*, ‘Indiana Journal of Global Legal Studies’ 2001, vol. 8, no. 2, p. 305.

⁴⁷ See further G. Samuel, ‘*Le droit subjectif*’ and *English Law*, ‘Cambridge Law Journal’ 1987, vol. 46, no. 2, pp. 264–286.

relation to persons.⁴⁸ Interestingly though, some of the concepts are dismissed easily without any deeper discussion in that regard,⁴⁹ as well as they are given a scant reasoning in ICJ jurisprudence.⁵⁰

Nevertheless, leaving aside that problem by the ILC – it was transferred into the deeper level of theoretical discussions that are always coloured by the blueprint of domestic concepts. An analogous problem could be seen in relation to the invocation of international responsibility (Article 42 ARSIWA) that has also been regulated in general terms. However, this is not a place to revive complicated legal notions of domestic law from a comparative perspective. It may be noted in a very general sense that legal orders extremely rarely recognize some kind of *actio popularis* and typically require either some kind of interest in instituting the proceedings or impairment of the right.⁵¹ It must be, however, borne in mind that until now these issues in relation to international law have not been researched in a comparative manner or decided upon in an authoritative way so it is quite obvious that they are looked at through the prism of municipal laws. It is even not sure whether the reference to some legal interest or right must be necessarily made in international law.⁵²

The third example concerns one of the institutions mentioned in Article 23 of ARSIWA – *force majeure*. The works within the ILC were coupled with some comparative law work undertaken by the UN Secretariat.⁵³

⁴⁸ J. Crawford, *The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility*, [in:] M. Andenas, D. Fairgrieve (eds), 'Judicial Review in International Perspective. Liber Amicorum in Honour of Lord Slynn of Hadley', vol. II, Martinus Nijhoff, The Hague/London/Boston 2000, p. 35.

⁴⁹ A. de Hoogh, *Obligations Erga Omnes and International Crimes*, Martinus Nijhoff, The Hague/London/Boston 1996, p. 20: *There is no use between distinction on permissive and prescriptive rules, between rights and obligations.*

⁵⁰ *Case Concerning the Barcelona Traction, Light and Power company, Limited*, ICJ Judgment of 5.2.1970, I.C.J. Reports 1970, para. 36: *Responsibility is the necessary corollary of a right.* The ICJ, however, did not explain why it is to be regarded as axiomatic in international law.

⁵¹ See e.g. Article 9(2) of Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25.6.1998, UNTS 2161, No. 37770, 447.

⁵² *Case Concerning the Northern Cameroons*, Separate Opinion of Judge Morelli, ICJ Judgment of 2.12.1963, I.C.J. Reports 1963, para. 3.

⁵³ '*Force majeure*' and '*Fortuitous event*' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine – study prepared by the Secretariat, UN Doc. A/CN.4/315.

The survey itself is not without some unintentional methodological flaws – specifically, it discusses mainly the difference in approaches taken by *civil law* and *common law* families, leaving aside the analysis of many other legal systems. So its representativeness and accuracy may be disputed. However, it is noteworthy that this report constitutes a very rare phenomenon of trying to decipher the normative meaning of *force majeure*, particularly bearing in mind that some systems might use alternative notions, like the distinction known in common law between an Act of God (‘an unusual or extraordinary occurrence due to ‘natural causes’ without human intervention’) and fortuitous event (*casus fortuitus*).⁵⁴

Such an effort is plausible and should be a necessary starting point in determination of any rule or principle of international law. This is not to say that the term *force majeure* is to be understood uniformly in all domestic legal systems, as well as in different branches of law.⁵⁵ It might be quite a risky undertaking on the side of the ILC to establish this circumstance precluding wrongfulness in an invariable way to all breaches of international law because in some fields like e.g. contract law, there are major divergences between municipal orders as to the scope of application of *force majeure*. Suffice it only to mention that different approaches have been taken by civil and common law families – the latter relying mostly on the doctrine of frustration.⁵⁶ The variances are, of course, even more perceivable in relation to other systems like Islamic law.⁵⁷ However, the comparative law studies are probably the only way to define at least an approximate equivalence of terms that may be the starting point for determining the scope of the rules of international responsibility.

4. Informal comparative methods

It is a pity that initiatives aiming at establishing or commissioning of systematic comparative law surveys within the ILC have been of a very

⁵⁴ *Ibidem*, 68–72.

⁵⁵ Cf. F.I. Paddeu, *The Genealogy of Force Majeure in International Law*, ‘British Yearbook of International Law’ 2012, vol. 82, p. 387–393.

⁵⁶ For a very brief overview see M. Katsivela, *Contracts: Force Majeure Concept of Force Majeure Clauses?*, ‘Uniform Law Review’ 2007, vol. 12, no. 1, pp. 101–109.

⁵⁷ S. Rayner, *A Note on Force Majeure in Islamic Law*, ‘Arab Law Quarterly’ 1991, vol. 6, no. 1, p. 86.

limited numbers for so many years. The attempts of Prof. James Crawford, a special rapporteur on State responsibility, might serve as examples, in that he used comparative law methods for ascertaining the meaning of rules during his work in the ILC, albeit not in a very extensive way. One of the particularly interesting efforts is the study annexed to his report on 'Interference with contractual rights: a brief review of the comparative law experience' concerning the analysis of civil wrong through intentional and knowingly inducing the breach of contract.⁵⁸ However, there might be another important factor that should be taken into account. Perhaps, the structure and method of the appointment of members of the International Law Commission itself may lend some support to the view that it was designed to be a body envisaged to work as a facilitator of comparative studies.

In accordance with Article 8 of the Statute of the ILC, its members shall: 'individually possess the qualifications required and that in the Commission as a whole, representation of the main forms of civilization and of the principal legal systems of the world should be assured'. This provision therefore ensures the widest possible representation of legal families during the ILC's work, in particular, bearing in mind that members of the Commission are elected by the UN regional groups. Furthermore, all States are encouraged to participate in the work of the ILC by providing information on their practice in relation to the subject matter, most often in the form of questionnaire, as well as in a way of commenting on the ILC reports in oral and written form and discussing them within the UN Six Committee.⁵⁹ Moreover, the special rapporteurs elected for the works on the specific topics are appointed from various regions so to assure that different legal cultures are represented within the ILC.⁶⁰ All these elements presuppose the natural lenience of this body towards the comparative method that is actually carried out unofficially on this forum.

It is argued that the outcome of the ILC's work would be more accessible if it could be institutionalized in the form of studies and reports allowing for a broader participation in the codification process of international organizations and States, including developing States particularly lacking

⁵⁸ See J. Crawford, *Second report on State responsibility*, UN Doc. A/CN.4/498 and Add.1-4, pp. 97-100.

⁵⁹ Yearbook of the International Law Commission, 1996, vol. II (Part Two), p. 89, para. 179.

⁶⁰ *Ibidem*, p. 91, para. 186.

legal resources to be communicated in English. This apparently might change the structure of the codification and progressive development of international law within the ILC itself. At the moment, the process could be described as a top-down approach (which is valid for ARSIWA and ARIO Articles): the ILC, consisting of independent members, submits some proposals that are elaborated upon and then sent for comments to State and international organizations. As a result, no one could be sure which scope of regulation might find support in the international community, and what kind of bureaucratic way of work is connected with the obvious tendency not to abandon the project that has been launched. Herein, I would opt rather for a bottom-up approach: facilitating of comparative surveys including different views from various legal cultures, would generate wider support and legitimization from the international community and constitute an excellent basis for further refinement during the works within the ILC itself.

Another intriguing factor is that international dispute settlement bodies are also not very happy with the comparative methods. Probably, this situation may be related to the fact that members of these bodies tend to underlie the *sui generis* character of international law as an independent, self-standing branch of law. It is quite astonishing that comparative surveys are extremely rare and are to be found in the separate opinions rather than in the judgments or their grounds. As an interesting, although rather rare example, from the work of international judiciary, the Separate Opinion of Judge Simma in the *Oil Platforms case* elaborating on joint-and-several responsibility of States, may be quoted.⁶¹ Perhaps, some signs of change may be seen in the ICJ judgment in the *Ahmadou Sadio Diallo case*. Here, the Court extensively referred to the jurisprudence of other bodies and compared them in some way.⁶²

The judicial self-restraint in referring to comparative law modalities is particularly puzzling taking into account that it was not uncommon in early jurisprudence on State responsibility.⁶³ It is plausible that such attempts were undertaken to solve certain practical issues in the area of

⁶¹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*. Separate Opinion of Judge Simma, ICJ Judgment of 6.11.2003, I.C.J. Reports 2003, pp. 324–361. It is worth noting that the English text of the judgment is authoritative.

⁶² *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Judgment of 19.6.2012, I.C.J. Reports 2012, paras. 18–24.

⁶³ *Lusitania (United States v. Germany)*, Award of 1.11.1923, 7 RIAA p. 35.

international responsibility; however, their scope and methodological range should be probably much broader. This would require using more financial and personal resources either in the ILC or in the ICJ to obtain at least some representativeness from some major legal families of the world. Nevertheless, such limited studies also show the potential for the fruitful application of comparative law methods in this field.

Bearing in mind these procedural approaches to comparative surveys, it is worth elaborating some more on their usefulness for codification of general principles and custom with the caveat that this analysis is not deemed to be exhaustive in light of the abundance of literature in this field. The author, however, feels inclined to make some cursory remarks relating to their influence on international responsibility and the role of comparative law methods.

5. The role of comparative methods in assesment of sources of international responsibility

‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form’.⁶⁴ This famous statement of the PCJI shows that general principles of law fulfilled a fairly important role from the very beginning in the law of international responsibility. It is claimed that general principles nowadays still play an important role in this field, albeit it seems not to be explicitly admitted by the ILC. Although the principle formulating the obligation to make reparation in an adequate form is without any doubt true, the practical question one needs to answer is what the adequate form for reparation is. In other words, how to translate the abstract principle into practical legal rules, namely, how to determine the general principles of law and apply them on day-to-day basis.

One of the ways of solving this puzzle is to give special attention to the general principles of law mentioned in Article 38(1)(c) of the Statute of International Court of Justice. It is worth noting that the end of the phrase in that article i.e. ‘recognized by civilized nations’ which might have been regarded as a limiting rule, tends to be omitted in case law

⁶⁴ *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, PCIJ Judgment of 26.7.1927, P.C.I.J., Series A, no. 9, p. 21.

and in scholarly writings.⁶⁵ There is much disagreement about the legal determination of this source of international law, but in this paper, only one of the aspects of this problem should be highlighted. Surprisingly, in international adjudication, until recently, little or no use have been made of comparative law methods in the process of ascertaining the content of general principles of international law. It looks obvious that the Article 38(1)(c) ICJ Statute explicitly refers to general principles of law recognized by civilized nations, so it necessarily focuses attention on different domestic attitudes to the hypothetical principle.

Many divergent approaches to the general principles have been proposed depending on the school of thought, but some scholars argue that they are principles derived from municipal laws.⁶⁶ Leaving aside the views of the opponents to the existence of the general principles as such, it must be admitted that this source of international law has been used in the practice of international courts and tribunals.⁶⁷ Even looking exclusively from the perspective of natural law (general principles as expression of natural law), it should be acknowledged that the process of proper ascertaining of the principles should include the proof of its 'generality'.⁶⁸ This term may be understood differently, either as being formulated in vague form (inherent structural generality) or as a cross-cutting term relating to various fields of law (scope-related generality) or as being common for different legal orders (origin related generality).⁶⁹ However, only the latter understanding of this notion is significant for the present analysis. The scoping in this case could be done either by referring to some general international law

⁶⁵ See further A. Pellet, *Article 38*, [in:] A. Zimmermann, K. Oellers-Frahm, Ch. Tomuschat, Ch. J. Tams (eds), 'The Statute of the International Court of Justice. A Commentary', OUP, Oxford 2012, pp. 836, MN. 261, ft. 744; cf. H. Thirlway, *Law and Procedure of the ICJ, Part Two*, 'British Yearbook of International Law' 1990, vol. 61, p. 124 and Ch. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, 'Recueil des cours – Académie de Droit International de La Haye' 1999, vol. 281, pp. 337–338.

⁶⁶ J. Ellis, *General Principles and Comparative Law*, 'European Journal of International Law' 2011, vol. 22, no. 4, p. 953.

⁶⁷ As to the views of the opponents see generally G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, pp. 131–132.

⁶⁸ As correctly noted by J. Ellis, *op. cit.*, p. 955.

⁶⁹ C. Semmelmann, *General Principles in EU Law between a Compensatory Role and an Intrinsic Value*, 'European Law Journal' 2015, vol. 19, no. 4, p. 461.

instruments,⁷⁰ international practice or by ‘importing’ general principles from the municipal legal systems.⁷¹ It should also be noted that there are proponents of the argument that there is no clear distinction between domestic principles and international principles of law.⁷²

I would argue that it is not enough to make a bold statement that something is a general principle of law in the area of international responsibility without even trying to determine its legal content. It is not disputable when in judicial reasoning the reference is made only to some vague principle (like the principle of reparation in an adequate form) when it is operationalized in certain circumstances by the specific rules.⁷³ However, the problem appears to be quite serious where reliance is made on general principles as rules prescribing specific conduct. The perils of overgeneralization of principles have been brought to the public attention relatively long time ago by writings of P. Weil,⁷⁴ but they are particularly visible in the practice of international tribunals in the field of international criminal law. The reasoning in the area of international criminal responsibility (from which some analogy may be drawn into the international responsibility) clearly shows that the tracing of general principle back to the domestic systems usually reveals conflicting normative meanings that are even more evident in cases when legal concepts have similar designation, but completely different content.⁷⁵ The stipulation in Article 38(1)(c) ICJ Statute relates to the general principles of ‘law’ without

⁷⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Advisory opinion of 28.5.1951, I.C.J. Reports 1951, p. 23.

⁷¹ *South Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase*, ICJ Judgment of 18.7.1966, I.C.J. Reports 1966, para. 88. See also excellent *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Separate opinion of Judge Fouad Ammoun, I.C.J. Reports 1969, p. 134 ff.

⁷² *Case Concerning Pulp Mills on the River of Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, para. 49.

⁷³ The distinction between rules and principles is well established in common law countries as a result of Hart and Dworkin’s writings. It should be noted, however, that civil law scholars tend to refer rather to legal norms. Cf. T. Spaak, *Kelsen and Hart on the Normativity of Law*, p. 407, <http://www.scandinavianlaw.se/pdf/48-24.pdf> (accessed: 2.1.2021) arguing that norms are equal to rules, but I am not inclined to share this view.

⁷⁴ P. Weil, *Le droit international en quête de son identité: cours général de droit international public*, ‘Recueil des cours – Académie de Droit International de La Haye’, 1992-VI, vol. 237, p. 146.

⁷⁵ E.g. see ICTY Judgment of 10.12.1998, *Prosecutor v. A. Furundžija*, IT-9517/1-T, paras. 177 et seq.

qualification of 'international law', which may suggest that they should be widely recognized to be applicable in any system of law. Nevertheless, I subscribe to the view that it cannot be stated that any principle is inherent in the very nature of the law without the examination of different municipal legal orders.⁷⁶

There have been formulated two steps of determining general principles of law in scholarly writings: 'generalization' (as mentioned above, the prevalent recognition in most legal systems of the word) and their 'adaptability' to the international legal order.⁷⁷ This mode of distinction inevitably leads to the problems of possibility of legal transplants and issues of (functional) equivalence between legal systems.⁷⁸ Though, this is not the place to undertake detailed theoretical debates on the flaws of comparative law methodology,⁷⁹ two points may be raised from the practice. First and foremost, the doctrinal discussion on legal transplants seems to be predicated by problems of communicating between cultures (the biggest problem so far in comparative and international law) divergent views and ideas.

At this point it might suffice to refer to the distinction made some time ago by Polish scholars between legal norms and legal provisions.⁸⁰ This theory of law application presupposes that legal norms are construed on the basis of lexical signs (words) so consequently the norm should not be equated with signs. The process of interpretation might involve (and usually does) taking into account also different statutes, case law, practice and even sociological approaches to the law (or *mentalité*). This concept does not easily capture international law reality where many legal norms are not formally written down but, nonetheless, must be deduced from some lexical signs even if they are included in non-written state practice.

⁷⁶ Similarly M. Akehurst, *Equity and General Principles of Law*, 'International and Comparative Law Quarterly' 1976, vol. 25, no. 4, p. 817.

⁷⁷ See S. Besson, *General Principles in International Law – Whose Principles?*, [in:] S. Besson, P. Pichonnaz (eds), 'Les principes en droit européen/Principles in European Law', Schulthess, Genève 2011, p. 37.

⁷⁸ The most famous proponent of legal transplants is A. Watson, *Legal Transplants. An Approach to Comparative Law*, University of Georgia Press 1993.

⁷⁹ Amongst many see R. Michaels, *The functional Method of Comparative Law* [in:] M. Reimann, R. Zimmerman (eds.), 'Oxford Handbook on Comparative Law', OUP, Oxford 2006, p. 339.

⁸⁰ M. Zieliński, *Decoding Legal Text*, [in:] Z. Ziemiński (ed), 'Polish Contributions to the Theory and Philosophy of Law', Amsterdam 1987, p. 165 ff.

Accordingly, only legal provisions (words) or specific solutions to the problems can be transplanted from one legal order to another, but not the legal norm itself. The most serious flaw in comparative ascertainment of the principles identified so far is the problem of identification of its generality. It is obvious that for the needs of international responsibility, not all legal orders in the world must be analyzed, but some kind of representativeness should be found. There are a few scholarly proposals as to the respective methods, like identifying the principles on the basis of legal traditions of the word⁸¹ or equitable geographical distribution.⁸² Another author analyzed convenience sampling, random sampling and theoretically informed sampling.⁸³ But the results of empirical studies show that if comparative studies are undertaken at all, they are usually done with random samples and systematically refer only to some specific legal systems known to the person conducting the study.⁸⁴ It seems that there is no possibility of making a good choice between reality of comparisons (impossibility of analysis of all domestic legal systems) and the danger of exclusion (taking into account only 'privileged' legal orders), but theoretically informed sampling seems to be most promising in the area of international responsibility.

The second point is that it might be true that legal concepts as such are not transferrable in an original shape as held by the famous dissenter – prof. Legrand,⁸⁵ however, law is a function of power, and, therefore, some legal rules may be enforced without looking at the consequences of such action. So if the Security Council decides under Chapter VII of the UN Charter that the State is 'liable under international law for any direct loss, damage, including environmental damage and the depletion of natural

⁸¹ Correctness of such approach is questioned in legal writing – see e.g. N. Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 'Harvard International Law Journal' 2016, vol. 57, no. 1, pp. 37–139.

⁸² F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Martinus Nijhoff, Leiden/Boston 2008, p. 55.

⁸³ K. Linos, *How to select and develop international law case studies: lessons from comparative law and comparative politics*, 'American Journal of International Law' 2015, vol. 109, no. 4, pp. 478–480.

⁸⁴ In the area of international criminal responsibility see F. O. Raimondo, *General Principles of Law as Applied by International Criminal Courts and Tribunals*, 'Law and Practice of International Courts and Tribunals' 2007, vol. 6, p. 402.

⁸⁵ Most famous is of course P. Legrand, *The Impossibility of 'Legal Transplants'*, 'Maastricht Journal of European & Comparative Law' 1997, vol. 4, pp. 111–124.

resources, or injury to foreign Governments, national and corporations' – the obligation must be accepted by virtue of law, despite the vagueness and possible different meanings in various legal systems of the terms: direct loss, damage and injury.⁸⁶

It is widely acknowledged that quite often the principles cannot be taken 'lock, stock and barrel' and require some kind of adjustment to be transposable to the international legal order.⁸⁷ This statement implicitly admits that they cannot be transposed as they stand but require some process of normative change. That begs the question why this process is to be left for international judge adjudicating on state responsibility in a quasi-legislative manner. But even if it is to be accepted that jurisprudential discretion is wide enough to cover such activity, there is no an easy answer in the positive law of how and according to which conditions the transposability of legal rules is allowed.

Custom has been regarded by the ILC as one of the most important sources of international responsibility law. However, due to its vague nature it is difficult to determine in practice the content of the rules that may be important from the point of view of legal certainty principle. Nevertheless, it is common ground that ascertainment of custom requires two criteria to be fulfilled: general practice that is accepted as law (*opinio juris*).⁸⁸ These criteria stem from clear theoretical assumptions, but in practice, they are assessed by the users grounded in particular legal systems and languages relevant for them. The language employed is, of course, relevant in such analysis,⁸⁹ but even more striking is the necessity to assess different ways of expressing State practice in various cultures.⁹⁰ The generality means that the practice must be sufficiently widespread, representative and consistent,⁹¹ so I may refer to the problems with the evaluation of the generality requirement as in case of general principles of law. It has been claimed, however, in scholarly writings that research of State practice

⁸⁶ Security Council Resolution 687 (1991) of 3.4.1991, para. 16, UN Doc. S/Res/687 (1991).

⁸⁷ *International Status of South West-Africa. Separate Opinion by Sir Lord McNair*, ICJ Advisory Opinion of 11.7.1950, I.C.J. Reports 1950, p. 148.

⁸⁸ Draft conclusions on identification of customary international law, with commentaries, Conclusion 2, 4, YILC 2018, vol. II, Part Two.

⁸⁹ See briefly A. Roberts, *Is International Law International?*, OUP, Oxford 2017, p. 46.

⁹⁰ As a striking example, compare *Ways and means for making the evidence of customary international law more readily available*, 14.2.2019, UN Doc A/CN.4/710/Rev.1.

⁹¹ *Ibidem*, Conclusion 8.

typically relates to the law practiced in Western states.⁹² This sometimes was described as legal imperialism.⁹³ A lack of comparative approach thus might result in giving inaccurate or insufficiently nuanced analysis of State practice.⁹⁴

Moreover, the further support to ascertain customary law and general principles of law may be found in subsidiary means of their determination. The comparative approach may also be useful in assessment of subsidiary means for the determination of rules of customary law as mentioned in Article 38 (1)(d) ICJ Statute, namely, teachings of the qualified publicist.⁹⁵ There is no doubt that English is a language that dominates international academia and practice,⁹⁶ and influences the unity of the international responsibility law, but it does so at the cost of losing other regional and national legal ideas and interpretations.

6. Conclusions

It does not seem obvious at first sight that comparative law is an inevitable tool for the construction of rules of international responsibility. The idea of international law being detached from domestic legal orders and completely universal and understandable for every entity seems alluring. Nevertheless, the process of communication in legal field of international responsibility is full of obstacles and distortions. However, against all odds the process of interpretation has been and is being conducted in everyday life, even if detailed analysis has shown us that the precise understanding in every aspect between actors of different legal orders is not fully possible – it has still to be attempted in the guise of international responsibility. What comparative law teaches us in seeing differences is the first step to mutual understanding. Above all, it looks that approximate equivalence

⁹² Compare with A. Roberts, *op. cit.*, pp. 165–176.

⁹³ J.R. Schmidhauser, *Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems*, 'International Political Science Review' 1992, vol. 13, no. 3, pp. 321–334.

⁹⁴ A. Roberts, *op. cit.*, p. 179.

⁹⁵ See Draft conclusions on identification of customary international law, with commentaries, Conclusion 14, 30.

⁹⁶ Further A. Roberts, *op. cit.*, pp. 260–270, ft. 311 at p. 269 with remarks as to the influence of translation of different languages and their impact on legal ideas.

at international level is in many cases enough for law to be applied and understood.

It has been noted some time ago that international law resembles mixed domestic jurisdictions.⁹⁷ The analysis indeed demonstrates that some of its legal concepts would be closer in their functionality to some domestic legal orders (like common law families), and some would resemble that of other jurisdictions (like civil law families). It cannot be otherwise, because international legal order was created by States via their own legal concepts. Behind them stood real people from the different cultural backgrounds, whose thinking evolved within the divergent municipal legal orders.⁹⁸ Their conduct contributed to the development of the law of international responsibility by international practice and case law, so by the very definition it must have consisted of multicultural legal ideas.

This should be expressly acknowledged by the ILC instead of paying lip service to the difficulties during codification process arising at a level of linguistic and intercultural understanding of legal terms. The Commission is a body that has been predestined to be the comparative authority gathering representatives of different legal cultures in the service of the international community. This would enhance the legitimacy of the ILC works and improve the reception of its codification efforts. The law of international responsibility is one of best examples demonstrating how the documents prepared at the level of the Commission are tested and applied worldwide by the lawyers rooted in various legal cultures. It is then worth using this experience for the improvement of the codification and progressive development of law by the ILC. Hopefully, this would also trigger the practice of international dispute settlement bodies.

Without the proper understanding of processes that led to the development of the law of international responsibility, it would not be possible to delineate its precise legal content. And in so variable an international environment, it can only be made possible by using comparative methods to at least advance a functional common denominator if it is to be appealing to all parts of the world. This is true, even bearing in mind the prevalence of legal English in this field.⁹⁹

⁹⁷ C.B. Picker, *International's Law Mixed Heritage: A Common/Civil Law Jurisdiction*, 'Vanderbilt Journal of Transnational Law' 2008, vol. 41, p. 1083 ff.

⁹⁸ C.B. Picker, *Beyond the Usual Suspects...*, p. 162.

⁹⁹ As noted: *The future speaks English, Ca va sans dire...* – see more on this point in C.P.R. Romano, *The Americanization of International Litigation*, 'Ohio State Journal on

Of course, there also are other aspects of using comparative law understood in a broad sense, in particular, by citing and comparing the case law of other international dispute settlement bodies.¹⁰⁰ The comparisons might induce the potential for harmonization of the rules of international responsibility and benefit from their development.

As a matter of conclusion, it is worth pointing out that anyone who has become involved in the process of interpretation of the rules of law of international responsibility be conscious that he or she might be:

elevating legal rules and concepts with which individual [...] are familiar from [its] own legal education and practice to the level of universal truths, sometimes without any reference to a source at all.¹⁰¹

This is particularly true for the law of international responsibility where dispute settlement bodies determine the consequences of breach of international obligation on the basis of some general principles of law or customary rules that could be found codified (written down) by the ILC Articles in one language. Therefore, only the employment of comparative law methods allows for the proper interpretation and drafting of legal rules in the area of the law of international responsibility.

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¹⁰⁰ Cf. E. Bjorge, *The International Court of Justice's Methodology of Law Ascertainment and Comparative Law* [in:] M. Andenas, D. Fairgrieve (eds.), 'Courts and Comparative Law', OUP, Oxford 2015, p. 213 ff.

¹⁰¹ J. Ellis, *op. cit.*, p. 965.

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