

Uses and possible misuses of a Comparative International Law approach

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1. *The question*

In a recent monograph¹ and in a subsequent edited volume,² Anthea Roberts makes the case for the adoption of a comparative international law (CIL)³ approach in the study and practice of international law.⁴ CIL is a project addressed primarily to international lawyers rather than States.⁵ It offers a vision of what international lawyers should be doing in

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¹ A Roberts, *Is International Law International?* (OUP 2017) 2.

² A Roberts, P Stephan, P-H Verdier, M Versteeg (eds), *Comparative International Law* (OUP 2018) 4 (hereinafter *Comparative International Law*).

³ In recent years, the proposal for comparative international law was made by by Martti Koskenniemi. See M Koskenniemi, 'The Case for Comparative International Law' (2009) 20 *Finnish YB Intl L* 1. For earlier attempts, see WE Butler, 'Comparative Approaches to International Law' (1985) 190 *Recueil des Cours de l'Académie de Droit International* 9-85; E McWhinney, 'Comparative International Law: Regional or Sectorial InterSystemic Approaches to Contemporary International Law' in R-J Dupuy (ed), *The Future of International Law in a Multicultural World* (Martinus Nijhoff Publishers 1984).

⁴ For an outline of the CIL project see A Roberts, P Stephan, P-H Verdier, M Versteeg, 'Comparative International Law: Framing the Field' (2015) 109 *AJIL* 467-74.

⁵ See in this regard H Ruiz Fabri, 'From Babel to Esperanto and Back Again: The Fate of International Law (or of International Lawyers?)' in the Symposium co-organized



the 21st century in response to the challenges of a fast-changing, multi-polar world. Considering the topic's great interest and timeliness, this paper purports to reflect on this project in some detail.

The plea for the adoption of a CIL approach originates from findings made in Roberts' monographic study. This study examines how international law scholars think of, teach, and use international law in several selected countries (the five countries that are permanent members of the UN Security Council). A key result of the study is that international law is not as international, let alone universal, as claimed and that, therefore, a discipline that likes to think of itself as cosmopolitan turns out to be rather parochial.⁶ Roberts says that there is not (or no longer is) an 'invisible college of international lawyers', but that there is only a divided college composed of 'different national communities of international lawyers' who construct 'their understandings of international law in ways that belie the field's claim to universality'.⁷ Hence, far from there being one international law that is clear and equal for all, there is a 'transnational legal field'⁸ made of 'multiple partially overlapping fields'⁹ or, in other words, a pluralistic legal order riddled with different views (some may qualify it as 'fragmented'), interpretations, and applications. According to Roberts, neither of these different perceptions should be snubbed, but instead they should be understood, and factored into the teaching and practice of international law. CIL is the methodological approach that Roberts proposes to international lawyers to make the best out of those differences. CIL purports to examine 'cross-national similarities and differences in the way that international law is understood, interpreted, applied, and approached by actors in and from different states'.¹⁰ CIL is not a normative mandated process in the sense of being required by existing international law norms. Its justification lies in the urgency of the problems to be tackled and in the significance of the aspirations it is meant to serve.

by EJIL: Talk! and *Opinio Juris*, D Akande, 'Joint Symposium with *Opinio Juris* on Anthea Roberts' *Is International Law International?*' (7 February 2018) (hereinafter EJIL Talk Joint Symposium) <www.ejiltalk.org/category/ejil-book-discussion/>.

⁶ Roberts, *Is International Law International?* (n 1) 312-25.

⁷ *ibid.*

⁸ *ibid.* 25.

⁹ *ibid.*

¹⁰ *ibid.* 2.



At first blush, the introduction of a new methodology within the field of public international law may be looked at as an eccentricity in a discipline that is mature and technical enough not to be in need of new heuristic tools. Yet, upon closer inspection, one notices that CIL is much more than a legal technique. As I understand it, CIL is a functional device serving a political project directed at the betterment of international law as a profession and, in turn, of international law as a normative system. For Roberts, in a multipolar new world order, ‘international lawyers should rely on a comparative international law approach to become more humble, open, and reflexive in their engagement with international law’¹¹ by looking ‘at their field through different eyes’ and ‘from different perspectives’.¹² A CIL approach may also draw attention to the ‘existence of certain forms of dominance’, so that international lawyers can see ‘whose norms are being globalised’ and how ‘globalised localisms often skew towards Western approaches in general and Anglo-American approaches in particular’.¹³

In other words, CIL is the therapy that Roberts offers to remedy the flaws and biases of international lawyers – particularly of Western international lawyers. It is meant to push international lawyers to go beyond their own convictions and beneath the surface of international law ‘instead of just accepting their own self-reinforcing vision of the truth’.¹⁴ It is considered appropriate as international lawyers are called upon to operate in a rapidly-changing world that is no longer Western-centric, and the dialogue between and among new (and hegemonic) actors becomes paramount. In such a scenario, there is a need for a more inclusive way of communication and cooperation among scholars, in spite of their different backgrounds and beliefs. This communication must start, argues Roberts, by taking seriously the views of the ‘unlike minded’ scholars.¹⁵ By doing all of this, CIL would be the primary instrument for prompting the renewal of international law while ensuring its continued relevance, despite significant power shifts among nations.¹⁶

¹¹ *ibid* 325.

¹² *ibid* 2.

¹³ *ibid* 10.

¹⁴ *ibid* 325.

¹⁵ *ibid* 13-7.

¹⁶ *ibid*.

Should international lawyers embrace the CIL project? One can readily share Roberts' laudable aspiration to renew international law and to deal more effectively with the challenges of our times. She is spot-on in her quest for going beyond one's comfort zone and engaging in a more constructive and effective communication among international lawyers of different origins and backgrounds. Still, the complexity and the breadth of the CIL project as both a legal and a political tool commands a more nuanced response.

To this end, this paper is divided in three parts. First, it illustrates the theoretical and factual basis underlying the CIL project. Second, it provides an overview of the function(s) that comparative law currently plays in different branches of public international law and asks in what way a more robust turn to comparative law than is currently in place may enrich international law. Third, it reflects on the relationship between the CIL approach and the existing system of international law as a set of primary and secondary rules.

2. *Theoretical and factual underpinnings*

Under a traditional positivist approach, international law is a normative system with, at its core, rules and principles created and developed primarily through the practice of States.¹⁷ From this perspective, international law exists and develops not without, but quite independently from, its scholars, although the role of scholars in defining the content of norms is far from negligible in a system based, at least in part, on uncodified and unwritten norms.¹⁸ Although this account of international law probably still prevails, the theoretical underpinnings of Roberts' work appear to be at a distance from the terrain of positivism. This point requires some explanation.

Over the years, different ways of thinking about international law have emerged within the field of public international law or have been

¹⁷ See generally M Shaw, *International Law* (CUP 2018) 32-39 and J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 20-47.

¹⁸ A Pellet, 'Article 38' in A Zimmermann, K Oellers-Frahm, C Tomuschat (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 677, 859.



imported from domestic legal systems.¹⁹ Chief among them is critical legal studies (CLS). Jan Klabbers speaks of the ‘critical revolution in international law’ prompted in the early 1980s by the works of David Kennedy and Martti Koskenniemi.²⁰ CLS is a legal philosophy that exposes a radical scepticism towards the tenets of both positive and natural law, and insists on the structural close connection between international law and politics.²¹ As such, CLS warns that international law is not necessarily a force for good, but that it can be (or has been) the instrument of someone’s own hegemonic agenda and thus it can be itself ‘part of the problem’.²² In an intrinsically political international law, the moral and political preferences of the interpreter, who often remains undisclosed, are not subordinate to the available normative data, but intentionally or unintentionally shape the meaning of those data. Martti Koskenniemi – who writes the preface of Roberts’ monographic study – famously said that ‘international law is what international lawyers do and how they think’.²³ Following this lead, some international lawyers have undertaken a critical evaluation of what international lawyers do. They study ‘the way in which our mode of thinking, including our beliefs and values, affects our research and work’.²⁴ This is perceived as necessary because ‘unmasking or unveiling [...] theoretical assumptions and presumptions helps us better comprehend the nature of our understanding of international law, and the biases that may accompany our own or others’ visions of it’.²⁵ Roberts herself ‘encourages international lawyers to be more reflective about the particularities of their networks and perspectives and more reflective about how they engage with the field’.²⁶

¹⁹ A Bianchi, *International Law Theories. An Inquiry into Different Ways of Thinking* (OUP 2016) 3.

²⁰ J Klabbers, *International Law* (CUP 2018) 13-16.

²¹ See generally Bianchi, *International Law Theories* (n 19) 135-39.

²² M Koskenniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’ in J d’Aspremont, T Gazzini, A Nollkaemper, W Werner (eds), *International Law as a Profession* (CUP 2017) 31-66, 65 (International Law as a Profession).

²³ M Koskenniemi, ‘Foreword’ in Anthea Roberts, *Is International Law International?* (OUP 2017).

²⁴ Bianchi, *International Law Theories* (n 19) 3.

²⁵ *ibid* 1.

²⁶ Roberts, *Is International Law International?* (n 1) 36-8.



Building on this way of thinking about international law, the CIL project examines international law as a profession rather than as the practice of States. In this sense, the CIL approach may therefore be seen more as an offshoot of CLS-style thinking rather than positivist sensibilities.

That said, as a general framework, the CIL project constitutes a fresh innovation from the critical legal studies template of combining a radical criticism²⁷ with an under purposive attitude that leaves one with more scepticism than tools to tackle contemporary legal problems. To her credit, Roberts articulates a potential solution as to the problems she identifies. This makes possible engagement with her project in the pursuit of what ultimately are shared aspirations and values, notwithstanding one's difference of perspectives.

The theoretical basis underpinning Roberts' work has an impact on the findings of *Is International Law International?*. Focusing on discussing what lawyers do as opposed to inquiring what States do, although fully justified from the philosophical and legal perspective she embraces, does present issues in terms of the persuasiveness of the analysis on which the CIL project is based. It leaves behind insights about the internationality of international law that could have been gained from looking at the practice of States. The possibility that international law could be international and universal certainly exists, regardless of international lawyers' views. One criterion for so determining could have been the degree of ratification by States of treaties. For example, there are areas of international law such as international humanitarian law that have reached a considerable degree of universality (which is not the same, of course, as compliance) as confirmed by the fact that the 1949 Geneva Conventions have received universal ratification.²⁸ A CIL approach could supplement this analysis by providing insights on how effective these norms are within a domestic order, but the starting point to gauge their relevance as a universal instrument should be the practice of States.

Next, the fact that the analysis is limited to the state of international law in the five countries that are permanent members of the UN Security

²⁷ In reflecting on the Critical Legal Studies school of international law, Georges Abi-Saab writes that 'it is the summum of cynicism to criticise the existing rules vehemently, while refusing to propose any alternatives, as do the members of this school'. G Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines' (2016) 37 *Third World Quarterly* 1957, 1958.

²⁸ T Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *AJIL* 348.



Council cautions against the possibility of considering those findings of general validity. One wonders, for instance, what the regard for international law is in countries that need international law the most; have used it to defend and pursue their sovereign interest against hegemonic States (some of which are represented in the Security Council); or have a strong tradition of doctrinal commitment to the study and development of international law. These countries include, for instance, various African States, which over the years have relied on key international law principles such as the right to self-determination, sovereignty over natural resources, and *uti possidetis*.²⁹

That said, the scientific interest in Roberts' work and, as a consequence, in the CIL project, remains. This is because how international law is perceived in those countries that exercise a key responsibility within the international community is a matter that concerns us all. What also concerns all of us is what to do about renewing our discipline for the 21st century.

3. *Comparative International Law as a legal methodology*

As comparative law scholars explain, comparative law is a discipline that is used to analyse and confront normative solutions in two or more different legal systems.³⁰ At a macro level, what is compared are the main traits of different legal systems (ie common/civil law); the procedures for resolving and deciding disputes; or the role of those engaged in law, such as courts.³¹ At a micro level, comparative law has to do with specific legal institutions or problems. Rules are compared to address actual problems or particular conflicts of interest across different normative systems.³² Unlike other legal disciplines, comparative law does not consist of positive legal rules.³³ Rather, it is a perspective on existing law that can be used in any field of domestic laws. Comparative law does not comprise rules, but is a method of studying law. It is also a stock of academic

²⁹ Roberts, *Is International Law International?* (n 1) 36-9.

³⁰ K Zweigert, H Kötz, *An Introduction to Comparative Law* (OUP 2011) 4.

³¹ *ibid* 4-5.

³² Zweigert, Kotz, *An Introduction to Comparative Law* (n 30) 4-5.

³³ M Reimann, 'Comparative Law and Neighbouring Disciplines' in *The Cambridge Companion to Comparative Law* (CUP 2012) 13, 14.



knowledge having law as its object and comparison as its process.³⁴ It is an effort to be ‘cosmopolitan’ for lawyers trained in domestic jurisdictions, so that they learn from approaches in different jurisdictions and can be ‘international’.³⁵ While comparative law is used very much in the field of private international law to examine, *inter alia*, which normative solutions should prevail in a given context, comparative lawyers normally do not study classic public international law. This is mainly because the law of nations is perceived as a fairly uniform (international) system that provides little to no opportunity to compare anything (unlike the different domestic versions of private international law).³⁶

That said, two comparativists, Konrad Zweigert and Hein Kötz, suggest that the method of comparative law could also be successfully employed in the field of public international law when interpreting the meaning of treaties, and in helping to understand some of the concepts and institutions of customary international law. For instance, the rule *pacta sunt servanda*, the clause *rebus sic stantibus*, and the theory of *abuse de droit* in international law all have their roots in the institution of municipal private law.³⁷ Hence, a comparison may occur between the international system and domestic legal systems to enrich the former. In line with these two authors’ suggestions, it can be observed that there are a number of uses for comparative law within the field of public international law that have been employed, to a greater or lesser extent, at the international and domestic levels. The principle examples can be recalled here.

First, as Bing Jia observes, there is space for ‘a comparative approach’ within the classical sources of international law. Under Article 38(1)(c) of the Statute of the International Court of Justice, comparative law can be used to identify ‘the general principles of law recognized by civilized nations’.³⁸ However, a survey of the application of this provision since the

³⁴ *ibid* 14.

³⁵ Zweigert, Kotz, *An Introduction to Comparative Law* (n 30) 15-6.

³⁶ HC Gutteridge, *Comparative Law* (CUP 1946) at 51-61, Zweigert, Kotz, *An Introduction to Comparative Law* (n 30) at 8; and Reimann, *Comparative Law and Neighbouring Disciplines* (n 33) at 18.

³⁷ Zweigert, Kotz, *An Introduction to Comparative Law* (n 31) 6.

³⁸ BB Jia, ‘A Word on the Comparative Approach of International Law and a Proposed Direction for Chinese Textbooks of International Law’ in *EJIL Talk Joint Symposium* (n 5).



Permanent Court of International Justice, conducted by Alain Pellet, suggests that this norm has found, for a number of reasons, limited application in the practice of the International Court of Justice.³⁹

Second, as Mathias Fourteau explains, comparative law is frequently relied upon in the work of the International Law Commission. It is used to identify possible differences among State practices or *opinio juris* and to identify the minimum common denominator among States on the content of existing international law.⁴⁰ In this sense, comparative law is a 'conduit between international law and domestic laws'.⁴¹ Third, as Neha Jain has shown, comparative law has been used at the International Criminal Tribunal for the former Yugoslavia (ICTY) to determine the existence of general principles of law.⁴² In this regard, the writer can add his own personal experience as an ICTY legal officer to recall that a comparative approach was also used, at times, in the process of drafting and amending the rules of procedure and evidence. It was a constant feature to compare norms belonging to different legal traditions and jurisdictions to determine the content of a rule to be included or amended in the rules of procedure and evidence.

Fourth, comparative law may be used to compare norms and cases that concern the same issues, but are defined and applied differently in different regimes and treaties of international law. It would also be the opportunity to reflect on how 'international law is made' and assess that significant variance can exist among States 'at states of law-making and law-formation'.⁴³ In the case of treaties, the comparison would serve the purpose of clarifying the content of a given norm by examining the process through which the meaning of a norm (or of a reservation⁴⁴) came

³⁹ A Pellet, 'Article 38' (n 18) 766-772.

⁴⁰ M Forteau, 'Comparative International Law Within Not Against, International Law: Lessons from the International Law Commission' in *Comparative International Law* (n 2) 161.

⁴¹ *ibid* 179.

⁴² N Jain, 'Comparative International Law at the ICTY: The General Principles Experiment' (2015) 109 *AJIL* 486.

⁴³ See T Broude, YZ Haftel, A Thompson, 'Who Cares About Regulatory Space in BITs? A Comparative International Approach' in *Comparative International Law* (n 2) 527, 545.

⁴⁴ As perceptively remarked in T Ginsburg, 'Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation' in *Comparative International Law* (n 2) 230-1.



into being or is being interpreted by States.⁴⁵ Different judicial bodies may treat norms of human rights and humanitarian law differently. In this regard, Mathias Siems sees a role for comparative law in connection with the process of the fragmentation of international law in different legal regimes. The more that international law specialises and evolves in a system of regional actors and institutions (each operating within an *ad hoc* specific normative framework, albeit within the framework of general international law), the more there is room for comparing different legal approaches and processes.⁴⁶

Fifth, comparative law can be used to determine the content of a norm of international law by examining the way it is interpreted by domestic actors.⁴⁷ One way of so doing is to 'identify and interpret international law by comparing various domestic court decisions'.⁴⁸ Moreover, as Anne Peters recalls, a comparative approach can be used to compare the international law system with domestic systems to verify the content of a norm of international law.⁴⁹ In this way, a comparative approach would be beneficial, Peters notes, in that by 'analysing national practice'

⁴⁵ See as examples in this regard the studies of S Dothan, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement' in *Comparative International Law* (n 2) 379; J Goldenziel, 'When Law Migrates: Refugees in Comparative International Law' in *Comparative International Law* (n 2) 397; and A Knight, 'An Asymmetric Comparative International Law Approach to Treaty Interpretation: The CEDAW Committee's Tolerance of the Scandinavian States' Progressive Deviation', in *Comparative International Law* (n 2) 419.

⁴⁶ M Siems, *Comparative International Law* (CUP 2018) 293-301. See further, C McCrudden, 'Comparative International Law and Human Rights' in *Comparative International Law* (n 2) 444-46.

⁴⁷ P-H Verdier, M Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' in *Comparative International Law* (n 2) 209-230; KL Cope, H Movassagh, 'National Legislatures: The Foundations of Comparative International Law' in *Comparative International Law* (n 2) 271.

⁴⁸ A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57; C Cai, 'International Law in Chinese Courts during the Rise of China' in *Comparative International Law* (n 2) at 295, 317-318 and L Mälksoo, 'Case Law in Russian Approaches to International Law' in *Comparative International Law* (n 2) at 337. Interestingly, Mälksoo also suggests that 'academic projects in comparative international law should take history into account as much as possible as an explanatory factor' (*ibid* 338).

⁴⁹ A Peters, 'International Legal Scholarship Under Challenge' in *International Law as a Profession* (n 26) 124.



it would be possible to ‘identify a truly international legal corpus of rules on a particular international problem at hand’.⁵⁰

Finally, comparative law is used frequently at the European Court of Human Rights. This court employs comparison among States Parties’ laws to ascertain the meaning and scope of treaty provisions. The process of comparison is used to legitimise the Court’s exercise of discretion. If there is a sufficient degree of commonality in some of the States Parties’ laws, the Court may accept the evolution of the European Convention of Human Rights’ norms in a new situation. Comparison shows the linkage between the international and the national by highlighting that what is done at the Court is derived from domestic jurisdictions and gains legitimacy from domestic jurisdictions.⁵¹

In light of this review, it could be argued that there is conspicuous room within public international law for the use of comparative law approaches. Therefore, insofar as the CIL approach is a call to international lawyers to foster different uses of the comparative law methodology and to make them part of the daily routine of international law scholarship, the international lawyers must respond to this call affirmatively. These uses of comparative law are not a novelty to the field of international law. After all, it is part and parcel of the traditional function of international lawyers to examine the content of international law in different contexts to ascertain and determine the existence, content, and effectiveness of a given norm.⁵² The value of insisting on a CIL approach is that it could be a sort of umbrella under which different techniques and approaches employed could be placed and systematised. It could be the opportunity to expand knowledge of different normative approaches (and in this way to teach lawyers to see things differently), and a reminder that the determination of the content and existence of a norm of international law should be arrived at after reviewing the practice of all the concerned legal systems and jurisdictions rather than only a selected few often drawn from

⁵⁰ *ibid.*

⁵¹ P Carrozza, ‘Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights’ (1998) 73 *Notre Dame L Rev* 1217, 1227.

⁵² See, for instance, H Lauteparcht, *Private Sources and Analogies of International Law* (Longmans 1927) 69-70.



one's personal experience. This is certainly of great use to an international law that aspires to be inclusive and truly universal in a multi-polar world.

That said, the aspect of the CIL project that strikes me the most is its being a multi-layered effort. It does not stop at reinvigorating traditional comparative law within the field of public international law. It breaks new ground by going beyond this traditional approach. The next section discusses the viability of this further dimension of the CIL project.

4. *Comparative International Law as a sociological and political tool*

In a passage cited in the introductory chapter of *Comparative International Law*, Xue Hanqin, the Chinese judge at the International Court of Justice, states 'Notwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among states'.⁵³ From a traditional perspective, this statement is not surprising. It reiterates something of a truism. Difference of opinions and interpretations of international law do exist. They are the salt of international law as of any legal system. Such differences do not, in and of themselves undermine the unity and universality of international law as a legal system. They contribute to its development, adaption, and fine-tuning in changing circumstances. That said, those differences may shift from the physiology to the pathology. They might become a matter of concern if they remain unsolved due to a lack of viable mechanisms and institutions. A legal order that is not in order because of an irremediable uncertainty about the content of its norms and precepts can hardly fulfil its chief function of providing guidance and restraining conduct. As such, it is doomed to irrelevance.

Interesting, however, is that under the CIL approach, the existence of different perspectives and interpretations is not perceived as a normative issue that ought to be remedied through appropriate rules, mechanisms, and institutions. Roberts acknowledges that some of the interpretations proffered could indeed be 'strategic' and thus not made in good faith. As such, they could be closer to personal or professional interests than truth. For Roberts, however, the latter attitude is not necessarily the

⁵³ *Comparative international law* (n 2) 4.



rule. It is plausible that differences of interpretation may result from genuine and good faith interpretations, which are contingent on nothing but one's unavoidable subjectivity.

The diversity of opinions is then a fact and a sociological reality to be reflected upon, which commands a change – not of rules – but of attitudes among international lawyers. Under a CIL approach, differences among international lawyers could be identified, understood, explained, and, ultimately, defused. In this regard, it is useful to look directly at how Roberts (and the other scholars supporting the CIL project) describe CIL:

‘Comparative international law entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law.’⁵⁴

This definition shows the *sui generis* nature of the CIL approach. CIL does not exist only in the mere application of the idea of comparative law to the field of public international law, as illustrated in the previous section. More than that, the CIL approach seems to be calling for a journey down a somewhat different trajectory from classical comparative law. First, CIL seeks to understand differences of interpretation and approaches within the same legal system, that is, international law, and not only in different legal systems as in classical comparative law. Moreover, as I understand it, that which is to be compared under the above definition is not only law – however broadly defined that may be. Instead, in addition to the claims made by States (and by their lawyers), it is international lawyers' thinking about and interpreting international law's rules and principles. That notion includes the opinion of private individuals because the majority of international lawyers are not governmental officials. Finally, the purpose of the comparative exercise is to understand and explain why international lawyers think of and apply international law in the way they do rather than determining what law should be applied in a given context.⁵⁵ These traits of the CIL project reveal that it essentially serves a cognitive purpose rather than a normative one. As such, the CIL approach seems to be amounting to an exercise more akin

⁵⁴ *ibid* 6.

⁵⁵ See in this regard P Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in *The Oxford Handbook of Comparative Law* (OUP 2006) 422.



to sociological analysis rather than to legal analysis. The fundamental question it asks is why a given claim is made, as opposed to whether it is valid or not. It does not distinguish whether this claim is made by a public official or by a private individual. This line of inquiry enables international lawyers to be more cautious and reflective, and thus in a position to genuinely understand each other, so that ‘new alliances may be forced and divisions overcome’.⁵⁶ This concern unveils the political telos of Roberts’ project, which is to ensure a stronger and more fruitful dialogue among international lawyers to enhance cooperation and reduce tension – if not disputes – among inevitably different communities of international lawyers and, as a consequence, among States.

Assuming that one has correctly grasped the gist of this dimension of the CIL project, questions arise. First, one wonders whether the sociological and political exigencies so perceptively articulated by Roberts can be effectively tackled by a legal methodology such as CIL. What Roberts has identified are not legal problems *per se* (although they do have legal consequences), but they may be regarded as flaws in the professionalism and education of contemporary international lawyers. It is the latter group that in Roberts’ account appears unequipped for shepherding the international law of the 21st century. Therefore, it may be suggested that, rather than identifying an appropriate legal tool, the effort should be made to identify the hard and soft skills (such as learning more than one’s own language⁵⁷) that international lawyers need to master in a growing, complicated multi-polar world.⁵⁸ The next questions concern the relationship between CIL and the norms and principles of international law.

5. *The relationship between Comparative International Law and the normativity of International Law*

⁵⁶ Roberts, *Is International Law International?* (n 1) 280.

⁵⁷ On the need of English as the *lingua franca* of international law but also and on the perils of monolingualism see C Tomuschat, ‘The (Hegemonic?) Role of the English Language’ (2017) 86 *Nordic J Intl L* 196-227 and M Bohlander, ‘Language, Culture, Legal Traditions, and International Criminal Justice’ (2014) 3 *J Intl Criminal Justice* 1-23.

⁵⁸ A Peters, ‘Realizing Utopia as a Scholarly Endeavour’ (2013) 25 *Eur J Intl L* 533, 540.



From a substantive perspective, the question arises as to how the aspirations and values that CIL is meant to serve relate to those already codified within primary international law rules. From a procedural perspective, it can be asked whether CIL may contribute in some way to the normativity of international law and hence to its much-needed effectiveness. The relationship between the CIL approach and what may be referred to as the normativity of international law is presented by Roberts as one of neutrality: the CIL approach does not concern the question of adherence to and compliance with international law. However, from a lawyer's perspective, this approach is somewhat puzzling. For a lawyer, unlike in the case of a diplomat, politician, theoretician, or philosopher of law, it is of the essence to make a synthesis to evaluate one's argument from a normative perspective. This is because the primary question that he/she must ultimately answer is whether a given conduct is permissible or not.

CIL provides no criteria, for instance, to distinguish between claims made by States, and international lawyers acting in an official capacity or in a private capacity as scholars. Moreover, not all the opinions can be validly vented by actors, regardless of the reasons on the basis of which they have been formulated. As noted by Orfeas Chasapis-Tassinis, it is essential for a lawyer 'to have a clear normative vision of international law *as law* that is supposed to transcend, and not yield to, the differences that we look at as a matter of legal discourse'.⁵⁹ Moreover, the information that could be collected through a comparative approach is not neutral. It is a set of reasons that may prompt one to agree (or disagree) with a given claim, thereby conferring on it legitimacy without, however, relying on normative criteria, but rather on a variety of policy considerations. What is then necessary is some norm of coordination that explains how the wealth of information collected through comparison may impact on existing norms and rules of international law, and whether, for instance, it may justify a departure from them or not.

If international law is not simply what international lawyers do, but also what States do, it is all the more necessary to connect the dots of what I may characterise as the 'subjective' dimension of international law

⁵⁹ O Chasapis-Tassinis, 'The Self-seeing Soul and Comparative International Law: Reading Anthea Roberts' *Is International Law International?*' (2018) 7 *Cambridge Intl L J* 185.



represented by the interpretations of its content by international lawyers, and the 'objective' dimension of international law. The latter is given by the factual reality that there are rules and principles agreed upon by States and consolidated in international treaties or norms of customary law. The CIL approach focuses on the subjective dimension of international law. However, when it ventures beyond the normative data, that is, norms or administrative and judicial decisions enacted by entities exercising public functions, and enters the realm of lawyers' opinions and thinking, it tilts the balance excessively in favour of the subjective dimension of international law.

Hence, my concern, which can only be flagged for reasons of space, is that the CIL approach could attribute more importance to the practice of lawyers rather than to the practice of States as if interpretations provided by States on the content of international law were on par with those of international lawyers. The more subjective a legal discipline becomes, the more it loses its capacity to bind all its subjects equally and thus, ultimately, its normativity.

For all its imperfections and limitations, to me international law is not, at the time of writing, an eminently subjective discipline dominated by the opinions of its scholars. There was probably a period of its history in which it was so, as Martti Koskenniemi has discussed.⁶⁰ Neither is it a language that lawyers can use to motivate any claim whatsoever. When we look at it from a historical perspective, it becomes clear that international law has grown since the aftermath of World War II into quite a dense corpus of primary and secondary norms that are reasonably determinate and binding. In particular, within its objective dimension, international law has come to contain several 'communitarian values' in the sense of core ideas on which most States (from different corners of the planet) have, by and large, agreed, and, more often than not, sought to adhere to, and ensure compliance with. A detailed analysis of what these values are and why it is possible to define them as such, and what is intended with the adjective 'communitarian', of course, requires further

⁶⁰ See M Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2002) especially 11-97. Writing in 1965, Clive Parry remarked that the 'books and opinions of the nineteenth century seem often to resemble catalogues of the praises of famous men. 'Hear also what Hall sayeth. Hear the comfortable words of Oppenheim' is an incantation which persists even into this century'. C Parry, *The Sources and Evidences of International Law* (Manchester UP 1965) 103.



discussion that must be left for another paper. However, for the purposes of this paper, it may be sufficient to note that no less an authority than James Crawford has spoken of the existence of ‘communitarian values’ in a piece recently published in the *Modern Law Review*.⁶¹ At the conclusion of an analysis of what international law has become through a process of codification (which, interestingly, flourished when the international community was also multi-polar) since the end of World War II, Crawford comes to the following conclusion:

‘Adjustments may be necessary to respond to perceived inequalities or injustices [...] but we should also be wary of the increasing rhetoric of skepticism towards international law. Over time, this may precipitate a larger-scale retreat into nativism and unilateralism. We should be ready to defend the communitarian values of international law against this possibility.’⁶²

I agree with this conclusion. Hence, the challenge for international lawyers who want to build a viable and binding international law for the 21st century is dual in my view. Not only should they learn about the subjective dimension of international law, but they should also coordinate it, through a coherent methodology, with its objective dimension, the existence and detail of which has increased significantly in recent years through a process of codification.

6. *Conclusion*

A CIL approach is certainly to be welcomed if it means insisting on the need for acquiring more knowledge and understanding of different perspectives before passing judgment. A comparative law methodology is already used in certain domains of public international law. Refreshing such a use by making it more comprehensive and ultimately fairer is certainly useful for a contemporary international law. It is also necessary to maintain bridges between the international, the regional, and the domestic level. A comparison of how norms are construed and thought of at the international (or regional) level, and are received and applied locally, is

⁶¹ J Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern L Rev* 1.

⁶² *ibid* 22.

pressing to effectively assess the content, reach, and validity of a norm of international law. This scrutiny is part of the 'homework' of each professional international lawyer. Insofar as CIL is a reminder of that duty, it deserves much appreciation.

The analysis of CIL as a sociological and political tool must be more nuanced. The CIL approach does not stop at the comparison of what States do internationally or domestically. It looks beyond what the law is, no matter how broadly it is interpreted, to discuss opinions and interpretations. Roberts is right that this knowledge would encourage international lawyers to be more reflective about their own limits. How to use this knowledge from a legal perspective, however, is not clear. The risk is misusing this knowledge to justify claims that run contrary to widely-accepted communitarian values, which would reduce further the normativity of a legal system already under strain.

