



Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence To International Law and Beyond

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INTRODUCTION

Comparativists sometimes study other comparable legal systems, hoping to discern lessons that may then be applied to their own legal systems. Thus, an American may become an expert on the English legal system, and then seek to apply some aspects of that system within America. Such an effort is generally thought to be legitimate, as both America and England are Common Law jurisdictions. Mixed Jurisdictions are similarly studied, often with the hope that lessons learned from those studies may be applied to other comparable legal systems – typically other Mixed Jurisdictions. Thus, a scholar from Sri Lanka may study the Scottish private law with a view to employing some lesson from that study within Sri Lanka – a sister-Mixed Jurisdiction. An American studying Mixed Jurisdictions, however, perhaps should come from Louisiana, otherwise any applications of the Mixed Jurisdiction jurisprudence to that scholar’s home legal system may be considered somewhat suspect. But, as this Article will show, lessons derived from the study of Mixed Jurisdictions may, and should, be applied more broadly.

In this Article, I will argue that a narrow application of the lessons from the Mixed Jurisdictions is misplaced. This is not to say that all that is applicable or relevant to Mixed Jurisdictions may be considered outside of the Mixed Jurisdictions, but rather that with some imagination and courage, the tremendous wealth of ideas being generated within Mixed Jurisdiction scholarship may have considerably wider application than is presently being considered. There may be a little bit of Mixed Jurisdiction in many legal systems. By way of illustration, an example of just how far a field the study might go, this Article will show that the characteristics of Mixed Jurisdictions may even be found within international law, and if within international law, then within all legal systems, for international law is applicable to all legal systems. Thus, perhaps the Mixed Jurisdictions jurisprudence truly will have greater application than is presently thought to be the case.

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Of course, the comparative analysis that will be attempted in this Article relies on the traditional comparative law classifications. Those classifications, of course, fail to truly reflect the complexities involved, but such classifications are necessary for comparative analysis to proceed.¹ Needless to say, at all times the inherent simplification must be kept in mind and reconsidered throughout the comparative process. Additionally, the classifications described here are discussed in terms of the classical characteristics – even as many of those characteristics are fading within the different described systems, and even as in many respects those different systems are converging.²

INTERNATIONAL LAW – AKIN TO A MIXED JURISDICTION?

While it may be argued that all legal systems are ‘mixed’, the ones classified as Mixed Jurisdictions are mixed in a similarly specific manner and to a certain comparable degree.³ That similarity allows for useful and legitimate comparative work among those systems. But those characteristics may also be identified to a significant extent in other legal systems, and as such those Mixed Jurisdictions can then be employed for useful comparative work with other legal systems – in this case, with international law.

The General Characteristics of a Mixed Jurisdiction as Applied to International Law

Vernon Valentine Palmer has argued that there are three overarching characteristics and then a whole host of lesser more specific characteristics to this ‘new’ legal family. The three overarching characteristics are that:

1. The ‘basic building blocks’ of a Mixed Jurisdiction are from the Civil and Common Law Traditions;
2. The dual character, Civil Law and Common Law, is objectively apparent; and
3. In a Mixed Jurisdiction, the Public Law tends to be Common Law in style, while the Private Law tends to be Civil Law.⁴

Palmer has additionally identified other more specific characteristics, that will also be considered later in this Article. Of course, it must be remembered that not all the legal systems that have been considered to be Mixed Jurisdictions satisfy all of these criteria – an important point when international law is viewed under a Mixed Jurisdiction lens. Nonetheless, can these general characteristics be found within international law?

The ‘basic building blocks’ of a Mixed Jurisdiction are from the Civil Law and Common Law Traditions

This criteria is used to distinguish those other mixed systems of the world that would consequently have little in common with those mixed systems that have been derived from the Common and Civil Law traditions. Though ‘[i]t goes without saying that some Mixed

¹ See Fassberg, Celia (2003) ‘Language and Style in a Mixed System’ (78) *Tul. L. Rev.* 151 at 171.

² See Glendon, MA, Carroza, P & Picker, C (2007) *Comparative Legal Traditions: Text, Materials And Cases On Western Law* 3rd ed, Thomson West Publishing at 241 and 799.

³ Reid, KGC (2003) ‘The Idea of Mixed Legal Systems’ (78) *Tul. L. Rev.* 5 at 19; Visser, D (2003) ‘Cultural Forces in the Making of Mixed Legal System’ (78) *Tul. L. Rev.* 41 at 46. For an overview of Mixed Jurisdictions, see Glendon et al, supra n 2 at Chapter 19.

⁴ Palmer, VV (2000) *Mixed Jurisdictions Worldwide: The Third Legal Family* Cambridge Univ. Press at 7-9.

Jurisdictions are also derived partly from non-occidental legal traditions: the North African countries, Iran, Egypt, Syria, Iraq, and Indonesia, for instance.’⁵

Given the western pedigree of international law, it would appear that this criteria should be easily satisfied. Nonetheless, the issue bears consideration and careful explication. While the term ‘international law’ was coined by a jurist from the Common Law world, Jeremy Bentham,⁶ for the most part it was Civil Law trained jurists that created modern international law.⁷ Thus from its earliest, international law was born among early Civilian ideas, with the predictable result that it reflected those very ideas.⁸ Of course, the jurists responsible for creating the ideas and institutions of international law could, as a theoretical matter, back then and now, have developed the new international law in isolation from their domestic legal environment. But people do not, and can not do that. The jurists necessarily borrowed and adopted existing institutions, ideas and mechanisms from their existing Civil Law legal systems – sometimes subconsciously, and perhaps even when they may have explicitly tried to reject Civil Law notions.⁹ It was only natural then that they would create international law in the ‘image’ of Civil Law. The impact of the Common Law world on international law would, in contrast, have to wait until the twentieth century. In particular, during the last sixty years, since the end of the Second World War, the influence of the Common Law world and its legal culture was most pronounced. In that time, international law has absorbed various Common Law ideas and institutions, ones that might very well have been anathema to its original Civil Law character.

This geopolitical ordering of international law has been further reinforced as a result of the fact that the vast bulk of the day-to-day operations of international law take place within the domestic legal institutions¹⁰ - the vast majority of which are systems within either the Civil or Common Law traditions.¹¹ True, despite that borrowing from the Civil and the Common Law, international law has some unique aspects, reflecting the fact that its primary subjects are states, but then each of the Mixed Jurisdictions also include significant unique features.¹²

⁵ Tetley, W (2003) ‘Nationalism In A Mixed Jurisdiction And The Importance Of Language (South Africa, Israel, And Quebec/Canada)’ (78) *Tulane L. Rev.* 175 at 183.

⁶ See Janis, MW (1984) ‘Jeremy Bentham and the Fashioning of “International Law”’ (78) *Am. J. Int’l L.* 405 at 408.

⁷ Such as Hugo Grotius (1583-1645) Francisco de Vitoria (1486-1546), Alberico Gentili (1552-1608), Francisco Suarez (1548-1617) and Samuel Pufendorf (1632-94). See also Merryman, JH & Clark, DS (1978) *Comparative Law: Western European and Latin American Legal Systems* Bobbs Merrill at 3. But see, e.g., Yasuaki, O (2000) ‘The History of International Law: Universality and Particularity - The Birth Of International Law As The Law Of International Society’ (94) *Am. Soc’y Int’l L. Proc.* 44 (arguing that international law only came into being once the Western notion of international law was applied to Africa, through colonisation, and once China accepted the Western international law at the end of the nineteenth century).

⁸ See Butler, W (ed) (1980) *International Law in Comparative Perspective* Brill at 15 (‘since the age of Grotius, when the law of Rome was the basic element in almost the whole of the law of Europe and was universally regarded as the standard by which justice should be measured.’).

⁹ See e.g., Bederman, DJ (1996) ‘Reception of the Classical Tradition in International Law: Grotius’ *De Jure Belli Ac Pacis*’ (10) *Emory Int’l L. Rev.* 1 at 20-21.

¹⁰ Janis MW & Noyes, JE (2006) *International Law: Cases And Commentary* 3rd edn Thomson West Publishing at 180.

¹¹ See Glendon, supra 2 at 68-72 (global distribution of the Civil Law) and 320-324 (global distribution of the Common Law).

¹² Visser, supra n 3 at 47; Öricü, E (2003) ‘The Judge and Jurist in Scotland: On the Verge of a second Renaissance’ (78) *Tul. L. Rev.* 89 at 90-91. See also Barnes, WR (2005) ‘Contemplating a Civil Law Paradigm for a Future International Commercial Code’ (65) *La. L. Rev.* 677 at 684. ‘All but three of the one hundred ninety-one nations of the world have some form of either civil law or common law.’ (footnote omitted)

The Dual Character of International Law is Objectively Apparent

This characteristic of Mixed Jurisdictions really constitutes two separate and distinct requirements. The first is that there be a 'dual' character, in other words that the system is not solidly or predominantly part of just either the Common Law or the Civil Law. The second is that the dual character be objectively apparent. Employing an objective standard necessarily suggests that a subjective standard is inappropriate. Thus, just because a country might argue that its legal system includes this dual character, that assertion will not alone prove to be sufficient to satisfy this criteria.

The first requirement, that international law has a dual character must overcome the wide spread view that Civil Law has served as the most significant influence on international law.¹³ Civil Law jurists were its main creators.¹⁴ Indeed, today many still believe that international law is essentially a Civil Law system.¹⁵ This is understandable given that Civil Law is the predominant legal tradition within the Western Legal Tradition. More countries employ a legal system within the Civil Law tradition than within the Common Law.¹⁶ More people in the world live under Civil Law than under the Common Law.¹⁷ It thus makes sense that Civil Law *should* have been the dominant influence on international law.

Demographics and history, however, are *today* insufficient to maintain the predominantly Civil Law character of international law. The world today is a different place than it was four hundred years ago, indeed even from what it was forty years ago. It is almost as though the Civil Law tradition imbued throughout traditional international law is under assault from the legal imperialism of the Common Law countries – primarily from the United States and the United Kingdom. It has been suggested that international law is moving away from the 'civil-style approach' and towards a common law, almost as though it were being subjected to an 'Americanization.'¹⁸

While international law is not yet 'Americanised', nonetheless at this time there is sufficient Common Law influence alongside the Civil Law influence so that international law can fairly be characterised as a dual system.

But, it is not sufficient that we characterise it as a dual system, but that the second half of this criteria should be satisfied - that the dual character be objectively obvious. For a domestic system this proposition is less problematic inasmuch as the character or legal tradition of the legal system is something that is frequently considered and so the 'obvious' will be noticed! For international law, such an examination is less likely and hence even the obvious may be missed. This myopia is a consequence of the usual view that international law is *sui generis* and that international law scholars are not usually thinking along comparative

¹³ Nagle, LE (2000) 'Maximizing Legal Education: The International Component' (29) *Stetson L. Rev.* 1091 at 1092 ('It is the civil-law traditions that have most widely influenced international law, international organizations').

¹⁴ See Merryman & Clark, *supra* n 7 at 3.

¹⁵ 'The study of civil law concepts is particularly helpful to the common law lawyer working with public international law, which is largely based on civil law and natural law principles.' Schadbach, K (1998) 'The Benefits of Comparative Law: A Civil European View' (16) *B.U. Int'l L.J.* 331, 385.

¹⁶ One study found that 51 nations utilise common law, whereas 115 countries have civil law systems. See Barnes, *supra* n 12 at 684.

¹⁷ See Barnes, *supra* n 12 at 685-685 ('Common law (exclusive of any Civil Law), whether in "pure" or "mixed" form, is utilized by some fifty-one nations, or 26.7% of all nations of the world. These nations account for 34.81% of the world's population. [. . .] Civil law (exclusive of any Common Law), whether in "pure" or "mixed" form, is utilized by some 115 nations, or 60.21% of all nations of the world. These nations account for 59.01% of the world's population.' (footnotes omitted))

¹⁸ See Bhala, R (2000) 'Five Theoretical Themes in the World Trade Organization Adjudicatory System' (6) *ILSA J. Int'l & Comp. L.* 437 at 442.

lines when considering the field as a whole. As such the issue of membership in a legal family, let alone whether it has a dual character, typically will not come up. This Article, however, by subjecting international law to a comparative analysis, lifts the veil obscuring the natures, obvious or not, of international law.

Once the comparative analysis is undertaken and the evidence even marginally mustered, as is undertaken in this Article, it is indeed objectively clear that the Civil and Common Law are the significant contributors of the style and character of international law. Furthermore, it is also clear that neither predominates in influence or in representation throughout international law today. As such, the two traditions, Common Law and Civil Law, are the two primary parts of international law. Thus, when viewed correctly, international law is obviously a dual system of Civil and Common Law.

In a Mixed Jurisdiction, the Public Law Tends to be Common Law-Like, While the Private Law Tends to be Civil Law-Like

One of the most awkward factors for international law is the fascinating observation that Mixed Jurisdictions' private law tends to be Civil Law-like and their public law tends to be Common Law-like.¹⁹ This characteristic is, as an initial matter, difficult to consider for international law because the international law that we tend to discuss is already considered public law, indeed it is referred to as 'Public International Law'. In contrast, 'Private International Law' traditionally covered what in the United States is called 'conflicts of laws'.²⁰ Despite this difficulty, it is nonetheless possible, if admittedly occasionally contrived, to view international law in a few different ways that show that there is an emerging pattern of Common Law-like attributes within a so-called public side and Civil Law-like attributes within a so-called private side of international law.

While novel, perhaps the best and most accurate way to handle this issue is to divide international law itself into a public and private-type framework. By analogy to domestic systems, the international institutions are accorded the role of the government or public body while the states, the subjects of international law, are accorded the role that private parties, individuals, are accorded within a domestic legal system. Thus, the law governing the actions of international law institutions would be the public law component of international law. The international law regulating interstate or transnational behaviours would then constitute the 'private' law component of international law. Applying this framework we can indeed see a division such as occurs within Mixed Jurisdictions. Within this designated international 'public law', we can see that the behaviour of international institutions and their interaction with the state members tend to reflect Common Law conceptions of public law. Those conceptions include independence of the judiciary; separation of powers; methods of selection of judges (from practice, not via a judge school); and with respect to international law's direct application to the new subjects of international law, individuals in human rights contexts, free speech, due process of law, and freedom from arbitrary arrest.²¹ These are all traditionally considered to be Common Law style public law norms, and all shared by the Mixed Jurisdictions.²² In contrast, the interstate international law obligations, what this analogy is designating as the 'private law' part of international law, are usually a result of treaty obligations, interpreted according to the Civil Law-like Vienna Convention on Treaties.²³ Admittedly, this is a crude approximation to the public-private law split within domestic legal

¹⁹ Palmer *supra* n 4, at 8-10.

²⁰ See Janis & Noyes, *supra* n 10 at 767

²¹ Palmer *supra* n 4 at 9-10.

²² *Id.*

²³ Treaties are often interpreted in a Civil Law style, *see* Schadbach, *supra* n 15 at 386, n. 321.

systems and it deserves more attention than that briefly provided here, but it nonetheless provides some basis for the contention that international law is similar to Mixed Jurisdictions in this regard.

Admittedly, this issue, the public-private law division among Civil-Common Law norms, is complex and not as easily applicable to the so-called public international law.²⁴ Perhaps the issue is that international law is still in the early stages of development in comparison to domestic legal systems and until international law is more firmly involved in private law matters, such as may be the case in the area of contracts, this criteria is simply not as amenable to consideration.²⁵ Or perhaps this issue is simply not relevant to international law – where individuals have relatively little role and where the states are not really easily analogised to private parties. If so, then that failure should not prejudice any determination of whether or not international law is akin to a Mixed Jurisdiction. Indeed, other jurists have noted that this last criteria may not even be a necessary Mixed Jurisdiction characteristic.²⁶

International Law and the Specific Characteristics of Mixed Jurisdictions

Surprisingly, more easily considered than the general characteristics of Mixed Jurisdictions are the similar specific characteristics of Mixed Jurisdictions and their applicability to international law. This relatively straightforward analysis may reflect the underlying similarity of the nuts and bolts of international law and of the Mixed Jurisdictions. Employing Palmer's criteria, the question is whether international law has the following specific Mixed Jurisdiction shared characteristics:

1. Similar Origins of the Mixed aspect of the Jurisdiction
2. Similar Judicial Character
3. Similar Linguistic Issues
4. Similar Approach to Precedent and Legal Sources
5. Similar Reception of the Common Law
6. Similar Creativity
7. Similar Reception of Anglo-American Procedure
8. Similar Style of Commercial Law.²⁷

As the analysis below suggests, the application is not exact, with international law lacking some of the characteristics – but then not every Mixed Jurisdiction has all of these characteristics.

²⁴ Indeed, so-called public international law now involves private parties and their private relations. Increasingly private parties are having direct involvement with international law, through human rights or international contract laws and so on. Thus, tort-like actions may now fall under international law – though a public component must also be involved. *See, e.g., Kadic v. Karadzic*, 70 F.3rd 232, 245 (2nd Cir. 1995), cert denied 518 U.S. 1005 (1996). Private contracts between parties of different nationalities may also be covered by treaty law. *See, e.g., United Nations Conference on Contracts for the International Sale of Goods*, Vienna, Austria, Mar. 10-Apr. 11, 1980, Final Act, U.N. Doc. A/CONF.97/18 (Apr. 10, 1980) (CISG); *The Convention on the Carriage of Goods by Sea*, Mar. 31, 1978, 17 I.L.M. 608 (Hamburg Rules).

²⁵ Much contract and commercial law is subject to international law regulation - through such international law as the CISG.

²⁶ Visser, *supra* n 3 at 47

²⁷ See Palmer *supra* n 4 at 76-80.

The Similar Origins of Mixed Jurisdictions

Mixed Jurisdiction systems were typically 'mixed' as a result of conquest (typically, a Civil Law system coloniser defeated by a Common Law system coloniser) or through a Civil Law system gradually suffering such intense contact with the Common Law that it eventually adopted Common Law characteristics.²⁸ The development of modern international law is similar. Modern international law was originally heavily influenced by the Civil Law environment in which it was born in the sixteenth and seventeenth centuries. But, for international law a story could legitimately be told that like the Mixed Jurisdictions, the Common Law 'conquest' of international law followed the defeat or destruction of the influence of the Civil Law countries on international law following the First and Second World Wars, and the concomitant rise in the Anglo-American Common Law influence on international law. That development has accentuated in this modern period of international institution building, institutions that are frequently employing Common Law ideas and mechanisms, no doubt as a result of the powerful influence and involvement of the Common Law United States. Even the EU's potential Civil Law counterweight in the development of international law is somewhat offset by the EU's own very powerful Common Law member – the United Kingdom.²⁹

Furthermore, the origin and formation of a Mixed Jurisdiction is often fraught with internal disputes between those trying to preserve the original Civil Law system and those permitting or pushing the Common Law into the system – with language and culture playing a part in the conflict.³⁰ Nor does the battle ever stop – for that same battle is present to some degree in every Mixed Jurisdiction to this day. The participants include the 'purists' ('keep the Common Law out'), the 'pragmatists' ('if a Common Law idea works, let us use it'), and the 'pollutionists' (arguing to use Common Law as 'it is better law' or 'it is what I know').³¹ International law has experienced and is presently experiencing these same 'turf' battles.³² International law 'purists' decry the growth of powerful international law courts, *stare decisis*, and so on – in other words those aspects of the Common Law system invading the traditional Civil Law.³³ On the other hand, 'pragmatists' in international law look to solve the problems of the day, especially when the issue appears novel to international law or the international law institution is new, often by employing Common Law techniques and norms.³⁴ Perhaps it is that the 'pollutionists' in international law tend to be Common Law practitioners/jurists transplanted into the international law world and bringing their traditions in the name of what

²⁸ See *id* at 18-19. Most were created as a result of conquest, Scotland was formed as a result of the intensive interaction between it and its southern neighbour. See MacQueen, HL (2001) 'Mixed Jurisdictions and Convergence: Scotland' (29) *Int'l J. Leg. Inf.* 309 at 309; Tetley, W (2000) 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (60) *La. L. Rev.* 677 at 688. The unusual member of the Mixed Jurisdictions is Israel which purposively adopted Civil Law aspects after it became independent. See Fassberg, *supra* n 1 at 155-58. Palmer *supra* n 4 at 5.

²⁹ Perhaps the involvement of Ireland and the United Kingdom in the EU will eventually turn the EU into a Mixed Jurisdiction. See Tetley (2003) *supra* n 5 at 206.

³⁰ Palmer *supra* n 4 at 18

³¹ *Id* at 31-32.

³² Indeed, it may be that some of the criticism of the idea presented in this Article will be motivated by those seeking to preserve a Civil Law-like international law in the face of the continuing Common Law incursions.

³³ See generally Bhala, R (1999) 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' (14) *Am. U. Int'l L. Rev.* 845 (providing a detailed discussion of the origin, myths, and arguments concerning the use of precedence/stare decisis in international law in general).

³⁴ *Id.* See also Bhala, R (2001) 'The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)' (33) *Geo. Wash. Int'l L. Rev.* 873 (providing just the sort of pragmatic response suggested above).

they might consider to be the ‘better’ system or sometimes through simple ignorance of the Civil Law aspects of international law, sometimes without even realising that the Common Law may be perceived as an alien invasion. This last is especially the case when new international law institutions or norms are created and powerful Common Law countries seek application of their traditions, believing them to offer the better law.³⁵

In these ways, and others not explored due to space limitation in this Article, international law shows substantial similarity in its origin to that of the Mixed Jurisdictions.

Similar Judicial Character

The Mixed Jurisdiction judicial character, like other public law aspects of Mixed Jurisdictions, tends to be closer in style to the Common Law.³⁶ The judiciaries of the Mixed Jurisdictions tend to employ generalised courts that are centralised.³⁷ The judges tend to be more powerful than is typical in Civil Law systems, they may engage in law making, and are usually drawn from the practicing bar.³⁸ The question is then whether the judiciary/ies of international law are similar in character to those of the Mixed Jurisdictions.

The international law courts tend to be specialised and diffuse, not centrally organised or controlled from above. Furthermore, the use of precedent and *stare decisis* is new and while prevalent in some of the significant courts, is still considered problematic.³⁹ However, the international judges themselves may increasingly resemble the Common Law judges more than the Civil Law judges – coming from practice, not being civil servants, and increasingly viewing themselves as significant if not equal participants in the growth and development of international law. For example, the international law courts, like Common Law courts, tend to take powers for themselves that they view as necessary, such as creating procedural or other rules, as opposed to the legislatures (or for international law – the state parties to a treaty regime) being the sole source for such rules. While still unusual in international law, this is an issue that is showing up with increasing frequency as these courts mature. For example, the WTO has itself dealt with the issue of accepting *amicus* briefs, asserting that it had the power to decide the issue and then exercising it, much to the consternation of many WTO members.⁴⁰ Similarly, the ECtHR, now a mature court, has started to expand its reach into areas that it originally argued were beyond its competence.⁴¹

Consequently, with respect to this specific judicial characteristic of Mixed Jurisdictions, at most it can be said that the international law judiciary is beginning to resemble and *may* soon be like those of the Mixed Jurisdictions, but it is perhaps not yet at that point. Though this may be more of a function of the slow development of these new international law institutions as they increasingly challenge traditional notions of state

³⁵ See e.g., Langer, M (2005) ‘The Rise of Managerial Judging in International Criminal Law’ (53) *Am. J. Comp. L.* 835 at 856-58 (the procedural rules for the International Criminal Tribunal for Yugoslavia were drafted reflecting adversarial notions as a result, in significant part, of the role of the United States).

³⁶ Palmer *supra* n 4 at 36.

³⁷ *Id.*

³⁸ *Id.* at 37-38.

³⁹ See Bhala *supra* n 33; Bhala *supra* n 34; and Bhala, R (2000) ‘The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two Of A Trilogy)’ (9) *J. Transnat'l L. & Pol'y* 1

⁴⁰ See e.g., WTO AB decision to allow *amicus* briefs. Appellate Body Report, United States-Import Prohibitions of Certain Shrimp and Shrimp Products (‘Shrimp-Turtle’), WT/DS58/AB/R, adopted 12 October 1998. See also Keller, J (2005) ‘The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments’ (33) *Int'l J. Legal Info.* 449.

⁴¹ See Mowbray, A (2005) ‘The Creativity of the European Court of Human Rights’ (5) *Hum. Rts. L. Rev.* 57.

sovereignty. Accordingly, examination of this characteristic suggests that international law is perhaps an emerging Mixed Jurisdiction.⁴²

Similar Linguistic Issues

As a consequence of the conquest by one and then another imperial power over an indigenous people and over non-indigenous colonists, Mixed Jurisdictions typically have serious linguistic issues.⁴³ There may be multiple official or working languages including an indigenous language, a language associated with the Civil Law tradition (the original colonial power), and one associated with the Common Law - English (following conquest by the United States or Britain). So long as both the Civil Law and Common Law languages remain viable, with jurists having working knowledge of both, the dual character of the system can be maintained. Problems start to occur when the language associated with one of the traditions, usually the Civil Law, ceases to be well known among jurists, lawyers, and members of the government.⁴⁴ In that case the vitality of the Civil Law within the Mixed Jurisdiction suffers.⁴⁵

International law shares similar linguistic issues. Historically, the primary languages of modern international law were Latin and French, though there were attempts by the English, and later the Americans to make English one of the languages of international law.⁴⁶ International law jurists would be conversant and proficient in these languages, allowing them access to primary and secondary legal sources, typically from sources within the Civil Law system. Today, increasingly the international language is English, with the consequence that there is greater resort to writings, legal opinions, and texts written in English.⁴⁷ That trend suggests that those sources will then more likely reflect the legal traditions that employ English as their primary language – and those systems typically come from the Common Law tradition.⁴⁸ In contrast, a working knowledge of Civil Law languages tends to be confined within those specific countries themselves, with English as the universal second language across even those countries within the Civil Law tradition. Sadly, the fact that international law shares similar linguistic issues with Mixed Jurisdictions means that, like the Mixed Jurisdictions, these linguistic issues may contribute to the decline of the role of Civil Law in international law.

⁴² See Glenn, HP (2003) 'Mixing It Up' (78) *Tul. L. Rev* 79 at 85-86 (discussing the idea that systems can transform from one tradition to another – mentioning U.S. state of Michigan as an example of a system that was once Civil Law and yet where today there is little trace of that heritage).

⁴³ Or because of the other unique circumstances of their creation (e.g. Israel's citizens originally comprising migrants from all around the world), Palmer *supra* n 4 at 41.

⁴⁴ See Loubser, M (2003) 'Linguistic Factors into the Mix: The South African Experience of Language and the Law' (78) *Tul. L. Rev.* 105 at 144-47.

⁴⁵ See e.g., Örüci *supra* n 12 at 102 (noting the potential of this problem in Scotland where 'there are no longer "civilian trained" lawyers, nor are foreign languages well known').

⁴⁶ See Shelton, D (1997) 'Reconcilable Differences? The Interpretation of Multilingual Treaties' (20) *Hastings Int'l & Comp. L. Rev.* 611, 613-615.

⁴⁷ See e.g., Romano, CPR (2003) 'The Americanization of International Litigation' (19) *Ohio St. J. on Disp. Resol.* 89 at 115-116

⁴⁸ See Loubser *supra* n 44 at 107 (noting that the language structure may itself influence the development of the law and using German as an example of a language whose structure may have contributed to the German legal system's style).

Approach to Precedent and Legal Sources

Unlike many modern Civil Law systems with aspects of Common Law, the Mixed Jurisdictions employ precedent, at a minimum as a *de facto* primary source of law, if not as a *de jure* primary source.⁴⁹ In light of the role precedent plays in marking the difference between the Civil Law and Common Law, it should not be surprising that the issue of precedent should be a defining characteristic of Mixed Jurisdictions. Indeed, the failure to employ, at a *de facto* level at a minimum, precedent and *stare decisis* as a primary source of law may end up ruling out many systems from classification as a Mixed Jurisdiction. The question is then whether international law satisfies this criterion.

Supposedly inferior to treaty law, according to the ICJ statute, an authoritative statement on the sources of international law, judicial decision are only meant to comprise a secondary source of law in international law.⁵⁰ And yet, in reality, they live somewhere between the Common Law's view that at times they may be considered primary law and the Civil Law's view that they are secondary law. This judicially created international law is usually in the form of the authoritative precedent, *stare decisis*. While not binding as a *de jure* matter, it is increasingly *de facto* binding.⁵¹ For example, studies of the use of precedent in the most dynamic of the present-day international tribunals, the WTO Appellate Body, show its increasing use and importance.⁵²

Thus, international law, like the Mixed Jurisdiction, employs an approach to precedent that is, as a practical matter, somewhere between the Common Law and the Civil Law, with a definite tilt towards the Common Law approach. Consequently, this specific Mixed Jurisdiction characteristic appears to be satisfied as far as international law is concerned.

Reception of the Common Law

This Mixed Jurisdiction characteristic refers to a pattern of impact of Common Law into specific fields of the private law of Mixed Jurisdictions.⁵³ Generally, the Common Law has impacted some fields more than others, with the most impact in the area of delict, and the least in property.⁵⁴ Of course, such an analysis for international law is difficult in light of the public nature of international law and the limitations on an exact correspondence between

⁴⁹ Palmer supra n 4 at 45-46.

⁵⁰ Article 38(1) of the Statute of the International Court of Justice provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, Article 38, available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (website of the ICJ, last checked Jul. 3, 2007).

⁵¹ See Bhala supra n 33.

⁵² See id. See also, Haazen, OA (1997) 'Book Review Precedent In The World Court. By Mohamed Shahabuddeen' (38) *Harv. Int'l L.J.* 587 at 587-588.

⁵³ Palmer supra n 4 at 53. The reception is usually Common Law into the Mixed Jurisdictions and on top of the Civil Law system, due to the nature of the origin of the Mixed Jurisdictions (usually, Common Law conquest of the Civil Law jurisdiction— though Israel provides an example of the opposite direction).

⁵⁴ Reid, supra n 3 at 25; Palmer supra n 4 at 57; Fassberg, supra n 1 at 156 (describing similar reception during the English U.N. Mandate over pre-independence Israel).

domestic and international legal fields.⁵⁵ But, if instead of focusing on specific fields, the focus is on the style and the patterns of the reception, it is possible to find these characteristics present to some extent within international law.

While not understood completely, some preliminary consideration of the style of reception of the Common Law into Mixed Jurisdictions suggests that the reception occurs when the Civil Law field is, relatively speaking, both general and vague.⁵⁶ Those criteria then open the door to Common Law intrusions, as in certain areas of delict, such as negligence.⁵⁷ In contrast, it may be that the Common Law fails to be received into those fields where the Civil Law and Common Law concepts are diametrically opposed, such as in property.⁵⁸ Also reception fails where there are strong cultural connections to the law, as in family law.⁵⁹ Those cultural connections prove to be a hardy barrier to any foreign Common Law characteristics.

These notions may also apply to the pattern of Common Law intrusion into international law. For example, the greatest impact of the Common Law in international law may be in judicial behaviour – perhaps this is because the judicial institutions and the regulation of international judges are both new and vague. It is, after all, unclear just what should be the role of international law judges, and in any event it is questionable just how would one control them if they strayed off the permitted path. In contrast, those areas of international law that are specific and/or closed may be less receptive to Common law characteristics. An example may be the field of interpretation of treaties which, as noted earlier, might be the international functional equivalent of contract law within the private law. The detailed and clear Vienna Convention on Interpretation of Treaties may have been more impervious to the influence of the Common Law than other parts of international law. This is an area that needs further exploration, though as an initial matter, it might be fair to suggest that international law has suffered its greatest Common Law ‘infection’ in those areas that are general and vague – as has largely been the case in the Mixed Jurisdictions.

The role of culture in international law is less clear. While cultural relativism has been bandied about, it and culture otherwise is a problematic concept that has not found an easy reception within international law.⁶⁰ As such an equivalent concept within international law is not so easily identified. One such concept, raised but not examined here, is whether it might be the case that where international law has been created as a result of specific historical factors, it might be less amenable to the gradual Americanisation, with its Common Law approaches, that is perhaps present in so many other parts of international law. However, consideration of that issue is not pursued here. It is sufficient that international law, like the Mixed Jurisdictions, might be more common law-like in those parts that are more general and vague than in its parts that are more structured and specific.

⁵⁵ Indeed, Palmer notes that both Israel and Quebec cannot fit into this criteria because of some of their unique aspects. Palmer *supra* n 4 at 54.

⁵⁶ Palmer *supra* n 4 at 59

⁵⁷ *Id.* at 57.

⁵⁸ *Id.*

⁵⁹ *Id.* at 57-59

⁶⁰ See, Wyman, JH (1997) ‘Comment, Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law’ (6) *J. Transnat'l L. & Pol'y* 543; Teson, FR (1985) ‘International Human Rights and Cultural Relativism’ (25) *Va. J. Int'l L.* 869.

Creativity

This criterion is less a definitional requirement and more of a description of the creativity that accompanies the mixing of the two primary members of the Western Legal Traditions. Unique devices are created through the interaction of the two bodies of law.⁶¹ International law, as already pointed out, also has no shortage of unique devices, some a consequence of the two traditions interacting. For example, it has been argued that the new rules of procedure for the new International Criminal Court may fairly be described as ‘unique’, and were the result of the blend of the two traditions resulting in a system that arguably does not belong to either.⁶²

Reception of Anglo-American Procedure

Palmer points out that the ‘juxtaposition of civil law in alien procedural surroundings is a phenomenon unique to [the Mixed Jurisdictions]’.⁶³ The alien procedure is of course the common law style of procedure.⁶⁴ Furthermore, channelling the substantive Civil Law through a Common Law procedural mechanism will have a noticeable impact on the substantive law.⁶⁵ Common Law procedure in this context includes, among other things, common law oral adversary proceedings with a correspondingly larger role for the attorneys than is traditionally found in the Civil Law procedure, Common Law style witness cross-examination, the finality of the first instance judgment and the limited role of appeals, the ‘various writs’, and the overarching presence of the ‘jury’ whether actually employed or not.⁶⁶ Of course, there are differences among the systems depending on the many different histories of the different systems. For example, the level and type of Common Law procedural penetration may depend on what was the stage of development of the legal system when the common law was introduced.⁶⁷ Goldstein argues that perhaps the ‘primary explanation’ for the application of Common Law procedure ‘is the emotional, almost religious attachment of the adherents of the Common Law procedure to their system.’⁶⁸ Might this same passion by common law trained international jurists result in a form of Common Law procedure being applied in the international system? As we shall see, indeed, it appears that international law is undergoing the same experience as that of the Mixed Jurisdictions.

But, international procedure, unlike domestic procedure, is hard to identify with any degree of uniformity due to the diffuse and independent nature of international adjudicatory bodies. Nonetheless, the method of formation of these many and different procedural systems can be considered together. They are typically created through two methods. As an initial matter, the state parties to a tribunal will usually decide on the procedure, either through a treaty, such as the WTO’s Dispute Settlement Understanding (the ‘DSU’) or by mutual agreement before arbitration begins. The second method of procedure formation derives from the fact that despite the parties’ attempt to create the procedure in anticipation of the

⁶¹ Palmer *supra* n 4 at 61-63. An example is the Scottish form of a trust (it does not divide the equitable and legal ownership). *Id.* at 63.

⁶² Kress, C (2003) ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (1) *J. Int’l Crim. Just.* 603 at 604-605

⁶³ Palmer *supra* n 4 at 63, though Goldstein notes that Scotland is anomalous in this regard. Goldstein, S (2003) ‘The Odd Couple: Common Law Procedure And Civilian Substantive Law’ (78) *Tul. L. Rev.* 291 at 292.

⁶⁴ Though perhaps there is not as large a difference between the Civil and Common Law procedure as some claim, but rather for the most part it is simply a matter of ‘degree.’ Goldstein, *supra* n 63 at 296.

⁶⁵ Palmer *supra* n 4 at 63 and 66,

⁶⁶ *Id.*, and Goldstein *supra* n 63 at 297.

⁶⁷ Palmer *supra* n 4 at 63-65.

⁶⁸ Goldstein *supra* n 63 at 293.

litigation, it is usually not possible for all procedural issues to be resolved ahead of time. Accordingly, the court must itself then end up, as in the Common Law,⁶⁹ deciding on procedural issues itself as it is not easy to go back to the state parties to get them to agree on changes or additions to the previously agreed procedures, particularly where the procedures are memorialised in a multilateral treaty.

The former attempt, pre-agreement between the state parties on the procedural rules, will often result in a procedural system that is a mix of Common and Civil Law ideas - given the involvement of Common and Civil Law states in the development of the rules.⁷⁰ That in itself is an insertion, a reception, of Anglo-American procedures into a system historically more Civilian than Common law-like. The second method, judicial creation of the rules, also opens the system up to Anglo-American procedure, particularly where the arbitrators/judges or parties are trained in the common law procedure and hence might feel 'passionately' about the superiority of common law procedure over that of the Civil Law.⁷¹ Indeed, the idea that the court can set up its own procedural rules is itself quite Common Law-like and typical for Mixed Jurisdictions.⁷²

Furthermore, when we examine the procedural systems of international bodies, we see a strong Common Law influence – even though the jury is typically absent from the system. For example, the limited role of appeal at the WTO accords well with the Common Law idea of limited appeals. The WTO's Appellate Body, as a formal matter and as its primary method of practice, will typically only hear appeals of law, and not of the facts that were developed at the initial panel hearing.⁷³

Of course, there are plenty of Civil Law aspects to the procedure employed in international law. There are even some procedural devices that are unique, as all legal systems have unique features. But it may be fair to say that the procedures found in international law are frequently of a Common Law style and hence, as in the Mixed Jurisdictions, the substantive law may be filtered and altered by this Common Law overlay. Nonetheless, despite Common Law aspects to the procedures frequently employed in the international law system, it can not be said that the procedure is entirely or even significantly Common Law-like due to the diffuse nature of that body of international procedural law. Once again, one of the integral characteristics of Mixed Jurisdictions is more suitable to domestic systems than to the international system. So, although international law may have tendencies that satisfy this Mixed Jurisdiction characteristic, over all perhaps, international law does not satisfy this characteristic. Of course, not all Mixed Jurisdictions satisfy all of the criteria. Indeed, it has been asserted that Israel and Scotland do not satisfy this procedural reception characteristic as they never employed a civilian style of procedure that would then suffer a Common Law procedural incursion.⁷⁴ Accordingly, the quasi-failure of international law under this characteristic should not be fatal to this Article's attempt to find commonalities between international law and the Mixed Jurisdictions as a whole.

⁶⁹ Palmer *supra* n 4 at 65

⁷⁰ Costa, JE (1998) 'Double Jeopardy And Non Bis In Idem: Principles Of Fairness' (4) *U.C. Davis J. Int'l L. & Pol'y* 181 192 ('The Draft Statute for an International Criminal Court embodies both Common Law and Civil Law principles. The drafters incorporated elements of both legal systems and blended them together to fashion an international law satisfactory in both civil law and common law countries.')

⁷¹ Goldstein notes that this passion is even evident in the use by Common Law attorneys of the pejorative word 'inquisitorial' to describe Civil Law procedure. Goldstein *supra* n 63 at 293.

⁷² Palmer *supra* n 4 at 65

⁷³ Dispute Settlement Understanding, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, APPELLATE REVIEW – STANDING APPELLATE BODY, art. 17.6, [33 I.L.M. 1125 \(1994\)](#).

⁷⁴ Palmer *supra* n 4 at 64-65.

Commercial Law Has Become Common Law-Like

The final specific characteristic of Mixed Jurisdictions to be considered here is that Mixed Jurisdictions have usually adopted Common Law commercial law, eventually going so far as to totally replace their Civil Law-like commercial law.⁷⁵ Despite the fact that many of the Mixed Jurisdictions were the result of English or American conquest of formerly French, Dutch or Spanish colonies, this adoption of the Common Law-like commercial law was essentially carried out through voluntary assimilations.⁷⁶ In part the reasons for this voluntary adoption have had to do with the recognition that adoption of significant elements of the Anglo-American commercial law, the law of the ‘dominant’ economies of the world, would be in the financial self interest of the Mixed Jurisdiction.⁷⁷ Thus, over time the pre-existing Civil Law commercial law, often derived from the European Law Merchant, has been replaced.⁷⁸ The question is then whether we can discern a comparable move of international commercial law from a traditional Civil Law to a more Common Law form.

The possibility that this characteristic may be applicable to international law can be considered from two different perspectives – both somewhat artificial due to the disconnect that must necessarily exist between public international law and domestic legal fields, such as the private or commercial law. The first, and perhaps less contrived, is by the more directly comparable consideration of the existing international law that regulates individuals’ transnational commercial interactions. The second method is through employment of analogy, as before in this Article, by substitution of states in the role of the private actors in commercial law and then by considering how the law impacting commercial relations between states has developed.

The international law governing individuals’ transnational commercial actions has ancient roots, though the modern form is most closely associated with the law that grew out of the Law Merchant – *Lex Mercatoria*.⁷⁹ Historically, the law merchant was influenced more by the Civil Law, though it was to a great extent largely immune to the formal law – having been developed by merchants for merchants, largely outside the control of the public courts.⁸⁰ Gradually, however, the commercial law was brought into the public realm and at that point was influenced by the Civil Law tradition present in most of the commercial jurisdictions of the world.⁸¹

Centuries later, and with the tremendous growth and influence of the American and British economies, there is indeed evidence for a strengthening of the Common Law within international (or transnational) commercial law, particularly as a result of American dominance in the world economy in the twentieth century.⁸² For example, the Hague-Visby

⁷⁵ Id at 66.

⁷⁶ Palmer examines this voluntary adoption in great detail for many of the Mixed Jurisdictions. Id. at 67-76.

⁷⁷ Id. at 76.

⁷⁸ Id. at 80.

⁷⁹ Berman, HJ (1985) *Law and Revolution: The Formation of the Western Legal Tradition* Harvard Univ. Press at 333.

⁸⁰ Id at 346-347. But see Kadens, E (2004) ‘Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law’ (5) *Chi. J. Int’l L.* 39 (critiquing Berman’s depiction of the history of the Law Merchant and arguing that there was a greater and earlier role played by the state).

⁸¹ Berman supra n 79 at 348.

⁸² For discussion of the United States declining to enter into private law treaties because they were based on Civil Law ideas, see Nadelmann, KH (1954) ‘Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law’ (102) *U. Pa. L. Rev.* 323; see also, Golove, DM (2000) ‘Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception Of The Treaty Power’ (98) *Mich. L. Rev.* 1075, n 551 (‘Private international law treaties provide a good example: the United States, like the British, long resisted joining because the conventions were based upon civil rather than common law premises.’)

Rules,⁸³ concerning bills of lading, are arguably Common Law in character, while the Hamburg Rules, an alternative set of rules for bills of lading, are arguably Civil Law in character, and so far the Hamburg Rules have encountered great difficulties in universal adoption.⁸⁴ This growing Common Law influence is no surprise; as with the Mixed Jurisdictions, this development probably reflects the strength of the Common Law economies and the need for other economies to harmonise with them in order to take advantage of the financial benefits of easier access to those markets. Thus, if this international commercial law is considered, then it is possible to discern this Mixed Jurisdiction trait, an emergence of a Common Law-like commercial law, within international law.

The problem with the preceding argument, however, is that it may be said to fall into the realm of 'private' international law, not public international law. True, there are treaties involved that set the tone for this private law, but this law does not typically involve the traditional actors of international law – the states. This issue can be circumvented as before by the employment of an analogy whereby the private actors in the domestic model are replaced with the states from the international law model, and then the consideration of international law that is the functional equivalent of the commercial law in the private context. The initial question is then what would be the functional equivalent to commercial law in this analogy – the law that regulates the economic relations between the states. The answer may be what we have come to know as 'international economic law'. That law consists of the laws found within the WTO and the other Bretton Woods Institutions, the many Bilateral Investment Treaties, and so on. The question then is, 'Can these laws be said to be in any way more Common Law-like than Civil Law-like?' Or will the analogy simply not hold up?

One way to approach this question is to consider within the Mixed Jurisdiction model what characteristics of the commercial law are Common Law-like. As it turns out, in the Mixed Jurisdiction model it was not really a battle between substantive rules and understandings of the commercial law, but simply an effort to harmonise the Mixed Jurisdiction's commercial interests with American and British commercial interests. Applying that underlying rationale, the question then becomes whether we see anything similar in the development of international economic law – in other words whether there has been a move towards acceptance of Anglo-American rules and values about international economic relations. The consideration of that question is obviously beyond the scope of this Article. Yet, it is clear that the Bretton Woods and post-World War Two, and even post-Cold War era, are periods when there has been significant economic influence by the United States and Britain, as well as by Canada and Australia. London's place as the financial capital of the world, and Washington's grip on the Bretton Woods institutions as well as its overpowering economy cannot but have had significant influences on the development of international economic law. Furthermore, the WTO was moulded in significant respects by the common law countries.⁸⁵ Also, the accession agreements for new members are heavily impacted by America. For example, China's entry into the WTO took place only after it had acceded to American demands. Indeed, any new member of the WTO must secure the agreement of the United States (and the European Union) before it can truly take advantage of the benefits of

⁸³ Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), reprinted in 6 Benedict on Admiralty doc. 1-2 (7th rev. ed. 2004); Protocol Amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14., 1984), reprinted in 6 Benedict on Admiralty, supra, doc. 1-2A.

⁸⁴ Tetley, W (2000) 'Uniformity of International Private Maritime Law--The Pros, Cons, and Alternatives to International Conventions--How to Adopt an International Convention' (24) *Tul. Mar. L.J.* 775 at 802.

⁸⁵ The role of Canada, the United States, the U.K., New Zealand, and Australia in the Uruguay Round leading to the birth of the WTO cannot be over stated.

WTO membership.⁸⁶ Thus, while this does not result in a specifically Common Law-like character to international economic law, it certainly imparts a peculiarly Anglo-American focus. In that respect, international law is similar to the Mixed Jurisdictions – in that both Mixed Jurisdictions and international law have generally adapted their economic law to Anglo-American rules and expectations.

CONCLUSIONS

After having briefly considered the nature and characteristics of international law alongside the specific and general traits of Mixed Jurisdictions, and when viewed in the totality, international law appears, at least in part, to share, in some significant respects, many of the characteristics of Mixed Jurisdictions. Of course, international law does not satisfy all of the criteria. After all, how could it? It is not a domestic legal system, and some of the criteria are particularly domestic law orientated. But then each of the different legal systems that comprise the Mixed Jurisdiction family also more or less satisfy most, but not all, of these criteria. In any event, perhaps all these different criteria are not the sole measure of whether a system is a Mixed Jurisdiction. Some scholars have identified other specific criteria that are common to all or to a sufficient number of Mixed Jurisdictions.⁸⁷ Perhaps the most relevant for this Article is that of William Tetley, that Mixed Jurisdictions are those ‘where debate over the subject takes place.’⁸⁸ Though that debate is not presently taking place in international law, hopefully this Article will set the stage for satisfaction of this characteristic. Or, perhaps the notion of ‘emerging’ Mixed Jurisdictions is more appropriate for international law. In other words, there are some legal systems that are in the process of becoming Mixed Jurisdictions.⁸⁹

Nonetheless, the congruence between the characteristics of international law and the Mixed Jurisdictions, as shown above, is sufficient to support productive comparative analysis. In particular, that analysis may be used to support international law ‘borrowing’ ideas from the Mixed Jurisdictions in order to help resolve emerging issues in international law. This is especially important in light of the fact that international legal institutions rely, often unconsciously, to a significant extent upon national legal systems for much of their present development - from substantive norms to procedural rules.

But what are the benefits for the Mixed Jurisdictions? Perhaps for the Mixed Jurisdictions, the real success of this exercise is to show the legal scholars of the world that Mixed Jurisdictions are potentially directly relevant to their own legal systems – be it a Common Law, Civil law, Islamic Law, or Socialist legal system, or some form of mixed system. The reason for this direct applicability is that international law is everyone’s law. It is part of the domestic law, be it via domestically enacted legislation or directly applicable – whether applicable in a monist or dualist legal system. Even in ‘isolationist’ America, ‘International law is part of [U.S.] law.’⁹⁰ And this is more and more the case with the constant growth of international law. This impact is now even applicable to individuals, as much of that new international law is directly applicable to them through human rights law. It is even applicable in the commercial world, through the direct effect of the regulation of economic actors as a result of the increasing prevalence of international economic law. In

⁸⁶ See, e.g., How to join the WTO: the accession process (WTO webpage) http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited August 10, 2007).

⁸⁷ See Reid *supra* n 3 at 21-25.

⁸⁸ Tetley *supra* n 28 at 680.

⁸⁹ Glenn *supra* n 42 at 79-80.

⁹⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

other words, because in every country international law is directly relevant, as such the study of Mixed Jurisdictions may be of vital importance for all countries of the world. If so, then the study and knowledge of those small and far-flung Mixed Jurisdictions will take on a level not otherwise anticipated or predicted.⁹¹

Finally, if, through imagination it is possible to consider international law, a public law-based system that many consider sui generis, juxtaposed with these Mixed Jurisdictions, then through similar imagination, and courage, perhaps other systems can be laid alongside the Mixed Jurisdictions and perhaps with productive results for both. Indeed, the example presented in this Article suggests that there may be benefits in considering other seemingly disparate systems against each other and engaging in a comparative analysis. While many times the results may be frustrating or inconclusive, the fact that there may be successful and useful comparisons supports the idea that as comparativists, we need to be open minded to new avenues of research and comparison.

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⁹¹ That being said, some of the Mixed Jurisdictions are in fact often in the centre of world affairs, such as South Africa and Israel, or have issues that command the world's attention – such as the future of Quebec in Canada, or the on-going civil war in Sri Lanka, or even the calamitous events flowing from Hurricane Katrina in Louisiana. Furthermore, others of these Mixed Jurisdictions have played a role in the development of the modern world significantly beyond what their small sizes and populations would have suggested – such as Scotland 'where civilization was born' See, e.g., Herman, A (2001) *How the Scots Invented the Modern World: The True Story of How Western Europe's Poorest Nation Created Our World & Everything in It* Three Rivers Press.