

## **VERTICAL COMPARATIVE LAW METHODS: TOOLS FOR CONCEPTUALISING THE INTERNATIONAL RULE OF LAW**

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### **Abstract**

International institutions are increasingly engaged in the exercise of public power – traditionally exercised by states – that might adversely affect individuals. Consequently, calls have arisen for checks and balances in order to provide affected individuals with adequate avenues for recourse and redress. Developing the ‘rule of law’ concept at the international level is one way in which this issue has been addressed, although only to a limited extent. This article explores the potential of comparative law methodology as a means to further this conceptualisation. It is argued that ‘vertical, bottom-up’ comparative law methods (as expounded by this article) can assist lawyers inspired by certain concepts within national legal systems (such as the rule of law) to apply these concepts – or the ideas behind them – at the international level. Furthermore, it is argued that employing comparative law methodology in this manner is increasingly justified by the emergence of a ‘common zone of impact’ – i.e., the area of overlap between national and international law, where individuals are adversely affected by the exercise of public power by states and international institutions alike. The authors propose a comparative law typology and discuss what risks might typically be involved in employing comparative law methods in general, as well as ways in which these risks could potentially be mitigated. Specifically, the article sets out a particular vertical, bottom-up comparative law method, as employed in the context of two separate doctoral research projects, both focusing on ways to enhance the accountability of international institutions: one in the context of international territorial administrations, and the other in the context of the World Bank and its Inspection Panel.

### **1 Conceptualising the International Rule of Law: The Potential of Vertical Comparative Law Methods**

*... the history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law.<sup>1</sup>*

Calls for enhancing the accountability of international institutions – defined here as the need to ‘account’ for the exercise of ‘public power’<sup>2</sup> and incorporating the

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<sup>1</sup> Roscoe Pound, quoted in J. B. Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’ (2001) 27 *Ecology Law Quarterly* at 1295-1296, and n. 1.

<sup>2</sup> This definition largely corresponds to the International Law Association’s (ILA) of ‘accountability’, which links accountability of international institutions to their ‘authority and power’, making

dual requirement to provide affected individuals with adequate avenues for recourse *and* redress<sup>3</sup> – have become a steady chorus over the past few decades. These demands for accountability flow from a situation in which international institutions are increasingly engaged in exercising ‘public power’,<sup>4</sup> traditionally exercised only by states, thereby steadily gaining in power and influence. Public international law, however, has failed to keep up with this changing reality to a significant degree.<sup>5</sup> Of specific interest for this article, is the (oft-recurring) situation in which the exercise of public power by international institutions, such as the United Nations or the World Bank, adversely affects individuals and their environment. This scenario often coincides with the weakening position of the state as traditional intermediary.<sup>6</sup> Indeed, it is suggested that international institutions are progressively exercising public power alongside states, which often results in blurred lines of responsibility and creates a so-called ‘common zone of impact’. Under this scenario, the social functions fulfilled by law in the organisation of society, such as the protection of the individual and the distribution of resources, are becoming increasingly similar in both national and international legal orders.<sup>7</sup> Seen from a different perspective, the common zone of impact describes as a situation in which individuals – at the local level – have trouble discerning whether the adverse effects they are suffering result from the exercise of public power by states, international institutions, or both – making it almost impossible to determine who is to be held accountable (see Figure 1 below).

This article suggests, as others have done,<sup>8</sup> that it might be beneficial to look to national legal systems for potential ways to enhance the accountability of international institutions. It specifically argues that, in this context, comparative law analysis of national systems is justified by the emergence of a ‘common zone of impact’. As the addressees of both legal domains continue to merge, the expectations of international law will also continue to rise. A strict separation between the two legal orders (including a separation of their respective comparative methodologies) will therefore increasingly be unwarranted.<sup>9</sup>

‘accountability’ the ‘duty to account for’ the exercise of this power. See ILA, *Accountability of International Organisations* (2004) at 5.

<sup>3</sup> See e.g. K. Wellens, *Remedies against international organizations* (Cambridge: Cambridge University Press 2002).

<sup>4</sup> For the purposes of this article, ‘public power’ is defined as power that ‘constructs the public plane or space’. See P. Allot, *Eunomia: New Order for a New World* (Oxford University Press 1990) at 336-337.

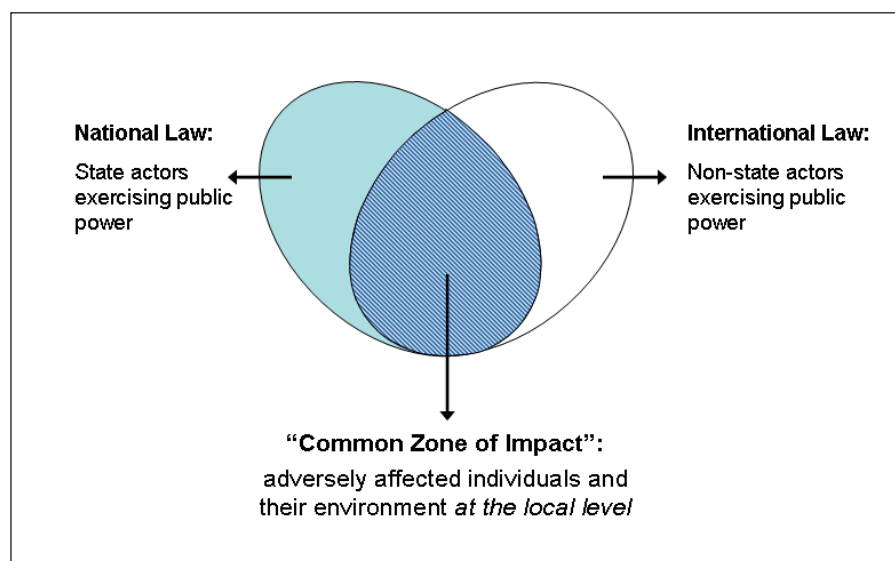
<sup>5</sup> This is reflected, for example, in the fact that non-state actors do not have standing before most international (quasi-)judicial tribunals and that international institutions cannot become signatories to most international human rights and environmental treaties.

<sup>6</sup> See e.g. M.N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003) at 232-233.

<sup>7</sup> See in general P. Allot, ‘The Concept of International Law’ (1999) 10 *European Journal of International Law* 31.

<sup>8</sup> See e.g. the *Global Administrative Law Project* of the Institute for International Law and Justice, New York University School of Law, with a project overview in B. Kingsbury, N. Krisch and R.B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68:3-4 *Law & Contemporary Problems* 15. Wiener remarks that international lawyers ‘cannot examine “the same branch of the law in other legal systems” under different conditions, because we only have one international law on this planet – only one Earth. We have no database for a cross-sectional empiricism of international law. To follow Watson’s teaching [on comparison and similarities], we would somehow need to look at other planets also facing [similar problems] and evaluate how their legal systems responded in comparison to our own.’ See Wiener, above n. 1, at 1356.

<sup>9</sup> This approach is decidedly non-positivistic and is based on the opinion that much of international law is constructed through the interaction of various actors and procedures within the international legal system. See in general J. Brunnée and S.J. Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ (2000/2001) 39 *Columbia Journal of Transnational Law* 19; and see R. Higgins, ‘Reflections from the International Court’ in M.D. Evans (ed.), *International*

**Figure 1: The ‘Common Zone of Impact’**

A prominent mechanism for ensuring accountability (of state organs exercising public power) at the national level is, for instance, the ‘rule of law’.<sup>10</sup> The exact meaning of this legal concept at the national level is often contested,<sup>11</sup> and the meaning of the concept at the international level (the ‘international rule of law’) is even more debatable.<sup>12</sup> For the purposes of this discussion, the ‘international rule of law’ is roughly conceived as consisting of similar ‘components’ as outlined by (then) UN Secretary General Kofi Annan in 2004, namely:

*Law* (Oxford: Oxford University Press 2003) 3 at 6: ‘There are not clear answers. There is a process by which optimal answers can be arrived at, with leading guidance given by those decision-makers entrusted by the international community with that task. This is the contemporary challenge in international law...’.

<sup>10</sup> Another potential manner through which public power is curbed in the state context is through mechanisms associated with democracy. These mechanisms are primarily political in nature and involve notions such as popular consent based on free and fair elections, referenda and the procedure of popular initiative. Clearly, international law is not ‘democratic’ in this sense, nor, arguably, should it be.

<sup>11</sup> See e.g. B.Z. Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press 2004).

<sup>12</sup> The meaning and potential of the rule of law concept at the international level has been analysed in various contexts and with varying success. See e.g. D. Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’ (2005) Institute for International Law and Justice Working Paper 2005/1, available at: <<http://www.iilj.org>> (last accessed 1 May 2009); E. Cannizzaro, ‘Machiavelli, the UN Security Council and the Rule of Law’ (2005) Global Law Working Paper 11/05, available at: <<http://www.law.nyu.edu/global/index.htm>> (last accessed 1 May 2009). See also e.g. UN General Assembly Report of the Sixth Committee, *The rule of law at the national and international levels*, UN Doc. A/61/456, 17 November 2006, as well as the related report of the UN Secretary-General, *Uniting our strengths: Enhancing United Nations support for the rule of law*, UN Doc. A/61/636 – S/2006/980, 14 December 2006. Finally, see also the Hague Institute for the Internationalisation of Law, *High Level Expert Panel Report on The Rule of Law in an Internationalised World: Looking for the Right Questions*, as well as the Final Report and Recommendations from the 2004-2008 Austrian Initiative, ‘The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System’, Ministry for European and International Affairs of the Republic of Austria, prepared by Prof. Simon Chesterman, available at: <[http://www.iilj.org/research/documents/panel\\_2\\_report.pdf](http://www.iilj.org/research/documents/panel_2_report.pdf)> (last accessed 1 May 2009). Any substantive conclusions as to how the rule of law might be perceived at the international level fall outside the scope of this article’s focus on methodology. For example, see S. Chesterman, ‘An International Rule of Law?’ (2008) *Public Law and Legal Theory*

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>13</sup>

This article proposes that ‘vertical’ comparative law methodology<sup>14</sup> holds significant potential for further conceptualising the ‘international rule of law’. This assertion is based on the authors’ experience with two doctoral research projects, both aimed at analysing how the accountability of international institutions might be improved. One project deals with the accountability of international entities administering territories – international territorial administration (ITA)<sup>15</sup> – and the other project relates to the World Bank Inspection Panel (WBIP), an internal accountability mechanism of the Bank.<sup>16</sup> Both research projects illustrate the manner in which individuals at the local level might be adversely affected by the international institutions’ exercise of public power, and both projects look to national (constitutional) law for potential solutions to the accountability problem.

Section 2 of the article presents a few considerations that need to be kept in mind when designing and implementing vertical comparative law methods.<sup>17</sup> Section 3 briefly outlines the ‘four-stage’ vertical comparative law method developed and applied in the context of the ITA and WBIP research projects and illustrates the

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Research Paper Series, Working Paper No. 08-11, at 1. Here, Chesterman shares a similar view on the benefits of employing vertical comparison in this context. However, Chesterman does aim to provide a substantive outcome from the application of such a comparative method. He proposes ‘a core definition of the rule of law as a political ideal being seen as a means rather than an end, as serving a function rather than defining a status’.

<sup>13</sup> See the report of the UN Secretary-General, *Uniting our strengths: Enhancing United Nations support for the rule of law*, UN Doc. A/61/636 – S/2006/980, 14 December 2006. Note that UN Secretary-General Kofi Annan was referring here to the ‘rule of law’ in a state context. However, this article argues, notions such as the ‘rule of law’ can be successfully transposed to the international level. See also UN General Assembly Report of the Sixth Committee, *The rule of law at the national and international levels*, UN Doc. A/61/456, 17 November 2006 and UN Doc. A/61/636 – S/2006/980, 14 December 2006.

<sup>14</sup> For a definition of vertical comparative law methodology, see section 2.1 below.

<sup>15</sup> International territorial administration (ITA) as a concept denotes situations in which an international entity has assumed the authority to exercise public power within a territory. This authority affects individuals directly, is virtually all-encompassing, ultimate in nature and includes legislative, executive and judiciary powers. To all intents and purposes, international institutions in casu substitute the state and, moreover, act as one. This dynamic concept has been applied in several instances on an ad hoc basis, arguably lacking an adequate conceptual framework and institutional backing. The concept and its application have outgrown the confines, institutional capacity and terminology of public international law, which has become ineffective in tackling crucial issues inherent in ITA. The research project explores how essential principles of public international law – traditionally related to states – could contribute to solving the lack of accountability and ultimately increase the legitimacy of such undertakings. Findings resulting from this research project are envisaged for publication in 2010.

<sup>16</sup> The World Bank Inspection Panel (WBIP) was established in 1994 to improve the accountability and legitimacy of the World Bank (i.e. the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)). The WBIP investigates and reviews the extent to which the World Bank has complied with its own operational policies and procedures in the course of the design, appraisal and implementation of World Bank financed development projects. Such an investigation is triggered by a complaint brought by two or more individuals that claim to have been adversely affected by the organisation’s non-compliance with its internal standards. See Resolution No. IBRD 93-10; Resolution No. IDA 93-6 ‘The World Bank Inspection Panel’, at para. 12 (hereinafter, the ‘Inspection Panel Resolution’). On completion of its investigations, the WBIP makes a recommendation to the Bank’s Board of Executive Directors – the final decision-making authority in the process (Inspection Panel Resolution, paras. 19, 23). See in general A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the ‘Judicial Spirit’ in Public International Law* (Utrecht: Eleven International Publishing 2009, forthcoming).

<sup>17</sup> By ‘method’, we mean ‘the “techniques” by which comparisons are carried out’. See V.V. Palmer, ‘From Leretholi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 *American Journal of Comparative Law* at 262-263.

method with examples from the two projects. Section 4 concludes with several brief comments on the major insights drawn from the vertical comparative law method and the potential of such methods for conceptualising the international rule of law.

## 2 Considerations for Employing Comparative Law Methods

The considerations discussed in this section have been formulated based on our experience with a specific form of comparison ('vertical' – as will be explained below), but it is suggested that they might be of broader value to legal comparativists in general. The first consideration is typological in nature (2.1) and the second concerns a few general risks involved in employing comparative law methodology (2.2).

### 2.1 Four Modes of Comparison: A Suggested Typology

At the outset, it might be useful to clarify which 'mode' or form of legal comparison is being used, since different modes might require different risk considerations (see section 2.2 below) and different comparative methods altogether.<sup>18</sup> We propose that legal comparison is primarily 'horizontal' (occurring among legal systems belonging to the same 'level' or 'echelon') or 'vertical' (occurring among legal systems not belonging to the same 'level', i.e. 'cross-echelon'). Within this primary typology, we foresee four potential (secondary) modes of legal comparison (see Figure 2 below): (1) horizontal, among legal systems at the national level (e.g. comparative constitutional law and conflict of law studies)<sup>19</sup> and (2) horizontal, among legal systems or regimes at the international level (e.g. when international institutions or compliance mechanisms are compared or when a treaty in one area of international law is compared to a (proposed) treaty in a different area of international law).<sup>20</sup> Legal comparison might also be (3) vertical, 'top-down' (e.g. typically in the context of the *internalisation* of international norms and regulations by national legal orders, whereby national law is required to incorporate international concepts into the national legal system, terminology and ideology),<sup>21</sup> or (4) vertical, 'bottom-up'. This fourth mode of legal comparison reflects the method discussed in this article, and will therefore be expounded in more detail.

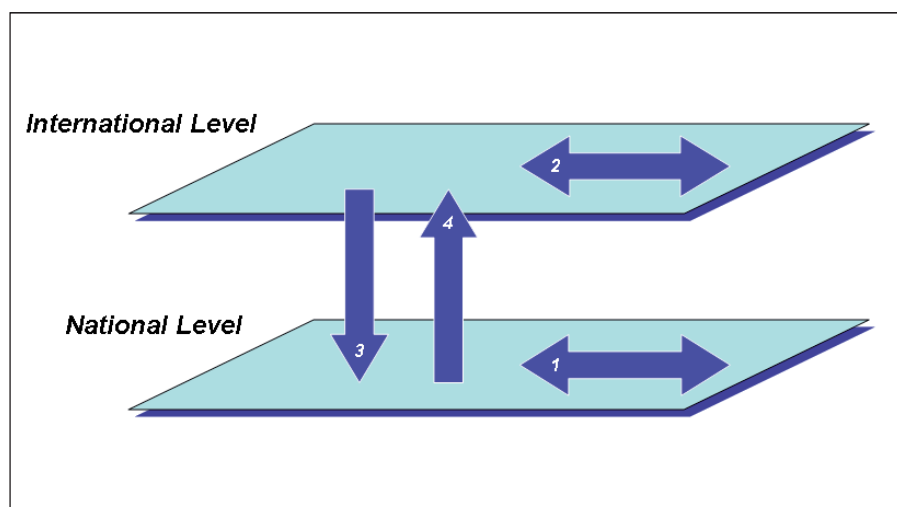
<sup>18</sup> See e.g. Wiener, above n. 1, at 1297: '... the debate among comparativists over the propriety of transnational borrowing has only limited guidance to offer to those interested in the very different question of trans-echelon borrowing, because the merits of horizontal and vertical borrowing depend on rather different considerations'.

<sup>19</sup> See in general T. Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press 2003).

<sup>20</sup> A.C. Kiss, 'Comparative Law and Public International Law' in W.E. Butler (ed.), *International Law in Comparative Perspective* (Alphen aan den Rijn: Sijthoff & Noordhoff 1980).

<sup>21</sup> See e.g. D. Rosenblum, 'Internalizing Gender: Why International Law Theory Should Adopt Comparative Method' (2007) 45 *Columbia Journal of Transnational Law* 759. See also H.E. Chodosh, 'Comparing Comparisons: In Search of Methodology' (1999) 84 *Iowa Law Review* 1025 at 1038: '[E]ach view of the increasingly penetrating role of an international law, institution, or a process in a traditionally national ambit of authority relies on a comparison.'



**Figure 2: Four ‘Modes’ of Legal Comparison**

Vertical, ‘bottom-up’ legal comparison, as defined here, refers to the transposition of legal concepts, or the ideas behind them, from national to international level. This mode of legal comparison has conventionally been viewed with scepticism due to the assumption of inherent incompatibility between the national and international legal orders.<sup>22</sup> Gutteridge, for example, reflects this conventional position, arguing that

so far as it exists at all, any relationship or kinship between comparative law and the law of nations must, therefore, be of a shadowy nature, and the only possible link between the two disciplines is to be found in the extent to which the comparative study of private law can be regarded as an instrument to be employed in promoting the growth and development of the law of nations.<sup>23</sup>

The pervasive scepticism regarding vertical, ‘bottom-up’ legal comparison might explain the lack of methodological research in this area.<sup>24</sup> It does not signify, however, that international lawyers have not been employing vertical, ‘bottom-up’ comparative legal methods to a significant degree and for a significant amount of time;<sup>25</sup> they have just not been as forthright about it.<sup>26</sup> As Wiener remarks:

... even a brief inquiry reveals that there are many examples of vertical legal borrowing between national and international law in practice; what is needed is a more rigorous analytical approach to how, why, and when these trans-echelon transplantations occur, and when we should choose to undertake them.<sup>27</sup>

<sup>22</sup> Note that there have been similar sceptical reactions to the functionalist method and other similarities-oriented comparative methods that dominated the 20th century. See G. Dannemann, ‘Comparative Law: Study of Similarities or Differences?’ in M. Reimann and R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2006) at 390 for an overview of ‘difference theorists’ that work with a presumption of dissimilarity.

<sup>23</sup> Quoted in Butler, above n. 20, at 27.

<sup>24</sup> See e.g. Wiener, above n. 1, at 1297.

<sup>25</sup> Principles entrenched in the international legal order such as *good faith*, *pacta sunt servanda* and *res judicata* all find their origin at the national level. See M. Bothe and G. Ress, ‘The Comparative Method and Public International Law’ in Butler, above n. 20, at 51, 58-62. See also Kiss, in Butler, above n. 20, at 44.

<sup>26</sup> Wiener, above n. 1, at 1301: ‘Whatever couplings or comminglings between national and international law have in fact occurred might have been so discreet, or perhaps so scandalous, that no one seems to talk about them in polite company (at least not for very long). Even if borrowing from national into international law occurs in practice, it seems to have been neglected or hushed, both in officialdom and in theory.’

<sup>27</sup> Wiener, above n. 1, at 1297.

This article submits that, while scepticism regarding vertical comparative methods might be healthy – especially when aimed at identifying and mitigating the risks involved in using comparative law methods, as discussed below – the employment of vertical, ‘bottom-up’ comparative law methods is increasingly justified by the emerging ‘common zone of impact’.<sup>28</sup>

## 2.2 Risks Involved in Employing Comparative Law Methods

This section outlines three risks or pitfalls associated with the employment of comparative law methods, namely failure to take context into account (2.2.1), engaging in one-dimensional comparative analysis (2.2.2) and skewing comparative analysis to fit preconceived ideas (2.2.3).<sup>29</sup> Before considering each of these pitfalls, a general remark is in order. It is often asked whether the risks involved in comparative law methods are different depending on the particular mode of comparison. For instance, is vertical comparison inherently riskier than horizontal modes of comparison? Since this article is based on two specific experiences with the vertical comparative mode (although the method outlined in Section 3 does include elements of horizontal comparison),<sup>30</sup> we do not venture a definitive answer. Tentatively speaking, therefore, it appears that the risks outlined in this section are probably similar for all four modes of legal comparison, although there may be differences in degree.

### 1.2.1 Failure to Consider Context Properly

Failure to account for contextual differences is perhaps *the* most common post-modernist criticism of comparative law methodology.<sup>31</sup> Clearly, a thorough understanding of all the legal systems included in the comparative analysis is a *sine qua non* that has become widely accepted by legal comparativists.<sup>32</sup> Such an acknowledgement, however, is not necessarily useful for determining how to mitigate the risk itself. For instance, how far does one have to go in accounting for contextual difference? Is extensive, detailed knowledge of the legal system – similar to that of native lawyers originally trained in that system – necessarily required? Such a requirement might place comparative law methods beyond the reach of many, since it would require time and financial commitments that many lawyers are unwilling or unable to make. Moreover, is complete immersion really necessary in order to consider context properly?

This article argues that while failure to consider the context properly remains a prominent risk within comparative law methodology, being overly concerned about this risk may lead to ‘exaggerations and absurdities’.<sup>33</sup> In other words, the importance of contextual differences should not be overstated as more extensive analysis often reveals that many apparent ‘differences’ are, in fact, superficial. Moreover, complete immersion into a particular legal system is hardly ever possible, since it can only

<sup>28</sup> See Figure 1 above.

<sup>29</sup> Section 3 describes how these specific risks have been considered in the context of the method employed by the two doctoral research projects.

<sup>30</sup> See section 3.3.2 below.

<sup>31</sup> Note that post-modernist critique is critical of comparative methods in general – not only of comparative legal methodology. See A. Peters and H. Schwenke, ‘Comparative Law beyond Post-Modernism’ (2000) 49 *International and Comparative Law Quarterly* at 801-802.

<sup>32</sup> See e.g. Koopmans, above n. 19, at 96-97.

<sup>33</sup> See e.g. Peters and Schwenke, above n. 31, at 803. See also Palmer, above n. 17, at 261.

occur up to a point before constraints such as time, costs and language skills become more important considerations.<sup>34</sup> Mitigating this risk therefore involves a trade-off between being thorough and heeding the above-mentioned constraints.

### 1.2.2 Conducting One-Dimensional Comparative Analysis

Another component of the post-modernist critique of comparative methodology is its criticism of ‘functionalism’, the predominant comparative law method.<sup>35</sup> Functionalism emphasises ‘a concrete social problem’ instead of the formal aspects of laws or institutions and therefore analyses the social function of the legal concepts that are being compared.<sup>36</sup> This article does not address the merits of several specific criticisms aimed against functionalism. However, it is suggested that the common denominator of these criticisms is the rejection of functionalism’s monopoly as the predominant method. This article shares that viewpoint, although the specific point we wish to make here pertains to the risk of conducting a one-dimensional comparative analysis – the risk being that the analysis is not only one-dimensional but also one-sided, lacking sufficient depth.<sup>37</sup> While we argue that functionalism should not be summarily rejected (in contrast to many of its critics) since it continues to strengthen comparative law methodology,<sup>38</sup> we *do* contend that it should not be the sole focus of comparative law methodology. As Myres McDougal remarks:

The demand for inquiring into function is, however, but the beginning of insight. Further questions are ‘functional’ for whom, against whom, with respect to what values, determined by what decision-makers under what conditions, how, with what effects.<sup>39</sup>

In other words, it is suggested that the risk can be mitigated by considering multiple aspects of the particular legal concept under consideration, which should typically include both substantive (such as the social function of the legal concept) and procedural elements.<sup>40</sup>

### 1.2.3 Skewing the Comparative Study Based on Preconceived Ideas

Two types of ‘preconceived ideas’ inject a substantial degree of subjectivity into the comparative law analysis, which might unconsciously skew the outcomes of the analysis, namely our ideas about ‘law’ and the comparative objective(s). This section addresses each one in turn.

<sup>34</sup> Palmer, above n. 17, at 290.

<sup>35</sup> See Peters and Schwenke, above n. 31, at 827, explaining that post-modernist critique charges functionalism with being inherently biased and implicitly hegemonic. Others have criticised functionalism for being purely contemporary in nature, lacking incentives to engage in historical research. See e.g. O. Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2007) 32 *Brooklyn Journal of International Law* 405 at 417-420. A further central critique addresses functionalism’s emphasis on similarities. This has even led some authors to propagate a ‘presumption of dissimilarity’ instead, which considers certain concepts and legal orders ‘irrevocably irreconcilable’. See e.g. Dannemann, above n. 22, at 390. See also D.J. Gerber, ‘Toward a Language of Comparative Law?’ (1998) 46:4 *The American Journal of Comparative Law* 719 at 722-724. Gerber’s main criticism of functionalism is that it is not aimed at analysing procedural aspects, because it is normatively focused on the ‘social function of norms’.

<sup>36</sup> Peters and Schwenke, above n. 31, at 808, quoting Ernst Rabel, founder of the functional approach.

<sup>37</sup> For instance, Gerber notes that a comparative approach grounded in functionalism only tends to focus on the substantive aspects of law, while new comparative objectives also require an emphasis on e.g. procedural elements. See Gerber, above n. 35, at 722-726.

<sup>38</sup> See section 3.2 below.

<sup>39</sup> Peters and Schwenke, above n. 31, at 828, quoting Myres S. McDougal.

<sup>40</sup> See in general Gerber, above n. 35.



First, comparative law methodology is fundamentally influenced by our own perceptions of what (international) law ‘is’. It has been argued, for example, that a strictly positivist *or* strictly naturalist view of law cannot sustain any forms of legal comparison.<sup>41</sup> On the one hand, having ‘preconceived’ ideas about what (international) law is, or how it should be, is not only inevitable but also desirable if normative development is to occur. At the very least, a legal comparativist’s jurisprudential view on ‘law’ invariably influences the manner in which comparative law methods are constructed and applied.<sup>42</sup> On the other hand, being unaware of our own perceptions about ‘law’ and how it influences comparative law methodology might result in a distortion of the results.

Second, the comparative objective is likely to be closely associated with the underlying comparative method, and, as many have argued, this is how it should be.<sup>43</sup> As Gerber puts it, ‘where are we going?’ and ‘how can we get there?’ are (or at least should be) interrelated questions.<sup>44</sup> For instance, when the goal is legal ‘unification’ and ‘harmonisation’,<sup>45</sup> or when comparison is fuelled primarily by scientific curiosity or the need to improve one’s understanding of law,<sup>46</sup> the comparative focus might be both on the similarities and differences between legal systems.<sup>47</sup> Conversely, when comparative methodology is used as a ‘tool’ to solve a particular problem in a legal system, the emphasis might be on the ‘common core’ of the legal systems being compared.<sup>48</sup> However, there is a risk that narrowly focusing on the comparative objective might inject an unacceptable degree of bias. For example, a comparativist bent on finding a solution for a particular problem through comparative law methodology might ignore or understate the differences between legal systems uncovered by the comparative law analysis.

Clearly, a comparative law study cannot do without the legal comparativist’s own perceptions about ‘law’ or without having clear comparative objectives, even though they inject a degree of subjectivity into the analysis that might skew the results in a certain manner. This article suggests, however, that this risk might be mitigated, first and foremost, by being upfront about one’s own ideas about law and about the comparative objective and, secondly by understanding how they might influence the use of comparative law methodology. This awareness should serve as a check throughout the process of employing comparative law methods.

<sup>41</sup> C. Valcke, ‘Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems’ (2004) 52 *The American Journal of Comparative Law* 713 at 719.

<sup>42</sup> Clarifying how a particular comparative law methodology is grounded in legal theory helps, for example, to determine the comparative scope. For instance, Valcke links his theory of ‘comparative jurisprudence’ to Ewald’s notion about ‘law as jurisprudence’, which argues that *law* is not ‘law in books’ or ‘law in action’ but ‘law in minds’ – hence, ‘a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions’. Accordingly, ‘comparative law as jurisprudence’ surmises that law can only be ‘apprehended from within, from the standpoint of legal actors.’ See Valcke, above n. 41, at 716-717. See also Brand, above n. 35, at 435.

<sup>43</sup> Gerber, above n. 35, at 721.

<sup>44</sup> Gerber, above n. 35, at 719. Gerber argues that these two questions are currently not closely aligned, since legal comparativists are pursuing ‘new comparative objectives’ with methods that have been based on the predominant comparative objective, namely, functionalism.

<sup>45</sup> Dannemann, above n. 22, at 402-403. See also K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press 1998, 3rd ed.) at 16-17, 24-28; and Gerber, above n. 35, at 721.

<sup>46</sup> Dannemann, above n. 22, at 404-405.

<sup>47</sup> *Id.* See also Zweigert and Kötz, above n. 45, at 15: ‘the primary aim of comparative law, as of all sciences, is knowledge’, and at 21-24 on the educational function of comparative law. See also Koopmans, above n. 19, at 5-6 on various comparative objectives; and G. Haraszti, ‘The Comparative Method in Comparative Law’ in Butler, above n. 20, at 117 on how comparative law can shed light on ‘the genesis of particular institutes’. See also Dannemann, above n. 22, at 401, arguing that there is not an exhaustive list of comparative goals.

<sup>48</sup> See Gerber, above n. 35, at 721.

### 3 The ITA/WBIP Vertical Comparative Law Method

This article submits that, while there might be similar or even recurring steps in various comparative law methods, ‘comparative law is not one, it is many’.<sup>49</sup> The choice of a particular comparative method is ‘a function of variables’ such as ‘the purposes of the project and the individual circumstances of those who pursue it’.<sup>50</sup> In other words, we argue that ‘... there is a sliding scale of methods and the best approach will always be adapted’ to the specific research project, taking into account considerations such as ‘the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs’.<sup>51</sup> This section will discuss a particular comparative law method developed in the context of the ITA and WBIP doctoral research projects (the ‘ITA/WBIP Vertical Comparative Law Method’ or ‘Method’). The mode of comparison utilised by the Method is primarily vertical, bottom-up,<sup>52</sup> since it involves the transposition of legal concepts from the national to the international level. However, the Method also incorporates elements of horizontal legal comparison,<sup>53</sup> as this section illustrates.

The ITA/WBIP Vertical Comparative Law Method consists of four stages that are set out in a linear fashion in this section, although, in practice, the Method will likely require some iteration.<sup>54</sup> Stage one involves the formulation of a hypothesis based on the observation of *prima facie* similarities between legal systems (3.1). In stage two, a conceptual model is constructed that serves as the basis for comparison between national and international legal systems (3.2). Stage three involves a systematic (vertical) comparison between national and international legal systems (3.3). Finally, the results from this vertical comparison are synthesised in stage four, providing a basis for drawing conclusions (3.4).

#### 3.1 Stage One: Formulating a Hypothesis

While hypothesis formulation is the point of departure for scientific research in general, hypotheses formulated in the context of legal research employing comparative law methodology are often triggered by the observance of apparent similarities between legal systems – whether those similarities concern a particular problem, the solution to the problem, or both. Stage one of the Method is based on a *praesumptio similitudinis*,<sup>55</sup> derived from the actual observation of similarities between problems and (potential) solutions at the common zone of impact.<sup>56</sup> The ITA and WBIP projects observe that individuals and their environment are adversely affected due to the exercise of power by international administrating entities and the World Bank in ways similar to individuals adversely affected by states exercising public power. Both projects are based on the assumption that there is a significant

<sup>49</sup> See Valcke, above n. 41, at 715; and Palmer, above n. 17, at 262-263 and 285. On the development of comparative law methodology and the employment thereof, see in general W.J. Kamba, ‘Comparative Law: A Theoretical Framework’ (1974) 23 *The International and Comparative Law Quarterly* 3 at 485.

<sup>50</sup> Palmer, above n. 17, at 290.

<sup>51</sup> Id.

<sup>52</sup> On the four different modes of comparative research, see section 2 above.

<sup>53</sup> Id.

<sup>54</sup> See Brand, above n. 35, at 439.

<sup>55</sup> See e.g. Dannemann, above n. 22, at 388. In this respect, the Method is influenced by functionalism, which is rooted in the presumption that ‘the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results’. See Zweigert and Kötz, above n. 45, at 34.

<sup>56</sup> Whether one emphasises differences or similarities remains a balancing act and depends on the purpose of comparison. See Dannemann, above n. 22, at 383-385.

similarity in the manner in which the accountability of these international institutions could be enhanced, namely through a system of checks and balances – ranging from an institutionalised rule of law concept to the reviewability of decisions – that is usually found in the context of national constitutional systems

In the context of the ITA project, it is observed that international administrating entities experience problems setting up meaningful accountability structures.<sup>57</sup> The research project hypothesises that, in order to overcome obstacles in setting up such structures, international territorial administrations should be perceived as state-like entities rather than international institutions engaged in extensive peacebuilding operations.<sup>58</sup> Only such a paradigm shift can facilitate potential solutions to the problems of accountability and legitimacy. Hence, the ITA project's hypothesis asserts that the institutional design and processes of ITAs should reflect concepts and mechanisms that usually serve to regulate the exercise of public power in the state context.

The WBIP project observes similarities between an existing accountability mechanism – the Inspection Panel – and judicial entities in national legal systems exercising judicial review of political decisions or actions. Obvious differences between the Inspection Panel and courts exercising judicial review pertain to the limited decision-making authority of the Panel, and its institutional dependency on the Bank's Board of Executive Directors.<sup>59</sup> However, the project notes that prominent judicial institutions – such as the French *Conseil d'Etat* and the Dutch *Raad van State* – started off with a relatively low level of institutional independence, had a narrow review mandate and were not even initially considered to be 'courts' but only had advisory powers.<sup>60</sup> The WBIP project consequently hypothesises that there is a functional, procedural and institutional equivalence between the World Bank Inspection Panel and mechanisms exercising judicial or constitutional review in national legal systems.

Thus, the hypothesis formulated at the outcome of stage one clarifies which particular aspect(s) should be the focus of the comparative law study and therefore require further conceptualisation in stage two. For the ITA project, the object of comparison is 'the state' and related mechanisms for regulating the exercise of public power; the WBIP project's object of comparison is 'judicial review' in the national legal context.

<sup>57</sup> International administrating entities have been widely criticised for their persistent reluctance to establish mechanisms and procedures that would adequately address the call for their accountability, primarily *vis-à-vis* the local populations subjected to their rule. See e.g. Human Rights Watch, 'Better Late Than Never – Enhancing the Accountability of International Institutions in Kosovo', Briefing Paper No. 2, 14 June 2007.

<sup>58</sup> Certain authoritative documents, as well as academic writing, have come close to describing the authority assumed during ITA as resembling fully-fledged governmental power. For example, the UN Handbook on Multidimensional Peacekeeping observes that UN peacekeeping operations have become 'multidimensional' as they increasingly include non-military components. The Handbook also makes explicit reference to ITA by stating that 'multidimensional peacekeeping operations ... may be required to ... [a]dminister a territory for a transitional period, thereby carrying out *all the functions that are normally the responsibility of a government*' which creates a situation in which the international presence is 'responsible for *directly managing all aspects of civilian life* while simultaneously working to devolve its responsibilities to local authorities'. *Handbook on United Nations Multidimensional Peacekeeping Operations*, United Nations, Department of Peacekeeping Operations, Peacekeeping Best Practices Unit, December 2003, at 1, 2 and 35 (emphasis added).

<sup>59</sup> Inspection Panel Resolution, paras. 10, 12, 14, 19 and 21.

<sup>60</sup> For a discussion of the *Conseil d'Etat*, see Koopmans, above n. 19, at 10, 34-36. The Dutch *Raad van State* obtained judicial powers only around 1976. See Vlasblom, *De macht der kritiek: De gedachtevorming over aard en zin van rechterlijke beoordeling van bestuursoptreden sedert omstreeks 1815*, available at: <<http://irs.ub.rug.nl/ppn/043199305>> (last accessed 1 May 2009); and see in general J. van der Hoeven, *De drie dimensies van het bestuursrecht – ontstaan en vorming van het Nederlandse algemene bestuursrecht* (Alphen aan den Rijn: Samsom H.D. Tjeenk Willink 1989).

### 3.2 Stage Two: Constructing a Conceptual Model

Stage two involves the development of an abstract, conceptual model of the object(s) of comparison that were identified through the hypothesis formulation that occurred in stage one. This conceptual model has to capture the ‘right’ level of abstraction in order to fulfil its purpose, which is to serve as a basis for the vertical comparison of the national and international legal systems. While constructing a conceptual model is in some ways similar to the ‘common core’ notion frequently employed by functionalists such as Schlesinger, Zweigert and Kötz,<sup>61</sup> this stage of the Method goes beyond the establishment of a ‘common core’ that is exclusively derived from the social functions fulfilled by the object(s) of comparison.<sup>62</sup> Developing a conceptual model also requires more than formulating a broad definition or finding the ‘lowest common denominator’.<sup>63</sup> Importantly, this stage should not be interpreted as the propagation of universally acknowledged ‘prototype’ norms or principles.<sup>64</sup>

Instead, the conceptual model constructed during this stage is an analytical tool that ‘serves as a yardstick for the comparison’,<sup>65</sup> the *tertium comparationis*.<sup>66</sup> It is suggested that the conceptual model should uncover multiple facets or dimensions of the legal concept in question (i.e. the object of comparison).<sup>67</sup> The process of expounding such a multi-faceted model might also benefit from the application of non-legal conceptual tools and frameworks, for example from fields such as law and economics or political science.<sup>68</sup> The WBIP project, for instance, employs systems thinking theory (especially the analytical tools provided by systems dynamics) in developing its conceptual model.<sup>69</sup>

Stage two unfolds in two steps. First, an initial – and theoretical – conceptual model is developed that describes the key characteristics, principles, functions and dynamics of the legal concept as it operates within its traditional context (3.2.1). Second, the conceptual model is verified and refined through a horizontal legal comparison (3.2.2), which may also include an historical analytical component.<sup>70</sup>

<sup>61</sup> Peters and Schwenke, above n. 31, at 808. Zweigert and Kötz also emphasise the necessity to create an ‘abstract heuristic conceptual framework; free from the context of a particular system’ and ‘flexible enough to grasp a wide variety of ‘heterogeneous institutions which are functionally comparable’. See Chodosh, above n. 21, at 1051, quoting Zweigert and Kötz.

<sup>62</sup> On functionalism, see section 2 above. Zweigert and Kötz explain the functionalist focus of the ‘common core’ as follows: ‘... the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need’. See Zweigert and Kötz, above n. 45, at 44. For a similar approach, see Brand, above n. 35, at 443.

<sup>63</sup> In a similar fashion, Dutoit describes the approach taken by the European Court of Justice (dealing with distinct administrative law principles and elevating them to the Community level) as follows: ‘The object is not to illuminate the smallest common denominator of the laws of the states, but on the contrary to seek a solution toward which the legal orders being compared are disposed and which best fits the goals of the EES.’ See B. Dutoit, ‘Comparative Law and Public International Law’ in Butler, above n. 20, at 80.

<sup>64</sup> Peters and Schwenke, above n. 31, at 810.

<sup>65</sup> Koopmans, above n. 19, at 6-9.

<sup>66</sup> Comparative law research starts with a working hypothesis, often born out of an observed deficiency. See Zweigert and Kötz, above n. 45, at 34.

<sup>67</sup> For a discussion about the risks of conducting single-aspect comparative analysis, see section 2 above.

<sup>68</sup> See e.g. M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press 2002).

<sup>69</sup> See e.g. J.D. Sterman, *Business Dynamics: Systems Thinking and Modeling for a Complex World* (McGraw-Hill Higher Education 2000). See also Naudé Fourie, above n. 16.

<sup>70</sup> See above n. 35.

### 1.3.1 Constructing the Initial Conceptual Model

The ITA project focuses primarily on analysing how accountability issues have been perceived and addressed at the national level, i.e. how concepts of limited government and accountability are institutionalised.<sup>71</sup> Three mechanisms associated with the regulation of public power in the state context are conceptualised, namely the diffusion of power, the reviewability of decisions and the rule of law. The WBIP project, in turn, conceptualises three aspects of judicial review, namely its ‘nature’ (or core characteristics), its ‘effect’ (or the outcomes associated with the exercise of judicial review) and its ‘dynamics’. The dynamics of judicial review refer to the relationships between various components within a system of judicial review – such as courts and political institutions – and the consequences of those relationships for courts exercising a mandate of judicial review.

### 1.3.2 Verifying and Refining the Conceptual Model

The initial model is verified and refined by means of a horizontal legal comparative analysis. In other words, the model is tested against actual case law from national legal systems or against other empirical evidence. An initial step, therefore, would be to set up the horizontal comparative study, for example by determining the historical range or by deciding which legal systems – and specific case law from those systems – to include in the horizontal analysis.<sup>72</sup>

The ITA project explores state-*like* entities in an historically cross-cutting fashion in an attempt to refine and further neutralise the model. In doing so, the model is further detached from the nation state concept and translated into terms more closely related to the exercise of public power as such.<sup>73</sup> This results in a conceptual model that outlines the fundamental principles governing the exercise of public power and aims to minimise the chance of abuse. The WBIP project verifies the ‘judicial review model’ through a (horizontal) comparative constitutional law analysis, by applying the model to case law from the constitutional canons of the United States, the European Union (Community law) and South Africa.<sup>74</sup> The model is refined by utilising analytical tools from the field of systems dynamics (such as causal loop diagrams)<sup>75</sup> to make sense of certain observations emerging from the comparative law study, such as the apparent fluctuation between judicial ‘activism’ and ‘restraint’.<sup>76</sup>

<sup>71</sup> As pointed out previously, the construction of this model by no means implies universality. Its aim is to distil essential principles and workable solutions employed in situations dealing with challenges similar to the ones faced at the international level. Thus, for instance, if it were to be established that the concept of limited government is not accepted by a certain group of national legal orders, this would *not* prevent the construction of a model based on the legal orders that *do* embrace the concept. The aim of the comparison *in toto* is to address an expressly proclaimed need: enhanced accountability. Therefore, the hypothetical existence of national legal systems that do not subscribe to the concept of accountability of holders of public authority is in fact irrelevant.

<sup>72</sup> Zweigert and Kötz, above n. 45, at 34; and see R. Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 125 at 142 on the selection of legal systems to include in a horizontal comparative study.

<sup>73</sup> See e.g. A. Momirov, ‘The individual right to petition in internationalized territories: from progressive thought to an abandoned practice’ (2007) 9 *Journal of the History of International Law* 2.

<sup>74</sup> See Hirschl, above n. 72, at 133, mentioning four principles on which cases can be selected: ‘most similar cases’, ‘most difficult cases’, ‘prototypical cases’ and ‘outlier cases’.

<sup>75</sup> See e.g. V. Anderson, *Systems Thinking: From Concepts to Causal Loops* (Waltham, MA: Pegasus Communications, Inc. 1997) at 20.

<sup>76</sup> See in general K. Roosevelt (III), *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press 2006); and Koopmans, above n. 19 at 51-57.



In sum, the outcome of stage two is a multi-faceted conceptual model of the comparative legal object that has been verified through a particular form of horizontal legal comparison and may therefore be viewed as being representative of national legal systems in a general sense. This conceptual model can now serve as the basis for further vertical comparison, as discussed in stage three.

### 3.3 Stage Three: Conducting Vertical Comparison

Stage three of the Method forms the heart of the vertical or cross-echelon legal comparative process<sup>77</sup> and involves making ‘a statement or estimate of similarities and differences’.<sup>78</sup> During this stage, the conceptual model (developed in stage two) is compared with the (quasi-)legal concept or a particular situation at the international level. In other words, the hypothesis (developed in stage one) is tested by analysing the similarities (3.3.1) and differences (3.3.2) between the national level (as represented by the conceptual model) and the international level. For the ITA project, this stage involves a comparison of the institutional design and practice of the UN administrations of Timor Leste and the territory of Kosovo, as well as the international governance of Bosnia and Herzegovina, against the model of fundamental principles governing the exercise of public power and aimed at minimising the chance of abuse.<sup>79</sup> For the WBIP project, stage three constitutes an analysis of the conceptual model (of judicial review) compared to the World Bank Inspection Panel’s institutional history, design and practice (i.e. requests from individuals for investigations into the compliance of World Bank development projects with the Bank’s operational policies and procedures).<sup>80</sup>

#### 1.3.1 Analysing Similarities

The detailed vertical analysis should confirm the existence of the *prima facie* similarities (identified at the beginning of the process)<sup>81</sup> and could reveal additional similarities between the conceptual model and the international (quasi-)legal concept. However, these similarities should not be accepted without questioning

<sup>77</sup> For a discussion of the different modes of comparison, see section 2 above.

<sup>78</sup> A definition of ‘comparison’ as given in the American Heritage Dictionary of the English Language (Houghton Mifflin Company 2000, 4th ed.), available at: <<http://www.bartleby.com>> (last accessed 1 May 2009).

<sup>79</sup> Concerning the territory of Kosovo: On 10 June 1999, UNSC Res. 1244 (1999) was adopted, deciding on an ‘international civil and security presence’ and paving the way for the establishment of UNMIK, the UN mission in Kosovo. A Special Representative was appointed by the Secretary-General to ‘control the implementation of the international civil presence’ and to ‘coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner’. Concerning Timor Leste: On 25 October 1999, based on the situation on the ground and on an agreement between Indonesia and Portugal regarding the transfer of authority to the United Nations, UNSC Res. 1272 (1999) was adopted establishing UNTAET, which was empowered to assume full civil administration of the territory and contained a military component, with reference to the multinational force previously deployed pursuant to UNSC Res. 1264 (1999). UNTAET was formally terminated on 20 May 2002, upon the independence of East Timor. Concerning Bosnia and Herzegovina: The efforts to establish and maintain sustainable stability in Bosnia and Herzegovina are complex, as they are carried out by numerous actors and entities. The General Framework Agreement for Peace in Bosnia and Herzegovina, negotiated in Dayton, Ohio and signed in Paris on 14 December 1995 (Dayton Peace Agreement), established the Office of the High Representative, entrusted with final authority with regard to the implementation of the peace agreement.

<sup>80</sup> Inspection Panel Resolution, para. 14.

<sup>81</sup> See section 3.1 above.

their significance; they might, for instance, be merely coincidental.<sup>82</sup> Moreover, not all similarities are likely to be of equal significance. Hence, the Method suggests that identified similarities should be further qualified.<sup>83</sup>

For the ITA project, the conceptual model developed in stage two serves as scale against which the ITA concept is assessed. The parallel initially drawn between states and ITA is explored and affirmed. For instance, research shows that documents and resolutions establishing ITAs entrust these international entities with mandates to exercise public power virtually mirroring the scope of public power exercised by states.<sup>84</sup> Furthermore, ITA practice has interpreted these mandates expansively, furthering the semblance between a state and ITA.

The vertical comparative analysis in the WBIP project reveals, for example, that the Inspection Panel's independence from World Bank management is formally ensured by several provisions in the Panel's constitutive resolution that resemble similar provisions in national constitutions.<sup>85</sup> The analysis also reveals that the Inspection Panel asserts its de facto independence from World Bank management in manners comparable to national courts exercising judicial review. This last finding of similarity is of greater significance for the research project because the Inspection Panel process is often criticised for *not* ensuring adequate independence from the Bank.<sup>86</sup>

### 1.3.2 Analysing Differences

Ultimately, the differences between the conceptual model (representative of the comparative object in national legal systems) and the object of comparison at the international level determine the boundaries of the analogy. In addition, they are crucial in proving or disproving the hypothesis – especially since the Method departs from a presumption of similarity.<sup>87</sup> As with the similarities, however, the differences identified by the vertical comparative analysis should not be taken at face value. For instance, differences may turn out to be more artificial once the context is taken into account or when differences in language or terminology are better understood.

In the ITA project, for example, comparison shows that, while states enjoy full sovereignty, international entities administering territories (formally) do not. Another difference is observed in the fact that, unlike states, international administrations – being part of international organisations – enjoy extensive immunities. However, further research indicates that these differences are predominantly a result of

<sup>82</sup> See Wiener, above n. 1, at 1356. Wiener quotes Watson: 'It is a myth to think that ... every parallel is a provenance.'

<sup>83</sup> Brand, above n. 35, at 445 on the notion of 'gradation'. See also M. Cohn and M. Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 *Canadian Journal of Law and Jurisprudence* at 333-356, available at: <<http://ssrn.com/abstract=942476>> (last accessed 1 May 2009).

<sup>84</sup> Thus, the parallel is founded – among others things – on these mandates, which form the basis from which the international entities operate within the territory they administer. These mandates entrust all-encompassing and ultimate *legislative, executive* and *judicial* power to the entities, i.e. the public power traditionally vested in a state.

<sup>85</sup> Inspection Panel Resolution, para. 4: Panel members cannot be employed by the World Bank group (in any capacity) after the end of their three-year term. The effect of this provision is arguably similar to that of national constitutions granting judges 'life tenure'. See e.g. Article 97(2) of the German Constitution.

<sup>86</sup> See e.g. S.R. Roos, 'The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case' (2001) 5 *Max Planck Yearbook of United Nations Law* at 482: '... the Panel is not a truly independent body despite these safeguards for independence. The Panel's independence is primarily counterbalanced by the fact that it only has advisory powers.'

<sup>87</sup> See section 3.1 above.

traditional conceptions of public international law rather than being necessarily inherent to the concept of ‘international territorial administrations’ as such. In the WBIP project, for instance, vertical comparative analysis reveals that the Inspection Panel does not have any remedial capability – potentially a significant difference between the Panel and courts exercising judicial review. On the other hand, closer analysis of the Panel’s practice reveals that the Bank’s Board of Executive Directors informally involves the Panel in remedial activities on occasion.<sup>88</sup>

Thus, the outcome of stage three is a thorough understanding of the similarities and differences between national and international legal systems in relation to the comparative object. These insights position researchers to prove or disprove the hypothesis and formulate specific recommendations, which will be discussed in stage four.

### 3.4 Stage Four: Synthesising

At its core, stage four requires researchers to establish whether the hypothesis has been proven or disproven and to decide what conclusions and/or recommendations can be formulated based on this finding. Compared to stages one to three (which are distinctly ‘descriptive-analytical’), stage four may therefore include normative elements.<sup>89</sup> Seen from this perspective, stage four of the Method is typical of the final stage of a scientific research project. However, for vertical comparative law methods, such as the Method under discussion, stage four is the culmination of legal transposition, that is, the process of transferring the ideas behind legal concepts (if not, strictly speaking, the legal concepts themselves) from the national to the international level. Some refer to this process as legal ‘borrowing’ or ‘transplantation’.<sup>90</sup> Whatever its designation, the term has to imply adaptation (i.e. ‘tailoring’ or ‘customisation’). As Wiener describes this process, if somewhat fatalistically:

... we are selecting a bit of regulatory DNA from national law, inserting it into an international law embryo [sic], and hoping that this new legal hybrid will grow to be a hardy offspring.<sup>91</sup>

In fact, given the lessons legal comparativists have learnt from instances of ‘mindless borrowing’, any mode of legal comparison is at its most effective for problem-solving purposes if this transformational aspect is taken seriously. As Palmer explains:

...[legal] transplants almost always undergo some modification and reform not only at an unconscious epistemological level (wherein borrowed rules receive a distinct local interpretation or ‘translation’ by the local culture); there is often a conscious revision of the transplant to conform to an analogous or cognate legal idea already present in the system. The process is neither new nor abnormal in many mixed systems. It is actually a kind of creative convergence – the construction of autonomous law out of borrowed elements.<sup>92</sup>

It is also important to note that the existence of similarities does not necessarily lead to a verification of the hypothesis, as this depends, for example, on the nature of those similarities (as qualified during stage three). Likewise, differences revealed by the vertical analysis do not necessarily have to lead to a refutation of the hypothesis. In case of the WBIP project, for example, the absence of remedial capacity in the

<sup>88</sup> This typically involves cases surrounded by controversy or findings of gross non-compliance with Bank operational policies, such as the 1999 *China Western Poverty Reduction Project* request, the 2001 *Chad Petroleum and Pipeline Project* Request and the 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* request. See: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html>> (last accessed 1 May 2009).

<sup>89</sup> Brand, above n. 35, at 453.

<sup>90</sup> Wiener, above n. 1 at 1298.

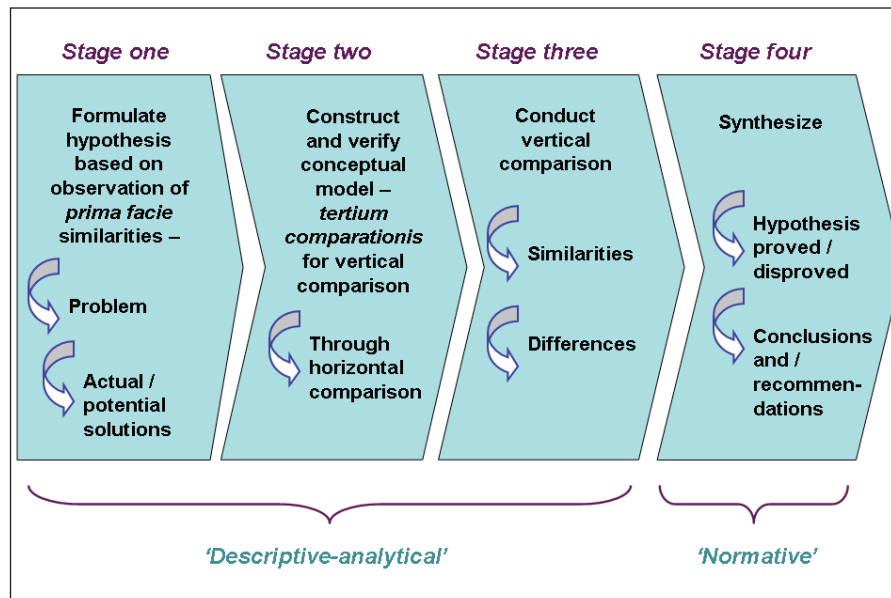
<sup>91</sup> Id., at 1371.

<sup>92</sup> Palmer, above n. 17, at 276.

Inspection Panel process does not lead to a conclusion that there is no meaningful equivalence between the Panel and courts exercising judicial review. The particular conclusion, rather, centres on the need for the Inspection Panel process to be amended so as to formalise the Panel's role in formulating and/or enforcing remedies.

In sum, the outcomes of this final stage of the Method are a proven or disproven hypothesis, as well as conclusions and/or recommendations based thereupon. For an overview of the ITA/WBIP Vertical Comparative Method, see Figure 3 below.

**Figure 3: The 'ITA/WBIP' Vertical Comparative Law Method**



#### 4 Concluding Remarks

This article explores the potential of vertical comparative law methods, which transpose legal concepts (or the ideas behind them) from the national to the international legal level, for conceptualising the 'international rule of law'. It presents two kinds of considerations (typology and risk) that need to be kept in mind when employing comparative law methods in general. Section 2 outlines four potential modes of comparison: horizontal (among national legal systems or among international (quasi-)legal regimes) and vertical (top-down: from international law to national law; or bottom-up: from national law to international law). Section 2 also highlights three common risks associated with comparative law methodology (not considering the context properly, conducting a one-dimensional analysis and skewing the results of the comparative analysis based on preconceived ideas about 'law' or due to a narrow focus on the comparative objective) and suggests ways to mitigate them. Section 3 sets out a particular vertical, bottom-up comparative law method, as employed in the context of two separate doctoral research projects that both analyse ways to enhance the accountability of international institutions (the ITA project and the WBIP project). This four-stage method (formulating a hypothesis; constructing a conceptual model; applying the conceptual model to the international level; and synthesising findings) may be regarded as an example of the type of vertical, bottom-up comparative law method that could aid the conceptualisation of the 'international rule of law'.

This article draws two major conclusions based on the experience of employing this Method in the context of the ITA and WBIP research projects.

Firstly, employing vertical, bottom-up comparative law methods is increasingly *justified* by the emergence of a ‘common zone of impact’ (i.e. a situation in which individuals are affected by the exercise of public power – whether by states, international institutions or both). Though best illustrated through the substantive findings of the ITA and WBIP doctoral research projects, suffice it to state here that the changing nature of international law and the intensified interplay between the national and international legal levels give rise to new legal problems that, in turn, call for solutions that cannot be easily found within international law – at least not in its current stage of evolution. Hence, this situation presents a compelling justification – and an interesting opportunity – for considering national legal systems when looking for potential solutions to address the accountability problem in international law, since many national systems have been dealing with ways to curb the exercise of public power for quite some time.

Secondly, vertical bottom-up comparative law methods indeed have the *potential* to address problems such as the accountability issue at the international level. The remainder of this section outlines a few considerations that might lead to a greater realisation of this potential.

To start with, while there are definite risks involved in employing vertical, bottom-up comparative law methods, this article argues that the risks are not necessarily greater compared to other modes of legal comparison and that they can be sufficiently mitigated. Moreover, national legal concepts may often seem to be inadequate for application outside their original (national) legal contexts, but it is often the existence of formal and frequently peripheral elements (such as strict contextual connotations or the terminology traditionally associated with those legal concepts) that make them seem unsuitable for the purpose of vertical, bottom-up legal comparison.<sup>93</sup> By distilling the ideas behind such legal concepts,<sup>94</sup> it becomes possible to make a distinction between associations that are inherent to the idea and others that are mostly contextual or formal characteristics that can be accounted for.

In addition, the need for a common comparative law language and shared conceptual frameworks is widely acknowledged among legal comparativists.<sup>95</sup> However, this article argues that they are urgently required if vertical, bottom-up legal comparative methodology is to ‘move beyond serendipitous vertical borrowing’ and hence realise its potential.<sup>96</sup> As Wiener argues, international lawyers have ‘to engage in a systemic inventory and evaluation of the national law ideas ... available worldwide, in both large and small countries’ – including sharing their ‘experiences of success and failure’.<sup>97</sup> It is especially by sharing our experiences, as we have attempted to do in this article, that the development of a shared language and conceptual tools may become a reality.

<sup>93</sup> See e.g. N. Walker, ‘Post-National Constitutionalism and the Problem of Translation’ (2003) IILJ Working Paper 2003/3 (History and Theory of International Law Series), available at: <<http://www.iilj.org>> (last accessed 1 May 2009). For a more linguistic perspective, see V. Grosswald Curran, ‘Comparative Law and Language’ in Reimann and Zimmerman, above n. 22, at 675-708.

<sup>94</sup> In terms of the Method presented in this article, by developing multi-faceted conceptual models describing the legal concept in question. See section 3.2 above.

<sup>95</sup> See in general Gerber, above n. 35. See also Zweigert and Kötz, above n. 45, at 44-45, where it is argued that the establishment of a shared vocabulary could ‘identify the demands that a particular slice of life poses for the law in all systems where the social and economic conditions are similar and provide a realistic context within which to compare and contrast the various solutions, however much they may differ technically or substantially.’

<sup>96</sup> Wiener, above n. 1, at 1366. See also Haraszti, above n. 47, at 116.

<sup>97</sup> Wiener, above n. 1, at 1366.



Finally, sharing experiences may not be a simple matter either, since comparative law methodology often bears a treacherous simplicity. In other words, the need to set out a comprehensive comparative law methodology often seems superfluous, discouraging legal comparativists from elaborating on methodology because, it is argued, ‘facts of common knowledge require no proof’.<sup>98</sup> As a result, legal comparativists may remain vague or even silent on the comparative legal methodology they are employing.<sup>99</sup> On the other hand, those engaged in comparative law analysis can easily become entangled in its complexities, not to mention its politics, which usually lurk just below the surface. That is to say, the comparative legal methodology is elaborated to the point of becoming convoluted and of little practical use, since it contains ‘unrealistic and unattainable standards’, even – as Palmer quips – by the standards of academics.<sup>100</sup> However, we maintain that the ‘message from Mount Olympus must not be that comparative law is always forbidding and difficult. It must be accessible and its methods must be flexible.’<sup>101</sup>

Indeed, fear of stating the obvious should not prevent legal comparativists from sharing their experiences; and neither should it cause them to ‘dress up’ their methodology so that it appears more intricate than it is. As Koopmans notes, it is a ‘comforting thought’ to realise that there are ‘general truths’ that permeate our thinking.<sup>102</sup> We may just need to be bold enough to express them.

<sup>98</sup> *Id.*, at 1300-1303. However, see V.V. Palmer, above n. 17 at 264, who argues that ‘even simple methods, which it has long been fashionable to disdain [...] could all have legitimacy and value in practical forms of legal research’.

<sup>99</sup> See e.g. Zweigert and Kötz, above n. 45, at 33, where the authors argue that there has been very little systematic writing about methods of comparative law. See also Chodosh, above n. 21, at 1044-1046.

<sup>100</sup> Palmer, above n. 17, at 263.

<sup>101</sup> *Id.*, at 290.

<sup>102</sup> Koopmans, above n. 19, at 284.