
The Persuasiveness of Domestic Law Analogies in International Law

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Abstract

Domestic law analogies are often treated dismissively in international law cases and scholarship. Yet they continue to find their way into arguments about international law and sometimes into international law itself. Rather than rejecting such analogies, this article dissects the process of analogical reasoning into three steps, drawing on insights from the study of analogical reasoning in other disciplines. The aim of working through the three steps is to assess when a particular domestic law rule or concept can 'fit' in the different international law context and thus provide the basis for a domestic law analogy in international law.

1 Introduction

Analogical reasoning is a rhetorical method that uses analogies – a type of similarity that exists when 'two ... situations share a common pattern of relationship among their constituent elements'¹ – to draw conclusions about a lesser-known situation (the target) based on the similarities it shares with a well-known situation (the source).² Analogies provide 'ready-made schemes of thinking',³ and, in international law, they

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¹ Holyoak, 'Analogy', in K.J. Holyoak and R.G. Morrison (eds), *The Cambridge Handbook of Thinking and Reasoning* (2005), at 117.

² Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy', 109 *Harvard Law Review* (HLR) (1996) 923, at 1006; Holyoak and Thagard, 'The Analogical Mind', 52 *American Psychologist* (1997) 35, at 35.

³ Ferrari-Bravo, 'International and Municipal Law: The Complementarity of Legal Systems', in R.St.J. MacDonald and D.M. Johnston (eds), *The Structure and Process of International Law* (1986) 715, at 718.

are often drawn from domestic law.⁴ Such domestic law analogies are premised on the existence of sufficient similarities between the problems that domestic and international law need to address as well as between the relationships of domestic law actors (primarily, private individuals and the state) and those of international law actors (traditionally, states and international organizations but with an increasing role for non-state actors). This premise then justifies the use of domestic law concepts, insights and sometimes even rules in international law discourse. Examples are the influence of contract law doctrines such as *pacta sunt servanda* or *pacta tertiis nec nocent nec prosunt* on the law of treaties⁵ or that of the *sic utere* principle on the law of transboundary environmental harm.⁶

The use of domestic law analogies in international law, however, has been condemned as a sin,⁷ ‘like reaching for that extra piece of chocolate’.⁸ Most critiques deal with the process of analogical reasoning;⁹ some argue that domestic and international law are too different for any analogy to be possible,¹⁰ whereas others take aim at private

⁴ Analogical reasoning also happens within international law. See Bleckmann, ‘Analogy Im Völkerrecht’, 17 *Archiv des Völkerrechts* (1977) 161; Sivakumaran, ‘Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief’, 28 *European Journal of International Law (EJIL)* (2017) 1097. In the *Reparations for Injury* case, the International Court of Justice (ICJ) held that the United Nations (UN) could not base its claim for reparations from Israel for the death of Count Bernadotte, the Swedish UN negotiator, on diplomatic protection because the relationship between the UN and its staff is not analogous to that between a state and its nationals. Although the general steps outlined in Part 3 can be applied, these analogies are not the topic of this article as they do not raise the same issues as the ‘inter-systemic’ analogies drawn from domestic law. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174. On the term ‘inter-systemic’, see Bordin, ‘Analogy’, in J. d’Aspremont and S. Singh (eds), *Concepts for International Law* (forthcoming).

⁵ Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, arts 26, 34. Other examples can be found in the 2016 report of the International Law Association’s (ILA) study group, see ILA, *The Use of Domestic Law Principles in the Development of International Law* (2016), available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1616&StorageFileGuid=54c25d0d-3d18-49c4-8d73-b1bec1a346aa>.

⁶ Kratochwil, ‘The Limits of Contract’, 5 *EJIL* (1994) 465, at 465; Brunnée, ‘Sic Utere Tuo Ut Alienum Non Laedes’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010).

⁷ Weiler, ‘The Geology of International Law’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547, at 550.

⁸ Poole, ‘Sovereign Indignities: International Law as Public Law’, 22 *EJIL* (2011) 351, at 351.

⁹ Older critiques focused on the tendency to expand international law beyond what states have consented to, and, indeed, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), devotes considerable attention to rebutting these positivist arguments. Others saw analogies as masking a dearth of new ideas. See DeWitt Dickinson, ‘The Analogy between Natural Persons and International Persons in the Law of Nations’, 26 *Yale Law Journal* (1917) 564, at 582.

¹⁰ DeWitt Dickinson, *supra* note 9, at 582–591; Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’, 10 *EJIL* (1999) 425, at 433–434; Thirlway, ‘Concepts, Principles, Rules and Analogies: International and Municipal Reasoning’, 294 *Recueil des Cours (RdC)* (2002) 265, at 275. However, he admits that ‘[i]nternational law can benefit from argument from analogy’ (at 405); Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) 331, at 358; Besson, ‘Theorizing the Sources of International Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 163, at 164; Hurd, ‘The International Rule of Law and the Domestic Analogy’, 4 *Global Constitutionalism* (2015) 365, at 366.

law analogies but allow public law analogies.¹¹ Still others accept domestic law analogies as a normal process of legal reasoning but advise caution.¹² This article is inspired by unease with these positions. A categorical rejection of domestic law analogies, or of a particular subset thereof such as private law analogies, is difficult to maintain in the face of evidence that they exist. At the same time, their acceptance in some situations, without articulating when or why that is the case leaves a semblance of arbitrariness. Therefore, this article examines how we can identify the suitability of a domestic law analogy for international law. To this end, I lay bare the process of analogical reasoning. Using insights from other disciplines, I identify three steps that help us examine whether sufficient similarities exist between both legal orders to argue for an analogical transfer from domestic to international law. My hope is that these insights and the three steps identified will help overcome international lawyers' reticence about the suitability of domestic law analogies for international law,¹³ by enabling us to identify any strengths and weaknesses of a specific domestic law analogy.

2 Domestic Law Analogies in International Law

Domestic law analogies are sometimes used for the development of international law, as when contract law doctrines shape the substance of treaty law.¹⁴ Such upward legal transplants are only the tip of the iceberg. The process of analogical reasoning can produce a 'negative analogy' when it reveals that the differences between the international and domestic legal orders are too great for a domestic law analogy to work.¹⁵ This might lead to the development of a different international law rule free from domestic law influences.¹⁶ Alternatively, the process of analogical reasoning may lay

¹¹ Chayes, 'A Common Lawyer Looks at International Law', 78 *HLR* (1965) 1395, at 1400, rejected the analogy between states and private persons but accepted the analogy between states and government bodies (at 1410). Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', 22 *EJIL* (2011) 315, at 329, likewise replaces the analogy between states and individuals with a new analogy to officials and agencies under municipal law, although he admits that his aim is to use an 'expanded array of analogies' (at 331); a similar position is taken in Kadelbach, 'From Public International Law to International Public Law: A Comment on the "Public Authority" of International Institutions and the "Publicness" of Their Law', in A. von Bogdandy, *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010) 33, at 43–44.

¹² Lauterpacht, *supra* note 9, at 84–85; G. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 44–45; Shahabuddeen, 'Municipal Law Reasoning in International Law', in R.Y. Jennings, A.V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 90, at 100–102; C. de Visscher, *Problèmes d'interprétation Judiciaire en Droit International Public* (1963), at 39–40; O. Schachter, *International Law in Theory and Practice* (1991), at 52–53.

¹³ An illustration of this reticence is Bogdandy *et al.*, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 1375, at 1391, who deny that applying domestic constitutional insights to international institutions amounts to domestic analogies but is instead a comparative approach, without asking how that differs from an analogical approach. Likewise, Wessel, 'Revealing the Publicness of International Law', in C. Rynjaert, E.J. Molenaar and S.M.H. Nouwen (eds), *What's Wrong with International Law?* (2015), speaks about 'escaping a domestic analogy'.

¹⁴ Prott, 'Argumentation in International Law', 5 *Argumentation* (1991) 299, at 303, argues how Grotius' treaty-contract analogy forms the basis of modern international law.

¹⁵ See Section 3.C.

¹⁶ Shahabuddeen, *supra* note 12, at 101.

bare a gap in international law that needs to be filled before a transplant can be successful. Examples of the latter are the doctrines of duress and *rebus sic stantibus*, which were initially not accepted in international law because of the lack of an institutional framework to adjudicate such claims.¹⁷ However, as international law has developed, these doctrines found their way into treaty law.¹⁸

Developing international law is not the only use of domestic law analogies. As an argumentative tool, analogies can help us understand the nature of international law,¹⁹ theorize a specific question²⁰ or provide a way of conceptualizing international law rules.²¹ Whatever purpose domestic law analogies are used for, we need to be able to evaluate them. There are two overarching questions: one focused on the process of analogical reasoning to identify whether a domestic law concept is suitable for the international legal order and a second focused on which state's, or states', legal system to analogize from. Adopting Olufemi Elias and Chin Lim's distinction in relation to general principles, the former is a vertical question, whereas the latter is a horizontal question.²²

Although both questions are important, this article focuses on the vertical question. This is not to deny the importance of the horizontal question. To the contrary, the horizontal question comes with unresolved methodological challenges, similar to those faced when identifying general principles of law under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).²³ To name just a few, which domestic legal system (or systems) can we draw from; can we truly understand different systems in their entire nuance and can we avoid the dominance of one system (whether that be intentional or accidental when lawyers fail to look beyond familiar horizons)? All of these questions are important because, while it is theoretically possible to analogize from a single legal system, such an analogy is unlikely to carry much force in today's world. Nevertheless, I focus only on the vertical question, which too often remains underexplored in international law even though many criticisms of domestic law analogies go to its heart – namely, when are there sufficient similarities between

¹⁷ Lauterpacht, *supra* note 9, at 161, 169–75.

¹⁸ VCLT, *supra* note 5, Arts 51–52 (duress) and 62 (*rebus sic stantibus*).

¹⁹ E.g., Pauwelyn starts the first substantive chapter of his book *The Optimal Protection of International Law* with: 'In domestic law ...' and describes how his objective is 'to apply the Calabresi and Melamed analysis ... to entitlements accorded under *international law*' (at 8; emphasis is in original). He goes on to raise as questions whether these models can find application in international law, need to be adapted or are completely inappropriate (at 8–9). Another example is Lowe, *International Law* (2007), at 29–30, who uses a domestic analogy to explain how law is invoked domestically and internationally.

²⁰ E.g., is state sovereignty analogous to private property or to trusteeship? See 'Introduction', 18 *Theoretical Inquiries in Law (TIL)* (2017) i, at i.

²¹ E.g., when we use a constitutionalism analogy, see Knop, 'Statehood: Territory, People, Government', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 95, at 112–113.

²² Elias and Lim, "'General Principles of Law'", "Soft" Law and the Identification of International Law", 28 *Netherlands Yearbook of International Law* (2009) 3, at 23–24. These questions are sub-questions of the same broader question; there is neither sequence nor hierarchy to them.

²³ On these challenges, see Ellis, 'General Principles and Comparative Law', 22 *EJIL* (2011) 949. Statute of the International Court of Justice 1945, 59 Stat. 1031.

the domestic and international legal orders to enable us to borrow from domestic law in our arguments about international law?

Before embarking on this key vertical question in Part 3, domestic law analogies need to be distinguished from the broader group of legal transplants, from general principles, from the direct application of domestic law in international law and from analogical reasoning in the law more generally. As already explained, domestic law analogies are not solely used as a source of legal transplants. Moreover, not all legal transplants from domestic law rely on analogical reasoning. For example, to the extent that international criminal law draws inspiration from domestic law, it does not rely on a process of analogizing states to individuals (as subjects of law) and of international institutions to domestic institutions (as the makers and/or enforcers of the law).²⁴ Another difference between domestic law analogies and legal transplants is that the latter are not limited to upward processes of internationalization but, rather, happen horizontally between states or downward from international to domestic law.²⁵ Domestic law analogies are also often conflated with general principles of law under Article 38(1)(c) of the ICJ Statute.²⁶ The conflation is understandable; general principles are the most likely 'formal dress worn by analogy when invited to contribute to the law'.²⁷ However, domestic law analogies can become incorporated in other formal sources, such as when treaty negotiators adopt a domestic law concept in an international agreement. More fundamentally, domestic law analogies as a process are best separated from their products, whether these are sources of international law or simply arguments or clarification tools to help our understanding of an international legal problem. My focus is on the process of analogical reasoning and on when a particular domestic law analogy could work for international law. It does not mean that domestic law analogies have to be used or that domestic law is a source of international law. I am not arguing, for example, for a return to a patrimonial conception of the state,²⁸ where the state is considered the private property of the ruler and which, historically, paved the way for the direct application, rather than an application

²⁴ See ILA, *supra* note 5, at 54, para. 193. Here, international law has stepped into a role previously reserved for states (criminalizing certain behaviour of individuals).

²⁵ Dolidze, 'Bridging Comparative and International Law: *Amicus Curiae* Participation as a Vertical Legal Transplant', 26 *EJIL* (2015) 851, at 853.

²⁶ E.g., Zajtay, 'Reasoning by Analogy as a Method of Law Interpretation', 13 *Comparative and International Law Journal of Southern Africa* (1980) 324, at 329. The ILA's Study Group report, *supra* note 5, deals with domestic law analogies (e.g., the section on the International Law Commission) and general principles (e.g., the section on international criminal law). Thirlway, *supra* note 10, at 345, does not even discuss general principles separately because 'the whole thrust of these lectures [on the use of analogies] is an attempt to identify some of the circumstances in which it is inappropriate ... to have recourse to general principles identified in national legal systems'.

²⁷ Thirlway, *The Sources of International Law* (2014), at 405. He also notes that 'analogy is ... a method of legal reasoning, but ... difficult to regard it as a source' (at 24), a noticeable change compared to 2002. See Thirlway, *supra* note 10. As pointed out by M. Koskeniemi, *The Gentle Civilizer of Nations* (2002), at 375, Sir Hersch Lauterpacht also conflated general principles and domestic law analogies in his seminal book on private law analogies.

²⁸ Triepel, 'Les Rapports entre le Droit Interne et le Droit International', 1 *RdC* (1923) 73, at 100.

by analogy, of private law rules.²⁹ Nor am I arguing for the adoption of a common law-style of reasoning whereby domestic law has to be followed in international law. Contrary to ‘analogical’ common law reasoning,³⁰ I am not concerned with finding a general rule that encapsulates the (domestic law) source as well as the (international law) target and that therefore must be applied in both legal orders. My purpose is solely to identify when the relevant relations in the international and the domestic legal orders are sufficiently similar so that an analogy with a concept or even a rule from domestic law could be suitable for international law.

3 Identifying Suitable Analogies

To answer the vertical question about the suitability of a domestic law concept or rule for international law, we need to investigate when, and how, the mental leap from domestic to international law can be justified. When do the undeniable differences between domestic legal orders and the international legal order make a particular analogy unwarranted and why is it that despite these differences, the influence of domestic law ideas is equally undeniable in many areas of international law, such as treaty law or the law on state responsibility? A wide literature deals with analogical reasoning. Some theories on analogies, such as Keith Holyoak and Paul Thagard’s multi-constraints theory,³¹ describe how human beings reason by analogy. Others, such as Derdre Gentner’s structure-mapping theory,³² Paul Bartha’s articulation model³³ and John Norton’s material theory of analogy,³⁴ are normative in that they also aim to identify what makes a persuasive analogy.

²⁹ The earliest ‘international’ lawyers did not distinguish between private and public nor between domestic and international law but, instead, applied private law doctrines from Roman law. Lesaffer, ‘Roman Law and the Intellectual History of International Law’, in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 38, at 49. Moreover, these international lawyers, in civil and common law jurisdictions, were deeply conversant in Roman law, which they saw as the *ratio scripta*, embodying natural law. Waldock, ‘General Course on Public International Law’, 106 *RdC* (1962) 1, at 54. A. Clapham, *Brierly’s Law of Nations* (2012), at 20; Kingsbury and Straumann, ‘State of Nature Versus Commercial Sociability as the Basis of International Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 33, at 38, 41; Bederman, *The Spirit of International Law* (2002), at 5.

³⁰ The quotation marks are deliberate because this type of legal reasoning is better described as the induction of a general rule and the deduction of the solution in the specific case from this general rule. It is an argument from example or *paradeigma*. See Bartha, ‘Analogy and Analogical Reasoning’, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2016). Others have critiqued the equation of precedent and analogy on different grounds. Schauer, ‘Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy’, 3 *Perspectives on Psychological Science* (2008) 454, at 455, 457–458, has pointed out that where precedents bind decision-makers when a later case with the same facts presents itself, analogies merely help the decision-maker in reaching the best decision and in persuading others that the decision made is indeed the best. Similarly, J. Raz, *The Authority of Law* (2009), at 202, has argued that ‘argument by analogy is not a method of discovering which rules are legally binding because of the doctrine of precedent. That discovery requires nothing more than an interpretation of the precedent to establish its ratio. Analogical argument is a form of justification of new rules laid down by the courts in the exercise of their law-making discretion’.

³¹ Holyoak and Thagard, *supra* note 2; K.J. Holyoak and P. Thagard, *Mental Leaps* (1995).

³² Gentner, ‘Structure-Mapping: A Theoretical Framework for Analogy’, 7 *Cognitive Science* (1983) 155.

³³ P. Bartha, *By Parallel Reasoning* (2010).

³⁴ J.D. Norton, *Analogy* (2018), available at www.pitt.edu/~jdnorton/papers/material_theory/4.%20Analogy.pdf.

Despite best efforts to develop a normative theory about analogies, no general rules are available to determine what makes a valid analogical inference.³⁵ The problem lies not in the logical structure of the analogical argument³⁶ but, rather, in the premise that the source and the target are indeed sufficiently similar to justify the conclusion reached.³⁷ If this premise does not hold, the remainder of the inference falls apart as well. All attempts to formalize the process by which we identify relevant similarities have failed to provide a watertight rule; no matter how complicated these rules become, they always end up being too permissive in that they allow bad analogies to pass.³⁸ At most, rules can establish a threshold to weed out implausible analogies, but not a method to pinpoint where an analogy falls on the continuum ranging from 'not bad' to 'excellent'.³⁹

Requiring validity from a tool of reasoning before deploying it for the advancement of human knowledge, however, may be too much to expect when all we need is persuasiveness.⁴⁰ The premise of sufficient similarity, and the steps leading up to the formulation of this premise, requires evaluation⁴¹ and intuitive judgment.⁴² No formal rules can immunize an analogical argument from challenge, yet the possibility of such a challenge does not imply that we should abandon analogical reasoning altogether or that we should leave the process unexplored.⁴³ Bearing these points in mind, theories on analogical reasoning are nevertheless useful when assessing the suitability of a domestic law analogy for international law. These theories generally distinguish three steps in the process of assessing whether the source and the target are sufficiently similar in relevant respects to enable reasoning by analogy: (i) the retrieval of the source domain; (ii) the mapping of the similarities between the target and the source domain and (iii) the analogical transfer from the source to the target based on the presence of relevant similarities and the absence of critical dissimilarities. Following these steps does not produce an ironclad result, nor are they intended to do so. Analogies belong to the field of rhetoric, not logic. They will always be contestable: at the level of choice of the source domain, when mapping, as well as when identifying the (dis)similarities and their relevance to the argument. Even an analogy that was once acceptable may not always remain that way, as evolving attitudes and understandings about international and domestic law may make a once-suitable analogy less so.⁴⁴

³⁵ Bartha, *supra* note 30, at 7.

³⁶ The logical structure is stylized as follows (derived from Klug's formula in R. Alexy, *A Theory of Legal Argumentation* (2010), at 281):

- i. If A then B;
- ii. If C is similar to A;
- iii. Therefore, if C then B.

³⁷ *Ibid.*, at 282.

³⁸ Norton, *supra* note 34, at 1, 13, 23.

³⁹ Bartha, *supra* note 33, at 316.

⁴⁰ C. Perelman, *The New Rhetoric and the Humanities* (1979), at 97.

⁴¹ Alexy, *supra* note 36, at 282–283, and sources quoted therein.

⁴² Norton, *supra* note 34, at 12.

⁴³ Lauterpacht, *supra* note 9, at 84.

⁴⁴ E.g., the challenge thrown up by public law analogies in international arbitration. See Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107 *American Journal of International Law (AJIL)* (2013) 45, at 63–68, or the diminished relevance of private law analogies in matters of state succession or acquisition of territory. See IIA, *supra* note 5, at 34.

I explore each of these steps in Sections A to C, and I illustrate how a domestic law analogy can fail at each of these steps. It should be noted that the boundaries between these steps are in practice more fluid than this analysis suggests. However, for the purposes of our analysis, it is useful to separate them out.

A Retrieval of the Source Domain

The first step in any analogy is to retrieve the source to which the target is compared.⁴⁵ The choice of source domain is influenced by what we know about the target as well as by what we do not know but want to know.⁴⁶ The term ‘domain’ can be defined as ‘a set of objects, properties, relations and functions, together with a set of accepted statements about those objects, properties, relations and functions’.⁴⁷ It is a flexible concept, and its scope depends on what it is we want to compare. For any analogy to be feasible, there must be some similarity between the source and the target domains. An often-heard argument against domestic law analogies in international law is that international law is too different from domestic law for any analogy to be possible.⁴⁸ This can be seen as an argument that domestic law is not the right ‘source domain’ of analogies for international law.

When comparing the international and domestic legal orders, the differences are undeniable. The traditional subjects of domestic law are natural persons, who can accept obligations towards each other through contracts, the compliance with which is overseen and enforced by courts whose jurisdiction is established by law. Individuals form part of a state, with a centralized lawmaker who has the power to enact legislation: general rules that apply to anyone within their scope. In addition, executive organs and agencies implement the rules. These rules govern the interactions between individuals as well as the relationship between the individuals and the public authorities. In addition, civil society organizations represent a range of interests and influence legislation and implementing rules. In contrast, the traditional subjects of international law are states,⁴⁹ which engage with each other without the presence of a court system with compulsory jurisdiction to enforce compliance with obligations. There is no centralized lawmaker or executive branch in international law, although there are now multiple international organizations, some with extensive mandates in their area of specialization. Some of these organizations, such as the World Trade Organization (WTO), come with their own dispute settlement mechanism, and many other international agreements provide for dispute settlement or arbitration through other institutions such as the Permanent Court of Arbitration.⁵⁰ As in domestic

⁴⁵ Holyoak, *supra* note 1, at 122–123.

⁴⁶ *Ibid.*, at 118, 123.

⁴⁷ Bartha, *supra* note 30, at 2.2.

⁴⁸ See sources quoted in note 10 above. In terms of the tabular presentation of Table 2, this argument means that there is no combination such as A – A*, only B – ~B* and ~C* – C.

⁴⁹ Thirlway, *supra* note 10, ch. IV discusses in detail the differences between states and individuals.

⁵⁰ The United Nations Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3, provides both with the possibility of arbitration provided for in Annex VII while also creating the International Tribunal for the Law of the Sea.

society, non-governmental organizations influence international law-making, and some have an official status within international organizations.

In international relations literature, the differences between domestic and international law have been used to reject the domestic analogy that was seen as an argument that domestic institutions need reproduction at the international scale to ensure order between states and to 'solve' the instability of the international legal order.⁵¹ However, even if one accepts that there is no domestic analogy because the international order is essentially different to the domestic order, this does not necessarily imply that any and all domestic law analogies should be rejected.⁵²

In the hurry to escape the domestic analogy, possibly due to the disappointment that inevitably follows when trying to shoe-horn the international order in domestic order solutions, we implicitly accept that the relations governed by international law are of one type only, and we close our eyes to the complexity and variety that gives international law colour. Even if the international legal order is not the spitting image of the domestic legal order, and should not be reshaped in the latter's image, it would be wrong to say that the international legal order shares no characteristics whatsoever with the domestic legal order and to rule out the latter as a source domain for analogies to inspire the former. Despite their differences, both legal orders have similar needs. For example, both orders need to ensure the coexistence of their actors and safeguard actors' freedom of action, including their ability to bind themselves voluntarily. Both also need to ensure that binding obligations are complied with. The similarities are thus as undeniable as the differences and explain why the question of domestic law analogies keeps popping up in international law. My argument is that, to the extent that there are such similarities, we should not rule out the possibility of analogizing from domestic to international law.

None of this is to say that the differences between domestic and international law can be completely disregarded. What I am saying is merely that these differences are not enough of a reason to reject domestic law outright as the source domain of analogies that can be deployed in international law. Likewise, the argument that international law can draw on domestic law analogies does not imply that all analogies to domestic law work. It may well be the case that some arguments by analogy to domestic law fail due to the differences between the domestic and international legal orders when the differences are critical dissimilarities or because the similarities are irrelevant – something that becomes relevant in the later steps of an analogy discussed in Sections B and C.

⁵¹ H. Bull, *The Anarchical Society* (1977), at 46–51; Rolf, 'The State of Nature Analogy in International Relations Theory', 28 *International Relations* (2014) 159, at 165; C. Bottici, *Men and States* (2009).

⁵² H. Suganami, *The Domestic Analogy and World Order Proposals* (1989), at 26–27. Thirlway, *supra* note 10, at 309, conflates the domestic analogy with domestic law analogies when he seeks to establish 'the possibility that international law as a whole is sufficiently parallel to national law for analogy to be possible' (emphasis added). However, he is seeking the impossible and the unnecessary. He may have been aware of that when he states that he does not want to leave 'the impression that all analogies with national law are likely to be faulty' (at 404).

Which domestic law analogies, then, are potentially suitable for international law? When are the similarities between domestic and international law sufficient for the former to be used as the source domain for analogies? I argue that to identify the relevant source domain, we need to adopt a more ‘retail’⁵³ approach to international law, where we look at the issues at stake, the structures in place and the relationships governed to see if domestic law analogies are appropriate in a particular situation. Neither domestic nor international law is accurately presented as a monolithic bloc; both govern a variety of relationships between a variety of actors and pursue different purposes that may sometimes stand in tension to each other, such as, in particular, the often competing goals of protecting individual freedom and the needs of the community.⁵⁴ Both are thus more accurately represented as multi-layered, with different areas of domestic law being able to provide inspiration to different areas of international law. As a result, I do not agree with the literature that presents the use of analogies as a binary choice between public or private law analogies, with only public law analogies being acceptable.⁵⁵ In some areas of international law, private law analogies are appropriate, while in other areas public law analogies might be more suitable.

Joseph Weiler’s geological metaphor of the different strata of international law is useful to help us understand which analogies are appropriate where. This metaphor reveals how different layers of international law exist alongside each other, and how changes in international law are not simply paradigm shifts from one conception to another.⁵⁶ Moreover, there are parallels with the ‘geology’ of domestic law, which are useful to identify the source domain for analogies.⁵⁷ However, as Weiler’s geology aims to unearth how the exercise of power is legitimated in each of these strata rather than to identify the purpose of international law, I label the strata differently: coexistence, coordination, cooperation and regulation. These build on Wolfgang Friedmann’s seminal distinction between the international law of coexistence and of cooperation – a distinction that, half a century after its original formulation, still retains a lot of explanatory force about the structure and goals of international law.⁵⁸

A first stratum is that of coexistence, in which the focus is on governing the mutual, horizontal, relationships between states, which are each considered to be sovereign within their respective territories. States are the main actors in this stratum, with few surrounding institutions. While there is the possibility of dispute settlement through diplomatic channels and, for almost a century now, through formalized, yet not compulsory, courts, it is the states themselves who drive this stratum of international law.⁵⁹

⁵³ The term ‘retail’ is taken from Waldron, ‘Response: The Perils of Exaggeration’, 22 *EJIL* (2011) 389, at 390. It contrasts with the idea of the ‘wholesale’ incorporation of an area of domestic law into international law.

⁵⁴ Not to mention the differences between the legal systems of different states. These differences, however, go to the horizontal question rather than the vertical question with which this article is concerned.

⁵⁵ Also questioning the need for a binary choice is Poole, *supra* note 8, at 354, n. 312.

⁵⁶ Weiler, *supra* note 7, at 549.

⁵⁷ *Ibid.*, at 550.

⁵⁸ W. Friedmann, *The Changing Structure of International Law* (1964), at 60–61.

⁵⁹ Abi-Saab, ‘Whither the International Community?’, 9 *EJIL* (1998) 248, at 252.

The central concerns of international law in this stratum are to safeguard the coexistence between states and to ensure the mutual respect for states' sovereignty within their respective territories. International law aims to achieve these goals through rules of abstention, such as the principle of non-intervention or the prohibition on the use of force.⁶⁰ The internal affairs of states are very much that, and other states are legally bound not to intervene. States are considered sovereign in the external (towards other states) and internal (towards their population) aspect thereof, although this does not mean that their sovereignty is absolute. Instead, it is limited by the rules of abstention – to the extent needed to protect the equal sovereignty of other states. Despite other strata building up over it, this stratum of coexistence has itself continued to thicken, as evidenced by the development of the no-harm principle in the context of environmental damage.⁶¹

As important as states' coexistence is, a properly functioning international society at times needs more 'active' tools than rules of abstention. These are provided by the international law of coordination, which together with the stratum of coexistence makes up classical international law. In this stratum of coordination, states are still the main actors, but the legal tools are transactionalist and take the form of bilateral treaties or basic international organizations that serve as a clearinghouse for bilateral treaties.⁶² These treaties create correlative rights and obligations of a 'civilist' nature,⁶³ reflected by their description as *traités-contrats*; they govern borders or shared waterways and enable transboundary communications services such as international mail and telephone services. Such transactionalist rules have a long history in international law, and despite having become less visible, they remain important for the everyday functioning of international law.

Not all international treaties concluded by states, however, are comparable to contracts, even if they are formally all treaties in the sense of Article 38(1)(a) of the ICJ Statute. Instead, as Jeremy Waldron has rightly pointed out, some 'treaty-making is much more like voluntarily participating in legislation than like striking a commercial bargain'.⁶⁴ These 'legislative' treaties or *traités-lois* are better seen as a 'social contract' rather than as a transaction. Examples are human rights treaties such as the International Covenant on Civil and Political Rights, environmental treaties such as the UN Framework Convention on Climate Change, trade treaties such as the WTO Agreement, and agreements governing the commons such as the United Nations (UN) Convention on the Law of the Sea.⁶⁵ These agreements, which often come with a supporting institutional structure, enable states to deal with common goals that surpass

⁶⁰ Friedmann, *supra* note 58, at 60.

⁶¹ H. Xue, *Transboundary Damage in International Law* (2003).

⁶² Weiler, *supra* note 7, at 553. Examples are river commissions or the International Postal Union.

⁶³ Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* (2009) 265, at 268.

⁶⁴ Waldron, *supra* note 11, at 330.

⁶⁵ International Covenant on Civil and Political Rights 1966, 999 UNTS 171; United Nations Framework Convention on Climate Change 1992, 1171 UNTS 107; Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154; UNCLOS, *supra* note 50.

the level and interests of individual states.⁶⁶ Their goal is not to coordinate state actions but, rather, to create a deeper form of cooperation that can go as far as subordinating the state to the decisions of the international body created by the treaty. International law in this stratum deals with various aspects of the relationship between states as well as between states and the international body. It includes issues such as the powers of the international bodies or the procedures used by these bodies – for example, when an international tribunal or court is set up to adjudicate conflicts between states.

More recently, international law has taken a regulatory turn, whereby international law directly regulates individuals, often bypassing the state.⁶⁷ In contrast to the international law of cooperation, this stratum of international law is far more detailed in the obligations it imposes on individuals and leaves very little margin for action with respect to the states.⁶⁸ States may even completely disappear out of the picture, as is the case for international criminal law.⁶⁹ In each of the strata identified above, international law pursues different goals and is structured differently, with different actors performing different roles and with different legal tools to govern the key relationships. For the purpose of identifying the source domain for domestic law analogies, we therefore need to consider them separately. Each of these strata can be matched with specific domestic law counterparts as the issues addressed and the relationships between the actors in each of these strata can be compared to the relationships between the relevant actors at the domestic level. These identified domestic law counterparts of international law are then the source domain for potential analogies in the target domain of international law.

In the strata of coexistence and coordination, states are comparable to individuals in private law.⁷⁰ Thomas Holland famously described international law, which in his time consisted of these two strata, as private law ‘writ large’.⁷¹ Although public international law is ‘public’ in the sense that it is addressed to public entities, it formally belongs to the ‘*genus private law*’ in these two strata.⁷² In the stratum of coexistence, possible analogies can be drawn from areas such as property or torts-type regimes, whereas contract law analogies can be, and have been used, in the stratum of coordination. When it comes to the final two strata, cooperation and regulation, international law can no longer be described as ‘private law writ large’. Instead, the process of verticalization, inherent in these two strata as a result of the creation of international

⁶⁶ Weiler, *supra* note 7, at 556.

⁶⁷ Katz Cogan, ‘The Regulatory Turn in International Law’, 52 *Harvard International Law Journal* (2011) 321, at 324–325. As Katz Cogan points out, this shift cannot be linked to a single event, but has been particularly noticeable since the end of the Cold War (at 325, n. 318).

⁶⁸ *Ibid.*, at 348.

⁶⁹ *Ibid.*, at 346, whose label ‘unmediated law’ reflects the absence of any role for the state in regulating individuals.

⁷⁰ Grotius, *Mare Liberum* (1609), ch. 5, 36: ‘[P]opuli respectu totius generis humani privatorum locum obtinent’. Translated by Magoffin as: ‘[F]rom the point of view of the whole human race peoples are treated as individuals.’ Quoted in W.E. Hall and A. Higgins, *A Treatise on International Law* (8th edn, 1924), at 18.

⁷¹ T.E. Holland, *Studies in International Law* (1898), at 156; Arangio-Ruiz, ‘The “Federal Analogy” and UN Charter Interpretation’, 1 *EJIL* (1997) 1, at 9.

⁷² Lauterpacht, *supra* note 9, at 81–82.

organizations, has prompted Bruno Simma to proclaim that '[international law] is on its way to being a true *public international law*'.⁷³ It is now public law because it creates obligations in the common interest rather than because its subjects are public entities. Hersch Lauterpacht predicted in 1927 that the creation of international organizations with authority over states' decisions would bring public law analogies into play.⁷⁴ Indeed, in the advisory opinion on the *Effects of Awards of Compensation Made by the UN Administrative Tribunal*, the ICJ used an analogy to national laws, and, in particular, to the powers of national legislatures, to reject the contention that the UN General Assembly is incapable of creating a tribunal that can make decisions binding upon the General Assembly.⁷⁵

In this process of verticalization, states are becoming increasingly integrated in global governance, similar to a government branch or agency, charged with the implementation of rules, the basic contours of which have been decided at the international level.⁷⁶ For example, the Basel Committee on Banking Supervision has developed a global regulatory framework for banks that are to be implemented and overseen by national banking regulators.⁷⁷ The more we move from the stratum of cooperation to the stratum of regulation, the more direct the link becomes between international organizations and individuals and the more limited the role of states. In the regulation stratum, we come closest to the re-creation of state-like structures at the international level.⁷⁸ Compared to domestic law, the main change in this stratum is a change in the authority that governs individuals, from domestic to international. Since the subject of regulation – the individuals – stays the same, the vertical question that is central to this article is less problematic. Although we can work through the three steps identified here (retrieval of the source domain, followed by mapping and the analogical transfer, which I will discuss in the next two sections), analogy-breaking dissimilarities are less likely due to the fact that one side of the relationship (the individuals) remains unchanged.

Table 1 summarizes international law's strata and their domestic law counterparts. It should be noted that I use domestic law here generically, in reference to the broad problems that domestic legal systems have to address and to the types of actors, interactions and relationships these systems govern, rather than in reference to a specific substantive regime that applies within a specific jurisdiction. In other words, the selection of the source domain is not about identifying a specific jurisdiction as the source of the analogies. Whether the law of one jurisdiction is chosen or whether we look for a common denominator across domestic legal systems of the world forms part of the horizontal question that is outside the scope of the current enquiry.

⁷³ Simma, *supra* note 63, at 268; emphasis in original.

⁷⁴ Lauterpacht, *supra* note 9, at 82, n. 82.

⁷⁵ *Effects of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47, at 61.

⁷⁶ As Katz Cogan, *supra* note 67, at 349, points out, these rules are increasingly less mediated by states, leaving the boundary between this stratum and that of regulation vague.

⁷⁷ This fits with Waldron's agency analogy, which is based on the insight that states are sometimes the source as well as the officials of international law. See Waldron, *supra* note 11, at 329.

⁷⁸ Saganami, *supra* note 52, at 28–29.

Table 1: Summary of international law's strata and their domestic law counterparts

	Main actors	Legal tools	Domestic law counterparts
Coexistence	States	Rules of abstention	Torts, property, trust and so on
Coordination	States	<i>Traités-contrats</i>	Contracts
Cooperation	International organizations States Individuals	<i>Traités-lois</i> Implementing rules	Public law / administrative law / procedural law
Regulation	International organizations Individuals	<i>Traités-lois</i> Implementing rules	Various

The choice of the source domain undeniably shapes the analogical reasoning process and, ultimately, the outcome.⁷⁹ Herein lies one of the dangers of analogical reasoning; when researchers become wedded to the paradigms that analogies provide, these analogies can limit the course of research.⁸⁰ Anytime analogies are used, we need to justify the choice of the source domain and to be aware of the danger of getting stuck 'inside the box'. This choice can always be challenged, and a successful challenge will defeat the analogical argument because the process of analogical reasoning will fail. I see at least two types of possible challenges. The first challenge arises when the wrong source domain is chosen. In the context of domestic law analogies in international law, this occurs when an analogy is attempted for a concept from a different stratum, as the following two examples illustrate. In each of these examples, there is no explicit reference to the concept of a source domain. However, the framework of analogical reasoning proposed in this article explains why each of these analogies fails.

The first example is the argument that states can exclude non-citizens from their territory in the same way as private property owners can exclude others from their property, based on an alleged analogy in the context of immigration between state sovereignty in international law and domestic law private property. Waldron has rightly challenged this analogy.⁸¹ His argument is based on the rejection of an 'ownership conception' of sovereignty in favour of a 'responsibility conception'. Nevertheless, Waldron recognizes that sometimes the ownership conception of sovereignty works; he refers to the owner's right to exclude and the sovereign's right to be free from interference by other states.⁸² But he points out, 'it is not clear whether we are entitled to

⁷⁹ Roberts, *supra* note 44, at 53.

⁸⁰ Bartha, *supra* note 30, at 2–3.

⁸¹ Waldron, 'Exclusion: Property Analogies in the Immigration Debate', 18 *TIL* (2017) 469. Wyman, 'Limiting the National Right to Exclude', 72 *University of Miami Law Review* (2018) 425, 433–439, takes a more favourable view of this analogy, although admits that it is imperfect to argue that there should be more limits on states' rights to exclude to reflect limits on private property owners' right to exclude.

⁸² Waldron, *supra* note 81, at 479. Likewise, he argues that analogies between sovereignty and property mostly fail, which suggests that such analogies work sometimes (at 470).

drop down from one level to the other by saying that Sovereign S's rights against other sovereigns also give S exclusionary rights against natural individuals', and he adds that 'something along [the lines of a "category mistake"] may be involved'.⁸³ In my view, this 'something' is the choice of the wrong source domain for the analogy; property law analogies can work in the horizontal relationships between states, but they do not work when the rights of a state compared to citizens of another are involved.⁸⁴ If the state has such rights, these are difficult to conceive of on the basis of any domestic law analogy; rather, the right to exclude citizens of another state is a matter for international law to resolve on its own. There is simply no good domestic law equivalent.

A second example of the wrong choice of source domain comes from the *Karadžić* case.⁸⁵ Mr Karadžić alleged that during the Dayton negotiations, he reached an agreement with Mr Holbrooke whereby he would receive immunity from prosecution in exchange for withdrawing from public life. The Trial Chamber had concluded that such an agreement did not bind the ICTY. The Appeals Chamber agreed that the Tribunal's jurisdiction, having been defined in the ICTY's Statute, could only be limited or amended through a resolution of the UN Security Council.⁸⁶ The Appeals Chamber then rejected Karadžić's argument that such a resolution was not required because of the doctrine of apparent authority taken from contract law. The Appeals Chamber pointed out that '[t]he field of contract law is so distant from the question of jurisdiction in international criminal law that the two are effectively incomparable'.⁸⁷ Although this could be seen as an argument about critical dissimilarities, the real issue here is that contract law is not the right source domain for questions about the jurisdiction of international courts. Once the question is framed in terms of jurisdiction, and thus placed in the cooperation stratum of international law rather than in the coexistence stratum, any analogies drawn should be sourced from domestic public law rather than from private contract law.

A different type of challenge arises when different subdomains exist within a stratum. The descriptions of the domestic law counterparts in [Table 1](#) are broad and cover a range of different concepts and rules from which analogies can be taken that may lead

⁸³ *Ibid.*, at 479, n. 427.

⁸⁴ I am not convinced, however, by Waldron's second point against the 'sovereignty ownership' conception – namely, that this 'cannot just be an analogy, because *both* have to be accommodated within the same conception' (at 479; emphasis in original). The point of the analogy is to use similar concepts from the source domain to deal with similar problems in the target domain. It does not apply the rules from the source in the target. In other words, the 'ownership conception' of sovereignty does not mean that the sovereign becomes the property owner of the land under domestic law, alongside the private owners. Waldron is reacting against the patrimonial conception of sovereignty where sovereign owns the state (at 481). However, that conception no longer corresponds to reality and is not necessary for analogies with property law to work. See Lauterpacht, *supra* note 9, at 81–82. For an analogy to work, it is sufficient to say that sovereignty is like property, whereas the patrimonial conception of sovereignty entails that sovereignty is property.

⁸⁵ Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, *Radovan Karadžić* (IT-95-5/18-AR73.4), Appeals Chamber, 12 October 2009.

⁸⁶ *Ibid.*, § 36.

⁸⁷ *Ibid.*, § 38.

to different outcomes. An example of this arose in the ICJ's *South-West Africa* cases.⁸⁸ The technical question was whether the Union of South Africa's mandate over South West Africa, exercised on behalf of the League of Nations under Article 22 of the Covenant of the League of Nations, had lapsed when the League ceased to exist, as the Union government contended. In its 1950 advisory opinion, the Court rejected any arguments based on analogies with domestic law because '[t]he "Mandate" had only the name in common with the several notions of mandate in national law' and because its 'object ... far exceeded that of contractual relations regulated by national law' in that it 'was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization'.⁸⁹

Although the Court was correct in not getting carried away by homonyms, whether it needed to reject the analogy entirely is a different matter. The question was not whether domestic private law (and, if so, which regime) governs the international mandate but, rather, whether domestic private law can provide guidance in answering open questions about the international mandate, such as the impact of the League's dissolution on existing mandates. That is indeed the point made in Sir Arnold McNair's separate opinion:

[T]he true view of the duty of international tribunals [when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law] is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.⁹⁰

Sir Arnold McNair pointed out that 'nearly every legal system possesses some institution whereby the property ... of those who are not *sui juris* ... can be entrusted to some responsible person' and that these domestic law institutions share at least three principles, such as a legal obligation to carry out the trust or the mission entrusted with, limited control over the property of the person protected and a separation of this property from that of the trustee or the *curateur*.⁹¹ Thus, like the Court, Sir Arnold McNair rejected analogies to the private contract of mandate, but, unlike the Court, he accepted analogies to the private law institution of the trust, which he described as 'a source from which much can be derived'.⁹²

B Mapping of the (Dis)Similarities

Once the source domain has been retrieved, the next step in analogical reasoning is to map the source and the target domains to identify their similarities and dissimilarities. The mapping exercise is meant to compare both the source and the target in order to identify their similarities and dissimilarities. Table 2 represents an analogical argument

⁸⁸ *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, ICJ Reports (1950) 128.

⁸⁹ *Ibid.*, at 132.

⁹⁰ *Ibid.*, at 148, Separate Opinion of Sir Arnold McNair. Sir Arnold McNair was, maybe not coincidentally, the doctoral supervisor of Sir Hersch Lauterpacht's work on private law analogies.

⁹¹ *Ibid.*, at 149, Separate Opinion of Sir Arnold McNair.

⁹² *Ibid.*, at 149 and 151, Separate Opinion of Sir Arnold McNair.

Table 2: Tabular representation of an analogical argument

Source domain	Target domain	
A	A*	Shared similarity ⁹⁴ Dissimilarities
B	~B*	
~C	C*	
Q	Q*	Hypothetical similarity

in tabular form.⁹³ The mapping stage is concerned with the shaded areas in the table. It consists of listing the characteristics of the source and the target domains and pairing up those that are similar (A – A*, with the * added to the target's characteristics to reflect that analogy only requires similarity but not identity) and those that are different (B – ~B* and ~C – C*, with the ~ indicating that a characteristic is not present in a domain). Both lists will rarely match completely, but that is not the point. Nor does the ability to map guarantee a successful analogical argument. A further similarity (between Q and Q*) can only be 'transferred' by analogy if the identified similarity (A – A*) is relevant or if any dissimilarities (B – ~B* and ~C – C*) are irrelevant. The questions of the relevance of the similarities and the dissimilarities inform the final step in the analogical reasoning process, as will be explored in Section C.

Applying this to domestic law analogies in international law, we can identify similarities between domestic and international law in the different strata. In the coexistence and coordination strata, the main actors are legally equal states who 'possess the totality of international rights and duties recognized by international law'⁹⁵ and who can in the exercise of their sovereignty bind themselves.⁹⁶ Taking centre stage in domestic private law are individuals, who are holders of rights to the extent not limited by the law.⁹⁷ Another notable similarity is the nature of the frictions that can arise between individuals at the domestic level and between states at the international level when activities within one's property or territory cause a disturbance in that of another. Likewise, when actors conclude agreements to govern their mutual behaviour, similar questions arise under both legal systems as to, for example, what happens when one party does not comply or when circumstances change. In these strata, there is thus a close analogy between states and individuals under private law.⁹⁸

In the cooperation stratum of international law, mapping becomes a more delicate exercise because we have individuals, states and international organizations as actors that can be mapped onto domestic actors, such as individuals, state agencies

⁹³ This model builds on Bartha, *supra* note 33, at 15, but the tabular representation of an analogy was pioneered by M. Hesse, *Models and Analogies in Science* (1966).

⁹⁴ Contrary to Bartha, *supra* note 33, at 15, who labels this a 'positive analogy', I prefer the word 'similarity' to avoid the risk of confusion that follows from the overuse of the word 'analogy'.

⁹⁵ *Reparation for Injuries Suffered*, *supra* note 4, at 180.

⁹⁶ *Case of the S.S. 'Wimbledon'*, 1923 PCIJ Series A, No. 1.

⁹⁷ The extent of these limitations, and, thus, the scope of their rights, will depend on the particular domestic system. However, the general idea remains. The question about the specific restrictions and how these are analogized into international law is part of the horizontal question that is not included in this article.

⁹⁸ Lauterpacht, *supra* note 9, at 81.

and institutions. While it might be tempting to pair up individuals under international law with individuals under domestic law and states under international law with states under domestic law, this could undermine the ability to reason by analogy. This is particularly the case for states; sometimes, states in international law are in a similar situation as individuals in domestic law – for example, when they are subject to the binding authority of an international body or when addressing procedural law issues such as third party appearances before an interstate court. At other times, states in international law are better mapped against domestic agencies of the executive branch – for example, when states implement decisions of an international body.⁹⁹

An example of mismatched mapping is former Judge Luigi Ferrari-Bravo's argument that analogies to specific torts or crimes are not available 'since torts and crimes in municipal law are attributable in the last resort to individuals, while in international law they are states'.¹⁰⁰ However, such a categorical statement can be defeated when we take into account that international law has drawn from municipal torts law, such as in the development of the no-harm principle and in the International Law Commission's Articles on State Responsibility.¹⁰¹ These analogies can work because in their mutual relations at the international level the states are similar to the individuals at the domestic level and the problem to be solved is similar. None of this is to suggest that states and individuals, and their relationships in domestic and international law, are identical. All a successful analogical argument requires is that there is similarity between the source's and the target's respective characteristics and between their relationships. There is no requirement of identity. The existence of differences is even presupposed for an analogy to be possible.¹⁰² It is only when the difference amounts to a critical dissimilarity that the analogical argument becomes unsound, which is addressed in Section C.

C The Analogical Transfer: Relevant Similarities and Critical Dissimilarities

The first two steps – identification of the source domain and the mapping of the similarities and dissimilarities between the source and the target domains – build up to the final step of the analogical transfer from the source to the target through which a further similarity is argued. In [Table 2](#), this hypothetical similarity is represented by the Q – Q* pairing, with Q being a known characteristic of the source domain and Q* the hitherto unknown characteristic of the target domain that we want to transfer by analogy. In the context of domestic law analogies in international law, Q is an existing domestic law rule or concept and Q* is the new international law rule or concept that is justified by the analogical argument. Again, the * indicates that the international law rule or concept can differ from the domestic law one, as

⁹⁹ Waldron, *supra* note 11, at 329.

¹⁰⁰ Ferrari-Bravo, *supra* note 3, at 717.

¹⁰¹ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001.

¹⁰² Rolf, *supra* note 51, at 163.

was also alluded to in Sir Arnold McNair's famous quote that international law does not import 'private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules'.¹⁰³

As a rule of thumb, the more similarities the source and target share, the stronger the analogical argument will be.¹⁰⁴ However, building a persuasive analogical argument is not simply a matter of adding up similarities and making deductions for dissimilarities. The concern is not with the quantity but, rather, with the quality of the (dis)similarities. Their quality depends on their relevance to the analogical argument.¹⁰⁵ The final step is thus to determine what makes a (dis)similarity relevant and then to apply that relevance criterion to identify which ones to take into account when inferring conclusions about the target based on what is known about the source. Theories on analogies are in agreement that similarities are relevant if the source and target domain have similarly structured relations;¹⁰⁶ it is the existence of a relationship between a shared similarity and the hypothetical similarity that makes the shared similarity relevant in analogical reasoning.¹⁰⁷ Thus, if Characteristic A is linked to Characteristic Q in the source domain, we have the start of an analogical argument that Characteristic Q* holds for the target domain, which is known to have Characteristic A*. In legal reasoning, the purpose or justification of the concept or rule in the source domain explains the relationship between the concept or rule and the characteristic of the source and thus helps to identify the relevant similarities.¹⁰⁸

The similarities between domestic and international law in the different strata, described in Sections A and B, are relevant for the purposes of an international law argument by analogy when the shared similarity explains the domestic law rule or concept that we want to extend to international law. For example, domestic private law can be explained by the tensions that can arise between individuals – for example, the need to limit one's freedom to protect someone else's equal freedom or the need to deal with a change in circumstances after a contract. Similar concerns arise when international law needs to ensure the coexistence of states. This explanatory relationship between the rules and the characteristics of the domestic legal order thus provides the link that makes the similarities between the domestic legal orders and the international legal order relevant for the purposes of an analogical argument that justifies the transfer from domestic to international law.

Even if we can identify relevant similarities, there remains the question of critical dissimilarities that can reduce the strength of an analogical argument. Indisputably,

¹⁰³ *South-West Africa*, *supra* note 88, at 148, Separate Opinion of Sir Arnold McNair.

¹⁰⁴ Bartha, *supra* note 33, at 19, has distilled common-sense guidelines for analogical arguments. The first two are (i) '[t]he more similarities ... the stronger the analogy' and (ii) '[t]he more differences, the weaker the analogy'.

¹⁰⁵ Bartha, *supra* note 30, at 8, 17; Raz, *supra* note 30, at 203.

¹⁰⁶ Schauer, *supra* note 30, at 457.

¹⁰⁷ The relationship is not necessarily causal but can be explanatory or otherwise. See Bartha, *supra* note 33, at 91, who requires 'a clear relationship in the source domain between the known similarities and the further similarity projected to hold in the target domain'.

¹⁰⁸ Raz, *supra* note 30, at 203.

domestic and international law are different from each other, and not all analogies will be possible due to an underlying critical dissimilarity. For example, the personified state is a fiction, and not everything an individual can do is available to states.¹⁰⁹ Two individuals can start a family, but the same cannot be said about two states. However, as already mentioned, a successful analogical argument does not require identity, and dissimilarities between the source and the target only undermine the persuasiveness of an argument by analogy if they amount to a critical dissimilarity. To return to the tabular representation in Table 2, if the presence (B) or absence (\sim C) of a characteristic in the source domain is a necessary condition for the presence of the hypothetical similarity (Q), then its absence (\sim B*) or presence (C*) in the target domain means that Q*'s presence cannot plausibly be argued. For example, the use of the property analogy in the immigration debate, discussed earlier as a wrong choice of the source domain, would also fail at this stage due to the presence of a critical dissimilarity. Table 3 represents this particular analogy in tabular form.

As Table 3 shows, there is no domestic law equivalent (\sim C) for the citizens of another state in international law (C*). Because the hypothetical similarity Q* relies on the presence of C*, the absence of C in domestic law amounts to a critical dissimilarity. Another example of a critical dissimilarity can be found in the *Certain Expenses* case,¹¹⁰ where the ICJ had to analyse whether expenditures authorized by the UN General Assembly in relation to operations in the Congo and the Middle East were 'expenses of the Organization' under Article 17(2) of the UN Charter.¹¹¹ The Court held that they were, and it added that each UN organ determines its jurisdiction given that, contrary to domestic law systems, there is no procedure within the UN to determine the legality of administrative acts.¹¹² Judge Gaetano Morelli elaborated the same point in his separate opinion, arguing that there is no space in the UN system for the concept of voidability of administrative acts because 'there is nothing comparable to the remedies existing in domestic law in connection with administrative acts'.¹¹³

Conversely, if B or \sim C are not linked to Q, or \sim B* or C* are not linked to Q*, the dissimilarities in these pairs are irrelevant. In that case, these dissimilarities do not undermine the analogical argument. For example, when analogizing the use by a state of its territory to an owner's use of his land, it does not matter that an individual can get a speeding ticket but a state cannot. Similarly, dissimilarities must be critical in the context of the specific analogy drawn. What amounts to a critical dissimilarity for one analogy may be irrelevant for another – for example, the lack of a general mechanism for judicial review of UN acts does not mean that states cannot engage in a contract-like relationship such as a treaty. Finally, even if there is a critical dissimilarity, the specific analogical argument is not necessarily fruitless. There is the

¹⁰⁹ Suganami, *supra* note 52, at 31.

¹¹⁰ *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151.

¹¹¹ The question arose because Art. 17 vests budgetary authority with the UN General Assembly, whereas the operations in questions came within the exclusive competence of the UN Security Council. *Ibid.*, at 162.

¹¹² *Ibid.*, at 168.

¹¹³ *Ibid.*, at 222, Separate Opinion of Judge Morelli.

Table 3: Tabular representation of the (failed) property/immigration analogy

Source: Domestic law	Target: International law	
Individual (A)	State (A*)	
Holder of rights over area (property) (B)	Holder of rights over area (sovereignty) (B*)	Shared similarities
B includes right to exclude other As from the area	B* includes right to exclude other A*s from the area	
~ C	Citizens of another state (C*)	Dissimilarity
~ Q	Right to exclude C*s? (Q*)	Hypothetical similarity?

possibility of ‘negative’ analogies, where the process of analogical reasoning leads to the conclusion that a different rule is more suited for international law.¹¹⁴ An example of this is the already mentioned example of the right to exclude immigrants on the basis of sovereignty.¹¹⁵ As Waldron has argued, this right to exclude cannot be justified by an analogy between sovereignty and property, but it would – if it exists – require another justification.¹¹⁶

Another outcome is that the failed analogy highlights gaps in international law that need remediation. Rather than being the end of the journey, the failed analogy is the start of a new one that ultimately leads to the removal of the critical dissimilarity. A case in point is provided by the most often claimed, although in my view contestable,¹¹⁷ critical dissimilarity between domestic and international law – namely, that of the special nature of sovereign states in international law compared to individuals who live in a domestic society, whereby states are said to be endowed with special ‘sovereign’ powers and therefore not subject to international law in the same sense as private individuals are to domestic law.¹¹⁸ Already in 1927, Lauterpacht foresaw that ‘the development of international law towards a true system of law is to a considerable degree co-extensive with the restoration of the missing link of analogy of contracts and treaties’.¹¹⁹ Since then, domestic law analogies have indeed produced legal limits on the exercise of state sovereignty, similar to those existing in domestic law on the freedom of individuals. We have seen the development of rules on state responsibility and the recognition of concepts such as duress or *rebus sic stantibus* in treaty law, which all limit the exercise of state sovereignty.¹²⁰ Recent work in international law scholarship, most notably Eyal Benvenisti’s work on sovereignty as trusteeship also uses a domestic law concept to rethink the justifications of limits on the exercise of state sovereignty.¹²¹

¹¹⁴ Shahabuddeen, *supra* note 12, at 101.

¹¹⁵ See text accompanying notes 81–84 above.

¹¹⁶ Waldron, *supra* note 81, at 489.

¹¹⁷ See Lauterpacht, *supra* note 9, ch. II, part IV; H. Lauterpacht *The Function of Law in the International Community* (2011), ch. XX.

¹¹⁸ Triepel, *supra* note 28, at 100, 104; *Right of Passage over Indian Territory*, Preliminary Objections, 26 November 1957, ICJ Reports (1957) 125, at 178, Dissenting Opinion of Judge Chagla.

¹¹⁹ Lauterpacht, *supra* note 9, at 166.

¹²⁰ See text accompanying notes 17–18.

¹²¹ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *AJIL* (2013) 295.

4 Conclusion

This article has set out to identify when reasoning by analogy from domestic law can be suitable for international law. This is not to say that domestic law has to be used as the starting point for any argument about international law; the use of a domestic law analogy in international law is always optional. However, if that option is chosen, then the steps developed in this article can help to evaluate the analogical argument and to pinpoint with more precision where problems arise. This is useful whether we are the ones construing the argument or on the receiving end of such an argument. The first step is to identify, and justify, the source domain for the analogies. The identification of the source domain is the key issue and depends on an examination of the types of relations and issues that are at stake. My distinction between the different strata of international law aims to understand the different actors and their mutual relations as well as the tensions that international law needs to respond to. In each of these strata, parallels can be drawn to the domestic legal order. Once the source domain has been identified, the next step is to map the similarities and the dissimilarities since the persuasiveness of the analogical inference from domestic to international law will ultimately depend on these. The final step is to identify the relevant similarities and the critical dissimilarities, which both depend on whether there is a relationship between a shared similarity and the hypothetical similarity.

Even if working through the three steps leads to the conclusion that a specific domestic law analogy could be suitable for international law, this does not guarantee that the specific domestic law analogy will, or should, be adopted in international law. There might be other, competing, domestic law analogies that also survive this three-step approach. Although these steps can indicate where a particular analogy can go wrong, they do not indicate whether a particular ‘surviving’ analogy is better than another ‘surviving’ analogy. Ultimately, this will be a qualitative judgment that depends on policy and other preferences rather than on the process of analogical reasoning. Moreover, the equally important horizontal question – the question about which domestic legal systems to take the substantive rules from – that I excluded from this article can play a role in accepting one analogy over another.

Finally, the analogy ‘does not have the last word’.¹²² This belongs to international law itself. Whether the analogical reasoning process results in a legal transplant, produces a negative analogy or runs into a critical dissimilarity, the analogy does not have more force than international law gives it. An analogy can result in positive international law, such as a treaty or a general principle, but then its status results from the formal source of international law in which it becomes incorporated rather than from the reasoning by analogy or even less from domestic law. International law ultimately forges its own way forward.

¹²² Perelman, *supra* note 40, at 93–94. Perelman wrote this in the context of the sciences, but it is equally true here. The domestic law analogy plays a heuristic role, but it is ultimately abandoned when the ‘results’ are formatted into their own language, such as when a domestic law analogy inspires international law and crystallizes in a formal source.