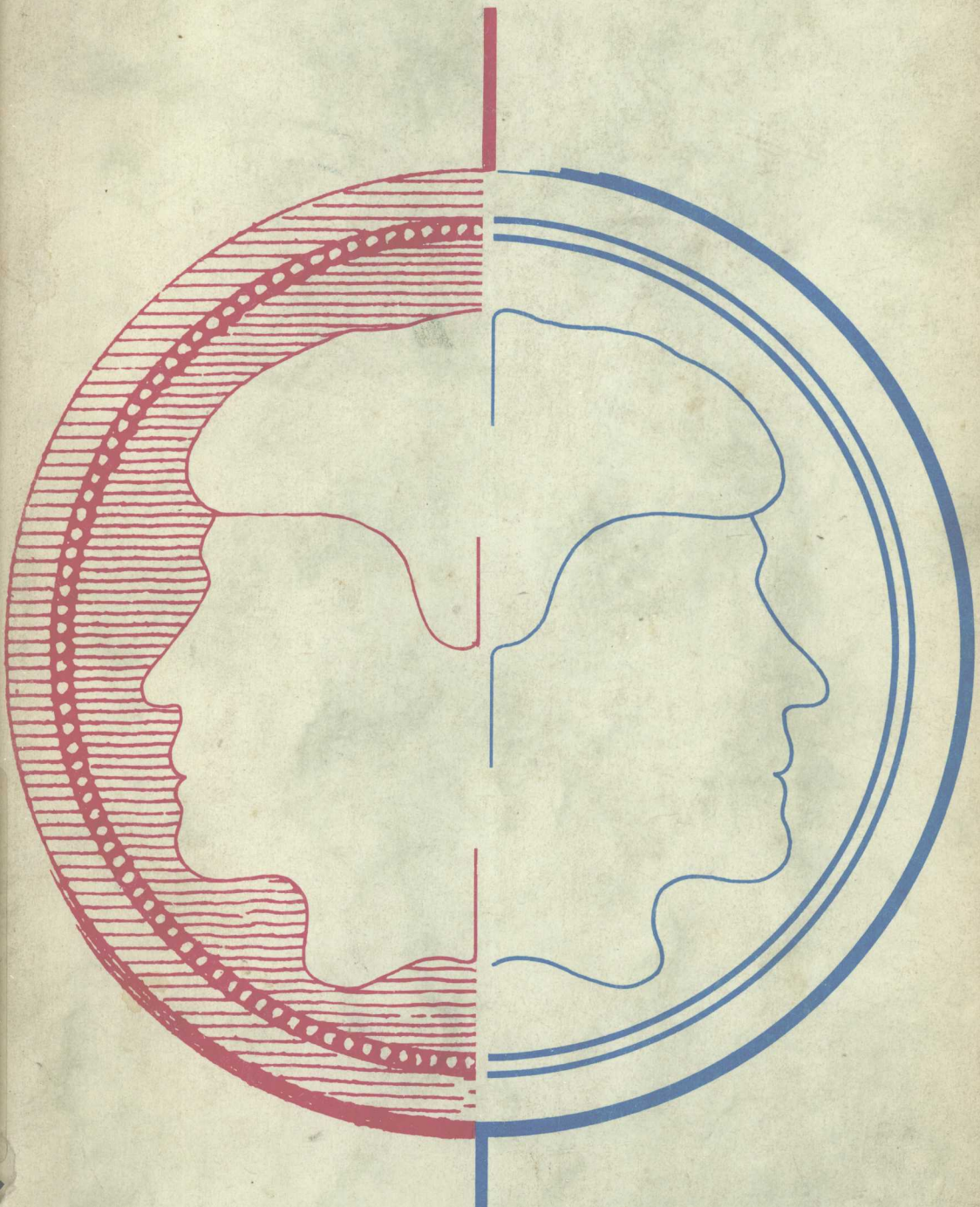
INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE



INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE

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Acknowledgements

The present volume is, I believe, the first attempt to bring together a considerable body of the accumulated wisdom regarding the applicability of the comparative method to public international law. As will be evident from my own contributions, my interest in and approach to the subject has been strongly conditioned by my studies of socialist legal systems, most especially of Russian and Soviet law, and of international law and relations. The first opportunity to develop these transpired at the Harvard Law School, where in 1968-1970 I collaborated with Professors R.R. Baxter, H. J. Berman, J. A. Cohen, and Dr. H. Chiu in offering a course on "Soviet, Chinese and Western Approaches to International Law." In London the ambit of concern has broadened considerably, inspired in part by the introduction of a special LL.M. seminar on "Comparative Approaches to International Law," which has afforded the occasion to explore a number of the issues raised in these pages and has also demonstrated the desirability of making these materials more accessible.

I owe a special debt of gratitude to The Rockefeller Foundation for allowing me to complete considerable work on the volume while a Scholar in Residence at the Villa Serbelloni in September 1977 and for supporting an earlier "conference in residence" devoted to elements of convergence and divergence in socialist legal systems. Each of the contributions to the volume is acknowledged separately in the Introduction, but I should like to express my thanks collectively to those participants of the Tenth International Congress of Comparative Law held at Budapest in August 1978 who prepared national reports for Panel IV.A.1; several are included in the present volume. Mrs. E. Maloney has typed the manuscript with her usual standard of efficiency and care.

The footnotes, punctuation, and spelling of all contributions have been modified as necessary to bring them into the standard format used in this volume.

W.E.B.

Contents

Introduction

William E. Butler

Exploration of the potential uses of the comparative method in understanding the international legal order and its relationship to other legal systems or families of legal systems, in enlarging the area of common principles and practices, and in devising bases for adjustment, harmonization, standardization, and cooperation continues to be an underdeveloped realm of comparative legal studies. A new generation of international and comparative lawyers has, however, been reconsidering the role of comparison in international law in all of its aspects with, as will be apparent from the essays in this volume, a new vitality, energy, and wide variety of perspectives.

The fact that all of the essays date from within the last forty years is a reflection on the state of the literature and not the editorial policy followed in selecting materials for inclusion. The late Professor H. C. Gutteridge, who held the Chair of Comparative Law at Cambridge University, was among the first to ponder the interrelationship between comparative law and the law of nations. The deep skepticism with which he approached any such relationship in all likelihood fairly summarized the prevailing views of his day: "So far as it exists at all, any relationship or kinship between comparative law and the law of nations must . . . be of a very shadowy nature . . . "[1]

Gutteridge's conclusion, it should be noted, was much influenced by his understanding of the nature of international law and its origins. By law of nations or public international law, he had in mind ". . . the *principles* of justice, which, by the common consent of *mankind,* should govern relations between states or nations . . . " (emphasis added). Because the rules are "avowedly universal" in character, they do not, he concluded "lend themselves to comparison."

On the other hand, in an essay which otherwise contained much comparative insight on national approaches to international law, Sir Hersch Lauterpacht claimed "the fact that rules of municipal law in one group of states differ from those in another group is on the whole irrelevant for the purposes of international law. International law is not concerned with matters of municipal law; it is concerned with relations between states."[2]

These considered views of a comparative lawyer and an international lawyer seem to have expressed the prevailing attitude of international and comparative lawyers of the interwar period. It is precisely that view which the remainder of the essays in this volume challenge as inadequate and obsolete. My own essay, "International Law and the Comparative Method,"[3] undertakes to demonstrate how the comparative studies of one or more legal systems or families of legal systems (in this case, the socialist legal systems) can contribute an indispensable perspective to our understanding of international law. Comparative lawyers have substantive knowledge, insight, and experience directly relevant to the international legal process, and I venture to suggest that comparative legal studies will increasingly come to be regarded as being as essential to the training of the international lawyer as is the study of international law itself.

Professor Kiss places the question of comparative law and public international law squarely in the movement toward interdisciplinary studies, toward greater collaboration among branches of the sciences, and points to ways in which comparative studies can further our understanding of international law and even assist in establishing the existence of rules of international law.[4] Of special interest is his suggestion that public international law has a contribution to make to comparative law, for example, in furthering the unification of municipal legal rules. And he does not cavil at encouraging comparison between concepts of law underlying the international and municipal legal orders.

The next two contributions are among the seven national reports in the present volume which were prepared for presentation at the Tenth International Congress of Comparative Law held at Budapest, Hungary, on 23-30 August 1978.[5] This was, to the best of my knowledge, the first international gathering to consider the matter, although, as Professor Ress observes, the 50th anniversary of the Max-Planck Institute provided an occasion to give some attention to the subject. Professor Ress examines the value of comparative studies in evaluating evidence of state practice or removing uncertainties about the significance for international rights and obligations of certain state practices or in extrapolating general principles of law as a source of international law.[6] He then turns to an application of the comparative method which attracts many of the contributors: the importance of comparative law for the law of international organizations; that is, how an organization develops and interprets its scheme of internal or administrative regulations and general principles.

Professor Bothe examines the role of comparative law in international judicial decisions, especially when an international tribunal may be called upon to apply a rule of international law whose substance must be ascertained through a comparative analysis of several municipal legal orders. The body of judicial practice is, so far, not extensive, but Bothe believes

international judges may find comparison to be an excellent tool of legal policy when problems arise that are not resolved by treaty or customary rules of international law.

Bernard Dutoit has a different perspective on many of the issues addressed by Bothe and Ress. He discusses in particular the role of comparative law in the *formation* of custom and general principles of international law and in the drafting of international conventions, and when examining the place of comparative law in the law of international organizations, draws his illustrations from the practice of the European Court of Justice.[7]

The next four contributions are by jurists from the socialist countries. Baskin and Fel'dman from the Soviet Union were the first international lawyers in their country to give extended consideration to the subject. They see numerous possibilities for the application of comparison in international legal research within a Marxian framework and urge that consideration be given to developing a harmonious means for using it within international law.[8] Their initiative has been further developed by two Soviet comparativists, Messrs. Tille and Shvekov, who elaborate upon the opportunities for comparative studies of public international law while making a strong plea for the resuscitation of private international law in the Soviet Union. They stress in particular the practical value comparative studies in both domains will have for future Soviet jurists, whose work increasingly involves an international dimension.[9]

Professor Haraszti believes the comparative method may be used to advance an understanding of the essential features of international law as a legal system and provide insight into the genesis of particular institutes of international law, especially in the interaction among the international and municipal legal systems. He does not have in mind, in the latter instance, general principles of municipal law; in his view and that of most other socialist jurists such general principles could not be a direct source of international law. Comparison also can be of assistance, he suggests, in establishing the existence and content of international law, ascertaining the intentions of parties to an international treaty, and codifying rules of international law.[10]

The rapidly growing interrelationships among states and the concomitant need for great harmonization and unification of legal rules on an international scale are, in the view of Professor Rajski, of Warsaw University, factors which have enhanced the role of comparison in international law in recent times. Drawing upon attempts to unify air and space law by way of illustration, Rajski shows how beneficial comparative legal studies can be in the preparation of draft international conventions. The international community would benefit to a far greater extent, Rajski points out, if comparative legal studies on a universal scale were organized more rationally. Accordingly, he recommends the creation of an "inter-

national center of comparative law documentation and studies" at the United Nations.[11]

The contributions of L. C. Green and Arthur von Mehren address the relationship of municipal legal systems to the international legal order from two very different vantage points. As a public international lawyer, Professor Green finds that comparative law has a threefold purpose. It enables him to identify common rules of local law which might form the basis of a uniform international code; it allows a court to avoid lacunae when deciding disputes by referring to a universal concept of justice; and it enables existing law to be supplemented through recourse to general principles of law recognized by civilized nations.[12] Von Mehren, as a private international lawyer, dwells from an American perspective on the comparative law contribution that will be required as new choice-of-law theories are applied to conflicts of law problems. This is, to be sure, but one aspect of the relationship between private international law and the comparative method; suggestions for further reading will be found in the "Selected Bibliography" of this volume.[13]

Studies of national approaches to international law almost invariably have a policy dimension; they are concerned with the manner in which individual states perceive and practice international law, usually with a view to identifying elements which contribute to the shaping of distinctive attitudes and behavior. My own essay concerning Anglo-American Research on Soviet Approaches to Public International Law undertakes to assess the principal orientations of past research in this domain and suggest areas for future concentration. Studies of this nature are necessarily comparative and, I would contend, if performed with regard to other nations they would appreciably augment our comprehension of the history and development of the modern international legal system.[14]

"Policy," of course, has acquired a special connotation in international law by virtue of the writings of the late Harold Lasswell and Myres S. McDougal. Although a more recent contribution might have been included in place of the one reproduced here, it seemed most useful to present the original formulation of comparative legal studies for policy purposes as that expression is used by Professor McDougal.[15] His approach is grounded firmly within comparative law philosophies of the first half of the twentieth century and indeed in a sense was a reaction or response to those intellectual currents. Except for the essay by Gutteridge, that body of literature seems to have passed beyond the purview of modern comparativists addressing themselves to international law and the comparative method.

Professor Emeritus Georg Schwarzenberger and Dr. A. M. Connelly both find the comparative method indispensable for the history of international law. Schwarzenberger posits a models approach to the history of international law,[16] whereas Connelly is partial to a systems approach.[17]

Both approaches rely upon comparison as the principle analytical technique and promise new insights into a lamentably neglected subject.

The volume concludes with two essays devoted to the role of comparison in specific international organizations, the International Civil Aviation Organization and the International Labor Organization. Earlier articles (e.g., Ress, Dutoit, Rajski) develop in principle the view that comparison had an invaluable contribution to make to the law of international institutions. Messrs. Mankiewicz and Valticos however, who respectively has served and is serving as an international civil servant, have an inside view. Mankiewicz demonstrates how the lack of specific comparative studies of air law within the ICAO has at times impeded the drafting or application of international air law conventions. Valticos presents the happier picture of an institution which has initiated and relied heavily upon comparative legal research in the course of its activities, indeed whose legislative series constitutes a basic primary source for comparative and international lawyers.

While it would be inappropriate to dwell upon areas of consensus and points of difference among the authors, who wrote a various periods and from diverse backgrounds and perspectives—themselves doubtless the product of different legal cultures and deserving comparative analysis—there are common elements and themes which require some comment. The apprehensions voiced by Professor Gutteridge and others of his generation about the inappropriateness of the comparative method for international legal studies have almost wholly disappeared. The concern of all the other essays is not *whether* to use comparison, but *how, when,* and *where.*

On a practical level the comparative method has been found useful in identifying trends in the emergence of general principles of international law (and the same would hold true for regional or subsystems of international law), as a means of filling gaps in or interpreting international treaties and even customary international law, of evaluating state practice as a constituent element in the formation of customary rules of international law, of exploring parallels between rules of municipal law and international law and the possibility that the former may comprise part of the latter, as a means of probing and clarifying the underlying ideologies, values, legal institutions, and cultures of states in order to better comprehend the international legal system, avert misunderstandings and misconceptions, and lay the groundwork for a more viable world order, of elaborating, exploring, and developing the law of international institutions, of assisting international tribunals, of codifying international law and developing individual branches of international law, of clarifying goals and values held by policymakers whose actions and decisions affect international law, of assessing compliance by states with international law, to mention only some of the principal uses observed or advocated by the contribution to this volume.

Three matters in particular arise with frequency in discussions of the formation of international law and the role of the comparative method. One is the usefulness of comparative legal studies for providing an authoritative indication of the extent to which uniformity may exist in the views or practices of states as evidence of the existence or acceptance of a rule of international law. Comparative studies of national legislation and state practice also may provide evidence of the extent to which states have fulfilled obligations assumed under international treaties or binding under customary international law. Non-self-executing international agreements, especially multilateral conventions, may give rise to divergent solutions or approaches at the municipal law level which can be identified and analyzed through comparative studies. Equally, the learning of comparative law may enable those drafting international agreements to anticipate and resolve problems that might arise pursuant to the arrangement in certain municipal legal orders or families of legal systems, thereby facilitating both the conclusion of the agreement and subsequent compliance with its provisions.

A second matter of concern is the codification of international law. Although some comparativists entertain doubts as to whether one may speak of the "codification" of international law in the same sense as the codification of municipal law, the value of comparative legal studies in assembling legal documentation regarding the actual practice of states and in analyzing such data is beyond doubt, as the recent experience of the International Law Commission, the European communities, and other international institutions testifies. The matter is of special importance for newly independent countries, whose practices in many areas of international law are little known, on one hand, and who may seek guidance regarding the consensus of state practice elsewhere when formulating their approach on either a municipal or international level. The codification and progressive development of international law can not proceed on a meaningful basis without taking due account of common elements or patterns found in municipal legal orders, illuminating the similarities and differences and seeking to identify or formulate the best possible solutions.

The same is true with regard to drafting municipal foreign affairs legislation, which indirectly may contribute to the codification of international law or the formation of customary rules of international law. The recent legislation enacted by the United States and the United Kingdom affecting state immunities is an excellent and by no means isolated instance of municipal enactments which must come to grips with legal concepts of ownership, sovereignty, and commerce that vary greatly from one legal system to another.

The third matter relates to one of the oldest and most controversial linkages between international law and the field of comparative law: the

"general principles of law." Jurists of older generations were disposed to look upon the search for general principles of law common to all legal systems as a principal objective for comparative lawyers, whereas one of the principal contributions of comparative legal studies has been to caution against hastily assuming that even formally identical municipal legal rules operate or function in the same manner in various societies. Article 38 of the Statute of the International Court of Justice has served as the focal point for discussion in recent years, and on this point the contributions to this volume display a wide range of disagreement which is probably a reasonable reflection of the general state of opinion on the question.

The classical concerns of comparative law and their relevance for the international lawyer will require further consideration than they receive in this volume, although my first essay seeks to develop some of these, as will the extent to which comparative legal studies are used by government legal advisers in the course of their duties.

As regards the former, comparative lawyers engaged in the study of foreign legal systems have regard not merely to the substantive and procedural law of those systems and their societal context, but also to the "actors," the legal personnel who create, practice, administer, and apply the law. The international lawyer, from whatever country he originates, also is a product of municipal systems of legal education and is trained to perform a role on the international plane that is strongly conditioned by roles assumed by domestic lawyers in his own country. The terminology of municipal legislation and legal concepts and the language of municipal legal institutions and processes contribute to shaping a nation's approach to international law as well and inevitably must affect movement toward larger communities of harmonized or unified legal rules and their relationship to international legal rules.

Comparative lawyers have sometimes found it instructive to classify legal systems or groups thereof on the basis of "style." There is certainly an awareness, for example, that the common law and its concomitant sets of mind and modes of reasoning set international lawyers in England distinctively apart from their brethren in other lands. One has in mind in this connection not differences in substantive positions as to the binding nature or content of international legal rules, procedures, or policies, but rather the way in which international lawyers conceive of their discipline, approach the interpretation or application of a legal rule, or view the international legal process. This would seem to be an area in which comparative law is especially well placed to make a contribution.

It would appear to be the case that government legal advisers are not ordinarily required by any general directive governing their work procedure to have regard to the domestic laws of another contracting party when drafting an international agreement. In practice, however, most legal

advisers should be aware of the importance of comparative legal studies for determining the extent to which domestic laws of the contracting parties may require modification in light of proposals under consideration or, as the case may be, for avoiding any modification whatever.

Comparative aspects of international law have become part of the law teaching syllabus in recent years, especially in North America and the United Kingdom. And to an increasing degree international legal education has become a comparative exercise in the sense that hundreds of international lawyers annually pursue studies, usually at the postgraduate level, in countries other than that in which they received their first law degree, thereafter returning to their respective homeland to assume responsible positions in government, academic life, or the practice of law.

The essays presented in this volume collectively suggest that whatever one's understanding of the nature of the international system, comparison has now become an essential handmaiden for illuminating essential aspects of its structure and operation and its relationship to other legal orders, either existing or ideal models, past or present. The day is upon us when international legal training must include an adequate dosage of comparative legal study appropriately fashioned to serve international law in the best possible manner.

Notes

1. The essay by Professor Gutteridge originally appeared in the British Year Book of International Law, XXI (1944), pp. 1-10 and is reproduced here by permission of the editors and of the Oxford University Press. The article was later incorporated with minor emendations in Gutteridge's classic study *Comparative Law* (Cambridge University Press, 1946; rev. ed., 1949; reprinted 1971). The footnotes have been renumbered.

2. See H. Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law,* British Year Book of International Law XII (1931): 38.

3. This essay is based on an inaugural lecture delivered in the University of London at University College London on 17 February 1977. The original lecture appeared in Current Legal Problems XXX (1977): 105-121, and is reproduced here with revisions.

4. Professor Kiss' article has been translated from the French version, *Droit comparé et droit international public,* Revue internationale de droit comparé XVIII (1972): 5-12, with the permission of the editors. I am grateful to my colleague Professor Jacqueline de la Rochere for assisting with some difficult passages. Professor Kiss is presently Director of the Centre de Recherches sur L'U.R.S.S. et les Pays de L'Est at the Université des Sciences Juridiques, Politiques, et Sociales de Strasbourg.

5. Panel IV.A.1 was devoted to Comparative Law and Public International Law. The co-general rapporteurs were Professor H. Bokor-Szego, of the Karl Marx University in Budapest, and the present writer. The general reports for the panel appear in the Congress Proceedings. Panel I.C.1 considered The Comparative Method and Private International Law.

6. The article by Professors Bothe and Ress is an edited version of the national report submitted to the Budapest Congress. Ress is responsible for Parts I and II and Bothe for Part III. Dr. Ress is Professor at the Europa Institut, Universität des Saarlandes, and Dr. Bothe is

Professor at the Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht at Heidelberg.

7. The contribution by Professor Dutoit is translated from the French text of the national report submitted to the Budapest Congress. See the *Recueil des travaux suisses présentes lors du 10e Congrès international de droit comparé* (1979). Dr. Dutoit is Professor at the Faculty of Law, University of Lausanne, and Director of the Institute of Comparative Law.

8. The Baskin-Fel'dman piece is an extract from Chapter 3 of their monograph *Mezhdunarodnoe pravo; problemy metodologii* (Moscow, 1971), pp. 148-158, which addresses methodological problems of international law in general. Chapter 3 is entitled "Quasi-Scientific Methods of Research and Peculiarities of Applying Them in International Law." The translation is my own, and I am indebted to Mrs. J. Giddings, King's College London, for preparing an initial draft. Footnotes have been renumbered.

9. An extract from A. A. Tille and G. V. Shvekov, *Sravnitel'nyi metod v iuridicheskikh distsiplinakh* (Moscow, 1973; rev. ed., 1978). The translation is my own, from the revised edition.

10. Professor Haraszti's article is adapted from the English text which appeared in the Hungarian collection of reports to the 10th International Congress of Comparative Law. Haraszti is Professor of International Law at the University of Budapest.

11. A revised version of the national report submitted to the Budapest Congress. See J. Rajski, "Le rôle de la comparaison dans le stade de préparation de la réglementation juridique internationale," in *Rapports polonais présentés au dixième congrès international de droit comparé* (Warsaw, 1978), p. 305. J. Rajski is Professor of Civil Law at the Faculty of Law and Administration, Warsaw University.

12. Professor Green's essay is reproduced by permission from the Tulane Law Review XLI (1967-68): 52-66. The author is presently University Professor at the University of British Columbia (Canada).

13. Professor von Mehren's contribution was submitted to the Budapest Congress as an American national report. It is reproduced by permission from J. N. Hazard and W. J. Wagner, eds., *Law in the U.S.A. in the Bicentennial Era,* issued as a special supplement to the American Journal of Comparative Law XXVI (1978): 31-42. Arthur von Mehren is Story Professor of Law, Harvard University.

14. An extensively revised and expanded version of an article which originally appeared as *American Research on Soviet Approaches to Public International Law,* Columbia Law Review LXX (1970): 218-235.

15. Reproduced from the American Journal of Comparative Law, I (1952), by kind permission of the editors. Professor McDougal is Emeritus Sterling Professor of Law, Yale University.

16. Professor Schwarzenberger's essay has appeared in several versions cited in the Selected Bibliography. The present essay is reproduced by permission of the author and Stevens and Sons, publishers of Current Legal Problems XXV (1972): 219-248. The author is Professor Emeritus of International Law in the University of London.

17. Dr. Connelly's article originally appeared in The Year Book of World Affairs XXXII (1978): 303-319 and is reproduced by permission of Stevens and Sons. Dr. Connelly is Lecturer in Law, University College Cardiff.

18. Dr. Mankiewicz's article was prepared as a Canadian national report for the 1978 Budapest Congress and appeared as "Le rôle de la comparaison dans le stade de préparation de la réglementation juridique internationale," in *Textes présentés par l'Association quebecoise pour l'étude comparative du droit au Xe Congres international de droit comparé, Budapest (23 au 30 aout 1978)* (Montreal, 1978), pp. 173-181. The English version contains some changes, and I am grateful to Professor J. de la Rochere for assisting with some of the more difficult passages. The author has been a member of the ICAO legal division.

19. The contribution by Professor Valticos is reproduced with some revisions from an

article which appeared under the title *Comparative Law and the International Labour Organization,* Comparative Labor Law, II (1977): 273-288; we are grateful to the editors for permission to include it. The article also was submitted to the 1978 Budapest Congress as a Swiss national report. Professor Valticos is the Assistant Director General and Adviser for International Labor Standards at the International Labor Organization.

I

THE COMPARATIVE METHOD IN INTERNATIONAL LAW