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# COMPARATIVE INTERNATIONAL LAW

*Boris N. Mamlyuk\* & Ugo Mattei\*\**

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\* Visiting Assistant Professor, Ohio Northern University, Pettit College of Law; Visiting Scholar, Cornell Law School (2009–2010); Ph.D. Candidate IEL–International Programme in Institutions, Economics & Law; 2008–2009 Fulbright Fellow, Institute of State and Law, Russian Academy of Sciences; J.D., University of California (Hastings). I would like to thank the organizers and participants of the January 2010 Toronto Group conference, the January 2010 LSE/SOAS international law colloquium, and the 2011 Yale Comparative Law Works-in-Progress workshop for their insightful comments and criticism on related presentations. In addition, I would like to thank Michele Graziadei, Mitch Lasser, Chantal Thomas, Antony Anghie, John D. Haskell, Golnoosh Hakimdavar, Asif Efrat, Gianmaria Ajani, and the participants of the Cornell Graduate Research Colloquium for their support and feedback. A special thanks to Prof. Butler for our conversations.

\*\* Alfred and Hanna Fromm Chair in International and Comparative Law at the University of California (Hastings); Full Professor of Civil Law, University of Turin, Italy; Academic Coordinator of the International University College of Turin, Italy.

## INTRODUCTION

Shortly over a decade ago, two very exciting developments in the fields of international law and comparative law (respectively) whizzed past one another. The first, in the field of international law, was the publication of a now-classic 1999 symposium issue by the American Journal of International Law ("AJIL") where representatives of seven different methods or approaches to international law wrote upon a single issue using their approach.<sup>1</sup> This was meant to illustrate the wealth of insights to be gained from various interdisciplinary, critical, or other approaches to common international law problems.<sup>2</sup> In comparative law, an event of parallel proportions was the Centennial World Congress of Comparative Law, held in New Orleans in 2000 to commemorate the opening of the first World Congress on Comparative Law in Paris in 1900.<sup>3</sup> The 2000 New Orleans conference drew leading comparativists from the world over to assess the state of the discipline, to examine comparative law's successes and failures in the twentieth century, and to outline the most pressing areas for inquiry for the coming years.

The two symposia could not have shared more disparate fates. The AJIL symposium issue, edited by Steven Ratner and Anne-Marie Slaughter, became a bestseller (by standards of American legal scholarship), commanding several subsequent reissues from 2004 forward. It remains in print, offering a menu of methodologies for internationalists depending on taste and intellectual or political bend.<sup>4</sup> The Ratner/Slaughter book has become a desktop reference for students and practitioners eager to acquaint themselves with realism in international relations or looking for a quick primer on Third World Approaches to International Law ("TWAIL"). By contrast, the comparative law symposium issue went, by and large, unnoticed outside the discipline. This is regrettable, but not for the familiar Cinderella reasons.<sup>5</sup>

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1. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293, 295 (1999).

2. See *id.*

3. See Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Opening Remarks*, 75 TUL. L. REV. 859, 862 (2001).

4. Steven R. Ratner & Anne-Marie Slaughter, *The Method is the Message*, in THE METHODS OF INTERNATIONAL LAW 239, 243 (Am. Soc'y Int'l Law, Stud. in Transnat'l Legal Pol'y Ser. No. 36, Ratner & Slaughter eds., 2004) [hereinafter Ratner & Slaughter, *Method in the Message*].

5. See generally Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (describing how failure to engage in critical introspection has relegated comparative law to the status of an underappreciated sibling in legal academia).

Ten years on, a group of scholars are now undertaking the delicate task of weaving together the fields of comparative law and international law. Recently, a conference organized by a progressive group of doctoral law students (the Toronto Group<sup>6</sup>) presented a panel exploring the field of *comparative international law* (“CIL”), or national approaches to public international law and governance.<sup>7</sup> These conferences are indicative of surging interest in, and potential misuse of, traditional comparative law techniques, vocabularies, and projects.

In effort to seize on this moment and guide the methodological and substantive discussion on CIL towards emancipatory ends, it is vital to address three fundamental issues, or what we shall call *roots* (the history of CIL); *pitfalls* (intellectual traps for the unwary sojourner exploring CIL); and *politics* (or the ineluctable moral, distributive, and participatory consequences of CIL projects). We explore these three issues mindful of a constellation of historical factors that have contributed to the rise of CIL. Principal among these was the collapse of the Union of Soviet Socialist Republics (“USSR”) twenty years ago and the ostensible elimination of not only socialist law from the grand family of legal systems, but also of socialist international law from the mindset of international lawyers and practitioners.<sup>8</sup>

Section I begins with an examination of the history of CIL, choosing the creation of the Soviet Union and the concomitant creation of “Soviet international law” as the starting point of our inquiry. This Section explores the important cross-fertilization between the two disciplines (comparative law and international law) during the period. Section II analyzes several important methodological paths available to CIL scholars, including focusing on the study of comparative international legal histories, CIL institutional histories, and the study of the diffusion of norms or dominant ideologies. Section III concludes by exploring the implications of such a study and suggests analytical frameworks for prospective CIL projects.

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6. See Michael Fakhri, *Anxieties and Aspirations: A Schematic Note on the Toronto Group for the Study of International, Transnational and Comparative Law* 1–2 (Comparative Research in Law & Political Econ., Research Paper No. 11/2008), available at <http://ssrn.com/abstract=1128129>.

7. See Toronto Group for the Study of Int'l, Transnational, and Comparative Law, Call for Papers: Concerning States of Mind, Disturbing the Minds of States (2010), available at <http://torontogroup.files.wordpress.com/2009/08/toronto-group-2010-call-for-papers.pdf> [hereinafter Toronto Group]; see also Am. Soc'y Int'l Law & Egyptian Soc'y Int'l Law, Call for Papers: Are There Regional Approaches to International Law and Institutions? (2010), available at <http://www.asil.org/files/egypt100620.pdf>.

8. See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 17–28 (3d ed. 1985).

## I. ROOTS: BRIEF HISTORY OF CIL

A common misconception in CIL is that this nascent field is the intellectual product of advances in critical approaches to international law, or what has elsewhere been called new approaches to international law ("NAIL") or 'newstream,'<sup>9</sup> and more recently still, TWAIL.<sup>10</sup> This sentiment is heard in any number of conference presentations.<sup>11</sup> As a threshold matter, it is factually incorrect. CIL is not the product of the past decade. As an academic discipline in the West, the course "comparative approaches to international law" was taught in the 1970s at University College London by eminent Russian law scholar William E. Butler.<sup>12</sup> An edited work on international law in comparative perspective was published thirty years ago by Butler in 1980.<sup>13</sup> Twenty-five years ago, Butler also delivered a series of lectures on the field at the Hague Academy of International Law.<sup>14</sup> His contributions to the methodology of CIL below are discussed below.

Even the term is far from new. Aside from Butler's use of comparative approaches to international law, CIL can be traced to the early 1960s to describe the competing Western and Soviet international legal orders.<sup>15</sup> The term was recently suggested for the process of comparing interna-

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9. See, e.g., David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345 (Pierre Legrand & Roderick Munday eds., 2003) [hereinafter *COMPARATIVE LEGAL STUDIES*].

10. See, e.g., Upendra Baxi, *New Approaches to the History of International Law*, 19 *LEIDEN J. INT'L L.* 555, 558–59 (2006); B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (1993).

11. See, e.g., Toronto Group, *supra* note 7 ("In the past decade, many scholars have critiqued this tendency, using historical and biographical methods to examine the place of subjectivity and situatedness in international law.").

12. W.E. Butler, *Acknowledgments*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* vii (W.E. Butler ed., 1980) [hereinafter *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE*]; W.E. Butler, *International Law and the Comparative Method*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE*, *supra* note 12, at 25, 29 n.17 [hereinafter Butler, *International Law and the Comparative Method*]. In the late 1960s, Butler led a study at Harvard Law School in Russian, Chinese, and American approaches to international law. See, e.g., W.E. Butler, *American Research on Soviet Approaches to Public International Law*, 70 *COLUM. L. REV.* 218, 223–24 (1970) [hereinafter Butler, *American Research on Soviet Approaches*].

13. *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE*, *supra* note 12 (surveying application of comparative method to public international law).

14. W.E. Butler, *Comparative Approaches to International Law*, 190 *RECUEIL DES COURS* 9, 58–61 (1985) [hereinafter Butler, *Comparative Approaches*].

15. 1 *THE STRATEGY OF WORLD ORDER: TOWARD A THEORY OF WAR PREVENTION* 227–29 nn.1–11 (Richard A. Falk & Saul H. Mendlovitz eds., 1966).

tional treaties and provisions,<sup>16</sup> but the more traditional and common-sense use is the one proposed by McWhinney, Butler, and others to describe, in very general terms, competing approaches to international law, institutions, and governance.<sup>17</sup> This is an important clarification, for as discussed below, terminological issues are some of the most central fields of debate in comparative law.

Furthermore, as will be explored, CIL also existed earlier as a discipline in other national traditions. Below, this Article surveys the origins of CIL in the early twentieth century without any claim regarding earlier origins of this sub-field.<sup>18</sup> In fact, subsequent histories will surely place the start of CIL much further in the annals of history (and introduce parallel CIL traditions in the same temporal plane). But, for the present purposes, the chosen periodization is sufficient to illustrate the promises and major blindspots inherent in such a study.

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16. MARKKU KIKERI, *COMPARATIVE LEGAL REASONING AND EUROPEAN LAW* 305 (2001) (uses the term to mean the “comparison of international treaties and their provisions” but this is assuredly not the best use for such a broad term); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMP. L.Q. 57 (2011) (using the term “comparative international law” to refer to the way academics, practitioners and national courts seek to identify and interpret international law by engaging in comparative analyses of various domestic court decisions).

17. Edward McWhinney used comparative international law to describe not merely intra-bloc rivalry over competing international law ‘systems’ during the Cold War, but to describe the divergent evolution of other systems of international law, such as: (1) traditional international law in the sense of custom-based rules and general treaty law; (2) UN law, UNSC and UNGA resolutions and decisions of the ICJ; (3) ‘regional’ international law; and (4) Socialist international law. See Edward McWhinney, *Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems*, 50 VA. L. REV. 36 (1964). “The operational problem for the present-day international lawyer who is genuinely concerned with the attempt to accommodate the contending legal systems may in some sense seem to reduce to an exercise in *comparative law*—*comparative international law*, if one wishes to be precise.” *Id.* at 54. McWhinney believed that by doing comparative international law, a U.S. and Soviet legal task force could find a ‘common core’ of international law where there is or is likely to be broad consensus and to separate and quarantine areas of controversy and divergence.

18. This is a heuristic choice, not a concrete historical claim. Comparative international law can be said to have started earlier, perhaps as early as the very creation of classic European international law in the seventeenth century, and the attempts by peripheral non-European states to appropriate or create alternative visions of international law. See, e.g., Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT’L L.J. 475, 521 (2010) (arguing that in the process of appropriating Western international law, elite non-Western international law jurists created a “particularistic universalism” conception of the international order).

*A. The Interwar Period and Start of Alternatives*

World War I ("WWI") and the formation of the League of Nations traditionally signify the start of modern international law.<sup>19</sup> This period also coincides with arguably the most significant historical events of the twentieth century, the Bolshevik Revolution and the formation of the Russian Soviet Federative Socialist Republic ("RSFSR"), and later the development of the Soviet Union. The two moments are of course intimately interrelated, and their linkages and nuances have been fought over by historians, political scientists, and sociologists ever since. The moments also had great significance for the three disciplines at issue here (public international law, comparative law, and CIL).

To the field of international law in the West, the Russian revolution signified a challenge. From its inception, the USSR squarely charged the architects of the League system and the Versailles Treaty with imperialist aims and threatened, quite bluntly, to demolish the international legal order by a series of worldwide workers' revolutions.<sup>20</sup> Inspired by the Marxist tradition, the Soviet state proposed an alternative domestic and global governance model that absolutely rejected longstanding classic liberal notions regarding private property, free trade, the organic class system (itself originating in the Aristotelian tradition, but rationalized by vulgarized interpretations of Charles Darwin's natural selection theory), and so on. To traditional comparative law scholars, the Russian revolution produced a great family of law—the socialist legal system—that would go on to influence dozens of national domestic legal orders through direct imposition, indirect transplant, and law and development schemes.<sup>21</sup> As discussed below, the Soviet state introduced a concrete programmatic proposal for the world's colonized peoples and exploited workers.<sup>22</sup> From its inception, it offered solidarity, material aid, and organizational resources to national liberation movements in opposition to European imperial powers. Equally important, it offered a theoretical and strategic alternative to the predominant global legal order. These developments stretched traditional disciplinary bounds, creating new fields (international political economy) but also for the first time, putting comparative law and international law into tension with one another. Whereas traditionally, comparative law rested on the assumption of legal pluralism and early twentieth century international law rested on an assump-

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19. Again, this is not the place to discuss the relevance of 1492, 1648, 1815, 1885 or other dates potentially integral to the development of international law. That lively debate is better held elsewhere.

20. See *infra* note 57.

21. See A. KH. SAIDOV, *COMPARATIVE LAW* 199 (W.E. Butler ed. & trans., 2003).

22. See *infra* text accompanying notes 242–51.

tion of universality, these bright distinctions no longer held true. From this point forward, the need for CIL (defined as the study of alternative approaches to dominant governance paradigms) was born.

### *B. A Historical Taxonomy*

How is CIL different from traditional comparative law, or traditional international legal theory, or the study of international legal history(ies)?

In its most basic form, CIL, like basic comparative law, intends to satisfy our base instinct to catalog, shelve, sort, and understand.<sup>23</sup> CIL is simply another form of legal taxonomy, built on the premise that its unique form of classification will facilitate an improved understanding of the law.<sup>24</sup> CIL offers a chance to take stock of an increasingly pluralized and fractionalized global legal order, the ever-more complex maze of international, regional, and bilateral agreements, both hard and soft. As Emily Sherwin has observed, significant benefits can result from a useful categorization of the law:

[O]rganisation of law into categories . . . facilitate[s] legal analysis and communication of legal ideas. . . . [A] comprehensive formal classification of law provides a vocabulary and grammar that can make law more accessible and understandable to those who must use and apply it. It assembles legal materials in a way that allows observers to view the law as a whole law. This in turn makes it easier for lawyers to argue effectively about the normative aspects of law, for judges to explain their decisions, and for actors to coordinate their activities in response to law.<sup>25</sup>

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23. VIVIAN GROSSWALD CURRAN, *COMPARATIVE LAW* 10–11 (2002).

24. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 5 (1997) [hereinafter Mattei, *Three Patterns*] (“[Taxonomy] provides the intellectual framework of the law and it makes the law’s complexity more manageable.”); see also Linda Silberman, *Transnational Litigation: Is There a “Field”? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT’L L. 1427, 1430–32 (2006); Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 243 (2000) (“Gaining knowledge of a subject is largely a matter of learning how to classify the subject and its constituent elements.”); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 484 (2006) (contending that a good taxonomy “is not simply an attempt to catalog existing laws,” but advances our understanding of the area of the law and thereby “provide[s] a useful framework for its future development”); GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 1 (1999) (“To classify is human.”); 1 ENGLISH PRIVATE LAW xxxi–ii (Peter Birks ed., 2000) (“The search for order is indistinguishable from the search for knowledge.”).

25. Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW* 103, 119 (Charles Rickett & Ross Grantham eds., 2008) (internal citations omitted); see also Mattei, *Three Patterns*, *supra* note

A perfect taxonomy of international legal orders, then, offers a coherent way to sort among them, to distinguish patterns and commonalities, and to observe faultlines. There is a reason, after all, why René David and Rudolf Schlesinger's systems and families analysis continues to offer very rough, but useful, guidance fifty years on.<sup>26</sup> In its most elementary form, for instance, breaking legal systems into common law, Islamic law, civil law, and socialist (and now post-socialist) law is a useful pedagogical heuristic, indispensable for introducing students to different traditions despite the variances within the 'families.'

Of course, comparativists know all too well that building a perfect framework for the world's legal systems is not only exceedingly difficult, but may in fact be impossible. Attempts to construct grand comparative law narratives on ostensibly objective criteria have been shown to mask and replicate traditional historical infelicities.<sup>27</sup> Thankfully, with the accelerating move away from the nation-state as the fundamental jurisdictional unit of comparison—Germany's liability rules for nuisance<sup>28</sup> versus South Africa's giving way to micro-level anthropological studies and ethnographies of decision making and adjudication processes<sup>29</sup>—there are fewer and fewer calls for a perfectly coherent taxonomy, at least from the ranks of academic comparativists.<sup>30</sup>

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24, at 6 ("Taxonomy plays an important role in transferring knowledge from one area of the law to another.").

26. Compare RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* (1950), with UGO MATTEI, TEEMU RUSKOLA, ANTONIO GIDI, SCHLESINGER'S *COMPARATIVE LAW* (7th ed., 2009) [hereinafter SCHLESINGER'S *COMPARATIVE LAW*].

27. See, e.g., Annelise Riles, *Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 94, 118 (Annelise Riles ed., 2001) [hereinafter Riles, *Encountering Amateurism*] (discussing early comparativist John Henry Wigmore's attempt to analyze the Japanese legal system as a whole, what Riles refers to as "legal corporeology").

28. See, e.g., Timothy Swanson & Andreas Kontoleon, *Nuisance*, 2 *ENCYCLOPEDIA OF L. & ECON.* 380, 396 (2008).

29. See generally LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL STUDIES* (2001) (discussing dispute settlement mechanisms in indigenous Zapotec communities); see also *infra* text accompanying notes 327–29.

30. Contrast this with the universalizing, highly structured, and ostensibly coherent comparative law project afoot at the World Bank—the Doing Business Reports. See generally Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *AM. J. COMP. L.* 765 (2009) (considering the role of the Doing Business Reports in the field of comparative law); Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 *L. & SOC. INQUIRY* 1095 (2007) (analyzing and assessing the effectiveness of the Doing Business Reports).

Moreover, just as international law is undergoing a “turn to history” for theoretical inspiration,<sup>31</sup> comparative law has also sought to make a “turn to politics” (and to history)<sup>32</sup> to seek out direction and purpose.<sup>33</sup> The conscientious wings of both disciplines, it seems, are essentially living out the story of the prodigal child returning home after realizing the world was far more complex than they had imagined. Naturally, since both have been out in the world, it makes sense to swap notes, exchange stories, find shared experiences, and identify common enemies they met along the road.<sup>34</sup> To close the metaphor, however, it is important to realize that *there may not be* any difference between the comparativist, the internationalist, and the comparative internationalist. They may all have traveled the same path, seen the same patterns, and returned home the same way, simply at different times. Taxonomies allow us to share these experiences. The taxonomic function of CIL, therefore, is not to stake out a new line of intellectual inquiry in the field of public international law, but rather, to map out ongoing and related intellectual projects within comparative law and international law and to bring them together to a coterminous end.

Proceeding on this general plane, the modest role of a comparative international lawyer, therefore, should be that of a liaison, a networker, or a matchmaker. Comparative international lawyers are not meant to be legal philosophers or great legal historians weaving tales of how nations used to solve functionally equivalent legal problems in unique ways by reference to archives or diplomatic histories. Rather, they are institution builders, conference organizers, and networkers. They are strategists, advisors, and diplomats who intuitively understand that every Finnish Yearbook of International Law, Israeli Yearbook of International Law, and Palestine Yearbook of International Law contains subtly (or radically) distinct approaches to identical problems; that state practice varies even in similar international fora because of differences in legal culture, language, and mentalité. As is shown in the Section on methodological minima,<sup>35</sup> CIL practioners should aspire to embrace plurality among the world’s legal systems, not to gloss over it. Consistent with the general

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31. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2002) (experimenting with the development of international law from a historical and political lens).

32. See generally *RETHINKING THE MASTERS OF COMPARATIVE LAW* (Annelise Riles ed., 2001) [hereinafter *RETHINKING THE MASTERS*] (a collection of works discussing modern comparative law issues through a historical lens of the development of comparative law).

33. *Id.*

34. As to why they ventured on the road out alone and not side by side, that is a matter for another day.

35. See *infra* Section II.B.

Hippocratic-like oath of the now ordinary comparativist, the goal of the CIL lawyer must be limited, to be interdisciplinary without claiming interdisciplinarity,<sup>36</sup> to understand and to translate foreign approaches to international norms and institutions without seeking to transform them.

Three historical figures, Evgeny A. Korovin, John N. Hazard, and W.E. Butler help illustrate this spirit.

### 1. Evgeny A. Korovin & Socialist International Law

In the history of Soviet approaches to international law, an often overlooked, but very important early figure is Evgeny A. Korovin (1892–1964).<sup>37</sup> Unlike the eminent Soviet legal theorist Evgeny Pashukanis—whose contributions to Marxist legal theory have stood the test of time—Korovin has been perennially neglected by Western scholars, who view him as a chameleon and whose career is seen as apologetic and mercurial, partly because he escaped Stalin's purges.<sup>38</sup> The late American comparativist and Sovietologist John N. Hazard, for instance, remarked that “no . . . praise of Korovin as a pioneer ever appeared from any official pen.”<sup>39</sup> This is surprising, as Korovin was one of the leading international lawyers in the Soviet Union,<sup>40</sup> a Soviet member of the American Society of International Law,<sup>41</sup> and charged with expounding Soviet legal theory

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36. See generally Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597 (1994). Riles argues that claim of interdisciplinarity has lost much of its rhetorical force, but that interdisciplinary scholarship is helpful in that it discloses tension between “reflexive and normative modes of engagement with legal problems.” *Id.* at 597.

37. *Pamiat Evgeniia Aleksandrovicha Korovina [In Memoriam Evgeny Alexandrovich Korovin]*, 1 PRAVOVEDENIE 201 (1965) [hereinafter *In Memoriam*], available at [http://74.125.155.132/scholar?q=cache:rPNB0jSAUwUJ:scholar.google.com/&hl=en&as\\_sdt=0,33](http://74.125.155.132/scholar?q=cache:rPNB0jSAUwUJ:scholar.google.com/&hl=en&as_sdt=0,33).

38. Stunningly, for instance, Piers Beirne's *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938* (Piers Beirne ed., 1990), does not have a single mention of Korovin. Cf. Zofia Maclure, *Soviet International Legal Theory—Past and Present*, 5 FLETCHER F. 49, 49–54 (1981) (providing a good summary to Korovin's work). Grewe offers one citation of Korovin's *Das Völkerrecht* (International Law of the Transition Period) for the proposition that a “fundamental conception of communism [was] that the existing international legal order was only a provisional and transitory system of practical intercourse between socialist and capitalist states.” WILHELM H. GREWE, *EPOCHS OF INTERNATIONAL LAW* 594 (internal citation omitted). For Grewe's retelling of the Soviet transition period (1919–1939), see *id.* at 604–05.

39. Hazard, *Foreword* to PASHUKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* xii (Piers Beirne & Robert Sharlet eds., Peter B. Maggs trans., 1980).

40. *In Memoriam*, *supra* note 37; Maclure, *supra* note 38, at 51, 53.

41. *DIPLOMATICHESKII SLOVAR': T. I.: A-K [DIPLOMATIC DICTIONARY, P. 1: A-K]* (A. Ia. Vyshinskii, S.A. Lozovskii eds., 1948), available at [http://dic.academic.ru/dic.nsf/dic\\_diplomatic/688/](http://dic.academic.ru/dic.nsf/dic_diplomatic/688/) (last visited Feb. 15, 2011).

to American scholars.<sup>42</sup> For the first decade of his career as an international lawyer, Korovin's writing was interpreted as the official pronouncement of the Soviet state.<sup>43</sup> No less of an authority than Vladimir E. Grabar<sup>44</sup> had called Korovin "the leading Soviet international law theorist."<sup>45</sup> Yet until now, little has been known about his life.

Korovin was born in 1892 in Moscow to a middle-class family.<sup>46</sup> His father was a doctor and the head of the First Moscow Society on Sobriety, an anti-alcoholism clinic and advocacy group.<sup>47</sup> He was a prodigious student and assisted his father with publications.<sup>48</sup> By age twelve, Korovin began translating the poetry of French poets Lemaitre, Mallarmé, and Gautier.<sup>49</sup> Details about his student life in Moscow are unclear, though an unpublished autobiography may reveal more about his formative years.<sup>50</sup> Korovin graduated from Moscow State University in 1915<sup>51</sup>

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42. See, e.g., Eugene A. Korovin, *Soviet Treaties and International Law*, 22 AM. J. INT'L L. 753 (1928); Eugene A. Korovin, *The Problems of the International Recognition of the Union of Socialist Soviet Republics in Practice*, 19 IOWA L. REV. 259 (1934); Eugene A. Korovin, *The Second World War and International Law*, 40 AM. J. INT'L L. 742 (1946) [hereinafter Korovin, *The Second World War*]; David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20, 34 n.101 (2006) (citing Korovin's 1928 article in AJIL and acknowledging AJIL's publication of the "occasional Soviet publicist").

43. L. Ratner, *Mezhdunarodnoe Pravo v Marksistkom Osveshchenii* [*International Law in Marxist Light*], 6 SOVETSKOE GOSUDARSTVO [SOVIET STATE] 128, 130 (1935) (acknowledging that the only scholarship available to foreign observers on Soviet international law was Korovin's, leading to the misconception that his scholarship represented the official Soviet doctrine).

44. Vladimir E. Grabar (1865–1956) was one of the leading Russian international law scholars, whose career spanned both the Imperial and Soviet eras. Among his principal works was *THE HISTORY OF INTERNATIONAL LAW IN RUSSIA (1647–1917)* (W.E. Butler trans., 1990). See W.E. Butler, *Introduction to PERESTROIKA AND INTERNATIONAL LAW* 1, 1–2 (W.E. Butler ed., 1990) [hereinafter PERESTROIKA].

45. Kozhevnikov, *Na Samom Otstalom Uchastke Na Fronte Sovetskogo Prava* [*On The Most Laggard Wing in the Battlefield of the Soviet Law*], 3 SOVETSKOE GOSUDARSTVO I REVOLIUTSIYA PRAVA [SOVIET STATE L. & REVOLUTION] 146, 150 (1930) (mocking Grabar's praise of Korovin).

46. See Evgenii Korovin, VEKPEREVODA.COM, <http://www.vekperevoda.com/1887/korovin.htm> (last visited Jan. 27, 2011).

47. *Id.*

48. *Id.*

49. *Id.*

50. The standard biography from the Institute of Soviet Law does not provide details on this period of his life. See *Evgeny Alexandrovich Korovin*, 1 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE & L.] 133 (1965); see also W.E. Butler, *Soviet International Legal Education: The Pashukanis Syllabus*, 2 REV. SOCIALIST L. 79, 85, n.34 (1976) (describing the unpublished autobiography). Korovin's personal papers are

during the height of Russia's campaign in WWI. It is unclear what his position was during the war or during the revolutionary period, but it is known that he began teaching in Moscow shortly after the revolution.<sup>52</sup> By 1923 (at age 31), Korovin was a full professor of law at Moscow State University and an assistant of the Institute of Soviet Law (Institut Sovekogo Prava) of the Russian Association of Scientific Institutes of the Social Sciences the predecessor of the Institute of State and Law of the Soviet Academy of Sciences.<sup>53</sup> With respect to his international credentials, and language skills, there is indication that Korovin read English and possibly German, was fluent in French, and monitored Western literature on Soviet law.<sup>54</sup>

His earliest works on international law are a series of articles in the journal *Sovetskoe Pravo*, from the very first issue in 1922.<sup>55</sup> Between 1922 and 1924, Korovin published articles on the principle of most favored nations,<sup>56</sup> League of Nations,<sup>57</sup> *rebus sic stantibus*,<sup>58</sup> and diplomatic recognition of the Soviet Union by other nations.<sup>59</sup> By the end of the 1920s, following the reorganization of the legal research institutes and law faculties, Korovin was elevated to a professorship in international law at Moscow State University, and taught international law and international relations at a large number of Moscow institutes of higher learning, including the Moscow Juridical Institute and the Moscow Diplomatic Academy.<sup>60</sup>

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held at the St. Petersburg affiliate of the Archive of the Russian Academy of Sciences, fund No. 1552, available at [http://www.rusarchives.ru/guide/lf\\_ussr/kom\\_kor.shtml](http://www.rusarchives.ru/guide/lf_ussr/kom_kor.shtml).

51. See *In Memoriam*, *supra* note 37.

52. *Id.*

53. See L.E. Lapteva, *Istoriia Instituta* [History of the Institute], <http://www.igpran.ru/about/index.php> (last accessed Feb. 15, 2011).

54. See Letter from John N. Hazard to Walter S. Rogers, Dir. of the Inst. of Current World Affairs (Nov. 24, 1934).

55. E.A. Korovin, *Inostrannaia Filantropicheskaia Deiatel'nost' v R.S.F.S.R. i Pravovye Formy* [Foreign Philanthropic Activities in the R.S.F.S.R. and its Legal Forms], 1 SOVETSKOE PRAVO [SOVIET L.] 108 (1922).

56. E.A. Korovin, *Uslovie Naibol'shego Blagopriiastvovaniia v Dogovorah R.S.F.S.R.* [The Most Favored Nation Principle in Treaties of the USSR], 3 SOVETSKOE PRAVO [SOVIET L.] 30, 30–31 (1923).

57. E.A. Korovin, *Liga Natsii i Evoliutsiia* [The League of Nations and Its Evolution], 4 SOVETSKOE PRAVO [SOVIET L.] 36, 36–43 (1923).

58. E.A. Korovin, *Ogovorka Rebus Sic Stantibus v Mezhdunarodnoi Praktike R.S.F.S.R.* [The Principle Rebus Sic Stantibus in International Practice of the R.S.F.S.R.], 6 SOVETSKOE PRAVO [SOVIET L.] 52 (1922).

59. E.A. Korovin, *Mezhdunarodnoe Priznanie S.S.S.R. i Iuridicheskie Ego Posledstviia* [International Recognition of the U.S.S.R. and Its Legal Consequences] 9 SOVETSKOE PRAVO [SOVIET L.] 76, 76–86 (1924).

60. See *In Memoriam*, *supra* note 37.

In 1924, the year of Lenin's death<sup>61</sup> and the year Pashukanis published his influential *General Theory of Law and Marxism*,<sup>62</sup> Korovin published *International Law of the Transition Period*.<sup>63</sup> The initial print run was 5,000 copies, significant for the first Soviet attempt to formulate a theory of international law and international relations. In 1924, Korovin published a short work on Soviet treaties, *International Conventions and Acts of the New Era*.<sup>64</sup> One year later, he published a teaching manual, *Contemporary Public International Law*,<sup>65</sup> which is likely the first CIL textbook. In 1929, a second edition of *International Law of the Transition Period* was translated into German.<sup>66</sup> In addition, between 1924–1928, Korovin published close to ten articles and book reviews on international law in the journal *Sovetskoe Pravo*.

Korovin's corpus of early work is important to our study for several reasons. First, as one of the two leading authorities on international law during the 1922–1939 period, he had a tremendous influence on an entire generation of Soviet international law scholars and practitioners.<sup>67</sup> The wide distribution of his works and the large print runs and reissues signify that Korovin's theories, despite being criticized by the Pashukanis camp, were actually quite widely read and taught. Second, Korovin's work offers the first glance into early Soviet comparative law, for Korovin routinely relied on 'bourgeois' examples and Western legal sys-

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61. 7 VLADIMIR ILYICH LENIN, THE NEW ENCYCLOPEDIA BRITANNICA 264 (15th ed. 2005).

62. Evgeny Pashukanis, *Obshchaia Teoriia Prava I Marksizm: Opyt Kritiki Osnovnykh Iuridicheskikh Poniatii* [The General Theory of Law and Marxism] (1924), reprinted in SELECTED WRITINGS ON MARXISM AND LAW (P. Beime & R. Sharlet eds., Peter B. Maggs trans., 1980), available at <http://www.marxists.org/archive/pashukanis/1924/law/index.htm>.

63. E.A. KOROVIN, MEZHDUNARODNOE PRAVO PEREKHODNOGO VREMENI [INTERNATIONAL LAW OF THE TRANSITION PERIOD] (1924) (Russ.) [hereinafter KOROVIN, ILTP].

64. E.A. KOROVIN, MEZHDUNARODNYE DOGOVORY I AKTY NOVOGO VREMENI [INTERNATIONAL CONVENTIONS AND ACTS OF THE NEW ERA] (1924).

65. E.A. KOROVIN, SOVREMENNOE MEZHDUNARODNOE PUBLICHNOE PRAVO [CONTEMPORARY INTERNATIONAL PUBLIC LAW] (1926) [hereinafter KOROVIN, CIPL]. Contemporary public international law was devoted to explaining contemporary European-American conceptions of international law, rather than providing a systematic Soviet perspective. Korovin meant for it to be read simultaneously with his *International Law of the Transition Period* for an understanding of the Soviet position on given issues. *Id.* at 3–4.

66. E.A. KOROVIN, DAS VOLKERRECHT DER UBERGANGSWEIT (1929).

67. See Lauri Malksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT'L L. 211, 226 (2008); see also Earl A. Snyder & Hans Werner Bracht, *Coexistence and International Law*, 7 INT'L & COMP. L.Q. 54, 59 (1958).

tems to make his point about Soviet legal theory.<sup>68</sup> John Hazard, who regularly met with Korovin in the course of his studies at the Moscow Juridical Institute, noted that Korovin was the first to introduce the study of Anglo-American law to Russia through his lectures on the topic in the early 1930s.<sup>69</sup>

Korovin devoted great energy to the study of English and American law, going so far as to translate the 1872 California Code into Russian.<sup>70</sup> To some, Korovin's comparative work may not seem rigorous and may appear to contain mostly Marxist-inspired platitudes about Western legal systems. For instance, Korovin taught that English law, though it was capitalist in function, was in actuality, feudal in form<sup>71</sup>—though why this distinction mattered was not clear to Hazard.<sup>72</sup> The Whigs and the propertied class controlled the courts in England, Korovin taught, they vigorously maintained the archaic form of the judicial system, adding to the mystique and “hypnosis of law.”<sup>73</sup> However, not having studied in England, Korovin's observations were derived from his own interpretation of secondary texts.

Nevertheless, despite the understandable opposition to bourgeois jurisprudence and amateuristic comparisons,<sup>74</sup> Korovin actually allowed for the introduction and transplantation of foreign legal concepts and systems into the Soviet Union. Korovin pointed out that the 1934 Soviet Civil Code, for instance, was modeled on the Swiss Civil Code and was compiled in just five months at the Intitute of Soviet Law.<sup>75</sup> Likewise, Korovin introduced elements from the German legal academy to influence Russian law teaching, both substantively and with respect to teaching method.<sup>76</sup> Korovin was deeply familiar with the three reigning ‘scien-

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68. See, e.g., Korovin, *The Second World War*, *supra* note 42, at 747–48; Mintauts Chakste, *Soviet Concepts of the State, International Law and Sovereignty*, 43 AM. J. INT'L L. 21, 31 (1949); Malksoo, *supra* note 67, at 226 (quoting a passage from Korovin explaining the break of Soviet international law from that of Europe).

69. John N. Hazard, *Fragments of Lectures on the History of International Relations* 29 (unpublished manuscript) (on file with the Bakhmeteff Archive, Columbia University Library System) [hereinafter Hazard, *Fragments*].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. The term ‘amateurism’ is by now a term of art in comparative law, and should not be read as derogatory. It refers to lack of language skills, or improper definition of the subject of study in comparative projects. See, e.g., Riles, *supra* note 27, at 94–100, 104 (pointing out Wigmore's deficient language skills), 118 (discussing legal systems analysis and legal corporeology).

75. Hazard, *Fragments*, *supra* note 69, at 36.

76. *Id.* at 29.

tific' schools of international law of the time—the natural law tradition, the historical school (Savigny), and the school of Rudolf von Jhering—and was especially influenced by the third, as this represented to Korovin the closest approximation of the realist theory of international law and international relations.<sup>77</sup> Korovin saw that Jhering “looked at law as the juridical defense of interests” and that law was, at its core, political strength, though he criticized Jhering for failing to see the class nature of law despite having read Marx.<sup>78</sup>

To understand the value of Korovin's work, it is important to appreciate that he was the first to apply Marxism to international law<sup>79</sup> and the first to offer a critical comparison of Western international law with the emerging Soviet system.<sup>80</sup> A brief overview of two of his un-translated works illustrates his scholarly contributions.

*International Law of the Transition Period* opens by explaining the novelty of the task: the first attempt, in Russian or international literature, to study problems of international law in the transition period between capitalism and communism.<sup>81</sup> For the Soviets, the core problem of the transition period was how to open daily diplomatic-level interactions with representatives of the Western powers without compromising the Soviet rejection of bourgeois law and the Soviet repudiation of the “legal inheritance” (read: debt) of the Tsarist and Kerensky governments.<sup>82</sup> In these first negotiations between the West and representatives of the Soviet Republic, Korovin admits, Soviet diplomats reverted to a familiar (or what he calls, ‘stereotypical’) ‘phraseology’ and reliance on ‘commonly accepted’ bases of international law, going so far as to rely on Imperial Russian treaties in support of Soviet agendas.<sup>83</sup> Therefore, one of the first problems Korovin sought to address was the continuity in forms between capitalist and communist international legal orders.<sup>84</sup>

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77. *Id.* at 29–32.

78. *Id.* See generally RUDOLF VON IHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., Macmillan 1921) (1914) (a great work by the legal philosopher Ihering, considering how purpose is the foundation of legal systems).

79. See KOROVIN, *ILTP*, *supra* note 63, at 28–35.

80. See KOROVIN, *CIPL*, *supra* note 65.

81. See KOROVIN, *ILTP*, *supra* note 63, at 1.

82. *Id.* at 5.

83. *Id.* Korovin later successfully defended his position of maintaining continuity of terminology between the Russian and Soviet periods on practical grounds. Since the Soviet interpretation of such terms would be qualitatively different from bourgeois interpretations, it made no difference what terms were used. See also KOROVIN, *CIPL*, *supra* note 65.

84. See KOROVIN, *ILTP*, *supra* note 63.

Secondly, notwithstanding Soviet diplomats' use of the familiar language and concepts of bourgeois international law,<sup>85</sup> Western diplomats began to lodge steady protests that, despite Soviet willingness to negotiate, the USSR was violating customary law, particularly with respect to the repudiation of the Kerensky and Tsarist debt.<sup>86</sup> Korovin immediately saw this as proof of his earlier indeterminacy theory.<sup>87</sup> That is, despite the use of common forms and attempts to agree on substantive points, international jurists on both sides of the negotiating table would be able to interpret their obligations in radically different ways. Rather than use international law substantively or "on the merits," Korovin realized the immense practical applicability of his indeterminacy critique.<sup>88</sup> In what he called *legal instrumentalism*, Korovin openly argued for elastic legal standards as a way to both undermine the bourgeois concept of law and to afford the young Soviet state room to operate in a hostile foreign environment.<sup>89</sup>

Unlike Pashukanis, it seems Korovin was not concerned with theorizing an internally coherent Marxist social order; his goal, rather, was to apply a Marxist critique to existing international law and institutions and to provide a guide for Soviet practice. Korovin was fully aware of the difficulty of reconciling Marxism with law and legal institutions and devised his transition theory to accommodate both law and its eventual disappearance.<sup>90</sup> But he elided these subtleties, beginning, like Lenin before him, with the axiom that where there is society there is law (*gde ob-*

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85. Korovin gives as an example the Soviet delegation to the Genoa Conference of 1922, which was headed by G.V. Chicherin, the People's Commissar of Foreign Affairs from 1918 to 1930. KOROVIN, ILTP, *supra* note 63; *see also* Maclure, *supra* note 38, at 50.

86. ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: DEBT AND REPUTATION IN THE TWENTIETH CENTURY* (forthcoming 2011) (manuscript at 133 n.52 citing Herschel Grossman & John B. Van Huyck, *Debt Repudiation Rouses All Nations: Joint Protest Made by 19 Envoys in Petrograd—Bonds Used as Currency*, N.Y. TIMES, Feb. 20, 1918) (on file with authors); *see also id.* at 107–52 (describing the joint protest issued by each country with representatives in Soviet Russia in 1918 to the debt repudiation decree).

87. *See* KOROVIN, ILTP, *supra* note 63.

88. Boris N. Mamlyuk, *Russia & Legal Harmonization: An Historical Inquiry into IP Reform as Global Convergence and Resistance*, 10 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2011) (manuscript at 8) (on file with authors) [hereinafter Mamlyuk, *Legal Harmonization*].

89. E.A. Korovin, *K Peresmotru Osnovnykh Poniatii Mezhdunarodnogo Prava*, [*Towards a Reexamination of the Main Tenets of International Law*], 18 SOVETSKOE PRAVO [SOVIET L.] 25, 26 (1925) (arguing for a need to develop "sufficiently elastic legal forms capable of accommodating two polar legal orders") [hereinafter Korovin, *Towards a Reexamination*].

90. KOROVIN, ILTP, *supra* note 63, at 6.

*shchезhitie—tam pravo*).<sup>91</sup> To Korovin, this maxim is not only the product of legal dialectics, but constituted a sociological fact.<sup>92</sup> Thus, international law and diplomacy were necessities so long as states existed. More concretely, as long as the USSR was surrounded by imperialistic states with whom it remained necessary to have relations,<sup>93</sup> such relations would need to be grounded in a legal basis.<sup>94</sup> To Korovin, it was scholastic to theorize the essence of law, when in actuality—after realizing that all law is politics and strength—it was important to assure the USSR's place in the world *by way of* legal mechanisms.<sup>95</sup> The only remaining question was of substance and adapting legal instruments to attain Soviet interests.

Korovin's main thesis is that international law was a temporary compromise between the USSR and other states in different stages of economic development on the road to a world revolution.<sup>96</sup> The implications of this compromise were dire: "as long as the U.S.S.R. is surrounded by capitalist states," declares Korovin, "it must remain in legal 'isolation'—it cannot become either an object or subject of the bourgeois trapeze."<sup>97</sup> This required the negation of practically all fundamental international law concepts, including the sources of international law, and its subjects,

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91. Korovin, *Towards a Reexamination*, *supra* note 89.

92. See KOROVIN, ILTP, *supra* note 63, at 6.

93. The "capitalist encirclement" theory was, in the view of American diplomats, incompatible with a desire for permanent peaceful coexistence. See GEORGE F. KENNAN, MEMOIRS, 1925–1950, at 547 (1967) (Excerpts from a Telegraphic Message from Moscow, dated February 22, 1946, quoting Stalin's remarks to a delegation of American workers: "In course of further development of international revolution, there will emerge two centers of world significance: a socialist center, drawing to itself the countries which tend toward socialism, and a capitalist center, drawing to itself the countries that incline towards capitalism. *Battle between these two centers for command of the world economy will decide fate of capitalism and of communism in the entire world.*" *Id.* (emphasis added)).

94. The word for 'relations' in Russian is further divided into multiple variants (*vzaimootnoshenie*, *otnoshenie*, *snoshenie*). *Vzaimootnoshenie* refers to interrelations; *otnoshenie* is relations generally, whereas *snoshenie* means something between interaction and contact. See W.E. BUTLER, RUSSIAN-ENGLISH LEGAL DICTIONARY 27, 145, 210 (2001).

95. See Maclure, *supra* note 38, at 53.

96. For a different restatement of the transition theory, see I.A. ISAEV, ISTORIYA GOSUDARSTVA I PRAVA ROSSII [HISTORY OF STATE AND LAW IN RUSSIA] (1996); see also I.A. ISAEV, TOPOS I NOMOS: PROSTRANSTVA PRAVOPORIADKOV [SPACE LAW AND ORDER] 348 (2007) ("A Russian federation was conceptualized as a transition stage on the way to an eventual political union, a period during which people would trounce national (ethnic) differences, and progress towards world revolution.").

97. See KOROVIN, ILTP, *supra* note 63, at 44.

objects, and institutions.<sup>98</sup> To Korovin, even the most entrenched sources of international law—treaties—were unreliable as objective determinants of state conduct.<sup>99</sup> Korovin routinely pointed out the indeterminacy of particular treaties, showing that the same terms were used by opposing parties to signify contradictory concepts.<sup>100</sup>

At the same time, Korovin was a consummate realist and pragmatist. Mindful of political disagreements as potential roadblocks to cooperation, he outlined a dualistic system of international law in which countries could agree on apolitical matters (for instance, international public health and epidemics, defense of international historical monuments, or artwork), while maintaining intellectual opposition on other issues.<sup>101</sup> Korovin's title for the former category was *international administrative law*,<sup>102</sup> a theory that continues to have purchase with respect to completely uncontroversial sub-fields of international law, such as international laws concerning postal carriage.<sup>103</sup> Korovin was also the author of the Soviet tripartite theory of international law, which divided international law into three camps: law between socialist states,<sup>104</sup> law between capitalist states *vis-à-vis* each other, and law between socialist states and capitalist states.<sup>105</sup> Perhaps most importantly, Korovin realized the tremendous practical and theoretical value to be gained from devising a theory of *perpetual transition*, although he never formally identified it as such.

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98. The chapters are: (1) International law in the system of Soviet law, (2) International law of the transition period in the history of international relations, (3) Essence and nature of international law of the transition period, (4) The state as the subject of international law, (5) Organs of international relations, (6) International treaties, (7) Main issues in the law of war, (8) Conclusion. See KOROVIN, ILTP, *supra* note 63.

99. *Id.* at 15–16; see also Chakste, *supra* note 68, at 27.

100. Korovin gives as an example the negotiations between Richard von Kühlmann and Trotsky leading to the Brest-Litovsk treaty. KOROVIN, ILTP, *supra* note 63, at 13. The meanings of terms like 'self-determination' and 'peace without annexation,' were self-determined by parties to the negotiations. In other words, socialist/Russian negotiators attached their own meanings to these terms, without reference to or belief in universal meanings or principles attached to them.

101. *Id.* at 15.

102. See *id.*; KOROVIN, CIPL, *supra* note 65.

103. See KOROVIN, CIPL, *supra* note 65.

104. The idea of an independent international law between socialist states is not different from the idea of an international law proper as law "between (European) states that shared similar ideas about statehood and its social functions." MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 282 (citing Pillet's *Le droit international public* and distinguishing between European states versus non-European entities based on the fact that non-Europeans lacked the advanced degree of civilization necessary to understand the idea of State functions).

105. See Maclure, *supra* note 38, at 52.

This theory of perpetual transition effectively underpinned the theory (or at least, the ethos) of Soviet exceptionalism until the collapse of the USSR.<sup>106</sup> It is striking that in the whole corpus of Korovin's work there is absolutely no indication that socialism would arrive at any proximate date or that the length of the transition even mattered. Similar to Pashukanis, it seems Korovin understood that socialist international law would exist so long as the USSR remained obligated to negotiate and deal with capitalist states.<sup>107</sup> As Korovin wrote in his preface to *International Law of the Transition Period*, the five year experience of war and agreements between the socialist Soviet state and capitalist states was an insignificant period of time in the realm of international relations.<sup>108</sup> Transition was going to take a long time; accordingly, socialist international law could remain in a state of permanent transition, similar to the notion of 'permanent exception' popularized by Carl Schmitt and his contemporary appropriators and critics.<sup>109</sup>

Korovin's book *Contemporary Public International Law* reiterates many of the themes of *International Law of the Transition Period* but is much more heavily criticized, possibly because of its intended use as a teaching manual.<sup>110</sup> David Levin, a disciple of Pashukanis at the Communist Academy, attacked Korovin precisely for ignoring larger theoretical questions.<sup>111</sup> "From a theoretical point of view," Levin wrote, "the book is lacking a Marxist methodology and even evidences a certain dogmatism."<sup>112</sup> According to Levin, Korovin limited himself to "traditional dogmatic formulation of the main theoretical questions pertaining to international law (resembling any regular bourgeois work)."<sup>113</sup> Levin especially criticized Korovin's treatment of the USSR as a quasi-subject

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106. The extent to which the Soviet Union claimed exceptional status in international law after WWII is open to debate. However, for examples of late Soviet exceptionalist rhetoric in the waning days of the USSR, see G.I. Tunkin, *Politics, Law and Force in the Interstate System*, 219 RECUEIL DES COURS 227, 292, 337 (1989) [hereinafter Tunkin, *Politics*].

107. See Maclure, *supra* note 38, at 52–55.

108. KOROVIN, ILTP, *supra* note 63, at 4.

109. See Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1827 (2000).

110. Compare KOROVIN, CIPL, *supra* note 65, with KOROVIN, ILTP, *supra* note 63.

111. See John N. Hazard, D. B. Levin's Aktual'nye Problem Teorii Mezhdunarodnogo Prava [Current Problems of the Theory of International Law], 70 AM. J. INT'L L. 165, 165 (1976).

112. D. B. Levin, *Retsenziia: Korovin, Sovremennoe Mezhdunarodnoe Publichnoe Pravo*, [Review: Korovin, *Contemporary Public International Law*], 1 REVOLUTSIA PRAVA [REVOLUTION L.] 225, 226 (1926).

113. *Id.*

under international law, simultaneously bound by international treaties, and at the same time, because of the unique extraterritorial class nature of the Soviet experiment, resembling something of a proletarian movement rather than a traditional territorial state.<sup>114</sup> Contrary to Korovin, Levin argued that:

Practically speaking, the USSR, as the only socialist state, is required to guard itself from the capitalist world by way of legal barriers (sovereignty, equality) and at the same time uphold the international law form of statehood even more intensively than bourgeois states, which, in the period of imperialism lose much of their significance.<sup>115</sup>

Yet Levin's view, which would come to dominate Soviet international legal theory from the mid-1930s until the zenith of 'classical' Soviet international law in the post-WWII period, portrayed a gross misunderstanding of the strategic implications of Korovin's indeterminacy and transition theories.

Pashukanis disciples also criticized Korovin in a series of articles in the *Encyclopedia of State and Law*.<sup>116</sup> In the realm of international law, the main disagreement was that Korovin claimed the Soviet Union could create new international legal forms.<sup>117</sup> According to Hazard, the Pashukanis camp "argued that Korovin was philosophically wrong [because] the international law being applied by Soviet diplomats could not be something new. International law could be *only* what it had been under the influences of capitalism."<sup>118</sup> But these aspects of the debate missed the broader basis of disagreement—namely, whether there was a tactical advantage to the Soviets in claiming the existence of an exceptional outlook on international law. To the Pashukanis camp, this argument was a non-starter, as all state relations mirrored relations between commodity owners, whether or not those relations occurred between capitalist states and ostensible 'socialist' ones. Therefore, the notion of socialist international law, as somehow unique from general international law, was a logical impossibility. To Korovin, however, comparing competing international law traditions to one's own offered a useful frame for a prolonged attack on the competing system.

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114. *Id.* at 227.

115. *Id.*

116. See Chakste, *supra* note 68, at 24; see, e.g., *infra* text accompanying note 120.

117. See John N. Hazard, *The Soviet Union and International Law*, 1 SOVIET STUD. 189, 190 (1950) [hereinafter Hazard, *The Soviet Union and International Law*], available at <http://www.jstor.org/stable/148828>; see also Maclure, *supra* note 38, at 52.

118. John N. Hazard, *Socialism and International Public Law*, 23 COLUM. J. TRANSNAT'L L. 251, 255 (1984) (emphasis added).

*Contemporary Public International Law* was, in other words, the first large-scale attempt by a Soviet jurist to present a systematic critique of the Western view of international law. For all the critical insight, the ultra-leftist Pashukanis camp<sup>119</sup> missed the brilliant advance that Korovin made. Read together, *International Law of the Transition Period* and *Comparative Public International Law* describe how, despite being bitter ideological foes, two states modeled on radically different economic models could, and would, coexist in parallel universes and cooperate with each other on matters of common concern. This tremendous insight would, of course, go on to form the basis for the doctrine of coexistence<sup>120</sup> and, eventually, the doctrine of permanent peaceful coexistence after the Cuban Missile Crisis.<sup>121</sup> However, perhaps partly because of the rapid development of international law in the USSR and the West after World War II ("WWII"), Korovin's contributions to peaceful coexistence were never credited.

Yet, here was a comparative international lawyer, *par excellence*, who had resisted the common Marxist urge to draw caricatures of Western models and institutions,<sup>122</sup> to perform simple comparison by contrast, or to define himself solely in opposition to an imagined bourgeois foe, rather than a realistic assessment of a powerful adversary.<sup>123</sup> Though he was subject to intense criticism at home and abroad, Korovin's stance offers three lessons for the understanding of CIL. First, Korovin's experience shows that it was possible to set aside ideological disagreements with representatives of competing systems in an effort to build institutional links with rival theoretical and political schools. Second, as Korovin demonstrated, CIL could reveal inner tensions within the competing system, serving as a useful base for critique. Lastly, Korovin's CIL

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119. Michael Head, *The Passionate Legal Debates of the Early Years of the Russian Revolution*, 14 CAN. J.L. & JURISPRUDENCE 3, 23–27 (2001) (describing the theoretical orientations of Pashukanis, Stuchka, and other leading Soviet legal theorists).

120. Eugene A. Korovin, *The Conception, Sources and System of International Law*, in ACADEMY OF SCIENCES OF THE U.S.S.R. INSTITUTE OF STATE AND LAW, INTERNATIONAL LAW 16 (Dennis Ogden trans., 1960).

121. See John Quigley, *Perestroika and International Law*, 82 AM. J. INT'L L. 788, 789–90 (1988).

122. See, e.g., Michael Head, *The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism*, 17 CAN. J.L. JURISPRUDENCE 269, 284–86 (discussing Pashukanis's mockery of Western models and responses to his writings); Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 CORNELL L. REV. 1158, 1187 (1994) (criticizing a Marxist scholar for drawing a caricature of the British criminal justice system).

123. See, e.g., KOROVIN, ILTP, *supra* note 63, at 1; JOHN N. HAZARD, RECOLLECTIONS OF A PIONEERING SOVIETOLOGIST 24 (2d ed. 1987) [hereinafter HAZARD, RECOLLECTIONS] (stating that Pashukanis argued that all law was bourgeois).

work evidences the pitfalls from corporeological accounts of a competing system, highlighting the need for narrow subject inquiry and methodological rigor.

## 2. John N. Hazard & Comparative Law

Unlike Korovin, John N. Hazard (1909–1995) is familiar to most comparative law scholars, Russian law experts, and American internationalists. Hazard's contribution to the field of CIL is indebted to Korovin, as much of his scholarship draws upon the letters and notes he wrote while auditing Korovin's international law courses at the Moscow Juridical Institute from 1934–1937.<sup>124</sup> These materials, now preserved in the Bakhmeteff Archive at the Columbia University Library, not only provide a glimpse into how international law was taught in 1930s Soviet Union, they also shed an important light on method and *methodology* when thinking about CIL.<sup>125</sup>

Hazard's career as a Sovietologist began following his graduation from Harvard Law School in 1934 when he was sent to Moscow as an Institute of Current World Affairs fellow to attend, and report on, Russian law courses.<sup>126</sup> Hazard took three courses related to international law while a student, all under Korovin: introduction to international law; history of international relations; and public international law.<sup>127</sup> Beyond the class notes, Hazard also provided brief sketches of Korovin in correspondence with his supervisors in the U.S.<sup>128</sup> Hazard's initial impression of Korovin was that he was a "scholarly man[,] . . . well-schooled in the Marxist attitude, and the reasons given by the authorities for [Soviet foreign policy decisions]."<sup>129</sup> In addition to classes, Hazard met with Korovin on a weekly basis in the latter's home, learning Russian and allowing Korovin to practice his English language skills.<sup>130</sup>

Hazard began his long and prolific scholarly career while still in Moscow, publishing articles in the *Columbia Law Review*<sup>131</sup> and the *Ameri-*

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124. See Hazard, *Fragments*, *supra* note 69; see also Oscar Schachter, In Memoriam: John Newbold Hazard (1909-1995), 89 AM. J. INT'L L. 583, 584 (1995).

125. See Hazard, *Fragments*, *supra* note 69.

126. Schachter, *supra* note 124, at 584.

127. See HAZARD, RECOLLECTIONS, *supra* note 123.

128. Schachter, *supra* note 124, at 584.

129. Letter from John N. Hazard to Walter S. Rogers, Dir. of the Inst. of Current World Affairs (Nov. 4, 1934) (discussing the introduction of a course on the history of the development of international law, the first of its kind in Russia).

130. See John N. Hazard, *Foreword to* EVGENY PASHUKANIS, SELECTED WRITINGS ON MARXISM AND LAW 273 (P. Beirne & R. Sharlet eds., 1980), available at [www.marxists.org/archive/pashukanis/biog/memoir.htm](http://www.marxists.org/archive/pashukanis/biog/memoir.htm).

131. John N. Hazard, *Soviet Law: An Introduction*, 36 COLUM. L. REV. 1236 (1936).

*can Journal of International Law*.<sup>132</sup> After returning from Moscow in 1937, Hazard enrolled in a doctorate program at Chicago University, studying comparative law under the supervision of Max Rheinstein.<sup>133</sup> In 1938, Hazard publicized the expulsion of Pashukanis and the ensuing attempts to “cleanse” Soviet international law of his impure theories.<sup>134</sup> After completing his doctoral training at Chicago in 1939, Hazard joined a law firm in New York City, but with the outbreak of WWII he took a position with the U.S. government, where he was assigned to the Soviet desk in the Division of Defense Aid Reports.<sup>135</sup> As part of his duties, he helped negotiate the conditions under which the Soviet Union became a major recipient of the Lend-Lease program.<sup>136</sup>

Hazard ultimately became deputy director of the Soviet branch of the Lend-Lease Administration, gaining the friendship of America’s post-war foreign policy elite, among them George Kennan, Dean Acheson, and Averell Harriman.<sup>137</sup> As an expert on the USSR, Hazard accompanied Vice President Henry Wallace on his secret mission to China in May, 1944 through Eastern Siberia.<sup>138</sup> The following year he was chosen as an expert on Soviet law to assist Justice Robert Jackson in preparing the prosecution of Nazi leaders to be brought before an international tribunal for war crimes.<sup>139</sup> These experiences gave Hazard an unmatched command of not only Russian law, but also the inner workings of diplomacy, international courts, and institutions.

After WWII, Hazard entered the legal academy at Columbia University, where he remained until his death.<sup>140</sup> Columbia so prized his background that it offered him the rare honor of a tenured position to start.<sup>141</sup> He immediately drew on his Moscow training (and notes) to prepare teaching manuals for his students at Columbia. His post-War publications ran the gamut from public law and Soviet constitutional theory, criminal law, family law, and of course, Soviet international relations and international law.<sup>142</sup>

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132. John N. Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, 32 AM. J. INT’L L. 244 (1938) [hereinafter Hazard, *Cleansing*].

133. Schachter, *supra* note 124, at 584.

134. See Hazard, *Cleansing*, *supra* note 132, at 244.

135. See Schachter, *supra* note 124, at 584; see also John N. Hazard, *Soviet Legal Studies Pioneer*, 20 COLUM. U. REC. 24, 86 (1995) [hereinafter Hazard, *Pioneer*].

136. Schachter, *supra* note 124, at 584.

137. *Id.* at 585.

138. *Id.*

139. *Id.*

140. *Id.*

141. See Hazard, *Pioneer*, *supra* note 135.

142. See *id.*

For the purposes of this Article, the most striking aspect of Hazard's work on Soviet international law was its sincere attempt to project a neutral view on the Soviet position and its philosophical origins.<sup>143</sup> Hazard's writings on Marxism showed deep sensitivity for the inner tensions and political pressures in which the Soviet jurists were working. He plainly understood the irreconcilable positions taken by Soviet scholars in defense of party decisions and he could sense the personal disenchantment those scholars felt when they had to renounce their positions weeks, months, or years later. Hazard's mindfulness of these tensions was both descriptive and analytical. He understood the paradox of so-called 'Marxist law'—that any law, as such, would mimic the logic of capital relations—but Hazard also understood the intellectual, institutional, and historical web that made exposing this precarious symmetry impossible for the Soviet jurists, including the later Pashukanis.<sup>144</sup>

Precisely because of these sentiments, and in the heightened atmosphere of McCarthyism, it was even feared Hazard had "gone native" and was complicit in the global communist conspiracy to overthrow the U.S. "from within."<sup>145</sup> He was investigated by the House Un-American Activities Committee, but was ultimately cleared.<sup>146</sup> Paradoxically, following this episode, the USSR would not issue Hazard an entry visa to the Soviet Union, a fact he did not reveal publicly to many people.<sup>147</sup> A victim of the hyper-politicization of the disciplines of international and comparative law in the Cold War period, Hazard's experience teaches a practical lesson confronting potential CIL scholars today—despite best attempts to find a neutral, objective, or 'scientific' base for comparison, it is always possible to expose an underlying set of existing legal/political traditions or perhaps even an ideological taint.

It is not surprising, therefore, that Hazard read with optimism the anonymous leading article in the September 1956 *Sovetskoe Gosudarstvo*

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143. See, e.g., Hazard, *The Soviet Union and International Law*, *supra* note 117 (carefully discussing the development of Soviet interest in international law).

144. See *id.*; see also Hazard, *Cleansing*, *supra* note 132, at 244, 248.

145. See William Partlett, *Re-Classifying Russian Law: Mechanisms, Outcomes and Solutions for an Overly Politicized Field*, 2 COLUM. J.E. EUR. L. 1, 23 (2008).

146. See *id.*; see also MEDFORD STANTON EVANS, BLACKLISTED BY HISTORY: THE UNTOLD STORY OF SENATOR JOE MCCARTHY AND HIS FIGHT AGAINST AMERICAN ENEMIES 169 (2007); STEPHEN F. COHEN, RETHINKING THE SOVIET EXPERIENCE: POLITICS & HISTORY SINCE 1917, at 17 (1985).

147. See Marshall D. Shulman, *Biographical Memoirs: John Newbold Hazard*, 142 PROC. AM. PHIL. SOC'Y 140, 142 (1998) (explaining his relationship with the Soviet Union after the war); Boris N. Mamlyuk, *Russia's Second Twenty-Years' Crisis (1989-2009): The Restoration of International Law* (2011) (unpublished PhD dissertation) (on file with authors) [hereinafter Mamlyuk Dissertation].

*i Pravo*, urging a reevaluation of the work of the interwar period.<sup>148</sup> To the scholarship of international law, Hazard hoped that a reexamination would put an end to the spinning of “fine theories,” and focus work on “specific problems” rather than the core “problem of the conflict between states of differing economic systems.”<sup>149</sup> Hazard understood how little good would flow from setting up ‘clashes of civilizations,’ from feeding into the mania of communism versus capitalism, good versus evil, us versus them.<sup>150</sup> Thus, he focused his life’s work on debunking these myths, on teaching several generations of scholars to think critically about the Soviet ‘other,’ and to understand the inner tensions, conflicts, and incongruities *within* the Soviet system through as pragmatic, realistic, and apolitical a lens as possible.<sup>151</sup> This was the great lesson he learned from the American realist school of the 1930s under Manley O. Hudson and Roscoe Pound, and the Soviet realist school of Korovin; it was perfectly fine to immerse oneself in the ‘Other’s’ legal culture, to establish institutional and professional links between warring systems,<sup>152</sup> and to conceptualize the nature and functions of international institutions (like the League of Nations) from radically different perspectives.<sup>153</sup>

### 3. W.E. Butler’s CIL Jurisprudence

The third pivotal figure in the development of CIL in the twentieth century is eminent Russian law scholar, Professor William E. Butler. The author of more than one hundred books (monographs, edited works, and translations) and over three thousand total publications (and counting) on Soviet, Russian, and Commonwealth of Independent State (“CIS”) law,<sup>154</sup> Butler hardly needs introduction to most international and comparative lawyers. A quick biography and overview of his main works on CIL helps contextualize the methodological discussion that follows.

Butler was born in Minnesota in 1939 and completed his undergraduate studies at American University’s School of International Service in

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148. John N. Hazard, *Pashukanis is No Traitor*, 51 AM. J. INT’L L. 385, 386–88, 386 n.2 (1957).

149. *Id.* at 388.

150. See Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

151. See Schachter, *supra* note 124, at 584.

152. For instance, Hazard developed a strong professional relationship with G.I. Tun-kin who would go on to become the leading Soviet international lawyer of the post-WWII era. See *id.*

153. See John N. Hazard, “New Thinking” in Soviet Approaches to International Politics and Law, 2 PACE Y.B. INT’L L. REV. 1, 13–15.

154. W.E. BUTLER, INTERNATIONAL AND COMPARATIVE LAW: A BIBLIOGRAPHY (2005).

1961.<sup>155</sup> Butler then attended the Johns Hopkins School of Advanced International Studies ("SAIS"), taking Jerome Cohen's and John Hazard's course on Chinese, Soviet, and comparative law.<sup>156</sup> After receiving his MA in 1963 from Johns Hopkins, Butler enrolled at Harvard Law School where he continued studying Soviet law under Harold J. Berman.<sup>157</sup> Butler returned to SAIS for his doctoral studies, completing a dissertation in 1970 on the "Soviet Union and the Law of the Sea."<sup>158</sup> Understanding Butler's institutional and academic lineage is vital, for it explains the similarities in comparative approaches of the three exemplary CIL scholars.

In 1967 and 1968, Butler began teaching as a lecturer on the Soviet portion of a Harvard course titled "Soviet, Chinese and Western Approaches to International Law."<sup>159</sup> The heavily subscribed course was co-taught by Jerome Cohen and Hungdah Chiu (on Chinese approaches),<sup>160</sup> Harold Berman and Butler (on Soviet approaches), and Richard R. Baxter (on American approaches).<sup>161</sup> Employing a combination of textual analysis and functionalism<sup>162</sup> from the point of departure of a standard U.S. international law syllabus,<sup>163</sup> the experts on Soviet and Chinese law would draw on foreign doctrinal and practice materials to answer how each nation would approach the given topic.<sup>164</sup> In 1970, Butler was elevated to a readership in comparative law at University College London ("UCL"),<sup>165</sup> and from 1975, he led a graduate-level seminar, "compara-

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155. William E. Butler, PENN STATE LAW, [http://law.psu.edu/faculty/resident\\_faculty/butler](http://law.psu.edu/faculty/resident_faculty/butler) (last visited Feb. 10, 2011).

156. *Id.*

157. *Id.*

158. *Biographical Note: Ph.D. Dissertations*, 29 INT'L ORG. 909, 917 (1975).

159. W.E. BUTLER, *Acknowledgements*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, *supra* note 12, at vii.

160. Some years later the two scholars published a two-volume documentary treatise on Chinese approaches. See 1 JEROME A. COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW (1974).

161. W.E. BUTLER, *Acknowledgements*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, *supra* note 12, at vii; Butler, *American Research on Soviet Approaches*, *supra* note 12, at 224; W.E. Butler, *Justice in Russia: Soviet Law and Russian History*, 42 EMORY L.J. 433, 440 (1993) [hereinafter Butler, *Justice in Russia*].

162. Butler, *Justice in Russia*, *supra* note 161, at 440.

163. *Id.*

164. *Id.*

165. *International Law & Organizations: Faculty and Staff*, JOHNS HOPKINS UNIV., THE PAUL H. NITZE SCH. OF ADVANCED INT'L STUDIES, <http://www.sais-jhu.edu/academics/functional-studies/international-law-orgs/faculty.htm#Butler> (last visited Feb. 9, 2011).

tive approaches to international law.”<sup>166</sup> The UCL course was not heavily subscribed and was only offered intermittently for five or six years.<sup>167</sup>

Butler’s subsequent CIL work built directly on these teaching experiences. In 1977, Butler selected essays on CIL for publication in a stand-alone volume, *International Law in Comparative Perspective* (“ILCP”), the first English-language work on comparative approaches to international law.<sup>168</sup> ILCP brought together seventeen works, including essays by McDougal, Schwarzenberger, and Gutteridge,<sup>169</sup> and offered a valuable introduction to the comparative method as applied to international law, especially with respect to comparative histories of international law. Butler went on to develop his own indispensable methodological insights, drawing on and rejecting many of the theories proposed by these very scholars.

Butler openly rejected the artificial divide set by the earlier interwar generations of comparativists and internationalists.<sup>170</sup> Thus, Butler rejected as anachronistic Gutteridge’s and other comparativists’ disinclination to engage with either private or public international law.<sup>171</sup> The posture of pre-WWII international lawyers was similarly antediluvian, Butler argued.<sup>172</sup> Because of the mainstream international law preoccupation with nation states, formalist reliance on treaties for positive law, and overarching spirit of universality, there was hardly a need to study how states internalized international obligations, or exhibited general principles.<sup>173</sup> In addition to being factually counterintuitive, such postures undermine the idea of custom as a traditional source of international law.

Butler also rejected the pragmatic, policy-oriented, comparative style of the American legal realists because it constrained the potential scope of inquiry to only like systems.

166. Butler, *International Law and the Comparative Method*, *supra* note 12, at 29 n.17.

167. Thomas Carothers, *Book Review: Recueil des Cours de l'Academie de Droit de La Haye* [Collected Courses of the Academy of Law of The Hague], 82 AM. J. INT’L L. 374, 379 (1988).

168. W.E. BUTLER, *Acknowledgements*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, *supra* note 12, at vii.

169. *Id.* at v, vi.

170. See W.E. BUTLER, *Introduction*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, *supra* note 12, at 1–2.

171. *Id.* at 1; see also H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY & RESEARCH* (2d ed. 1949) [hereinafter GUTTERIDGE, *COMPARATIVE LAW*] (explaining the origins and meaning, purposes, and value of comparative law).

172. See W.E. BUTLER, *Introduction*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, *supra* note 12, at 2.

173. *Id.* at 1.

Comparison has been viewed primarily as a means, or technique, to be employed in the service of law reform, in the proper application of foreign law by the courts, in the international harmonization or unification of private law, and the like. Although it need not necessarily do so, this orientation has contributed to an emphasis on studying those legal orders reasonably proximate in levels of development and sophistication . . . .<sup>174</sup>

To Butler, postwar politics meant that CIL would have to engage in far broader socio-legal comparisons, going beyond realist functionalism to encompass a number of related fields.<sup>175</sup> Butler called this a form of "know thine enemy syndrome . . . the need to comprehend the basic philosophical, historical, sociological, and political premises of a foreign legal system."<sup>176</sup> Accordingly, purpose driven CIL meant going beyond 'hard' comparisons between, say, American and Soviet foreign affairs law. CIL study had to embrace the ancillary fields of legal theory, culture, and profession in the respective states.<sup>177</sup> The key methodological challenge was identifying the purposive strategy—the *why* behind the comparative project—which would reveal what needed to be compared.

Like the Ratner/Slaughter collection,<sup>178</sup> *International Law and the Comparative Method* sought to present a menu of methodological approaches for studying how Soviets understood international law and, equally if not more important, how Soviets investigated the study of international law in the West.<sup>179</sup> The proper scope of CIL, in Butler's opinion, was not limited to one approach, but included, when appropriate, the study of the legal profession, legal language, the obstacles (real or anticipated) to municipal effectuation of international legal arrangements,<sup>180</sup> comparison of international legal histories, or how nations developed to have distinct approaches to given international institutions.<sup>181</sup> In sum, Butler emphasized the experimental and non-dogmatic nature of comparison and embraced the overarching spirit of "*hoped for* broader cooperation, dialogue, and exchange."<sup>182</sup>

Set against pre-Cold War and immediate post-WWII geopolitical realities, Butler's perspective on CIL was indeed forward thinking. Decoloni-

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174. Butler, *International Law and the Comparative Method*, *supra* note 12, at 26.

175. *Id.* at 29.

176. *Id.* at 31.

177. *Id.*

178. See generally Ratner & Slaughter, *Method in the Message*, *supra* note 4.

179. See Butler, *International Law and the Comparative Method*, *supra* note 12.

180. *Id.* at 34-35.

181. *Id.* at 36.

182. *Id.* at 31 (emphasis added).

zation,<sup>183</sup> the end of the Vietnam War (1975),<sup>184</sup> the waning of détente against the USSR,<sup>185</sup> and the Soviet invasion of Afghanistan (1979)<sup>186</sup> made it vitally important to understand how other states intended to use existing international process to gain stronger positions in the global power race. Butler was completely right to reject the universalism/absolutism of the interwar period—Gutteridge’s comparative style and Lauterpacht’s international sensibility—as “inadequate and obsolete.”<sup>187</sup> He was also right to reject the righteous post-WWII policy-oriented jurisprudence that sought to advance a personal conception of the good life against all others. In this sense, Butler’s approach to CIL was similar to Hazard’s in that it rejected the spinning of “fine theories,” or grand narratives, regarding the development of either Soviet or Western international law doctrine.

But in dismissing the earlier crude methodologies, Butler’s articulated replacement method was fraught with uneasy inner tensions. This is evident in several points. First, there is inevitable role conflict between Butler’s archetypal scholarly comparativist—the substantive knowledge seeker—and the pragmatic policy comparativist—who understands that “these matters . . . are of more than academic or historical concern”<sup>188</sup> and who has a duty to inform policy makers of what she knows about the foreign legal culture in question.<sup>189</sup> Second, while Butler seems comfortable with the idea of regional or even continental approaches to international law,<sup>190</sup> he is also intimately conscious of the localized and culturally contingent training process for would-be international lawyers.<sup>191</sup> Yet, Butler is silent on how a would-be CIL scholar should divine regional trends from particularized sources (language, culture, history, etc.).

*International Law in Comparative Perspective* was followed in the early 1980s by yet another innovative project with significant ramifications

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183. See David Strang, *Global Patterns of Decolonization, 1500–1987*, 35 INT’L STUD. Q. 429, 437 (1991); see also 3 COLONIALISM, THE NEW ENCYCLOPEDIA BRITANNICA 465 (15th ed. 2005).

184. 12 VIETNAM WAR, THE NEW ENCYCLOPEDIA BRITANNICA 361 (15th ed. 2005).

185. Robert G. Kaiser, *U.S.-Soviet Relations: Goodbye to Détente*, 59 FOREIGN AFF. 500, 500 (1980).

186. 28 UNION OF SOVIET SOCIALIST REPUBLICS, THE NEW ENCYCLOPEDIA BRITANNICA 1017 (15th ed. 2005).

187. Butler, *International Law and the Comparative Method*, *supra* note 12, at 2.

188. *Id.* at 36.

189. The conflict between the comparativist as an objective knowledge seeker and the comparativist as a policy advisor is a longstanding debate in comparative law literature. See RETHINKING THE MASTERS, *supra* note 32, at 5–18.

190. Butler, *International Law and the Comparative Method*, *supra* note 12, at 36–37.

191. *Id.* at 34.

for CIL. "In late 1983 a groundbreaking Protocol of Cooperation ["Direct Link"] was concluded between the Faculty of Laws, University College London . . . and the prestigious Institute of State and Law ["ISL"] of the USSR Academy of Sciences."<sup>192</sup> Together, Professor Vladimir N. Kudriavtsev (ISL) and Butler arranged for a series of symposia between representatives of the common law and socialist law traditions<sup>193</sup> to take place in London and Moscow, with the hosting side paying the reasonable conference costs.<sup>194</sup> The cooperation agreement led to a series of academic visits over the next eight years and colloquia on a range of substantive topics.<sup>195</sup> Naturally, the colloquia covered the topics of comparative and international law and the status of these disciplines in the respective countries.<sup>196</sup> Authors from both sides submitted concrete comparative studies on substantive issues and offered thoughts on methodological questions confronting the two disciplines.<sup>197</sup>

Different methodological approaches were also offered in Butler's 1990 edited work discussing the impact of *perestroika* on international law.<sup>198</sup> The approaches can be loosely labeled as, *inter alia*, Soviet positivist/functionalist (G.I. Tunkin),<sup>199</sup> Critical Legal Studies and literary theory (J.A. Carty),<sup>200</sup> systems analysis (D.I. Feldman), and a recurring policy-based methodology.<sup>201</sup> Yet even in the collection of articles on *perestroika* and international law, the essays are divergent, and there is

192. 9th Annual Aleksanteri Conference 2009, *Cold War Interactions Reconsidered, Talking Across the Fence: Cold War Academic Cooperation in the Legal Sphere*, UNIV. OF HELSINKI (Oct. 29–31, 2009), <http://www.helsinki.fi/aleksanteri/conference2009/abstracts/henderson.html>.

193. See W.E. Butler, *Acknowledgments*, in *COMPARATIVE LAW AND LEGAL SYSTEM: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES*, at vii (W.E. Butler & V. N. Kudriavtsev eds., 1985) [hereinafter *COMPARATIVE LAW AND LEGAL SYSTEM*].

194. See *Protocol on Scientific Co-operation between University College London and the Institute of State and Law of the USSR Academy of Sciences*, in *YEARBOOK ON SOCIALIST LEGAL SYSTEMS* 388 (W.E. Butler ed., 1987).

195. See W.E. Butler, *On the History of International Law In England and Russia*, in *THE NON-USE OF FORCE IN INTERNATIONAL LAW* 3, 3–10 (Butler ed., 1989).

196. See *id.*

197. See *id.*

198. PERESTROIKA, *supra* note 44. *Perestroika* (literally, restructuring) refers to a historical period in late Soviet history (1985–1991) marked by radical economic liberalization and political reorganization in the USSR, which ultimately led to the collapse of the Soviet Union.

199. See G.I. Tunkin, *On the Primacy of International Law in Politics*, in *PERESTROIKA*, *supra* note 44, at 5.

200. See J.A. Carty, *Changing Models of the International System*, in *PERESTROIKA*, *supra* note 44, at 13.

201. See D.I. Feldman, *New Trends in the Theory and Methodology of International Law*, in *PERESTROIKA*, *supra* note 44, at 31. See generally *PERESTROIKA*, *supra* note 44.

no consensus on what comparative method as applied to international law really means. By 1990, at least five different concepts, defined by their goals, were evoked to explain CIL: (1) comparison of various systems of international law in different historical epochs—the *historicist* goal, (2) identifying common values and general legal principles common to all people/nations—the *universalist* mission, (3) comparison of international organizations and institutions in their lawmaking or implementation aspects—the *institutionalist* goal, (4) drawing upon comparative method in a Marxist framework to compare international legal rules in relation to different social or economic systems—the *Marxist* approach, and (5) to simply understand and classify different approaches to international law—the *taxonomic* approach.<sup>202</sup>

It is immediately apparent that none of the above branches of CIL represent a comparative research or analytical methodology; rather, they represent an expanded or alternative domain for traditional comparative study.<sup>203</sup> What, then, does a CIL methodology actually entail? What did CIL scholars actually need to do?

Butler's own suggestions can be found in his 1985 Hague Lectures on the topic of comparative approaches to international law.<sup>204</sup> To Butler, the project entailed nothing short of a grand meta-narrative that would include:

The historical experience of a state in coming into being and in the patterns and mode of diplomatic relations with others; its geopolitical frontiers; its cultural, political, economic and ancestral links with foreign entities; its sense of political, religious, or ideological mission; its

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202. See generally W.E. Butler, *International Law and the Comparative Method*, *supra* note 12, at 29; Mattei, *Three Patterns*, *supra* note 24 (introducing different classification systems and explaining the value of taxonomies).

203. In this way, comparative international law is no different from basic comparative law. Comparative international law simply applies existing comparative method to study the diverse approaches to international law. That these differing approaches exist is taken as given. This pluralism of outlooks on international law and institutions is derived logically from plurality of national approaches to substantive legal fields, ethics, values, etc. In other words if it is taken as given the complexity and indeterminacy of a single language in a given domestic legal system and the guaranteed protection of philosophical and moral pluralism in many societies, the permutation of hundreds of languages, cultures, conflicting legal systems and ontological views produces literally thousands of competing approaches to international view. Every person, group, and state are thus entitled to a unique interpretation of international law; however, the great many of these views become irrelevant from the standpoint of more powerful interpreters. For an excellent summary of how theoretical pluralism operates, along with a comprehensive review of comparative law literature, see generally WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 40–68 (2d ed. 2006).

204. Butler, *Comparative Approaches*, *supra* note 14.

capacity to exert military, economic, or political influence over other States either directly or through emulation and inspiration; its techniques of formulating and executing foreign policy; together with its political, administrative, economic and legal institutions, concepts of law and methods of legal reasoning and discourse are all components, amongst others, of a national style in international law; . . . a comparative perspective [is] essential.<sup>205</sup>

To comparativists, the above list evokes Zweigert & Kötz's famous invocation of Rabel, demanding that future comparativist compare all possible factors affecting the law.<sup>206</sup> But how does one make sense of these factors and influences? Is there a rank, an order of importance, or method for including everything?

Butler (like Hazard and Korovin before him) does not offer a conceptual flowchart or cascading guide for how to assess influences such as economic constraints versus legal culture or political versus historical influences.<sup>207</sup> It may be impossible to rank these complex influences, or it may be contingent on a number of other factors; besides, each comparativist would likely employ his own preferred rank. However, the actual methodology for CIL is precisely the hoped for "broader cooperation, dialogue, and exchange" that Butler advocated.<sup>208</sup> As Butler wrote in the introduction to the first work product of the Direct Link between the UCL and ISL,

[L]egal studies originating in bilateral symposia of the nature described here are a veritable genre of legal literature of their own, to be measured against the past, the tenor of the times, the constraints inherent in the medium, and the possible unexploited possibilities of that medium. *Direct links hold out the promise of collaborative or sustained legal research over an extended period of time, if required.* . . . It remains for the parties concerned to make the most of the opportunity.<sup>209</sup>

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205. *Id.* at 81.

206. ZWIEGERT & KÖTZ, INTRODUCTION TO COMPARATIVE LAW 36 (Tony Weir trans., Oxford 3d ed. 1998) (1977).

207. Cf. PETER DECROUZ, COMPARATIVE LAW IN A CHANGING WORLD 235-39 (2d ed. 1999) (offering a flowchart for comparative analysis, including the need to: (1) "Identify the problem and state it as precisely as possible," (2) Identify the jurisdictions being compared and their legal families, (3) Decide what primary sources of law you will need, (4) Gather the relevant materials, (5) Organize materials according to the legal philosophy and ideology of the system being investigated, (6) "Map out the possible answer to the problem," (7) Analyze the intrinsic value of the legal principles, (8) Form conclusions).

208. Butler, *International Law and the Comparative Method*, *supra* note 12, at 31.

209. W.E. Butler, *Introduction*, in COMPARATIVE LAW AND LEGAL SYSTEM, *supra* note 193, at ix-x (emphasis added).

Put another way, what Butler and his counterparts at the ISL orchestrated in their *Direct Links* was CIL. Or to rephrase it in anthropological terms, by meeting his Soviet counterparts, Butler was building an expert ethnography<sup>210</sup> of Soviet international lawyers and, by extension, gaining a clearer appreciation for the broadly conceived complexities of Soviet approaches to international law. As noted legal anthropologist Laura Nader would argue, Butler's immersion worked partly because he was not borrowing "decontextualized and dehydrated" research methodologies,<sup>211</sup> but rather embarking on a good faith encounter that simply happened to work.<sup>212</sup> Like Korovin and Hazard before him, Butler was living out the method<sup>213</sup> of CIL by going beyond his encyclopedic knowledge of Soviet doctrine, going beyond the positive law, in favor of face-to-face engagement, by hosting an earnest conversation or clash between the leading representatives of two apparently disparate systems. The full import (and Butler's influence as chief choreographer) of this particular CIL project deserves greater study, but for the time being, this Article considers CIL in the post-Cold War context.

### *C. Post-Cold War Fragmentation in Comparative Law & International Law*

The lessons to be drawn from the above biographical histories may seem intuitive, perhaps even banal. Indeed, the moral thus far is rather general—we should realize that different 'systems' (nations, states, peoples, cultures, etc.) view things differently, and we should approach the study of these differences with an open mind. But, the deeper claim is that contemporary CIL has much to learn from the first generation of CIL in the Cold War era. So, why is it important to situate the current revival of CIL against the larger backdrop of the Cold War (and interwar) theoretical debates? Why has the emerging CIL discipline chosen to overlook twentieth century CIL projects involving Soviet approaches? This is doubly confusing when viewed in light of the recent revival of Marxist approaches to international law.<sup>214</sup> How can Marxists neglect non-Pashukanian Soviet approaches, and why do leading critical voices con-

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210. Laura Nader, *Moving On—Comprehending Anthropologies in Law*, in PRACTICING ETHNOGRAPHY IN LAW 190, 198–99 (June Starr & Mark Goodale eds., 2002).

211. *Id.* at 199 (discussing common failures of interdisciplinarity).

212. *Id.* at 193.

213. See William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition*, in COMPARATIVE LAW IN GLOBAL PERSPECTIVE 21, 57 (Ian Edge ed., 2000) (noting that "serious comparative study is more like a way of life than a method").

214. See CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2004) (engaging Marxist international law theory as a legal form).

done this ignorance? Are these strategic choices, ways to avoid appearing orthodox or pro-Soviet?<sup>215</sup> Or is a deeper ambivalence towards the Soviet legacy at play?

Because answers to the latter questions (concerning why critics and Marxists avoid engaging with Soviet Approaches to International Law ("SAIL")) would dwell on the speculative at this stage), those questions are left for a later date. But to explore the central claim of this Article—that, for good or bad, Soviet approaches continue to matter—it is important to briefly survey the state of international law in the post-Cold War era and to highlight several perennial challenges, starting with the immediate post-1989 era.

Even before the dissolution of the Soviet Union in December 1991, a number of scholars (in the West and the Soviet bloc) anticipated the radical impact *perestroika* would have on international law.<sup>216</sup> Without delving too far into the literature, it is sufficient to point out the most significant development—namely, the Soviet concession and willingness to ascribe to a monist, unitary international legal order.<sup>217</sup> This took the form of multiple changes, including the removal of objections to compulsory International Court of Justice jurisdiction under six international human rights agreements,<sup>218</sup> attempts to establish direct links with a number of international economic organizations,<sup>219</sup> and the incorporation of international legal standards—general principles of international law—into domestic legislation as normative and substantive justifications for reform.<sup>220</sup>

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215. See Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 AM. LEGAL STUD. ASS'N F. 32, 32–33 (1982) (suggesting that an implicit assumption of any discussion involving Gramsci is that one is classically Marxist without appearing Soviet). For an illustration of how scholars attempt to sever the appearance of sympathy to Marxism while discussing Marxist ideology, see James Fry, *Legitimacy Push: Towards a Gramscian Approach to International Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 307, 308 n.4 (2008).

216. See, e.g., PERESTROIKA AND INTERNATIONAL LAW: CURRENT ANGLO-SOVIET APPROACHES TO INTERNATIONAL LAW (Anthony Carty & Gennady Danilenko eds., 1990); A.P. Movchan, *The Concept and Meaning of Modern International Law and Order*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 123, 124 (W.E. Butler ed., 1987); G.G. Shinkaretskaia, *International Adjudication Today in the View of a Soviet International Lawyer*, in PERESTROIKA, *supra* note 44, at 245. For a more complete review of the literature, see Mamlyuk Dissertation, *supra* note 147.

217. G.G. Shinkaretskaya, *International Adjudication Today in the View of a Soviet International Lawyer*, in PERESTROIKA, *supra* note 44, at 251.

218. *Id.* at 245.

219. See KAZIMIERZ GRZYBOWSKI, SOVIET INTERNATIONAL LAW AND THE WORLD ECONOMIC ORDER 187 (1987) (discussing the General Agreement on Tariffs and Trade).

220. PERESTROIKA, *supra* note 44, at 1–3.

The West interpreted these sweeping reforms as the end to international law and institutions serving as ideological battlegrounds.<sup>221</sup> Around the early 1990s, many shared a sincere hope that the United Nations ("UN") would finally evolve into what its framers had hoped—the conscience of the world and a forum for the peaceful resolution of international disputes.<sup>222</sup> For example, at the UN Security Council, the Soviet cooperation with the U.S. over Iraq's invasion of Kuwait<sup>223</sup> was seen as ushering in a new era of international security cooperation.<sup>224</sup> With the ideological confrontation in the past, G.I. Tunkin enthusiastically praised *perestroika* for renewing faith in hope, progress, and most importantly, *reason* as the universal basis for a universal international law.<sup>225</sup> With the final collapse of the USSR<sup>226</sup> and Russia's peaceful withdrawal of troops from the majority of former Soviet republics (with the exception of small 'peacekeeping' contingents in territories like Moldova, Ukraine, and several other states),<sup>227</sup> it certainly seemed plausible that international law was entering a new epoch.

Faith in neo-Kantian Reason as the basis for a perpetual peace did not last long, however. By the late 1990s, with NATO's bombing raids in the former Yugoslavia,<sup>228</sup> a string of attacks directed against the U.S. and other states,<sup>229</sup> and the eruption of ethnic conflicts in Central Asia, Europe, Africa, and elsewhere,<sup>230</sup> the world suddenly seemed far more cha-

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221. See J.A. Carty, *Changing Models of the International System*, in PERESTROIKA, *supra* note 44, at 13.

222. See Tunkin, *Politics*, *supra* note 106, at 335–38.

223. See S.C. Res. 660, ¶¶ 1–3, U.N. Doc. S/RES/660 (Aug. 2, 1990); see also S.C. Res. 661, ¶ 6, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990); S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 18, 1990); S.C. Res. 665, ¶¶ 1–4, U.N. Doc. S/RES/665 (Aug. 25, 1990).

224. See Aaron Belkin & James G. Blight, *Triangular Mutual Security: Why the Cuban Missile Crisis Matters in a World Beyond the Cold War*, 12 POL. PSYCHOL. 727, 728–31 (1991).

225. See Tunkin, *Politics*, *supra* note 106, at 337.

226. 28 UNION OF SOVIET SOCIALIST REPUBLICS, THE NEW ENCYCLOPEDIA BRITANNICA 1024 (15th ed. 2005).

227. *Id.*

228. See *NATO's Role in Kosovo*, N. ATL. TREATY ORG. (July 15, 1999), <http://www.nato.int/kosovo/history.htm>.

229. See *Patterns of Global Terrorism: 1997*, FED'N OF AM. SCIENTISTS, [http://www.fas.org/irp/threat/terror\\_97/1997index.html](http://www.fas.org/irp/threat/terror_97/1997index.html) (last visited Feb. 12, 2011); see also *Attacks on U.S. Embassies in Kenya and Tanzania*, GLOBAL SEC., <http://www.globalsecurity.org/security/ops/98emb.htm> (last visited Feb. 12, 2011).

230. See Thomas S. Szayna, *Potential for Ethnic Conflict in the Caspian Region*, in FAULTLINES OF CONFLICT IN CENTRAL ASIA AND THE SOUTH CAUCASUS (Olga Oliker & Thomas S. Szayna eds., 2003); see also Kikkawa Gen, *Preventing Ethnic Conflicts: A Reconsideration of the Self-Determination Principle*, in CONTAINING CONFLICT: CASES IN

otic, bloody, and lawless than ten years prior. With the start of the Bush presidency, phrases like “new world order,” “American exceptionalism,” “lawless world,” and “collapse of multilateralism” echoed the broader sentiment that international law was again in crisis.<sup>231</sup> Thus, one of the enduring challenges for post-Cold War international law has been the inability to develop a working multilateral framework for ensuring global security.

A second crisis in international law, broadly speaking, was bound up in the “human rights boom” of the 1990s and 2000s. These debates can be found in the contestations over the creation of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and International Criminal Court;<sup>232</sup> the fiery debates over universal jurisdiction;<sup>233</sup> jus cogens norms;<sup>234</sup> and doctrinal wars over the application of legal categories like “war crimes,” genocide, and “crimes against humanity” to what we can all agree was mass murder around the world.<sup>235</sup>

Third, over the past twenty years, international law was maturing into a highly complex patchwork of new separate sub-fields of international law in practice—from international environmental law, to international criminal law, to international economic law (itself further fractionalized into various subspecialties)—alongside conventional categories like international humanitarian law.<sup>236</sup> The academic discipline of international law evolved symbiotically with these developments in public and private international law,<sup>237</sup> even providing the impetus for, and generating, sev-

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PREVENTIVE DIPLOMACY (Sato Hideo ed., 2003); William W. Allen, *Forward* to WILLIAM T. JOHNSON, *PANDORA'S BOX REOPENED: ETHNIC CONFLICT IN EUROPE AND ITS IMPLICATIONS* 3 (1994); Kenneth Menkhaus & Louis Ortmayer, *Somalia: Misread Crises and Missed Opportunities*, in *PREVENTIVE DIPLOMACY IN THE POST-COLD WAR WORLD* 211 (Bruce W. Jentleson ed., 2000).

231. See, e.g., PHILIPPE SANDS, *LAWLESS WORLD* 8–22 (2005).

232. See Kenneth Roth, *The Case for Universal Jurisdiction*, *FOREIGN AFF.*, Sept./Oct. 2001, at 150, 151.

233. See *id.* at 150.

234. See Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences*, 18 *EUR. J. INT'L L.* 853, 855 (2007).

235. See Karyn Becker, *Genocide and Ethnic Cleansing*, in 50 *ISSUES BOOK: EQUALITY AND JUSTICE IN THE 21ST CENTURY*, MODEL U.N. OF THE FAR WEST (2000), available at <http://www.munfw.org/archive/50th/4th1.htm>.

236. See Milena Sterio, *The Evolution of International Law*, 31 *B.C. INT'L & COMP. L. REV.* 213, 225–26 (2008).

237. John H. Barton & Barry E. Carter, Symposium, *International Law and Institutions for a New Age*, 81 *GEO. L.J.* 535 (1993) (discussing the emergence and new academic importance of subsets of international law, such as international economic law,

eral sub-fields.<sup>238</sup> This process of substantive fragmentation went hand in hand with institutional fragmentation, theoretical disaggregation, and growing tolerance for political pluralism.<sup>239</sup> Some have even described this as a split between American and European approaches to international law, the split itself now amenable to CIL analysis.<sup>240</sup>

These three conflicts—unilateralism vs. multilateralism, particularism vs. universalism in human rights discourse, and fragmentation—are but three main faultlines, of many. But the main commonality between the three is the systematic exclusion of a number of global stakeholders, actors, voices, or more simply, communities in the overall international law agenda. The disconnect between the wishes of acting global elites and the hordes of anti-war and environmental rights protesters is palpable.<sup>241</sup> The principal anxiety of non-governing elites is that international law is rapidly mushrooming somewhere in Geneva, New York, Brussels, or the Hague, but without their knowledge or participation and in a routine way that has become almost mechanical.<sup>242</sup> There are no venues for political contestation, and thus, international law just *is*; as it is made, so it continues to exist.

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international environmental law, restricting weapons and drug trade, and human rights law).

238. These sub-fields are mainly in the international environmental law arena, where states and private corporate actors are often loathe to act. “Globally, no central organization is coordinating environmental efforts. The United Nations Environmental Program (UNEP) is the formal institution in the area, but . . . it lacks any effective power to investigate and has no dispute resolution mechanisms.” *Id.* at 553 (illustrating the difficulty of encouraging state and private entities to act with regard to international environmental problems).

239. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 579 (2002); see also U.N. G.A. Rep. of the Int’l Law Comm’n, 58th Sess. May 1–June 9, July 3–Aug. 11, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 46–222, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

240. See Guglielmo Verdirame, *‘The Divided West’: International Lawyers in Europe and America*, 18 EUR. J. INT’L L. 553, 555 (2007) (comparatively reviewing recent scholarship and noting “[t]hat the works of American and European international lawyers could be so different as to reach or even cross the threshold of comparability is, in itself, a valuable if somewhat unsettling finding . . .”).

241. See John D. Haskell, *Takings Risks Ethically*, 22 FLA. J. INT’L L. 285, 289–92 (2010).

242. There is a sense of “deepening insinuation of international law into the internal affairs of sovereign states . . . [that raises] sharp questions about the status of this emerging body of law.” Jeremy Rabkin, *International Law vs. the American Constitution—Something’s Got to Give*, NAT’L INT., Spring 1999, at 30.

Herein lay at least four answers to why contemporary CIL must be situated against the Cold War international law debates. First, at their theoretical core, the Cold War debates were about political participation, redistributive outcomes of trade regimes, and rights to unique forms of economic development, religious, and cultural pluralism.<sup>243</sup> Decolonization and national liberation movements of the 1960s and 1970s were a direct result of these theoretical debates. Second, and perhaps more importantly, these debates had a concrete procedural/participatory aspect. Decolonization was not simply about national liberation; it was also about acquiring a seat at the UN General Assembly, about participating in the debates, about acquiring possible international law making powers.<sup>244</sup> Similarly, in the interwar period, the participatory debate centered on the role of the League of Nations as either a nest for imperialist hawks,<sup>245</sup> or as a venue for the dynamic expansion of the international community.<sup>246</sup>

Of course, the Cold War international law debates were also about traditional spheres of influence, re-colonization, dependency theories, and new forms of economic and military protectorates for the newly independent states.<sup>247</sup> Empowering decolonized states and giving them a voice at the UN General Assembly was acceptable so long as it did not dilute the power of the UN Security Council members.<sup>248</sup> So the call to

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243. See Sam Marullo, *Political, Institutional, and Bureaucratic Fuel for the Arms Race*, 7 SOC. F. (SPECIAL ISSUE) 29, 35–48 (Mar. 1992) (examining the true underpinnings to the end of the Cold War through a Sociological lens).

244. See generally EDWARD MCWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 170–77 (1984) (analyzing the Third World's 'lawmaking' powers at the UN).

245. While collective security was one of the greater goals of the League of Nations, if not the primary goal, many of those who were "not so disposed towards schemes of co-operative defense" celebrated the League's failure in this regard. C.G. Fenwick, *The "Failure" of the League of Nations*, 30 AM. J. INT'L L. 506, 506 (1936).

246. Although the League of Nations suffered from a "failure of collective security," other aspects of the League "concerned with the organization and administration of social and economic activities, including the International Labor Bureau," were unaffected. *Id.*

247. For example, scholars debated whether or not the end of the Cold War would bring "a return to the shifting alliances and instabilities of the multipolar era that existed prior to World War II" or a "great power society" where international coordination would rely on "economic liberalism and political democracy" rather than the threat of force. James M. Goldgeier & Michael McFaul, *A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era*, 46 INT'L ORG. 467, 467–68 (1992).

248. The Security Council has been criticized as a "hegemony of the industrialized north," essentially "the ruling oligarchy of the United Nations," with only limited decision-making powers granted to the General Assembly. Albert Venter, *Reform of the Unit-*

return to twentieth century theoretical debates should not be seen as a return to the actual political or intellectual postures of that time. But there is something vital and inspiring about how the twentieth century was pregnant with substantive and structural alternatives to the dominant post-WWII international legal order.

Third, these debates on procedural aspects had corollary substantive components. How decisions were made at the UN related directly to the question of what decisions would be considered, which related directly to the functions of international law. Who is international law for? What is the correct balance between free trade and local labor laws? What is the best way to regulate the movement of capital, goods, and labor? Why do we need to restrict the power of states or multinational corporations? These are the questions the Cold War was ostensibly fought over, good questions to which there are still no satisfactory answers. The past twenty years also produced new challenges, such as how to define the values of intergenerational equity and biosphere preservation in non-anthropocentric terms; and the proper balance between the threats posed by global terrorist networks, traditional doctrines of criminal liability, and evolving standards of international criminal law.

CIL should seek to address these challenges by reference to different national, ethnic, religious, and historical approaches to international law and governance. Unfortunately, doing so is not as simple as opening a foreign international law textbook and searching for different approaches.<sup>249</sup> While humans share certain uniting traits and universal aspirations, and different tribes of humans answer the above questions in radically different ways, where the answers are located is not at all evident. CIL can unlock where and how we find at least some answers to these questions.

Fourth, it is a geo-political fact that China has emerged as a new superpower.<sup>250</sup> It has its own deep history, traditions, languages, and unique approach to international law. The lessons of Cold War CIL are directly relevant to our understanding of this new reality. The USSR and China share remarkable similarities: they are self-proclaimed socialist states,

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*ed Nations Security Council: A Comment on the South African Position*, 20 INT'L J. WORLD PEACE 29, 30–31 (2003).

249. See, e.g., Bilahari Kausikan, *An Asian Approach to Human Rights*, 89 AM. SOC'Y INT'L L. PROC. 146, 146 (1995) (describing the complexity of and comparing different approaches to human rights in Japan and India).

250. "After three decades of spectacular growth, China passed Japan in the second quarter to become the world's second-largest economy . . . . The milestone . . . is the most striking evidence yet that China's ascendance is for real and that the rest of the world will have to reckon with a new economic superpower." David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, at B1.

with unitary political hierarchies and centralized academic organizations (especially at the highest echelons and in fields like international law). New analysts approaching China's international law doctrine are likely to be encumbered by similar misconceptions to those felt by an earlier generation of Sovietologists—"background" notions about a hyper-politicized judiciary or academy (the familiar refrain of 'telephone justice' or 'telephone doctrine'), rampant, across-the-board abuse of human rights, a covert imperial agenda, and so on. By situating our approaches to Chinese international law against the earlier experience with Soviet international law, lessons can be teased out that may help to diffuse the alarmist tendencies now gaining steam.<sup>251</sup>

Traditional comparative law has much to offer on how to deal with these four contemporary challenges. Indeed, scholars have already started down this path.<sup>252</sup> At the centennial summit in New Orleans in 2000, for instance, Mathias Reimann wrote of the need for comparative law to take on transnational issues, including global and regional trade organizations, the EU, and similar bodies.<sup>253</sup> In the ensuing ten years, to be fair, comparativists did not rush to engage with what Reimann called 'vertical comparisons.'<sup>254</sup> This likely had less to do with a lack of methodological tools or familiarity with international law and institutions, as with a general feeling of inertia. It is safe to say that the discipline of comparative law in the U.S. during the Bush era was dispirited and disorganized.<sup>255</sup>

251. *See id.*; *see also* discussion *infra* Section III.

252. Ugo Mattei, *Comparative Law and Critical Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 816, 831 (Mathias Reimann & Reinhard Zimmermann eds., 2006) [hereinafter THE OXFORD HANDBOOK OF COMPARATIVE LAW] ("The diversity of the Critical Legal Studies network's constituency and the current collapse of disciplinary boundaries have made it clear that we need to rethink the relationship between comparative and international law—incidentally a view widely shared by scholars outside the network as well.") [hereinafter Mattei, *Critical Legal Studies*].

253. Mathias Reimann, *Beyond National Systems: A Comparative Law in the International Age*, 75 TUL. L. REV. 1103 (2001). For a more recent rendition of Reimann's claim, *see* Reza Dibadj, *Panglossian Transnationalism*, 44 STAN. J. INT'L L. 253, 256–59 (2008).

254. These themes were picked up and elaborated in law and society circles in Europe and elsewhere. *See, e.g.*, Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 RATIO JURIS 1, 3 (2008) (describing the ongoing process of global legal pluralization as the multiplication of international institutions, norms and dispute resolution processes, but without a "single discursive arena in which legal reasoning takes place").

255. This statement is based on the self-reflection of the authors, rather than an assessment of others' work. Furthermore, even in the discipline's dejected periods, it is not correct to claim that "it [is] hard to find much well-done comparative-law work." COMPARATIVE LEGAL STUDIES, *supra* note 9, at 351. Though Kennedy credits the Common Core project, of which the authors are a part, he overlooks the dramatic cumulative growth of smaller-scale substantive comparative law projects, and the exciting growth of

What purpose was there, for instance, to study the traditional justice systems of Iraq or Afghanistan if the American leaders openly spoke of imposing democratization and modernization reforms?

Whether as a result of the 2008 presidential election in the U.S., or a constellation of other reasons, many in the discipline are optimistic again. The publication in 2009 of the seventh edition of *Schlesinger's Comparative Law* furthers the diversification of the traditional civil/common law divide by introducing a much broader horizontal scope of inquiry.<sup>256</sup> The new casebook also embraces Reimann's call for 'vertical comparisons,' though it stops short of mixing international and comparative law for pedagogical reasons.<sup>257</sup> Additionally, one positive result of the global financial crisis and its aftermath is the more aggressive pursuit of global harmonization by comparative lawyers. Ralf Michaels recently wrote of the need for comparative lawyers to take on the World Bank's linear and grossly deficient Doing Business project.<sup>258</sup> One of America's leading comparative lawyers and legal anthropologists, Annelise Riles, organized a large conference to explore 'techniques of hope' in the broadest sense.<sup>259</sup> And in 2009, the International University College of Turin led a collaborative project on global legal standards which had, as its aim, to suggest alternative models of development inspired by traditions and concerns of the global political, geographic, and economic "periphery."<sup>260</sup>

International law is also converging on this path. Led by David Kennedy and his newstream, critical international law theorists are again asking

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comparative law outside of the US/Europe. These projects expanded from 2000–2008 as well, so the above periodization (following U.S. presidential election cycles) should only be seen as facilitating the telling of this story, not literally implying causation.

256. SCHLESINGER'S COMPARATIVE LAW, *supra* note 26.

257. *Id.* at 8–13; *see also* Reimann, *supra* note 253, at 1116–17.

258. *See* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 765 (2009).

259. *See Conference, Techniques of Hope: How Professionals and Professionalism Can Stabilize the Markets and Change the World*, CORNELL LAW SCH. (Mar. 26, 2009), [http://www.lawschool.cornell.edu/international/clarke\\_program/conferences/Hope-as-Technique.cfm](http://www.lawschool.cornell.edu/international/clarke_program/conferences/Hope-as-Technique.cfm); *see also* Annelise Riles, *Is the Law Hopeful?* (Cornell Law Sch., Working Papers Series, 2010), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1070&context=clsops\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1070&context=clsops_papers) (forthcoming in HOPE IN THE ECONOMY (H. Miyazaki and R. Swedberg eds., 2010)).

260. INT'L UNIV. COLLEGE OF TURIN GLOBAL LEGAL STANDARDS RESEARCH GROUP, IUC INDEPENDENT POLICY REPORT: AT THE END OF THE END OF HISTORY—GLOBAL LEGAL STANDARDS: PART OF THE SOLUTION OR PART OF THE PROBLEM (Global Jurist vol. 9 2009) (collectively written by IUC Global Legal Standards Research Group including this Article's authors).

the difficult questions: why do law and development projects go south (geographically, metaphorically, pejoratively)?; what is the role of global elites in turning a blind eye to the world's dispossessed states and peoples?; what can international lawyers do to break the familiar intellectual cycles of crisis/progress, center/periphery, 'us' vs. 'them?'<sup>261</sup> In a related stream of inquiry, a group of international lawyers calling itself TWAIL, led by Antony Anghie and B.S. Chimni, also seeks to revive a number of long-ignored interests, not just from the Global South, but also the interests of repressed indigenous groups in the Global North.<sup>262</sup> TWAIL is concerned principally with questions of imperialism, neo-imperialism, and modern continuities of longstanding patterns of exploitation.<sup>263</sup> Bridging these two groups is an emerging third stream, roughly called national traditions in international law, which seeks to explore particular national or pre-national traditions or outlooks on international law. The next Section surveys these efforts in the context of the emerging field of CIL and asks what lessons CIL can draw from these diverse, yet interrelated, streams.

## II. PITFALLS: WHAT CAN COMPARATIVE LAW & INTERNATIONAL LAW LEARN FROM EACH OTHER?

### A. Mapping the Field

At this point, it is necessary to take a step back and define several broad terms and categories used above and in the remainder of the Article. There is no longer any question that different nations conceptualize and interpret international norms differently. As referenced above, the existence of national yearbooks of international law, national associations of international law, and national international law journals, may evidence, at the very least, a desire to stake out a 'national doctrinal iden-

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261. Newstream, also known as NAIL ("new approaches to international law") is a broad term used to describe non-traditional approaches to international law, especially as pertains to the history of the development of international law and its institutions. See David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1989) [hereinafter Kennedy, *New Stream*]; see also Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341, 342-45 (1996).

262. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 6-12 (2005) [hereinafter ANGHIE, *IMPERIALISM*]; see also BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003) (critiquing from a historical and interdisciplinary approach, international law from the perspective of Third World movements).

263. See ANGHIE, *IMPERIALISM*, *supra* note 262, at 6-12.

tity' or offer a space for the publication of scholarship arising from the territorial boundaries of a given state that may not 'rise' to the standards of 'elite' international law publications.<sup>264</sup> National yearbooks also serve the functional purpose of documenting a given state's treaty practice, national case law concerning international law questions, and related notes.<sup>265</sup> Furthermore, many national international law yearbooks and journals also publish in the local language, which provides an important outlet outside the English-language dominated 'elite' international law journals.<sup>266</sup>

At its most basic level, CIL simply entails the textual comparison of different doctrinal positions on a given international law topic. As an example, to get a good idea of how scholars in Canada and scholars in Russia interpret maritime obligations and boundaries in the Arctic, it is fair to turn to the Canadian and Russian yearbooks/journals of international law, respectively. Presumably, the texts need to be translated into a common language before an individual can compare the similarities and differences of the scholars' positions. Of course, this form of analysis is identical to the age-old process of treaty interpretation or discourse analysis and represents the very essence of what legal attachés do on a daily basis. Thus, though this is clearly a comparison between different nations' laws, such work falls within the discipline of international law as opposed to CIL. Similarly, the process of ascertaining general principles of international law, though also CIL in the strict sense, does not fall within a new conception of CIL.

Rather, this Article is concerned with the abuse of, and suspicious of the ambiguity in, terms such as 'Anglo-American tradition of international law,' Nigerian approaches to international law, Third World approaches to international law, Indian approaches, etc., as well as terms used in the brief historical overview above, such as "general international law," the West, "socialist international law," "Soviet international law," etc.

### 1. Why (and is it Possible to) Study Different Traditions in International Law?

At first blush, national approaches or 'national traditions' in international law appears to be a tautological misnomer. If it is *international* law, it is meant to be law between nations, and presumably the nation at

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264. See *infra* text accompanying notes 338–42; see also Mattei, *Critical Legal Studies*, *supra* note 252, at 833.

265. Jan Stepan & Frank C. Chapman, *National and Regional Yearbooks of International Law and Relations: A Brief Survey*, 8 INT'L J.L. LIBR. 19, 19 (1980).

266. *Id.* at 20.

issue is a constituent part of that law. For this reason, international law scholars have constantly sought to clarify the term or to discard it altogether, with suggestions like “transnational law,”<sup>267</sup> “global” or “world” law,<sup>268</sup> or “global governance.”<sup>269</sup> Insofar as the term is fixed in the field’s popular and professional imaginations, it simply must be dealt with. However, there has never been a clearly defined sense of what it means to have a national approach to international law.

For instance, it has always been exceedingly difficult to say whether America has a national tradition in international law. To illustrate, who in the American legal academy could summarize the main tenets of the *American* approach to international law? Even assuming such a brave step were taken, for every such enunciation by, say, Anne-Marie Slaughter or W. Michael Reisman, one could point to a countervailing summation by, say, Jack Goldsmith or David Kennedy.<sup>270</sup> The point is, within the American society of international law scholars, there are a sufficient number of diametrically opposed positions that it becomes impossible to brand one position dominant or orthodox.<sup>271</sup> Even in moments of relative

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267. See, e.g., PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956).

268. See, e.g., Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 INT’L J. GLOBAL LEGAL STUD. 119 (2007) (exploring the notion of global law, its creation, and its role as a field of study); Lawrence S. Finkelstein, *What is Global Governance*, 1 GLOBAL GOVERNANCE 367 (1995).

269. For an overview of this progression and a modern restatement of the global law thesis, see, e.g., RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 53–117 (2010).

270. Compare Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183 (suggesting that a network of interconnected but distinctly national departments do and should define current international law rather than international legal norms that override national legal precedent); W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT’L L. 171 (1988) (opining that international norms of non-intervention are preferable to unilateral actions by powerful nations); Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT’L L. 327 (2000) (concluding that international human rights law should *not* preempt domestic law); Kennedy, *New Stream*, *supra* note 261 (describing international institutions and international law as doctrinal rather than sources of normative laws and rights).

271. Compare Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4 (1990), with Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT’L L. 7 (2009) (examining the changing role of politics in international law). For a similar point, see R. A. Mullerson, *Sources of International Law: New Tendencies in Soviet Thinking*, 83 AM. J. INT’L L. 494, 494 (1989) (“During a joint Soviet-British seminar on international law in the spring of 1988, [incidentally, organized by W.E. Butler], Professor Ian Brownlie said that it is not possible to speak of a British doctrine of international law because there are too many different points of view, even different schools.”); cf. C. J. Warbrick, *The Theory of International Law: Is There an Eng-*

accord within any given academic circle in either international law or comparative law, basic concepts can remain indeterminate or ambiguous, or can be usurped. For example, the adoption of the term “Bush doctrine” to refer to the right to use force preemptively when faced with a threat or risk of threat,<sup>272</sup> was disparaged by those inside the last administration because the term quickly grew to signify anything from ‘the war on terror,’ to waterboarding, to good-old imperialism.<sup>273</sup>

Furthermore, doctrinal positions are dynamic and change rather quickly. They seem to routinely adapt to new political needs, economic challenges, and personal preferences or animosities. Thus, assuming it was possible to chart out the doctrinal positions of the twenty leading American international lawyers at time *A*, several weeks or months later, the matrix will not hold.

In response to the temptation to observe national legal systems as wholes, or what Riles calls “legal corporeology,”<sup>274</sup> comparative lawyers learned a long time ago that they need to narrow the scope of their study.<sup>275</sup> Yet even with narrowed approaches, issues of terminology, translation, and expertise will continue to trouble the field.<sup>276</sup> As explained above, the first generation of CIL scholars (Korovin, Hazard, Butler) intuitively sought to limit the scope of their respective inquiries, but even so, the problem of legal corporeology was a persistent hurdle. Unless one attacked the global legal web from a rigorously Marxist materialist framework—at which point CIL is useless except to show shades of gradation, or how inequitable one state’s view of the global order is versus another’s—socialist and Western legal families were sufficiently variegated such that discussion of Soviet or ‘bourgeois’ international law had to be heavily qualified or contextualized in an effort to avoid devolving to overbroad clichés of either one or the other.<sup>277</sup>

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*lish Contribution?*, in PERESTROIKA, *supra* note 44, at 41 (suggesting the existence of a unique English contribution to international law).

272. Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law*, 27 HASTINGS INT’L & COMP. L. REV. 457, 457 (2004).

273. Robert J. Delahunty & John Yoo, *The ‘Bush Doctrine’: Can Preventive War Be Justified?*, 32 HARV. J.L. & PUB. POL’Y 843 (2009) (discussing the continuing disputes over the normative, strategic, and legal wisdom of what has been called the “Bush Doctrine”).

274. Riles, *Encountering Amateurism*, *supra* note 27, at 118.

275. *Id.* (discussing the need to avoid panoramic views of legal systems).

276. See, e.g., Hungdah Chiu, *The Development of Chinese International Law Terms and the Problem of Their Translation into English*, 27 J. ASIAN STUD. 485, 485–86 (1968).

277. See MIEVILLE, *supra* note 214, at 60 (“quickly . . . dispens[ing] with . . . the ‘official’ theories of international law of the erstwhile Soviet Bloc”).

Several examples help highlight the contingent nature of statehood and other international political identities, such as regional groups, and identity-based groups or movements.

*a. The Myths of Regional Laws & Asian Approaches*

As mentioned above, over the past decades, scholars associated with the TWAIL movement have begun reviving the idea of regional approaches to international law and global governance. B.S. Chimni has gone so far as to claim that “*the Asian approach to international law has in its core been articulated by TWAIL.*”<sup>278</sup> The idea of a collective ‘Asian’ approach to public international law or human rights,<sup>279</sup> and distinct Asian-state approaches to international law was first popularized during the formal decolonization period of the 1960s and 1970s.<sup>280</sup> Contemporary international law scholarship on the Asian-values debate can be historical (as in studies on ancient Indian conceptions of international law),<sup>281</sup> or it may focus on religious commonalities between people in Asia (such as Frederick Tse-shyang Chen’s writings on the Confucian approach to world order and international law).<sup>282</sup> More recently, the discussion on shared aspirations and common cultural values has been grounded in quasi-anthropological assertions about a deep Asian spiritualism, historical practice of non-violence, and inner respect for the environment.<sup>283</sup>

These essentialized conceptions of ‘Asia’ or particular Asian nations are problematic for several reasons. The most obvious is geographic.<sup>284</sup>

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278. B.S. Chimni, *Is There an Asian Approach to International Law*, 14 ASIAN Y.B. INT’L L. 249, 264 (2008) (emphasis added).

279. See, e.g., Kausikan, *supra* note 249, at 146.

280. See, e.g., K.R.R. Sastry, *Hinduism and International Law*, 117 RECUEIL DES COURS 503 (1966) (assessing the principles of international law from a Hindu perspective).

281. Ved P. Nanda, *International Law in Ancient Hindu India*, in RELIGION AND INTERNATIONAL LAW 51, 51–57 (Mark W. Janis & Carolyn Evans eds., 1999) [hereinafter RELIGION AND INTERNATIONAL LAW].

282. Frederick Tse-shyang Chen, *The Confucian View of World Order*, in RELIGION AND INTERNATIONAL LAW, *supra* note 281, at 27.

283. See generally RODA MUSHKAT, *INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES* (2004) (examining the extent to which Asian cultural relativism influences interpretation of the norms of international environmental law and the application of these norms in the region).

284. See, e.g., Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 UC DAVIS L. REV. (forthcoming 2011). For similar analysis in the European context, see Hélène Ruiz Fabri, *Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White*, 1 ASIAN J. INT’L L. 1, 7–9 (2010).

India offers the best example in this respect. The product of colonialism, India is a veritable jigsaw puzzle of mixed ethnicities, language groups, religious groups and class factions. As a political body, it is an amalgamation of former principalities, carved into sometimes arbitrary federal units,<sup>285</sup> with a number of unresolved border disputes with China<sup>286</sup> and Pakistan.<sup>287</sup> Nonetheless, it is tempting to view it as a unitary state with an easily identifiable 'Third World' voice. But the notion of an Indian approach to international law, bracketed within a Third World approach, is not dissimilar from the way the Indian 'brand' is attached to a single style of music, dance, and cuisine in the West. These national brands, whether food or approaches to international law, are meaningless; just as south Indian cuisine is different from Gujarati cuisine, so too, is it difficult to categorize a single Indian approach to international law.

Although prefatory remarks in "national approaches" literature often acknowledge the vast cultural and intellectual pluralism within a country [or region], the exclusion of these sub-national, sub-regional, or separatist voices from a supposedly empirical study has a dangerous consequence: it validates one particular view as dominant to the exclusion of the other.<sup>288</sup> The same problem inheres when we imagine 'Chinese ap-

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285. Consider the case of Bengal, which was partitioned from the former British colony of India in 1905 pursuant to Lord Curzon's order. The partition was annulled in 1911. Bengal was again partitioned in 1947 following India's independence into two provinces, the predominantly Hindu West Bengal, and the predominantly Muslim East Bengal. From 1947 until 1971, East Bengal was a province of Pakistan pursuant to the Mountbatten Plan and the India Independence Act of 1947. In 1971, East Bengal became Bangladesh following the Bangladesh Liberation War. See Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1 (2010) (analyzing the historical strife that accompanies the demarcation of borders to create new sovereign nations); see also 14 BANGLADESH, THE NEW ENCYCLOPEDIA BRITANNICA 718–19 (15th ed. 2005).

286. See, e.g., *Factbox—India, China Begin Talks on Border Dispute*, REUTERS (Aug. 7, 2009, 4:09 AM), <http://www.reuters.com/article/2009/08/07/idUSDEL465372>.

287. See Arundhati Roy, *Kashmir's Fruits of Discord*, N.Y. TIMES (Nov. 8, 2010), <http://www.nytimes.com/2010/11/09/opinion/09roy.html?ref=kashmir>.

288. Cf. Fabri, *supra* note 284, at 10. Fabri discusses the geographical and political inclusion/exclusion bias inherent in the formulation of a 'European' approach to international law, but nonetheless suggests the possibility of an ambivalent dualistic European approach:

However, a European approach necessarily competes with a plurality of rather diverse national approaches and it therefore presupposes the possibility of discovering enough unity despite the diversity, or within the diversity, and progressing towards more unity. This is the internal aspect. But there also is an external aspect, and if we acknowledge the idea of a European approach, we must also acknowledge that the external aspect carries a certain number of specific-

proaches to international law,' except it is compounded by an already-strong instinct to presuppose internal coherence and crystalline consistency in international law doctrine that emanates from the mainland.<sup>289</sup> Just as the misplaced confidence in the 'official' Soviet position drowned out legitimate alternative positions, so in the context of China, the notion of a 'Chinese approach to international law' presupposes centrality of control over the means of intellectual production and doctrinal uniformity.<sup>290</sup> In other words, by indulging in the fantasy of a singular Chinese take on international law, the voices of opposition movements within the mainstream or heterodox positions slightly off the beaten track are silenced, paradoxically reinforcing the dominance of the presumed majority opinion.

*b. The Study of 'Other' Traditions in International Law & Comparative Law*

Critical streams in comparative and international law are, of course, aware of the exclusion of the Derridean 'other' within mainstream narratives.<sup>291</sup> Sometimes, the exclusion is the function of good faith ignorance.<sup>292</sup> Scholars simply have not thought to ask (or do not have time to ask) what Moldavian jurists think of the Transdnestrian conflict, or what Somali jurists think of the concept of universal jurisdiction and the International Criminal Court in the context of piracy. However, many times the exclusion is purposeful, a way to shield plunder, guilt, and legal liability.<sup>293</sup>

Over the past ten years, figures associated with various critical streams in international and comparative law have started to expose longstanding

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ties. In other words, a European approach is both what unifies and specifies, a duality which can easily lead to ambivalence.

*Id.*

289. See, e.g., Jacques de Lisle, *China's Approach to International Law: A Historical Perspective*, 94 AM SOC'Y INT'L L. PROC. 267, 268–71 (2000) (discussing the evolution of China's approach to international law).

290. *Id.* at 275.

291. See the excellent collection of essays in INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006) [hereinafter INTERNATIONAL LAW AND ITS OTHERS]. For a good introduction to legal deconstruction, more generally, see J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 748–49 (1987).

292. See Antony Anghie, *On Critique and the Other*, in INTERNATIONAL LAW AND ITS OTHERS, *supra* note 291, at 389.

293. See, e.g., UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008) (exploring a number of global examples when the law is utilized to impose injustice).

regional legal groupings as utterly contingent and artificial.<sup>294</sup> The trail-blazing work in this respect is Jorge Esquirol's project to uncover the 'myth of Latin American law'.<sup>295</sup> In a series of influential articles, Esquirol analyzes the work of Rene David to expose the contingency of regional constructs and their appropriation by powerful agents.<sup>296</sup> More trenchant attacks on the (f)utility of regional or identity-based interpretations of international law can be seen in the Asian values debate, which expose both the contingency of political and/or regional constructs and also raise the dual questions of identity and authority/authenticity.<sup>297</sup> Identity concerns the question of who is legitimately entitled to speak on behalf of a group or nation.<sup>298</sup> Authority/authenticity, on the other hand, refers to the degree of legitimacy/credibility attached to a given "voice" by its audience.<sup>299</sup>

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294. See, e.g., Ruskola, *supra* note 284.

295. See Jorge Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 42 (2003). For discussion of how Esquirol's work helps to deconstruct broader regional and national narratives, see David Kennedy, *The Methods and the Politics*, in COMPARATIVE LEGAL STUDIES, *supra* note 9, at 416 n.106.

296. See Esquirol, *supra* note 295, at 42.

297. Ruskola, *supra* note 284, at 3.

298. See Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*, in INFORMAL JUSTICE AND LEGAL PLURALISM IN THE GLOBAL SOUTH 32 (ILSA Beyond Law No. 27, 2004), available at <http://ilsa.org.co:81/node/356> (examining the reforms in many Latin American countries to account for indigenous peoples).

299. Authenticity can be established or lost on strength of expertise, such as command of terminology, language and translation skills, and substantive background knowledge of a culture, ethnic group, or nation. See, e.g., Chiu, *supra* note 276, at 485–86. On textual authenticity versus authority, see DOMINICK LACAPRA, *RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE* 53–60 (1983). Authenticity—as it pertains to the authentic/'official'/'mainstream'/'dominant' interpretations of contemporary international law—is directly relevant in both of the above meanings. See *id.* at 254 (discussing 'authentic' Marxist tradition). The authors expand on LaCapra's dichotomy and use authenticity in its everyday sense (fake vs. authentic) as well as the broader sense of 'identity, propriety and authenticity' which is established by reference to a pure opposite 'other,' in this case imperialist, Chinese, feminist, Third World, or indigenous orders. With respect to the former, authenticity is important for very practical reasons. In writing a comparative legal history, a comparativist is not dealing with 'international law' but rather what is *left of* international law—the writings of jurists, old codes, constitutions, and textbooks. See Pierre Legrand, "Il n'y a pas de hors-texte:" *Intimations of Jacques Derrida as Comparatist-at-Law*, in DERRIDA AND LEGAL PHILOSOPHY 125 (Peter Goodrich, Florian Hoffman, Michel Rosenfeld, & Cornelia Vismann eds., 2008); Lorca, *supra* note 18, at 479 n.6 (quoting Arnold McNair, *Aspects of State Sovereignty*, 26 BRIT. Y.B. INT'L L. 6, 6 n.1 (1949) (noting that "most history of international law is either a history of its literature, or a history of international relations . . . [and] [i]t is difficult to find much history of the content, that is, the actual rules of law as applied in practice"))).

An instructive illustration of the interwoven issues of identity and authenticity can be in the persona of even the most mainstream international law scholars, such as Rosalyn Higgins, the former President of the International Court of Justice from 2006 to 2009.<sup>300</sup> For instance, discussing the issue of whether it is any more difficult for her to be critical in the Israel case concerning the construction of the wall in the Palestinian territory<sup>301</sup> because she is Jewish, Higgins flatly responded that she did not think so, stressing that she judged the case as an international lawyer and not with regard to her background. She explains, "I also think that the fact you happen to be Jewish doesn't mean you think that everything the State of Israel does is right."<sup>302</sup> Yet when the UK Foreign Office put her name forward for election to the court, it should be remembered, there were fears that some countries in the UN would not vote for a Jewish woman. While Judge Higgins dismisses such concerns, saying "I don't think I have ever been perceived as Rosalyn Higgins, the Jewish international lawyer—and I hope not Rosalyn Higgins, the woman international lawyer,"<sup>303</sup> how credible is this act of detachment in the eyes of her audience? Conversely, if she had claimed to speak as a feminist 'voice' on international law, to what extent would this act pass muster? The takeaway from this example—along with the myths of Latin American law, or Asian approaches to international law—is to beware of putative oracles speaking on behalf of a given international law tradition; to beware of one's own doctrinal views being mischaracterized as falling into a rival international law tradition; and lastly, to understand that group-based international legal theory taxonomies (including in some ways the present one) are by and large useless to the individuals who actually drive policy, manage exports and imports, or re-negotiate sovereign debt.

Of course, these issues of identity and authority/authenticity are not new to comparative law. One of the great achievements of comparative law is that it has finally developed operational methodologies and techniques to identify these issues and address them.<sup>304</sup> Both are useful to

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300. *The Court: President Rosalyn Higgins*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=6> (last visited Feb. 16, 2011).

301. For the advisory opinion in the case, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

302. Joshua Rosenberg, *British Woman is World's Most Senior Judge*, THE TELEGRAPH (April 6, 2006), <http://www.telegraph.co.uk/news/uknews/1514961/British-woman-is-worlds-most-senior-judge.html>.

303. *Id.*

304. See, e.g., Mitchel de S.-O.-L'E. Lasser, *The Question of Understanding*, in *COMPARATIVE LEGAL STUDIES*, *supra* note 9, at 197, 205, 237. Lasser's contributions, particularly with respect to the 'official'/unofficial divide are extremely relevant to the

break down what could be called “methodological path-dependence”—the idea of the nation-state as the default and most-useful category for thinking about transnational social phenomena,<sup>305</sup> including the discipline of international law.<sup>306</sup> And as shown above, identity and authenticity critiques also allow the demystification of the notion that given groups of scholars represent a particular minority,<sup>307</sup> or other marginal voices.<sup>308</sup>

Thus far, the critiques of regional or identity-based approaches to international law suggest that the normative challenge for CIL scholars who want to do something with CIL aside from just classification is not to create an alternative perspective on international law, but rather to recognize a plurality of existing perspectives. Second, if the national pluralism thesis is accepted, then the task of CIL becomes to articulate these myriad national perspectives on international law. But here a problem presents itself. The deconstruction of the nation state as a coherent intellectual model logically facilitates the further deconstruction and pluralization of the nation-state’s constituent communities, whether they are ethnic, geographic, or class-based.<sup>309</sup> But, if all of these categories, too, are contingent and potentially unstable, then all that is left are the writings of particular jurists, or at most, networks of scholars working in common intellectual affinity with one another. Should the task of CIL be limited to studying the differences between these theoretical schools, or

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deconstruction of complex texts (i.e., a 2008 Iranian international law treatise written by a figure with unclear ties to the ruling regime) and conflicting or compound identity-based arguments.

305. Cotterrell calls it “methodological nationalism” but this terminology may be misleading. See Cotterrell, *supra* note 254, at 4.

306. *Id.* at 4–5.

307. In this respect, see INTLAWGRRLS, <http://intlwgrrls.blogspot.com> (last visited Jan. 15, 2010), a blog co-authored by a number of influential female international law scholars, subtitled “voices on international law, policy and practice” and further subtitled “it’s our world, after all.” *Id.* The purpose of the blog seems to facilitate discussion and the dissemination of ideas. Diane Marie A. Mann, *IntLawGrrls’ Heartfelt Hello*, INTLAWGRRLS (Feb. 10, 2007, 9:23 PM), <http://intlwgrrls.blogspot.com/2007/02/intlawgirls-heartfelt-hello.html> (“Women now have a hand in our world’s affairs: think Albright and Arbour, del Ponte and Higgins, Ginsburg and Rice. Yet our voices remain faint, in backrooms and in the blogosphere. IntLawGrrls—women who teach and work in international law, policy and practice—hope to change all that. We embrace foremothers’ names to encourage crisp commentary, delivered at times with a dash of sass.”). To what extent blogs such as this purposefully include or exclude certain other groups, or can be said to represent an identity-based ideological or political agenda, is altogether unclear.

308. See INTERNATIONAL LAW AND ITS OTHERS, *supra* note 291.

309. Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1457 (1992).

confederations of scholars? The answer, perhaps, is yes, but with important methodological nuances.

## 2. CIL as the Study of Norm Diffusion?

With the difficulty of identifying the subject of study (states, national groups, etc.), perhaps it is better for CIL to focus on the object (the actual norms in question), focusing its inquiry on the processes of norm diffusion across jurisdictions.<sup>310</sup> First, is it possible to study the process of transplantation of entire “theories” or models of international law from one state to another? This question is closely related to the question of the appropriate scope of CIL inquiry that was addressed above.<sup>311</sup> Second, is there still value to be gained from studying broad patterns of norm diffusion, transplants, and receptions? In brief, the answer to both questions is yes. There is great value to understanding how legal transplants transcend geographical, linguistic, and political boundaries and penetrate seemingly foreign terrains.<sup>312</sup> This can be done by analyzing the transmission agents, whether legal education reforms, direct imposition (like World Bank structural adjustment policies), or internalized perceptions of “lack” (of a robust legal system) by the local legal elites in a given state.<sup>313</sup>

However, moving from the local to the global, from micro- to macro-level comparisons is seemingly counterintuitive. At the very least, it goes against the grain of developments in comparative law over the past two decades that have moved into more sophisticated models of micro-level transplants and techniques of monitoring localized reception.<sup>314</sup> On the

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310. See generally LARRY CATA BACKER, *HARMONIZATION LAW IN AN ERA OF GLOBALIZATION* (2007) (highlighting interactions between different systems and illustrating the way different relationships produce different effects across the world); DAVID B. GOLDMAN, *GLOBALIZATION AND THE WESTERN LEGAL TRADITION: RECURRING PATTERNS OF LAW AND Authority* 12–34 (2007); William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM AND UNOFFICIAL L. 1, 5–7 (2004); Michael Likosky, *Cultural Imperialism in the Context of Transnational Commercial Collaboration*, in *TRANSNATIONAL LEGAL PROCESSES* 221, 222–26 (Michael Likosky ed., 2002).

311. See *supra* text accompanying notes 174–82.

312. See Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 252, at 441, 442–43.

313. See Laura Nader, *Law and the Theory of Lack*, 28 HASTINGS INT'L & COMP. L. REV. 191, 193 (2005).

314. Often, this has been practiced by scholars employing law and economics analysis in a transnational setting. See, e.g., Mathias M. Siems, *Legal Originality*, 28 OXFORD J. LEGAL STUD. 147 (2008) (identifying original approaches to legal research); see also Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55, 78–81 (2007); Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 945 (A. Mitchell Polinsky &

other hand, there is no theoretical hurdle to comparing such macro concepts as “international legal theory” or “approaches to governance.” It is theoretically possible to do functional micro-comparison<sup>315</sup> of a macro-concept like “public international law.”<sup>316</sup> So long as there is no pretense about capturing universal truths,<sup>317</sup> macro-comparisons of social phenomena like the appropriation of foreign theoretical constructs may actually be useful. In fact, recent CIL scholarship—such as Arnulf Becker Lorca’s comparative study of the notion of universality in European and peripheral international law—explicitly rests on a functionalist method.<sup>318</sup>

The transplantation of vague notions like “international law” or “rule of law” is also important because they often act as theoretical lodestars towards which subsequent micro-level reforms are geared.<sup>319</sup> Thus, in the context of traditional legal transplant studies, CIL projects can facilitate a keener understanding of vertically-imposed reasons for particular domestic reforms.<sup>320</sup> Where nations feel compelled to reform domestic legal orders to bring them into line with global legal standards, CIL can shed light on the process of norm diffusion in these contexts.

As with CIL projects focusing on national approaches or identity-based approaches, CIL projects analyzing norm diffusion also run the risk of amateurism and corporeology. Additionally, both types of CIL projects

Steven Shavell eds., 2007) (using econometrics to study particular events); William B. Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 PENN ST. L. REV. 703 (2005).

315. Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 252, at 339, 341; *see also* ZWEIGERT & KÖTZ, *supra* note 206, at 4–5 (discussing micro versus macro comparisons).

316. Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES, *supra* note 9, at 110 (arguing that subjects as large as ‘law’ or ‘religion’ can be investigated in functional terms).

317. *Id.* at 112.

318. Lorca, *supra* note 18, at 483 (“Section three explores the diversity of legal regimes in the three aforementioned ideal types and argues that the *functional equivalences* between them explain a *common pattern* of appropriation in the semi-periphery.”) (emphasis added).

319. Far from being an academic exercise, studying the diffusion of vague notions carries significant foreign policy overtones. Consider Attorney General Eric Holder’s recent claim that “the rule of law is one of the United States’ greatest exports.” *Written Testimony by Eric Holder, Attorney General, to U.S. Senate Judiciary Committee*, U.S. DEP’T OF JUSTICE (Nov. 18, 2009), <http://www.justice.gov/ag/testimony/2009/ag-testimony-0911181.html>.

320. *See, e.g.*, Mamlyuk, *Legal Harmonization*, *supra* note 88 (describing how the post-Soviet transformation to monism in Russian international legal theory necessitated vertical and horizontal legal harmonization reforms in the IP sector).

can be attacked on the basis of false objectivity, the notion that the CIL project itself is not merely an intellectual quest for knowledge or understanding, but carries a particular political agenda.<sup>321</sup> Even if scholars are careful to assume the political dimension of their comparative project and bring the assumption to the fore,<sup>322</sup> essentially offering a disclaimer of their political/ideological commitments, there is always an implicit undisclosed cultural and ideological bias that comes with the comparativist.<sup>323</sup> Likewise, the idea that CIL can offer some sort of non-contextualized truth, or a method of perceiving truth about competing approaches to international law, vastly misconstrues the capacity and function of the comparative endeavor.

### *B. Methodological Minima for CIL*

Having answered the core methodological question—whether it is valuable to speak of CIL as a disciplinary bridge between comparative method and international law—this Article proceeds with an outline of what can be called methodological minima and maxima. As a heuristic, the table below offers one way to conceptualize the functional unit (or range) perhaps most appropriate for CIL analysis.

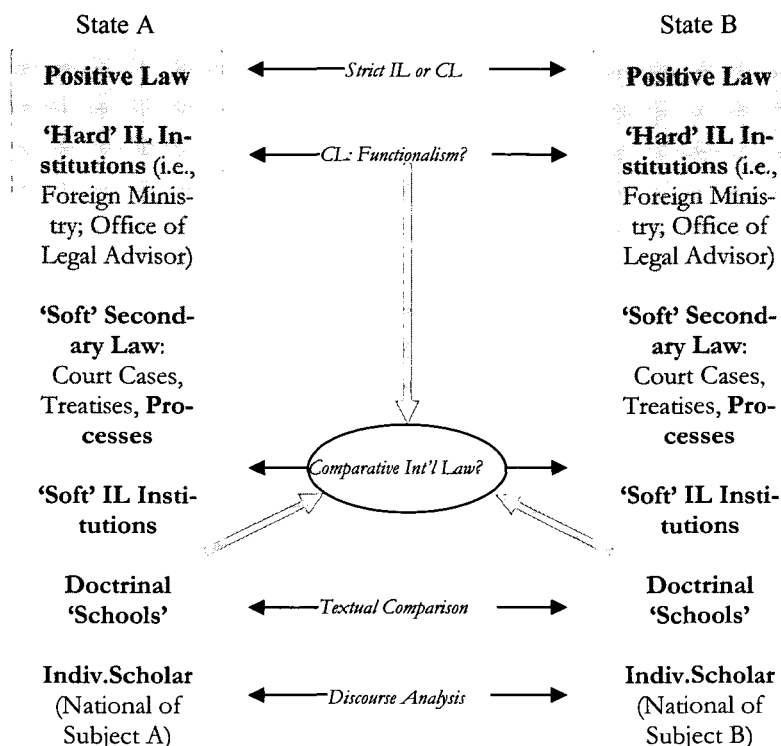
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321. See George Winterton, *Comparative Law Teaching*, 23 AM. J. COMP. L. 69, 80–81 (1975).

322. See David Kennedy, *The Methods and the Politics*, in COMPARATIVE LEGAL STUDIES, *supra* note 9, at 345. “[C]omparatists are sensitive to ‘accusations’ that their work might have anything one could regard as a politics. To my ears, their sensitivity on this point can seem so extreme that it is hard to think of it as fully ingenuous.” *Id.* at 349. Kennedy goes on to probe the ideological heart of comparative law by deconstructing the discipline’s history. For an earlier position on comparative law and hegemony, see Ugo Mattei, *Some Realism About Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 AM. J. COMP. L. 87 (2002). For an example of the self-congratulation and claim of objectivity at issue, see ZWEIGERT & KÖTZ, *supra* note 206, at 3 (“[B]y the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma.”).

323. See Winterton, *supra* note 321, at 81.

Figure 1: Conceptual Diagram of Comparative International Law?



The idea here is that existing methods already inhabit the wide range of what would ordinarily fall into the sweeping category of CIL, were such a discipline to take hold. With respect to positive law, comparative law and public/private international law probably already provides the techniques necessary to account for differences across jurisdictions. At this upper extreme, there is also a conceptual limit to CIL study, which is the notion of regional approaches, such as European approaches to international law, Asian approaches to international law, or North American approaches to international law.

The lower limit in CIL inquiry is an individual's writings on international law and particular schools of international law. If the work of two or more scholars shares sufficient similarity, it becomes possible to group it within a larger 'project' or 'tradition,' and so forth. For this reason, monikers like the Vienna Circle, Frankfurt School, New Haven approach, Trento/Torino Common Core, Harvard CLS, or the Toronto Group, have a more or less reliable, or at least familiar, referent. Scholars

who become affiliated with these and similar projects share a professional network, may share general political sensibilities, and at the very least, meet with one another and cite each other's work.<sup>324</sup>

But between these two extremes lies a gulf of contested territory. Moving from the top down, the next possible field is CIL as the study of similarities and difference between two (or more) national approaches to international law and institutions. But even the most basic and familiar categories in international law—the nation-states—blur at close range.<sup>325</sup> Adding the temporal dimension, the dynamic evolution of norms and doctrinal positions across a relatively short time span, shows that attempts to capture group narratives are but a single frame in a moving picture of interpretations (the views of several leading jurists), with the plot changing mid-frame to reflect political or substantive priorities.<sup>326</sup> Moreover, as discussed above, there is nothing inherently different about comparing how two given foreign ministries react to the introduction of a new international norm from the traditional functionalist method used in drawing comparisons about domestic legal orders.<sup>327</sup>

The next possible candidate for CIL study is a comparison of domestic processes and structures of making decisions about international law and international relations. This can be done by reference to cases, treatises, and other materials that explain how a given policy position is developed. In a way, this form of CIL amounts to a variant of McDougal's processual jurisprudence, an attempt to capture *how* decisions are made within the respective country's foreign policy apparatus.<sup>328</sup> This form of CIL presupposes, however, that a systemic account of these myriad aspects of social reality is possible; or, alternatively, that scholars could agree on the proper methodological basis for such an empirical study. If McDougal's "disciplined and contextual" policy analysis<sup>329</sup> ultimately failed to offer a predictive capacity for understanding one state's actions

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324. Mattei, *Critical Legal Studies*, *supra* note 252, at 829.

325. Continuing with David Kennedy's metaphor. See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 550–54 (1997) (discussing the international lawyer's perspective and view on subject through metaphor of Aunt Betty, Uncle Chuck, and their photographer).

326. See *id.*

327. See *supra* Section II.A.

328. See, e.g., Myres S. McDougal, *International Law, Power & Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953).

329. Myres S. McDougal, *Perspective for an International Law of Human Dignity*, 53 AM. SOC'Y INT'L L. PROC. 107, 109–10 (1959).

under international law, it is hardly an appropriate analytical or descriptive methodology for comparison among multiple actors.<sup>330</sup>

This leads to the space between the opinions of individual international law scholars and international law processes, or the domain of doctrinal schools and ‘soft’ international law institutions.<sup>331</sup> In the Authors’ view, this is the most proper domain for CIL inquiry for at least three reasons. First, this is the proper domain by basis of exclusion: traditional public international law and comparative law already occupy the discursive space for discussing similarities and differences in positive law across jurisdictions. Traditional discourse analysis already exists to analyze the similarities and divergences between individual doctrinal positions.<sup>332</sup> However, there is little work on comparison of institutional projects in international law—or the comparison of the coordinated output of legal research institutes, legal centers, and funded research projects.<sup>333</sup>

To make the abstract more concrete, a perfect example of an institutional project currently afoot that is in dire need of the type of CIL analysis envisioned here is the work of the Asian Society of International Law, and its most recent project, the *Asian Journal of International Law* (“Asian Journal”).<sup>334</sup> More specifically, what is the historical significance of the publication of the first issue of the new publication in January 2011? Perhaps it exemplifies the assertion of Asia overcoming the West in economic and even intellectual terms? Is there a commonality of political outlooks among the editors? Does this move signify a new theoretical posture or the emergence of a new network, coalition, or cluster of

330. Harold Koh’s New Legal Process School is the contemporary intellectual incarnation of this policy analysis jurisprudence. New Legal Process is distinguished from the earlier school principally by its narrower scope of inquiry. See Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 335 (1999).

331. The term “‘soft’ international law institutions” is used here to refer generally to legal actors, which encompasses networks of scholars, law school research centers, legal think tanks, but also what is conventionally thought of as actual legal actors in the international arena, such as diplomats.

332. Cf. John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657 (2008) (theorizing and employing discourse analysis as a methodology for analyzing legal transplants as “conversations” between different states’ regulatory regimes).

333. See, e.g., Fabri, *supra* note 284, at 3 (“[T]he question of the necessity for a European approach to international law is political in the sense that it is necessarily connected to a *project*. Giving an answer thus equates to siding with or against the project, more or less consciously and with more or less nuances. However, I do not believe this should be voiced within this article.”) (emphasis added).

334. See I ASIAN J. INT’L L. 1 (2011), <http://journals.cambridge.org/action/displayJournal?jid=AJL> (last visited Jan. 16, 2011) [hereinafter ASIAN J. INT’L L.].

scholars with a shared scholarly agenda? Why is the journal being published by Cambridge University Press, and why is it limited to English language contributions, as a practical convenience—"rather than political endorsement"—as the editors assert, or perhaps to ensure the highest levels of scholarship through the 'double-blind peer-review' process?<sup>335</sup>

Presumably, a legal journal is founded to fill a theoretical or structural void left by pre-existing publication fora, to publish work not being accepted elsewhere, that may be too controversial or non-topical, of a higher or lesser caliber than that published elsewhere, or as a challenge to existing frameworks. In remembering the Soviet interwar experience, it should be recalled that Pashukanis founded the Communist Academy and the legal journal *Revolution in Law* (*Revoliutsiia Prava*) as a direct challenge to not only the heir of the Imperial-era Russian Academy of Sciences (which became the Soviet Institute of State and Law) but also as a way to undermine the work of Korovin's *Journal of Soviet Law* (*Sovetskoe Pravo*). This was not only a political posture; it was as much an expression of theoretical opposition as of institutional rivalry for political favor and research funding. Similarly, Hazard's choice of Columbia University was not merely a personal convenience, it represented an institutional choice with significant consequences—the opportunity to establish a Russian legal studies center<sup>336</sup> and to attract research funding from individuals and institutions in an intensely charged political climate.<sup>337</sup> Similarly, it is possible that Butler's choice of London for the home of the Vinogradoff Institute<sup>338</sup> also reflected strategic considerations—a more or less neutral ground on which to develop the Direct Link—rather than mere chance. Perhaps the alternative, setting up the 'Link' directly between the U.S. and Moscow, would have been seen in the early 1980s as a quasi-official bilateral move not only by the respective parties, but also by outside observers. Alternating research conferences between Moscow and London may have been more palatable to both the Soviet and Western scholars, freeing them to engage intellectually with one another.

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335. *Instructions for Contributors*, ASIAN J. INT'L L. (Aug. 27, 2010), [http://journals.cambridge.org/images/fileUpload/documents/ajl\\_ifc.pdf](http://journals.cambridge.org/images/fileUpload/documents/ajl_ifc.pdf).

336. The institute that Hazard was involved with was the Russia Institute at Columbia, since renamed the Harriman Institute. It was founded in 1946 with support from the Rockefeller Foundation. See History, HARRIMAN INST., <http://www.harrimaninstitute.org/about/history.html> (last visited Jan. 16, 2011).

337. To recall the investigations by the House Un-American Activities Committee, see *supra* text accompanying note 146.

338. See W.E. Butler, *On the Origins of International Legal Science in Russia: The Role of P. P. Shafirov*, 4 J. HIST. INT'L L. 1, 1 (2002).

Accordingly, while at first blush the question of the Asian Journal may appear esoteric, upon closer examination, it is indicative of an important institutional development in international law. Taking the stated purpose of the new Asian Journal at its word, the focus of the journal is intended to cover 'Asian' approaches in a broad fashion:

The regional focus of the Journal is broadly conceived. Some articles may focus specifically on Asian issues; others will bring *one of the many Asian perspectives* to bear on issues of global concern. Still others will be of more general interest to scholars, practitioners, and policymakers *located in or working on Asia*.<sup>339</sup>

Yet browsing through the list of eminent contributors to the inaugural issue, one is struck by both the Western-centered nature of the contributions, and the Western origins of the authors.<sup>340</sup> Reflecting on the earlier discussion regarding the oft-stated goals of new legal research networks or new journals—as the intellectual homes of alternative frameworks, or as venues for the publication of otherwise unconventional scholarship—it is highly unlikely that the contributions of Koskenniemi, Farer, or Charlesworth could not find voice in any of the usual elite publication channels.<sup>341</sup> Instead, considering the sum of the outward indicia—the theme of the Tokyo conference establishing the journal,<sup>342</sup> the dissemination of the call for submissions to Ivy League U.S. law schools and top-flight European schools, the caliber of contributors to the inaugural issue, the publication venue—one gets the sense that the Asian Society of International Law is seeking to replicate the success of the European Society of International Law, to project relevance to the outside world, to declare that “we too, matter!” Regardless of the merits or likely success of such an endeavor, it represents a concerted effort by a group of scholars who already have significant personal intellectual cachet, and who have

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339. See ASIAN J. INT'L L., *supra* note 334.

340. *Id.* Only two out of the eight contributors can be said to be scholars, practitioners, or policymakers located in or working on Asia.

341. *Id.* Without speculating on the actual reasons for the inclusion of these highly esteemed international law publicists in the inaugural issue of the Asian Journal versus other scholars, it seems somewhat strange that a majority of the invited articles had practically nothing to do with the ostensible main purpose of the Asian Journal, which is to represent Asian approaches to international law. *An Asian Journal of International Law*, 1 ASIAN J. INT'L L. 1, 2 (2011) (“The *Asian Journal of International Law* aspires to cultivate a conversation between scholars, practitioners, and policy-makers located in or interested in Asia.”).

342. See *Tokyo Conference 2009*, ASIAN SOC'Y INT'L LAW, <http://law.nus.edu.sg/asiansil/conference/tokyo2009.htm> (last visited Jan. 16, 2011) (The conference was titled: *International Law in a Multi-polar and Multi-civilizational World – Asian Perspectives, Challenges and Contributions*.).

now sought to give voice to a particular thought through collective action.

CIL, if it is to have any relevance and recognized disciplinary space, can offer a sophisticated and empirically grounded analysis of these and related historical phenomena. Of course, scholars can take an active and creative approach by organizing these respective conferences, journals, networks, and think tanks. Yet, whether the actual research methodology adopted is professional immersion,<sup>343</sup> collaboration, and/or institutional convergence,<sup>344</sup> the goal of the individual should be to expose the political agenda of the given network. Additionally, if the scholar is the creative agent, the goal should be to set a common agenda, to force participants to make the tragic choices of being in or out, of being part of the presumed (and hopefully expressly identified) problem, or being part of the (hopefully expressly and programmatically identified) solution.

What should be clear, the CIL method being proposed here is not a systematic, objective driven encounter. It is empirical in the sense of collecting institutional data derived from institutional records, systematic surveys, semi-structured interviews, and ethnographic-style observation. But it is subjective *prima facie*, with the express goal not of collecting samples, per se, but of building political linkages between international lawyers. It is a knowledge quest, yes, but more importantly, it is an exercise in building political participation. For, by promoting academic exchange and research collaboration, the goal is collaboration and participation in and of itself. The CIL scholar is unable to transcend her own cultural habitus and immerse herself entirely in the mindset of the foreign internationalist. And that is not the point. The point is twofold: first, to develop working relationships and common projects with the foreign internationalist camp; second, to get a basic understanding of that foreign mindset to be able to present it to one's students.<sup>345</sup>

### III. METHODS: CIL AS STUDY OF COMPETING METHODS?

As an alternative to the comparative analysis of 'soft' international law actors and institutions discussed above, CIL is also accurately described as the study of competing comparative methods. For instance, CIL can entail the study of the impact of Soviet comparative law in the making of

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343. Herbert M. Kritzer, "Research is a Messy Business": *An Archeology of the Craft of Socio-Legal Research*, in CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES 264 (Simon Halliday & Patrick Schmidt eds., 2009) (highlighting themes common to many scholars' research methods).

344. See text accompanying notes 154–212.

345. Or, more ideally, to be able to attract a foreign internationalist to teach students how they perceive international law.

Western comparative law. Though a full study is outside of the scope of the present Article, this Section introduces the cross-fertilization between Soviet and Western comparative law in spite of the strident claims of incomparability by Soviet bloc comparativists.<sup>346</sup> The Section closes with a discussion on the uses of CIL scholarship and anticipated relevance for those outside of academic circles.

John Quigley's book on the positive influence of Soviet legal theory on the development of global international law and the Western domestic legal order is a good example of the farthest to which Western scholars acknowledge the influence of Soviet law outside of the socialist bloc.<sup>347</sup> Quigley's central claim is that "[d]espite its rejection of Soviet concepts, the West absorbed many of them," offering examples ranging from women's suffrage rights, women's rights in family law, decolonization, and a host of other positively perceived historical developments.<sup>348</sup> A logical outgrowth of Quigley's central thesis is that by rejecting Soviet exceptionalism and charging the Soviet Union with nihilism, Western international law learned the effectiveness and utility of exceptionalist rhetoric.

It should be noted that a comparative law tradition as a distinct discipline did not exist in Soviet jurisprudence.<sup>349</sup> From the inception of Soviet legal theory in the 1920s, there was an ambivalent relationship with the comparative legal method.<sup>350</sup> On the one hand, comparison was in-

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346. See SAIDOV, *supra* note 21, at 27.

347. JOHN QUIGLEY, *SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD* 193 (2007).

348. *Id.*

349. SAIDOV, *supra* note 21, at 82; cf. Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classification, Typological Interpretations, and Bibliographic Resources*, in *LAW AND THE SOCIAL SCIENCES* 11, 32–33 (Leon Lipson & Stanton Wheeler eds., 1986) (suggesting that Marxist anthropology is similar to comparative law in its cross-cultural and historicist features).

350. A brief note about interdisciplinarity in Russian jurisprudence at the turn of the twentieth century is in order. Russian jurists, for instance, M.M. Kovalevsky and S. Muromtsev, were especially strong in comparative law and sociological method. See M.M. KOVALEVSKIĬ, *SOTSIOLOGIĬA [SOCIOLOGY]* (1997) (Russ.). Kovalevsky, a renowned Russian sociologist, historian, jurist, and political theorist, was best known for his successful attempts to develop an inter-disciplinary approach to the study of sociology, merging elements of biology, geography, economics, and psychology. Kovalevsky's historical-comparative method was original in that it merged traditional descriptive comparative analysis with sociological/ethnographic methods, allowing him to develop pluralistic approaches to history, sociology, and law. Accordingly, as a jurist, Kovalevsky was able to develop and teach courses in comparative legal history, comparative history of political organizations, the history of American law, as well as ancient criminal law and procedure. His students went on to establish the first sociology courses in Russian universities, most notably, the course in "Jurisprudence and Sociology" by Professor

dispensable to understand the peculiar features of the bourgeois states so as to analyze and heighten the contrast between the Soviet Union and the West.<sup>351</sup> Comparative law, for instance, was included in the lesson plans for law faculties, though it was not taught as a separate course to students.<sup>352</sup> John N. Hazard's lecture notes from courses at Moscow's Juridical Institute indicate that descriptive contrastive comparison to bourgeois practice was common in practically every course.<sup>353</sup>

On the other hand, comparison was seen as superfluous to international law due to the objective/universal nature of historical rules.<sup>354</sup> It was logically unnecessary to have a comparative law discipline since the competing bourgeois systems would inevitably self-destroy and become historical relics.<sup>355</sup> For this reason, comparative law scholarship declined in the Soviet Union from the mid-1930s.<sup>356</sup> Following WWII, when Ger-

Muromtsev ("Iurisprudentsiita I Sotsiologiia"—S. Muromtsev). *Id.* at 9. However, research has not shown whether the early Soviet jurists relied on Muromtsev or Kovalevsky for their comparative method.

351. SAIDOV, *supra* note 21, at 82.

352. *See id.*

353. John N. Hazard, Letters and Course Notes on Korovin's International Law 26 (discussing work of League of Nations with respect to Bulgaria, Greece, Italy, China, Japan, etc.) (unpublished manuscript) (on file with the authors).

354. From the liberal side, the universal nature of justice was the same reason offered by one of the masters of English comparative law, H.C. Gutteridge, for maintaining a disciplinary divide between comparative and international law. GUTTERIDGE, *COMPARATIVE LAW*, *supra* note 171, at 60; H.C. Gutteridge, *Comparative Law and the Law of Nations*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* 13 (W.E. Butler, ed., 1980). In the words of Gutteridge:

If by the law of nations or public international law we understand the principles of justice, which by the common consent of mankind, should govern relations between states or nations, the employment of the comparative method would at first sight appear to be excluded, because rules which are avowedly universal in character do not lend themselves to comparison.

*Id.* at 13. Gutteridge saw the intersection of comparative and international law as the process of inquiring into the existence of "general," "universal" or "common to civilized nations" principles and the formulation of methodologies for ascertaining these principles. *Id.*

355. *See SAIDOV*, *supra* note 21, at 82.

356. *See id.* at 83. However, Saidov is unclear regarding the cause of the decline: "[T]here were moments of decline in the use of the comparative law method connected with underestimating the role of quasi-scientific methods and a denial of any moment of succession in socialist law." *Id.* This is curious because with the defeat of Pashukanis and his disciples and the adoption of stability of laws, Soviet legal scholarship was supposed to assume a less determinist stance. Thus, comparative law should have remained. Several likely explanations for the disappearance of comparative law from 1930–1960 include the general decline of interest in the discipline in Europe, though this is not supported by

man émigrés brought comparative law to U.S. law schools<sup>357</sup> and comparative law became a distinct (though troubled) discipline, interest in comparative law in Soviet scholarship was not as pronounced as in the West. To illustrate, Soviet scholars Iu. Ia. Baskin and D.I. Feldman, in their 1980 essay on *Comparative Legal Research and International Law*, cite Szabo's 1969 article on comparative law and the 1967 Soviet translation of René David's *Major Legal Systems of the World* as the extent of Soviet literature on the subject.<sup>358</sup>

More recent research reveals that a distinct Soviet comparative law style emerged in the 1960s as a result of attempts by Uzbek jurists to apply a comparative method to legal systems of the fifteen Soviet republics. It was a harmonization project similar to the Common Core project,<sup>359</sup> but markedly different in that it began from the assumption of harmonized legal systems and sought to identify divergent streams.<sup>360</sup> According to Butler, comparative law began to take on a disciplinary character (similar to that in the West) in the mid-1980s, led by the contributions of the Uzbek scholars.<sup>361</sup>

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post-WWII scholarship. Alternatively, the decline of interest may have signified Stalin's successful reorientation of Soviet law towards domestic rather than international orientation. Comparative projects would have undermined the stability of laws thesis by demonstrating Soviet deficiencies or excesses, totalitarianism, and the like. The research of this Article's co-author, Mamyluk, concludes that comparative projects continued within individual branches of law but with less vigor and with a greater reliance on overgeneralizations and secondary materials. More research is needed on this issue.

357. For an excellent retelling of the émigré story, see CURRAN, *supra* note 23, at 9–14.

358. Iu. Ia. Baskin & D. I. Feldman, *Comparative Legal Research and International Law*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVES 91, 91–93 (W.E. Butler, ed., 1980) (citing I. Szabo, *Sravnitel'noe pravovedenie*, in KRITIKA SOVREMENNOI BURZHUAZNOI TEORII PRAVA 181 (Moskva, 1969) [I. Szabo, *Comparative Law*, in CRITIQUE OF CONTEMPORARY BOURGEOIS THEORY OF LAW 181 (Moscow, 1969)]).

359. For a description of the Common Core project see Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1997).

360. By 1975, there was a textbook on comparative law in socialist countries. See A.A. TILLE, *SOTSIALISTICHESKOE SRAVNITEL'NOE PRAVOVEDENIE* [SOCIALIST COMPARATIVE LAW] (1975). One theory why Baskin and Feldman downplayed the role of comparative research in the USSR was probably to maintain the façade of a unitary socialist legal order, which the USSR on a federal level and vis-à-vis other socialist states certainly lacked.

361. See W.E. Butler, *Editor's Introduction* to SAIDOV, *supra* note 21, at 1. The formal agreement between W.E. Butler's Vinogradoff Institute in London and the Institute of State and Law of the Soviet Academy of Sciences (Protocol of Cooperation), most likely, had a greater and more direct influence on the development of comparative law in the last years of the USSR than one may assume from reading Butler's modest accounts of these efforts and his role in them. The results of the first conference under the agreement be-

Curiously, a review of Soviet literature reveals a lack of a functionalist or fact based comparative methodology for studying the bourgeois international law tradition, aside from pure oppositions derived from Soviet historical-materialism method. The only comparative method *per se* was Marxist-Leninist dialectics, which supposedly gave a model for contrasting different state and legal systems.<sup>362</sup> In a way, historical dialectics can be compared to the method of comparative legal history, but the methods are different in a basic way: Marxist historical dialectics was a historically determinist method,<sup>363</sup> whereas traditional comparative legal history was avowedly anti-determinist.<sup>364</sup> This is one reason, for instance, why historical materialism—while providing an excellent framework for deconstructing Soviet/Russian international legal history and for framing

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tween the Anglo-American and Soviet academies was the collection of essays published in *COMPARATIVE LAW AND LEGAL SYSTEM*, *supra* note 193. Reading these collections with the hindsight of history and against the backdrop of scholarship on both sides of the curtain, one is struck by the magnitude of Butler's pioneering and enormously successful attempt to bridge the two legal systems. These important bilateral conferences on comparative law, international law, law of the sea, and other substantive fields are discussed throughout this Article. Surprisingly, Butler, as a true master in the field of comparative law, international law, and Soviet/Russian/CIS law, his mammoth scholarly contributions, and his continuing work as jurist, statesman, scholar, practitioner, and mediator have not received their proper due from the new generation of comparativists. See *RETHINKING THE MASTERS*, *supra* note 32 (no acknowledgement of the Hazard, Berman, or Butler tradition of comparative law; one citation of Harold J. Berman on the topic of Max Weber; two citations of John Hazard, one as a founder of the International Committee for Comparative Law, the other in Jorge Esquirol's discussion of the legacy of Rene David, citing the co-authored work *Soviet Law* between David and Hazard). This may be due to Butler's failure to engage in the theoretical brouhaha on the pages of the *American Journal of Comparative Law*, preferring to *do* comparative law, rather than *theorize* comparative law (though his contributions to comparative law method have been immense). Or, it could simply reflect the general disdain of the profession's mainstream for Soviet or Russian studies. Nonetheless, the canon is incomplete without acknowledging the doctrinal and practical contributions of Hazard, Berman, and Butler. For a sample of Hazard's classic comparative project, see John N. Hazard, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES* (1969); JOHN N. HAZARD, *SOVIET LAW AND WESTERN LEGAL SYSTEMS: A MANUAL FOR COMPARISON* (rev. 2d ed., 1970). The project is not without its faults and is open to the critique of amateurism (Hazard cites Wigmore and David for panoramic reviews of the other major world systems), but the analysis of Russian sources is superb. Berman's later work, and lastly, Butler's, is remarkably more nuanced and sophisticated.

362. V.P. Kazimirschuk, *Pravo i Metody Ego Izucheniia* [Law & Methods of Its Study] 92 (1965) (citing Baskin & Feldman, *supra* note 358, at 92).

363. See Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory*, 26 FLA. ST. U. L. REV. 701, 727–31 (1998).

364. See *id.* at 711–12.

a comprehensive legal history—fails to answer normative or prescriptive questions.<sup>365</sup>

The Soviet comparative law of the 1980s was not a big improvement over the prior comparison-by-contrast method. Soviet literature resorted to familiar clichés about bourgeois law: “bourgeois comparativists do not conceal the fact that the principal aim of comparative jurisprudence consists of spreading the legal systems of the different capitalist states everywhere.”<sup>366</sup> However, Western comparative law was the one discipline where the critique was completely inapposite during Soviet times. Western comparativists like Hazard, Berman, and Butler spent entire careers trying to understand and compare the Soviet system to other systems in the spirit of cooperation, mutual understanding, and rapprochement.<sup>367</sup> To the extent they critiqued Soviet law, their critiques were wholly legitimate. One could hardly say (other than in the utmost abstract sense) that they were involved in a grand comparative imperial project.<sup>368</sup> The major contribution of a Marxist critique of ‘bourgeois’ comparative law was that “bourgeois comparativists . . . contrast only the forms of legal phenomena, paying no attention to essential social bonds, and subsequently

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365. This is a reference to Soviet *hist-mat*. Marcuse’s social determinism theory, for instance, sought to return Marxism to its true path by reinstalling individual responsibility over historical events. Individual action, and social action as only a collection of individual actions, is the only way to realize transcendent historical possibilities. Faith in automatic historical progression is insufficient. See, e.g., HERBERT MARCUSE, AN ESSAY ON LIBERATION 63 (1969).

366. Baskin & Feldman, *supra* note 358, at 92 (citing Kazimirschuk, *supra* note 362, without any supporting citation of Western comparative work).

367. The history of the discipline, though with its own blindspots and complicity in violence, is noticeably softer than the history of international law, if only in rhetoric. H.C. Gutteridge, for instance, was highly critical of eighteenth century continental jurists who, in promoting universal adoption of Grotian natural law as the basis for the law of nations, had undermined the pioneering work of Montesquieu, who had brought to fruition a notion, advanced by Leibnitz, to survey and analyze scientifically the laws of the world. According to Gutteridge, “the effort to secure recognition for the law of nature carried with it a tendency to slur over the differences existing between the laws of individual nations and to belittle their importance.” GUTTERIDGE, *COMPARATIVE LAW*, *supra* note 171, at 12; cf. ZWEIGERT & KÖTZ, *supra* note 206, at 36 (referencing Rabel’s warning, which may have been said in jest, that upon explorations in foreign territory, “comparatists may come upon ‘natives lying in wait with spears’ . . .”); David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language*, in *RETHINKING THE MASTERS*, *supra* note 32, at 190. These are all classic examples.

368. Whether comparativists were involved in a civilizing or imperial project following the collapse of the Soviet Union is another matter. W.E. Butler’s extensive law reform, privatization, and consulting work throughout the 1990s in the CIS is noteworthy. In fact, most established Sovietologists were involved in one way or another in post-Soviet legal reform.

carry over the conclusions derived to essential relations.”<sup>369</sup> The essential relations, of course, referred to the legal form, the fundamental nature and function of law, both domestic and international. But other than raising the critique, the late Soviet jurists did not explore it further so as not to undermine the then-reached compromise of permanent peaceful coexistence or reopen the theoretical debates of the interwar period. The Soviet CIL method was left to comparing the qualitatively different nature of Soviet treaties with fellow socialist states,<sup>370</sup> divining general principles of law for ICJ Article 38,<sup>371</sup> comparing domestic implementation regimes,<sup>372</sup> and studying the work of international institutions. Still, the method was invoked and practiced until the demise of the USSR.

#### CONCLUSION

CIL cannot be reduced to a set of fundamental unifying legal principles, methodological approaches, or disciplinary aspirations. Rather, just as the dominant characteristic of comparative law has been (by and large) by *ad hoc* muddling through, or sampling of, how different legal cultures solve difficult legal problems, so has much of international law scholarship looking at national or regional traditions been of a diffuse character.<sup>373</sup> But this apparent and likely doctrinal incoherence does not mean that CIL must lack a conceptual or political core.

Since its birth at the dawn of modernity, international law has always been presented as a discipline with an open universalistic vocation. Because of this flavor it has been contrasted with comparative law, a discipline that, to the contrary, rejects any form of universalism, being in the core business of locating and analyzing differences. Coherently with these intellectual premises, the system of international law, being a universal edifice claiming a global scope, cannot be compared with any other system for the simple reason of the lack of alternatives.

Today, these modern assumptions are questioned. On the one hand, we now know that comparative law alternates between “contrastive” phases, with emphasis on differences, and “integrative” phases, with emphasis on analogies. During the integrative phases, claims of universalism are not absent in this discipline. On the other hand, in recent years, because of the emphasis of the role of interpreters in the making of the law, the assumed universalism in international law has been questioned by a vari-

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369. Baskin & Feldman, *supra* note 358, at 92.

370. *Id.* at 94.

371. *Id.* at 95; Statute of the International Court of Justice art. 38.

372. Baskin & Feldman, *supra* note 358, at 96.

373. See William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 964 (2004).

ety of new approaches to international law. In this view, international law is not the same as interpreted in the core and in the periphery, in Western and non-Western countries, in dominant or in resistant settings. Hence it becomes possible to compare one vision of international law with another vision, and such an effort claims its own academic identity as one of the comparative disciplines, namely comparative international law.

In this new vision not only it is likely that the two disciplines may benefit from each other, but also that a dialogue between the two can produce important results in terms of overall legal civilization. Indeed, today there is more than one radically alternative approach to international law; approaches that consider the current international legal edifice as hopelessly flawed, a hypocritical cover up of a relationship of power that is entirely characterized by the law of the stronger. Such approaches believe that a different international legal order, genuinely alternative to the status quo and based on democracy and respect, is not only highly desirable but also necessary in a global political system that is conducting the world to the final catastrophe.<sup>374</sup> This alternative vision, much less grounded in State entities and much more on global people's movements, itself makes a global critical claim and consequently finds it very difficult to coexist intellectually with the current status quo based on the rhetoric of the rule of law.<sup>375</sup>

This Article sought to contribute to the understanding of the current clash of radically alternative views about the international legal order and to contribute in the first steps of the newborn discipline of comparative international law by telling the story of a time in which not only a completely alternative narrative of international law was available, but also in which its own claim to universalism was credible and supported by a powerful legal economic political and military apparatus. In this story, Soviet international law and "capitalist international law" found a way to coexist in a turbulent political environment. This is a story of responsibility of a global scholarly community that has contributed with the force of reason to overcome, at least in part, the reasons of force. The birth of comparative international law, or at least its first significant archeological layer, must be located in this story and must be fully appreciated to

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374. Compare CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS* (2004) (concluding with a pessimistic assessment of the potential of international legal actors to relinquish their profitable relationships with international power actors), with Robert Knox, *Marxism, International Law, and Political Strategy*, 22 LEIDEN J. INT'L L. 413 (2009) (concluding that international law can be used in instrumentalist, 'principled opportunistic' ways to advance progressive agendas aimed at ameliorating social problems).

375. MATTEI & NADER, *supra* note 293, at 2–3.

make sense of the development of a line of inquiry and of scholarly action called "comparative international law."