Comparative International Law: A Historical Re-Construction

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Abstract

What is the historic and contemporary domain of the field of comparative international law? This chapter shows that a wide range of different international systems have existed in the past 250 years and that significant comparative work has been undertaken on them, most prominently by William E Butler in the twentieth century. His international-systems approach is, thereby, very different from the post-2011 actor-centric approach, in which the field of comparative international law is defined by how different actors, especially national ones, understand and interpret international law. This new approach, however, suffers from serious conceptual flaws. For any good conceptualisation of comparative international law should take all three elements of 'comparative', 'international' and 'law' seriously. Contemporary comparative international law should thus refocus on its historic domain, namely the identification of similarities and differences among regional or specialised systems of international law – which constitute the core unit of analysis of the discipline.

A. Introduction: Butler and the International-Systems Approach

When was 'comparative international law' born, and what is the best definition of this field in light of its disciplinary history? Profoundly diverse 'orders' or 'systems' of international law have existed in modern history.[1] These various systems began to be studied comparatively at the end of the eighteenth century – not just from an historical perspective but also from a geographic perspective. An early example of this comparative analysis of international law can be found in the work of Robert Ward.[2] Faced with a plurality of regional international systems, Ward came to believe that there was no universal international law: 'that what is commonly called the Law of Nations, falls far short of universality; and that, therefore, the Law is not the Law of all nations, but only of particular classes of them; and thus there may be a *different Law of Nations for different parts of the globe*'.[3]

This relativist conception of international law, however, was increasingly challenged – and supplanted – by the expansion of 'European' international law in the nineteenth century. The story of this legal 'transfer' and diffusion has been told in the past, especially as regards Asia and Latin America.[4] By the early twentieth century, it therefore seemed that only one single universal system of international law governed the world. Yet three developments soon qualified this picture. With the rise of the Soviet Union, a new Socialist system of international law gradually emerged in the 'Second World', which was soon itself complemented by a 'Third World' conception of international law. The arrival of regional international organisations, like the European Union led, thirdly, to a discussion whether 'new legal order[s] of international law' were being created.[5] By the 1960s, it thus appeared that the

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[1] O Yasuaki, 'When was the Law of International Society Born?' (2000) 2 *Journal of the History of International Law* 1. See also, more generally, O Yasuaki, *A Transcivilizational Perspective on International Law* (Leiden: Martinus Nijhoff, 2010).

[2] R Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe*, vol I (Dublin: Butterworth, 1795).

[3] ibid xiv (emphasis added).

[4] For excellent discussions here, see especially: S Kroll, *Normgenese durch Re-Interpretation: China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Baden-Baden: Nomos, 2012); as well as A Becker Lorca, *Mestizo International Law: A Global Intellectual History, 1842-1933* (Cambridge: Cambridge University Press, 2016).

[5] Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR (English Special Edition) 1, 12.

universal system of general international law had been 're-particularised' into distinct normative sub-systems for different 'classes' of states.

It is at this point that the modern discipline of (public) comparative international law is born. One of its founding fathers is William E Butler, who tirelessly re-introduced comparative approaches back to international law.[6] Butler's pioneering work has largely been ignored by the post-2011 scholarship.[7] Especially his Hague Lectures on 'Comparative Approaches to International Law', however, remain a landmark in the development of the field. Noting that 'international law' and 'comparative law' have traditionally been treated as 'two discrete realms' rather than the latter constituting a method for the analysis of international law,[8] a number of disciplinary intersections are identified:

> Without in any way attempting to restrict the concept of comparative law, it will be suggested there are at least six different but inter-related domains of comparative legal studies, four of which appertain to public international law. It is the latter with which these lectures shall be primarily concerned: (1) the comparative analysis of the

[6] Butler's most important contributions to comparative international law are: WE Butler, 'International Law and the Comparative Method' (1977) 30 *Current Legal Problems* 105; WE Butler (ed), *International Law in Comparative Perspective* (Alphen: Sijthoff & Noordhoff, 1980); WE Butler, 'Comparative Approaches to International Law' (1985) 190 *Hague Academy Collected Courses* 9. A second person who made important contributions to the post-1945 English-language discipline of comparative international law was Butler's contemporary, Edward McWhinney. See here especially E McWhinney, 'Comparative International Law: Regional or Sectoral, Inter-Systemic Approaches to Contemporary International Law' in Hague Academy (ed), *The Future of International Law in a Multicultural World* (Leiden: Brill, 1984) 211. While both authors often use the label 'comparative approaches to international law' instead of 'comparative international law', the overlap between both disciplines cannot be doubted. See, eg: WE Butler, 'American Research on Soviet Approaches to Public International Law' (1970) 70 *Columbia Law Review* 218, 224: 'a course in comparative international law is now being offered at the Harvard Law School'; and the earlier E McWhinney, 'Operational Methodology and Philosophy for Accommodation of the Contending Systems of International Law' (1964) 50 *Virginia Law Review* 36, 54: '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.'

[7] The main exception to the rule is B Mamlyuk and U Mattei, 'Comparative International Law' (2011) 36 *Brooklyn Journal of International Law* 385. By contrast, in a striking act of omission, the introductory chapter of A Roberts et al (eds), *Comparative International Law* (Oxford: Oxford University Press, 2018) entitled 'Conceptualizing Comparative International Law', does not discuss Butler's (or McWhinney's) methodological work; and when listing 'antecedents in earlier scholarship', Butler is not mentioned (ibid fn 7). This omission seems to only serve the authors' foundationalist claim to be discovering 'this emerging field' (ibid 6) and 'to establish comparative international law as a field of research'. This misleading view stems from Roberts' earlier 'Comparative International Law' (2011) 60 *International and Comparative Law Quarterly* 81, according to which '[c]omparative international law is a unique phenomenon that has not received distinct treatment in the literature'. It is hardly surprising that Butler was not amused and rightly chastised this disappointing lack of intellectual generosity in his critical review of Roberts et al's book in WE Butler, 'Comparative International Law: A Review' (2018) 13 *Journal of Comparative Law* 242.

[8] Butler, 'Comparative Approaches to International Law' (n 6) 30.

> international legal system per se, including postulated subsystems and doctrinal writings; (2) the comparative analysis of the relationship(s) between international law and municipal or community legal systems and cultures; (3) the comparative analysis of the internal or 'administrative' law of international organizations and institutions; (4) the application of the learning and lore of 'traditional' comparative legal concerns to the domain of public international law.[9]

With acute sensitivity towards the comparative dimension of international legal history,[10] the special focus of Butler's own work has thereby been on the first dimension, even if his clairvoyance as regards the third dimension should also be noted.[11] In the course of his Hague Lectures, he thus finds:

> Although we speak quite properly of the universality of contemporary international law, the international system has entertained for the past three centuries divergent understandings of 'universal' and the co-terminus existence of regional, theological and ideological subsystems (in some cases, alternative systems). These may only be studied comparatively, with a view to better comprehending the international legal order and, on occasion, resolving conflicts of rules that may emerge between them. … The fountainhead of modern international law not so long ago was known as 'European international law'. … There are at least four postulated subsystems of contemporary international law: the Islamic law of nations, the Latin American (or simply American) international law, African international law and the so-called socialist international law.[12]

This 'systems' or 'subsystem' approach to comparative international law contrasts with what Butler calls 'national approaches to international law' or 'comparative foreign relations law', which primarily focus on single countries' interpretations of international law.[13] An analysis of the modern Chinese approach to international law would, according to him, fall into this category, as 'China is a single system, rather than a legal "family"'.[14] Comparative foreign relations law is, of course, comparative law; yet it is – strictly speaking – not an integral part of the discipline of comparative *international* law, which Butler in a later publication defines as relating to 'the identification and analysis of similarities and differences within *systems of*

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[9] ibid 17.

[10] ibid 33–35. See also Butler, *International Law in Comparative Perspective* (n 6), pt IV, 'International Legal History in Comparative Perspective'.

[11] ibid pt V, 'The Role of Comparison in International Organizations'.

[12] Butler, 'Comparative Approaches to International Law' (n 6) 42.

[13] ibid 44 and 83.

[14] ibid 76.

international law, historical and contemporary, and between *international legal systems* and all other legal systems'.[15]

This international systems focus of the discipline of comparative international law does not, unlike the methodology recently championed by Roberts et al, concentrate on diverse national actors and the way they understand, interpret and apply international law.[16] For if comparative international law is primarily understood in terms of how international law is *received* at the national level (especially by its courts or academics),[17] it squarely falls within the discipline of *international* law because the existence of one universal system of international law behind these national receptions is always assumed.[18] Contrariwise, if a critical-constructivist perspective is chosen, this approach collapses into comparative foreign relations law, which is, ultimately, comparative *national* law.[19] Butler's international systems conception, by contrast, focuses not on individual states but 'families' of states that *share* a distinct conception of international law.[20] That perspective allows him to simultaneously acknowledge the normativity of international law above each state, while equally being able to

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[15] Butler, 'Comparative International Law: A Review' (n 7) 246 (emphasis added).

[16] A Roberts et al, 'Conceptualizing Comparative International Law' in Roberts et al (eds), *Comparative International Law* (n 7) 6. The 'national' perspective is particularly prevalent in A Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017), which 'explores how different *national* communities of international lawyers construct their understandings of international law in ways that belie the field's claim to universality' (ibid 1, emphasis added). But see also (ibid 2 and 3 – emphasis added): '[T]his study represents one strand in a broader re-emerging subfield or set of approaches that I term "comparative international law," which examine cross-*national* similarities and differences in the way that international law is understood, interpreted, applied, and approached by actors in and from different states.'

[17] A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, as well as Roberts, *Is International Law International?* (n 16). See also: D Sloss, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009); as well as P-H Verdier and M Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 *American Journal of International Law* 514.

[18] See especially Roberts et al, 'Conceptualizing Comparative International Law' (n 7) 4 (emphasis added): 'On issues from Treaty interpretation to the content of customary international law, different states and international bodies may set forth different interpretations *of the same rules*…'

[19] That a critical-constructivist perspective ultimately questions the very normativity of international law as 'law' is admitted by Roberts, *Is International Law International?* (n 16) 321. Roberts' project here converges with the critical-legal-studies approach championed by M Koskenniemi (who wrote the preface to Roberts' book).

[20] On the ambivalent and controversial notion of legal 'family' and the problems of comparative taxonomies in general, see M Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 *American Journal of Comparative Law* 1043. See also M. Siems, *Comparative Law* (Cambridge: CUP, 2022), Chapter 4.

recognise different normative systems in which a particular 'style' of thinking prevails.

This chapter wishes to revisit Butler's core domain of the discipline of comparative international law. It offers a broad outline of the diverse system or legal families of international law that have existed in the 200 years between Ward's and Butler's versions of comparative international law.[21] Section B begins with the discovery, in the eighteenth century, of a geographic plurality of international systems, and especially the emergence of a distinctive 'European' international law that would, in the course of the nineteenth century, become the dominant 'system' of international law. Section C thereafter explores three major counter-currents to the supposed universality of this European international law in the twentieth century: the 'Socialist' conception of international law, the 'Third World' conception of international law and the 'new' European Union conception of international law. A Conclusion will return to the methodological question, posed at the beginning of this chapter, namely: how best to conceptualise and define the discipline of comparative international law today.

B. Out of One, Many – Part I: International Systems in the Nineteenth Century

Unlike the naturalist-rationalist conception of international law that insisted on the universality of its law of nations,[22] eighteenth-century Europe rediscovered that different civilisations had developed their own normative thinking about the relations between different peoples. An early comparative view here notoriously held that '[a]ll nations have a right of nations; and even the Iroquois, who eat their prisoners, have

[21] My chapter aims to primarily present the geographic (synchronic) co-existence of parallel systems of international law over time. It is not concerned with the historical (diachronic) distinctions between 'rationalist', 'historicist' or 'positivist' systems or periods in the history of (Western European) international law. For this 'historical' variant of comparative international law, see especially P Vinogradoff, *Historical Types of International Law* (Leiden: Brill, 1923), as well as, more recently, W Grewe, *The Epochs of International Law* (Berlin: de Gruyter, 2000). The synchronic and diachronic dimensions of comparative international law may overlap. All 'socialist' authors, for example, expressly endorse different 'historical types' of international law, because international law is seen as a product or 'super-structure' of the social and economic relations of an epoch. See eg DB Lewin et al (eds), *Völkerrecht – Lehrbuch* (Berlin: DDR Staatsverlag, 1967) 21: 'Jedem historischen Typ der Klassengesellschaft entspricht ihr eigenes Völkerrecht.'

[22] E de Vattel, *The Law of Nations*, tr J Chitty (Johnson & Co, 1883). The book was originally published in 1758. The subtitle of Vattel's book importantly is *Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns.*

one'.[23] Yet Montesquieu's extreme national approach would not prevail in the nineteenth century. It is, instead, a regional or civilisational approach to international law that gains the upper hand. Let us analyse this regional approach in a first step (section B.1), before exploring the rise of European international law in a second step (section B.2).

1. After 'Naturalism': The Recognition of Diverse Positive International Legal Systems

In the last quarter of the eighteenth century, a number of German 'positivist' legal scholars began to closely analyse existing state practices in order to discover the 'real' international law between states. It was soon found that this positive international law could be different, according to the states or regions involved. A good illustration of this discovery is Moser's 'First Principles of Today's European Law of Nations' (1778).[24] Moser here admits that there exist '*many positive* or particular' international legal orders;[25] and that 'Europe' only constitutes one such regional system with its own international customs.

This positivist conception is subsequently taken up by von Martens, whose textbook *The Law of Nations* (1785) was to become an international bestseller in the nineteenth century.[26] Like Moser, Martens also believed that the existence of various positive international orders cannot be doubted. The latter were rooted in 'the resemblance of manners and religion, the intercourse of commerce, the frequency of treaties of all sorts, and the ties of blood between sovereigns'.[27] And these social ties had, within Europe, created a 'society of nations and states' that, while falling short of a 'state' or

[23] C de Montesquieu, *The Spirit of the Laws*, tr A Cohler et al (Cambridge: Cambridge University Press, 1989) 8.

[24] JJ Moser, *Erste Grundlehren des jetzigen Europäischen Völker-Rechts, in Friedens- und Kriegs-Zeiten* (Raspe, 1778). Moser considers himself to be the first to have created the idea of a 'European' international law. On Moser's empirical programme generally, see A Verdross, 'J.J. Mosers Programm einer Völkerrechtswissenschaft der Erfahrung' (1922) 3 *Zeitschrift des öffentlichen Rechts* 96.

[25] Moser (n 24) § 15.

[26] After a first Latin edition in 1785, a French edition (1789) and a German edition (1796) are followed by an English edition in 1802. The following section is based on the first English edition.

[27] GF von Martens, *A Compendium of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe*, tr Cobbett (Cobbett, 1802) 27.

'republic',[28] did nonetheless form a normative system in which a positive law could be found.

The most reflective and comparative version of this regional international systems theory can be found in the work of Robert Ward.[29] Ward accepts, with his predecessors, that different positive international laws exist; and like Moser and Martens, he also thinks that for this positive law to be binding, it needs a 'binding principle' behind it. That binding principle is found in 'religion, and the moral system engrafted upon it'.[30] The world thus 'falls into different divisions or sets of nations, connected together under particular religions, moral systems, and local institutions, to the exclusion of other divisions or sets of nations'.[31] Unlike Montesquieu's national relativism, Ward here comes to embrace an *international* relativism: each 'system of morality' generates one particular system of international law. Next to a Christian Law of Nations – that applies to the European nations – there co-exists an Islamic Law of Nations, as well as a Chinese Law of nations and so on.[32]

By the time that Ward was writing, the central normative principles of the 'Islamic' and the 'Chinese' international law systems had become well known. There had, of course, been extensive cultural and diplomatic contacts between Europe and the Ottoman Empire; and just two years prior to the publication of Ward's book, a notorious encounter between the European and the Chinese conception of international law had taken place, when the English ambassador to China had refused the acknowledge the universal supremacy of the Chinese Emperor over the rest of the world.[33]

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[28] ibid 27, fn: 'We may compare this society of European powers to a people before they form themselves into a state; that is to say, before they acknowledge any sovereign power over them. The states of Europe need then make but one step, to advance from the natural to the civil state, and to form themselves into an universal monarchy or republic; but this step they will never make.'

[29] Ward (n 2).

[30] ibid xxxv.

[31] ibid xiii.

[32] Ward lists seven 'classes of nations' expressly (ibid 139), but appears to be open to more: 'Thus then, distinct Classes of Nations have distinguishing Sets of customs. The North American Indians have one; The Indians of the South Sea another; The Negroes a third; the Gentoos a fourth; The Tartar Nations a fifth; The Mahometans a sixth; The Christians a seventhes, and so on.' Ward also accepts that some nations may exist 'in a kind of twilight' between two international systems, and here mentions the Turkish Empire as an example (ibid 163).

[33] For this famous encounter, see D Mungello, *The Great Encounter of China and the West, 1500–1800* (Lanham, Md: Rowman & Littlefield, 2005), esp 126 et seq.

What, then, were the main differences and similarities between these international systems? The classic Islamic international system divided the world into two spheres: the realm of Islam (*dār al-islām*) in which a single law was to govern all Muslims, and the realm of war (*dār al-harb*) in which no law was to apply.[34] Unlike the European idea of a sovereign equality between states, under this normative conception there cannot be 'a family of nations composed of states enjoying sovereign rights and equality of status', because 'the law of Islam recognizes no other nation than its own'.[35] And while there may appear to be international 'treaties' with non-Islamic states, these were not seen as implying equality or permanency; they were, instead, regarded as unilateral concessions that temporarily suspended the holy war (*jihad*) against non-Muslims.[36] Classic Islamic international law is thus, in essence, a 'law of war', which is regarded 'as an instrument for universalising' Islam to the entire world.[37]

The classic Chinese system, by contrast, assumed the universal superiority of China. While it distinguished, according to Fairbank, three different cultural zones,[38] these three zones nonetheless formed part of a the 'unified and centralised' Chinese world order. The latter was, once more, 'not organised by a division of territories among sovereigns of equal status'; rather, its 'organising principle' was that of 'superordination-subordination' under a universal Chinese 'empire'.[39] International agreements between China and a 'barbarian' nation were considered impossible;[40]

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[34] For overviews here, see M. Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD: Johns Hopkins Press, 1955); IK Salem, *Islam und Völkerrecht: Das Völkerrecht in der islamischen Weltanschauung* (Thatcham: Express, 1984); as well as, more recently, S Laghmani, *Islam et droit international* (Leiden: Brill, 2023).

[35] M Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 *American Journal of International Law* 358.

[36] ibid 360.

[37] Khadduri (n 34) 51. For the same point, see Laghmani (n 34) 60 and esp 150: 'Ce que l'on appelle *siyar*, est, de ce point de vu, le droit d'un empire et plus précisément un droit impérial.'

[38] JK Fairbank, 'A Preliminary Framework' in JK Fairbank, *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press, 1968) 1, 2.

[39] ibid 9 See also Li Zhaojie, 'Traditional Chinese World Order' (2002) 1 *Chinese Journal of International Law* 20, 29 and 34: '[T]he concept of Chinese universal empire was that of an all-embracing domain, which included the whole world known to it … Such a hierarchically-structured world order was therefore characterized by the absence of state-to-state relations on the basis of principles of sovereign equality and territorial independence like the European world order…'

[40] On the Chinese notion of 'barbarians', see ICY Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858–1880* (Cambridge, MA: Harvard University Press, 1960) 7: 'Not only the Chinese language, but the Chinese people in their attitude toward the barbarians, often compared them

they were but unilateral concessions granted by the Chinese emperor.[41] And, again, unlike the classic European conception of sovereign equality, 'all other non-Chinese nations had to be submissive and obedient',[42] because the Chinese 'state' was charged with 'the administration of civilised society *in toto*'.[43]

2. 'European' International Law: From Particular to Universal Order

How would the nineteenth century deal with these three international systems? The European law of nations was quickly adopted by the United States of America. It can, for example, be found in Kent's *Commentaries on American Law* (1826).[44] Following Ward, 'Europe' is here identified with 'Christianity',[45] as this normative conception of European international law allowed the United States – geographically remote from Europe – to explain why it could adopt (and benefit from) the customs and laws of the old continent.[46] Ward equally influenced Henry Wheaton – whose 1836 *Elements of International Law* were to shape Anglo-Saxon thinking for almost a century.[47] Here we read:

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to animals. … Barbarians, in a strict sense, were not foreigners, for they were not outside the domain of the universal Chinese empire. They were but "uncivilized and outlandish" peoples awaiting assimilation into the Chinese orbit through cultural transformation.' It is only with the 1858 Treaty of Tien-tsin that China was prohibited from using the word 'barbarian' with regard to certain Western states. See, eg, art LI of the Peace Treaty between the Queen of Great Britain and the Emperor of China, in FL Israel (ed), *Major Peace Treaties of Modern History, 1648–1967*, vol II (Maidenhead: McGraw-Hill, 1967) 1065.

[41] According to Yasuaki, 'When was the Law of International Society Born?' (n 1), this conception even applied to the 1842 Treaty of Nanjing that, from the traditional Sinocentric worldview, saw the Chinese Emperor unilaterally allowing the 'barbarians' to settle their own disputes in China (ibid 31).

[42] Zhaojie (n 39) 34.

[43] ibid 48 (with reference to Mancall).

[44] J Kent, *Commentaries on American Law* (Halsted, 1826).

[45] Robert Ward is quoted already in Lecture 1 (ibid 4), and when Kent comes to assert that of all causes 'the most weight is to be attributed to the intimate alliance of the great powers as one Christian community', he has heavily relied on Ward.

[46] In one important way, however, the 'New World' quickly opposed the old one. For with the emergence of the European Concert and the Holy Alliance in post-Napoleonic Europe, the young American Republic could not accept the monarchic principle and the 'Monroe Doctrine' would become a cornerstone of an 'American' international doctrine – especially the later (Latin) American conception of International Law.

[47] H Wheaton, *Elements of International Law* (Caray, Lea & Blanchard, 1836). The influence of Wheaton's *Elements of International Law* can hardly be exaggerated. In addition to the editions Wheaton published himself, posthumous American editions by WB Lawrence and RH Dana ran alongside separate English and French editions. Italian, Chinese and Japanese editions started to be published after 1860.

> There is … no universal immutable law of nations, binding upon the whole human race – which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and pagan have recognised in theory or in practice … The ordinary jus gentium is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations. Hence the international law of the civilized, Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing.[48]

The passage was undoubtedly influenced by Montesquieu and Ward;[49] yet, unlike the latter's normative relativism, Wheaton's identification of European international law with 'civilisation' as such was to increasingly establish a hierarchy between the various regional systems of international law. How did this happen? European states came to assume that, despite their belief in sovereign equality, there was a hierarchical chain of being in which other societies reflected lower evolutionary stages when measured against the 'most advanced' European standard of civilisation.[50] Within the nineteenth century, the key representative of this kind of hierarchical thinking was John Stuart Mill.

Mill had worked on the idea of 'civilisation' since 1836;[51] and in his 'A Few Words on Non-Intervention' (1859),[52] he famously made a categorical distinction between those international law principles governing civilised nations and those principles that would govern situations in which one party was at a 'high' and the other at a 'low' stage of civilisation.[53] Within the former situation, 'civilised peoples' were seen to be 'members of an equal community', whose independence and sovereignty would need to be respected; yet the same principles could not apply to the relationship between civilised and uncivilised states.[54]

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[48] Wheaton (n 47) 44–45.

[49] ibid 44: 'Montesquieu deduces the peculiar law of nations prevailing among different races from their peculiar moral and psychological circumstances, in the same philosophical spirit with which he traces the origin and history of the civil laws of different nations.' However, Wheaton also heavily borrowed from Ward, whose work on the *History of the Law of Nations in Europe* was cited.

[50] G Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984).

[51] JS Mill, *Civilisation* (1836) in *The Collected Works of John Stuart Mill*, vol XVIII, ed J Robson (Toronto: University of Toronto Press, 1977) 117.

[52] JS Mill, *A Few Words on Non-Intervention* (1859) in *The Collected Works of John Stuart Mill*, vol XXI, ed J Robson (Toronto: University of Toronto Press, 1984) 109.

[53] ibid 118.

[54] ibid: 'To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a

Part and parcel of Mill's dual conception of international law is, thereby, his 'civilisational' imperialism. For in seeing Europe – and especially the United Kingdom and the British Empire – as the highest civilisation on earth, and considering mankind as 'one not because it [is] everywhere the same, but because the differences [represent] different states in the same process',[55] a hierarchy of states comes to be established, and that hierarchy ultimately justifies advanced states to lead and teach non-civilised states in the general interest of humanity as a whole. And this hierarchical view will soon come to mean the following:

> Strictly speaking, there is not one International Law, but several. Wherever a group of peoples are compelled by local contiguity or other circumstances to enter into relations with each other, a set of rules and customs is sure to grow up among them, and their intercourse will be regulated thereby. The rules will differ at different times and among different groups. Their nature will be determined by the ideas current upon the subject of international intercourse and the practices permissible in warfare. … But though there are several systems of International Law, there is but one important system, and to it the name has been by common consent appropriated. It grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome. It has been adopted in modern times by all the civilized states of the earth.[56]

The European society of states and 'its' international law is here portrayed as a universalistic society-in-becoming. For if the European standard is the most advanced standard, each society that wishes to interact with the Western world will have to conform to this standard. Ward's earlier relativist conception of different 'classes' of states having *each* developed their own (regional) international system is here rejected. There exists only *one* proper system of international law, membership of which is, however, still 'incomplete' because it depends on whether the 'European' standard of civilisation has been reached.[57]

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grave error, and one which no statesman can fall into, however it may be with those who, from a safe and irresponsible position, criticize statesmen.'

[55] JW Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge: Cambridge University Press, 1968), 98.

[56] TJ Lawrence, *The Principles of International Law* (Heath, 1898) 4.

[57] L Oppenheim, *International Law: A Treatise*, vol I (London: Longmans, 1912) § 103: 'Doubtful is the position of all non-Christian States except Turkey and Japan, such as China, Morocco, Siam, Persia, and further Abyssinia, although the latter is a Christian State, and although China, Persia, and Siam took part in the Hague Peace Conferences of 1899 and 1907. Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible.'

This European conception of international law would conquer the world, by force and by assimilation, in the long nineteenth century. After the United States, it was 'appropriated', albeit with caveats, by Latin America;[58] and by the middle of the nineteenth century, the Ottoman Empire – the leading Islamic power – was admitted into the European family of nations.[59] The integration of the Chinese international system took place in the second half of the nineteenth century. The Treaty of Nanjing (1842) here represents an infamous starting point.[60] For in the course of the next decades, the Chinese Empire reluctantly began to absorb the 'European' counter-conception; [61] and by the end of the nineteenth century, this European conception had imposed itself on much of Asia, with Japan and China in particular having entered into the (European) family of nations.[62]

By the end of the First World War, it appeared to many (European) contemporaries that the European international order had become 'universal'. With the creation of the League of Nations in 1919, a first universal international organisation had been created that, while still dominated by European states, was open to any fully self-governing state of the world.[63] And yet, in one of history's many ironies, it is at the very moment

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[58] For a detailed story of this development, see A Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harvard International Law Journal* 475. By the beginning the 20th century, however, some Latin American authors start to insist on a specifically (Latin) American conception of international law. See A Alvarez, 'Latin America and International Law,'(1909) 3 *American Journal of International Law* 269, esp 273 and; more recently, JP Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford: Oxford University Press, 2017).

[59] For an excellent summary of this story, see Yasuaki, 'When was the Law of International Society Born?' (n 1) 33–39.

[60] Y Zewei, 'Western International Law and China's Confucianism in the 19th Century: Collision and Integration' (2011) 13 *Journal of the History of International Law* 285; and now also S Hong-Lam, 'The Gentle Civilizer of the Far East – A Re-Examination of the Encounter between "China" and "International Law"' (2024) 26 *Journal of the History of International Law* 1.

[61] Part and parcel of this legal 'transplantation' was the translation of classic 'European' authors – like Wheaton. For a wonderful discussion of this aspect, with regard to China in particular, see Hsü (n 40), esp ch 8.

[62] The exact dates of this collapse of the Sinocentric system and its replacement by the Eurocentric system of international law are disputed. For excellent accounts here, see ibid, as well as R Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847–1911* (Leiden: Brill, 2007). For a brief discussion of the Japanese case, M Zachmann, 'The Reception and Use of International Law in Modern Japan, 1853–1945' (2014) 19 *Zeitschrift für Japanisches Recht* 109.

[63] Art 1 of the 1919 Covenant of the League of Nations provided that '[a]ny fully self-governing State, Dominion or Colony … may become a Member of the League if its admission is agreed to by two-thirds of the Assembly'. On China's position here especially, see Y Zhang, *China in the International System, 1918–1920: The Middle Kingdom at the Periphery* (London: Palgrave, 1991).

when the universal 'League of Nations' is conceived that a 'New World' is born. For with the success of the Bolshevik Revolution and the creation of the first socialist state in 1922, a new – Marxist – way of thinking about international relations and international law appears on the world stage.

C. Out of One, Many – Part II: International Systems in the Twentieth Century

The twentieth century gradually sees the re-emergence of new 'families' of nations. A socialist conception of international law would gain prominence after the Second World War, when the Union of Soviet Socialist Republics (USSR) extended its ideology to the 'Second World' (section C.1). Simultaneously, the decolonisation of the 'First World' created a 'Third World' of newly independent and developing states, with their own conception of international law (section C.2). And, once more with a degree of historical irony, even within Europe, a 'new legal order of international law' was beginning to emerge among the Member States of the European Union (section C.3). Let us look at this re-fragmentation of international law in more detail.

1. The 'Second World': The Socialist Family of Nations

What was the international law conception of the socialist family of nations? With the birth of the USSR, an explicitly Marxist-materialist conception of law entered the international arena. From its perspective, modern international law was 'the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world'; and as such, it was nothing but 'the continuation of one armed conflict and the preclude to the next'.[64]

But if international law was merely the result of the capitalist 'mode of production' and the legal expression of bourgeois 'class domination', how can a Socialist State engage with it? The first tentative answer that Soviet international law scholarship here gives is the idea of a temporary compromise:

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[64] E Pashukanis, 'International Law' (1925) in E Pashukanis, *Selected Writings* (Cambridge, MA: Academic Press, 1980) 168, 169.

> With the emergence of Soviet States in the historical arena, international law assumes a different significance. It becomes the form of a temporary compromise between two antagonistic class systems. This compromise is effected for that period when one system (the bourgeois) is already unable to ensure its exclusive domination, and the other (proletarian and socialist) has not yet won it. It is in this sense that it seems possible, to us, to speak of international law in the transitional period. … International law becomes inter-class law...[65]

This first socialist approach had originally been proposed by Yevgeny Korovin, according to whom this inter-class law was not only a 'temporary' but also a 'non-universal' international law.[66] There simply could not be a universal international law because the economic base structures of capitalism and socialism were radically different. This view would, however, soon fall out of favour with the Stalinist State, yet rather than offering its own positive conception of international law, the attitude of Soviet scholars during this second stage remained purely negativistic: 'The USSR does not accept all institutions and models of bourgeois international law – it openly rejects those which emerged as institutions for the enslavement of small and weak peoples by the groups of imperialist government.'[67]

In a third stage, finally, Soviet scholarship returned to a more positive conception of Socialist international law. It came to accept the existence of a historically conditioned capitalist *general* international law in addition to a more *specific* and 'higher' socialist international law.[68] Rejecting the 'constitutionalist' reading of the United Nations, because it undermined its pluralist conception of international law,[69] capitalist and socialist international law were here seen as 'law'; yet the normative principles that animated both systems of international law were different. General international law

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[65] ibid 172—73.

[66] EA Korovin, 'Das Völkerrecht der Übergangszeit' (1925), as discussed in AN Makarov, 'Die Völkerrechtswissenschaft in Sowjetrussland' (1936) 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 479, 481.

[67] A Vyshinsky, as quoted in E Green, 'Socialist Internationalism: *Theoria* and *Praxis* in Soviet International Law' (1988) 13 *Yale Journal of International Law* 306, 309.

[68] This idea of a specific socialist law had originally been rejected; yet post-Stalinist scholarship comes to emphatically accept this point, see eg DB Lewin et al (eds), *Völkerrecht: Lehrbuch* (Berlin: Staatsverlag der DDR, 1967) 20; as well as GI Tunkin, *Theory of International Law* (Cambridge, MA: Harvard University Press, 1974) 427.

[69] On this anti-mondialism, see E McWinney, 'Ideological Conflict and the Special Soviet Approach to International Law' (1971) 3 *University of Toledo Law Review* 215, 217.

was governed by the principle of 'peaceful coexistence'; socialist international law was, by contrast, informed by the idea of 'proletarian internationalism'.[70]

What are the main characteristics of this proletarian internationalism? The latter was given legal shape through three socialist legal principles, namely: the principles of fraternal friendship, close cooperation and mutual assistance.[71] The last principle in particular plays a distinct role for socialist international law and means the following:

> Proletarian internationalism has signified and does signify above all the unity of the proletariat of various countries in the class struggle against capital for a socialist reconstruction of society. … An important part of this struggle is the joint defence of the socialist system from any attempt of forces of the old world to destroy or subvert any socialist state of this system. … A vivid manifestation of this policy is the assistance of the Soviet Union to the Hungarian people of 1956 and the assistance, together with other socialist counties, to the people of Czechoslovakia in 1968 in protecting socialist gains and, ultimately, in defending their sovereignty and independence from sudden swoops of imperialism...[72]

Proletarian or socialist internationalism was thus based on the concept of 'limited' or 'socialist' sovereignty, which subjected the independence of each socialist state to the higher values of Marxist-Leninism.[73] This was to preserve the unity and integrity of the Socialist Commonwealth – the Second World, where individual national interests ought to always be subordinated to the fraternal common will of all other socialist states, and especially that of its oldest and most powerful member: the Soviet Union. It is this Soviet-centredness against which Chinese socialism would, after a while,[74] rebel through the development of its own 'Third World Conception' of international law. And in denouncing the idea of socialist sovereignty as a form of 'imperialism',

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[70] Tunkin (n 68) 432: 'The principles of proletarian internationalism have become international legal principles of relations between countries of the socialist system by way of custom and, partially, by treaty. These principles, which have been applied in the practice of relations between socialist countries, have been recognized by all states of the world system of socialism as international legal principles.'

[71] ibid 434–35. See also T Schweisfurth, *Sozialistisches Völkerrecht?* (Berlin: Springer, 1979), 273.

[72] Tunkin (n 68) 434–36. Similarly, Lewin et al (eds) (n 68) 85.

[73] For an excellent discussion of the relationship between 'sovereignty' and 'socialism', and the idea of 'socialist sovereignty', see RA Jones, *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev: The Brezhnev Doctrine* (London: Macmillan, 1990) esp 257–58.

[74] Originally, Communist China had closely followed the Soviet-Socialist conception of international law: see H Chiu, Communist China's Attitude Towards International Law, (1966) 60 *American Journal of International Law* 245; and more generally JA Cohen and H Chiu, *People's China and International Law: A Documentary Study*, vol 1 (Princeton, NJ: Princeton University Press, 1974).

Chinese communism comes to adopt its own specifically socialist conception of international law.[75]

2. 'Third World' Approaches to International Law (TWAIL)

The 'Third World' conception of international law originally grew out of the desire for a 'non-aligned' antiimperialist alternative to the Western-capitalist (First World) and Eastern-socialist (Second World) conceptions of international law.[76] Formally starting with the 1955 Bandung Conference that brought together a number of African and Asian states – especially China[77] – it came to be embraced by most of the decolonised states that had – after 1960 – become independent.

These 'new states' originally shared the Soviet-Socialist scepticism towards the 'liberal' nineteenth-century international law, because of its Eurocentric and imperialist nature.[78] And reclaiming their own histories,[79] they began questioning the binding nature of those 'European' customs and international treaties that seemed to contradict the interests of decolonised states:

> [I]t is incumbent upon the Third World countries to re-examine the principles, rules and regulations of traditional international law and to decide which of them ought to be rejected and which ought to be retained or even reaffirmed and given renewed emphasis.[80]

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[75] On this point, see S Jaschek, 'Die Chinesische Völkerrechtsdoktrin im Lichte der Drei-Welten-Theorie' (1978) 21 *German Yearbook of International Law* 363; as well as W Butler, 'Anglo-American Research on Soviet Approaches to Public International Law' in Butler (ed), *International Law in Comparative Perspective* (n 6) 169, 181–82. For a more recent analysis, see also T Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, MA: Harvard University Press, 2013).

[76] W Tieya, 'The Third World and International Law' in Chinese Society of International Law, *Selected Articles from the Chinese Yearbook of International Law* (Beijing: China Translation & Publishing Corporation, 1983), 6.

[77] C Yifeng, 'Bandung, China, and the Making of World Order in East Asia' in L Eslava et al (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017), 177.

[78] RP Anand, *New States and International Law* (Noida: Vikas, 1972) 45: '[E]ven a cursory look at the history of international law leaves no doubt about the Eurocentric nature of this law developed by and for the benefit of the rich, industrial, and powerful states of Western Europe and the United States.'

[79] eg TO Elias, *Africa and the Development of International Law* (Leiden: Sijthoff, 1972), esp ch 1; RP Anand, *Studies in International Law and History: An Asian Perspective* (Leiden: Brill, 2004).

[80] Tieya (n 76) 20.

According to the 'clean slate' theory, therefore, only those norms to which these new states could have expressly or implicitly consented to were to be binding on them.[81]

Yet unlike the Soviet view in favour of a special Socialist international system, the early Third-World conception of international law rejects the idea of distinct subsystems of international law.[82] On the contrary, to many Third-World scholars, only through decolonisation had international society become truly universal and the future task of legal scholarship was to make international law reflect this new universality. In the words of Anand:

> Today, with the reappearance of the new African-Asian states, the international society has become universal. The traditional international law, the parochial law of the European Powers, is bound to be affected by the new sociological structure of the society. While a large part of this law is fairly reasonable, useful and adjustable to the new international social structure, and cannot and should not be discarded, it requires complete overhaul and adaption to new circumstances. Like the present society and the classical international law, it must become universal to serve the interests of all the states, and help in the establishment of peace and security. In order to command respect to all the states it must extend from a European national law to a common law of mankind.[83]

What should this 'common law of mankind' look like? It would need to reflect the interests of all states; and in a demand that parallels nineteenth-century socialism, only a degree of *material* equality was ultimately seen to guarantee the sovereignty of all states. It followed that post-colonial international law would need to contain a global-solidaristic project that pursued economic development;[84] and it is in that context that a 'New International Economic Order' (NIEO) is envisaged.[85] The NIEO is the first attempt to institutionalise the 'welfare state' at the international level and it represents, to date, the 'biggest departure' from the Western liberal conception of (European) international law.[86]

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[81] A Krueger, *Die Bindung der Dritten Welt an das postkoloniale Völkerrecht* (Berlin: Springer, 2018) 54–64.

[82] GM Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *Howard Law Journal* 95, 105.

[83] Anand (n 78) 114.

[84] Krueger (n 81) 101.

[85] Most famously here, M Bedjaoui, *Towards a New International Economic Order* (Teaneck, NJ: Holmer & Meier, 1979). For a subsequent account, see PN Agarwala, *The New International Economic Order: An Overview* (Oxford: Pergamon, 1983).

[86] A Gotachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton, NJ: Princeton University Press, 2019) 12.

The vehicle to adopt and implement the NIEO was quickly identified: universal international organisations: '[I]nternational organizations, and especially the United Nations, provide an ideal context for the drafting of a legal new deal with a view to the transformation of the international economic order and the development of all peoples.'[87] The special role of the United Nations, and its 'political' organs in particular,[88] here led to another significant feature of the Third-World international law project – the demand to transform the United Nations General Assembly into a formal international legislature. In the words of Mohammed Bedjaoui:

> Through its egalitarian character, its majority basis and hence its democratic origins, the [General Assembly] resolution seems to [Third World States] to present sufficient guarantees as a method for the elaboration of international norms responding to today's needs. The preference of Third World States for resolutions as instruments for the progressive development of international law can thus be explained: first, by the conception these States have of the role of international organizations and especially the General Assembly of the United Nations; next by the speed of adoption of a resolution; and last, by the resolution's flexibility, since it can quite easily be changed to take account of developments in the world.[89]

Yet in the absence of a convincing concept of international democracy or demoicracy,[90] and in the face of powerful 'Western' resistance, the democratic and redistributive Third World conception of international law eventually fails. Worse, from the early 1980s onwards, an alternative neo-liberal philosophy swept over international law and has today eradicated, almost completely, the conditions of possibility behind this democratic-redistributive common-law-of-mankind conception. Reacting to this dramatic failure, a new generation of Third-World

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[87] Bedjaoui (n 85) 140. See also G Abi-Saab, 'Introduction: The Concept of International Organization – A Synthesis' in G Abi-Saab (ed), *The Concept of International Organization* (Paris: UNESCO, 1981) 9, esp 23.

[88] R Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963).

[89] Badjaoui (n 85) 140.

[90] I Claud, *Swards into Plowshares: The Problems and Progress of International Organisation* (Maidenhead: McGraw-Hill, 1984) 126: 'Majority decisions in the equalitarian General Assembly are likely to be undemocratic in the sense that they do not represent the majority of the world's population, unrealistic in the sense that they do not reflect the greater portion of the world's real power, morally unimpressive in the sense that they cannot be identified as expressions of the dominant will of a genuine community, and for all these reasons ineffectual and perhaps even dangerous.' For a discussion of the concept of demoicracy in the international arena, see R Schütze *We, the Peoples: Models of Demoicracy* (Oxford: Oxford University Press, in preparation).

scholars began, henceforth, to re-conceptualise TWAIL in the 1990s.[91] This 'TWAIL II' scholarship, however, differs significantly from its precursor. For in its most extreme version, it altogether rejects international law;[92] while even its more moderate expressions have replaced the constructive and affirmative TWAIL I with a negative 'critical legal studies' approach.[93]

3. Supranational 'International' Law: The New 'European' Legal Order

With the disappearance of the real-existing 'Socialist Commonwealth' after 1989, and the gradual fading of the original Third-World conception of international law, did the Western-liberal conception of international law again become universal? By the early twenty-first century, it indeed seemed to some that a 'new world order', based on Western liberal-capitalist principles, had arrived.[94] General international law, while open to internal critiques and distinct methodological approaches,[95] appeared to have become truly 'international'.[96] And yet what this 'end of history' view neglects is an important 're-particularising' development that had already started early in the

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[91] On the distinction between TWAIL I and TWAIL II, see A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77.

[92] The most radical TWAIL II critique has thus contended that the entire 'regime of international is illegitimate' as a 'predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West'. See MW Mutua, 'What is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

[93] For this excellent point, J Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 *Canadian Journal of Law and Jurisprudence* 383. Similarly, G Abi-Saab, 'The Third World intellectual in praxis: confrontation, participation, or operation behind enemy lines?' (2016) 37 *Third World Quarterly* 1957, esp 1958: 'I am with two minds about the label TWAIL. If it is taken literally – Third World Approaches to International Law – then, of course, I am a TWAILer or TWIALian. But if it is taken, as presented or perceived by some, as an off-shot of the Critical Legal Studies school, I am not.'

[94] Nothing signals this self-celebratory arrival more than AM Slaughter, *New World Order* (Princeton, NJ: Princeton University Press, 2005).

[95] SR Ratner and AM Slaughter (eds), 'Symposium on Method in International Law' (1999) 93 *American Journal of International Law* 291.

[96] It is against this post-1989 'universalistic' background that Roberts et al 'discover' comparative international law at a moment in time when earlier alternative regional conceptualisations of international law had largely disappeared from the textbooks of international law; and it is for this reason, it seems to me, that the 'national' diversity route appears to them as the only way forward for re-conceptualising the discipline of comparative international law. Yet are major disagreements between Russia or China (or the United States) and other states really something new and distinctive? Has the invisible college not always been divisible along 'ideological' lines during much of the 20th century? Historical amnesia is, of course, an infallible ingredient to 'discovering' new fields.

twentieth century: the rise of regional international organisations (RIOs).[97] Important post-1945 milestones here are the founding of the Organization of American States (1948),[98] the European Community (1957, since 1993: the European Union), the Association of Southeast Asia (1961, since 1967: ASEAN), and the Organization of African Unity (1963, since 2002: the African Union).

What stands behind this 'new regionalism' in the second half of the twentieth century? It is, with Alvarez, to some extent the realisation that '[t]o pretend that all states that form the community of nations should be always governed by the same identical rules, would be equivalent to a denial of the right of groups of nations of special origin and geographical situation to develop in conformity to their nature when they are able to so develop'.[99] And by the twenty-first century, it had also become clearer that modern international law simply lacked the normative and decisional structures for collective international government. Not only does it still adhere to the 'sovereign equality' of all states;[100] its adherence to state voluntarism and the unanimity rule has blocked all major government initiatives on all important global goods (peace, welfare, environment).

A regional approach, by contrast, promised better collective solutions by inviting states to share their sovereignty within a supranational 'union' of states.[101] The best analysed example in this context is the European Union.[102] From the very start, European integration contrasted with international 'coordination' in two essential ways. Normatively, the status of European law within the domestic legal orders would not depend on national law; and decisionally, the creation of many supranational norms would not require unanimous consent. In both respects, the European Union

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[97] JR de Orúe Y Arregui, 'Le Regionalism dans l'organisation International' (1935) 53 *Collected Courses of the Huage Academy* 1.

[98] For an overview here, see OC Stoetzer, *The Organization of American States* (Westport, CT: Praeger, 1993).

[99] A Alvarez, 'Latin America and International Law'(1909) 3 *American Journal of International Law* 269, 346.

[100] Art 2(1) UN Charter: 'The Organization is based on the principle of the sovereign equality of all its Members.'

[101] R Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (Cambridge: Cambridge University Press, 2018).

[102] See eg R Schütze, *European Union Law*, 4th edn (Oxford: Oxford University Press, 2025).

had created '*a new legal order of international law*';[103] and the most iconic new legal principles here were the doctrines of direct effect and primacy:

> By contrast with ordinary international treaties, the [EU] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply … The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.[104]

Ever since its creation, the European Union legal system has thus insisted on its 'autonomy'; and it has defended this autonomy against the normative demands of international law.[105] The United Nations Charter, for example, while having 'special importance' within the European legal order, could thus – at best – have primacy over European legislation but '[t]hat primacy at the level of [European] law would not, however, extend to primary law' as the constitutional basis of the European legal order.[106] The EU legal system thus constituted a special 'international' regime that did no longer derive its authority and normativity from general international law.

How should one think of the European Union and its 'new' legal system? In light of its historical evolution, the European Union today occupies a place somewhere in between an international organisation and a super-state.[107] This 'middle ground' is hard to conceptualise; and from the very beginning, the Union was said to have been 'established on the most advanced frontiers of the [international] law of peaceful cooperation', with its principles of solidarity and integration having taken it 'to the boundaries of federalism'.[108] But was the European Union inside those boundaries or outside them? Comparative international law can here assist in finding answers to these conceptual questions; as much as it can help in analysing the ways in which the

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[103] *Van Gend & Loos* (n 5) 12 (emphasis added).

[104] Case 6/64 *Costa v ENEL* [1964] ECR 585, 593–94.

[105] Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461.

[106] ibid para.308.

[107] R Schütze, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon' (2009) 46 *Common Market Law Review* 1069.

[108] P Pescatore, 'International Law and Community Law: A Comparative Analysis' (1970) 7 *Common Market Law Review* 167, 182.

European Union has itself become a supranational 'model', whose ideas and structures are increasingly diffused and transplanted elsewhere.[109]

D. Conclusion: Realigning Comparative International Law with its History

What should the domain of comparative international law be? As sections B and C have shown, a wide range of different international normative systems have existed over the last 250 years; and from Ward to Butler, several academic writers have engaged in 'comparative' work contrasting these different systems. Related work has, furthermore, focused on the legal 'diffusion' or 'transplantation' processes, especially of European international law, as well as the resulting hybridity that this process has brought.[110] But importantly: the main historical focus has thereby always been on comparing 'systems', 'orders' and 'regimes' of *international* law.

This system-centric approach is very different from the more recent Roberts et al approach in which the field of comparative international law is defined by how different actors, especially *national* ones, understand and interpret international law. The conceptual tensions within this actor-centric definition are, however, serious. For while its national-reception version, ironically, preserves the idea of one underlying universal international law that is only refracted into a plurality of subjective author-perspectives,[111] its national-constructivist version ultimately leads to a denial of international law as law. In essence, and as the *Introduction* has already argued, the Roberts et al approach to comparative international law either leads to a version of international law proper or it becomes comparative foreign relations law. Any good conception of comparative international law, however, should take all three elements of 'comparative', 'international' and 'law' seriously. With Butler, *national* approaches

[109] For interesting comparisons between the African Union and the European Union, see O Amao et al (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (Oxford: Oxford University Press, 2021); and from a political science perspective L Fioramonti and F Mattheis, 'Is Africa Really Following Europe? An Integrated Framework for Comparative Regionalism' (2016) *54 Journal of Common Market Studies* 674.

[110] See n 4.

[111] See again n 18.

to international law, à la Montesquieu or Roberts, should categorically be excluded from its domain.[112]

This refocusing of the discipline in light of its history does not empty its twenty-first century subject-matter. For while the socialist-materialist conception of international law no longer seriously rivals the Western-liberal conception (and TWAIL has transformed itself from a universal-welfarist into a critical-negative project), there continue to be different variations of inter-state law today. Indeed, with the rise of regional international organisations, like the European Union, an important new branch of comparative international law has emerged.[113] The African Union, for example, here offers brilliant possibilities for the international comparativist. For not only has it tried to learn from the legal experiences of the European Union (and the Council of Europe), the 'innovative principles' within its own Constitutive Act will themselves inspire others in turn;[114] and its integrated 'regionalism within regionalism' approach might especially be a future guide for other continents, including Europe.

But apart from the horizontal comparisons between 'regional' international orders – whether at the systemic level or in respect to specific issues, such as human rights[115] – what ought to be included and what excluded from the field of comparative international law?

From the perspective of one regional 'inter-state' system, vertical comparisons can of course go upwards and downwards. The European Union may, for example, be compared to universal organisations, like the United Nations or the World Trade

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[112] For the same reason one might be equally sceptical towards the more recent plea to 're-nationalise' the history of international law. For this Roberts-like attempt to create a 'new' discipline of 'comparative international legal history', see now I de la Rasilla, 'Towards Comparative International Legal History?' (2025) 27 *Journal of the History of International Law* 1.

[113] For good recent overviews of the new 'field' of comparative regionalism, see T Börzel and T Risse (eds), *Oxford Handbook of Comparative Regionalism* (Oxford: Oxford University Press, 2016); as well as C Closa and L Casini, *Comparative Regional Integration* (Cambridge: Cambridge University Press, 2016). See now also S Besson and E Kassoti, 'The International Law of Regional Organizations: Mapping the Issues' (2024) 21 *International Organizations Law Review* 1, which locates this branch specifically within 'comparative international law' (ibid 3).

[114] AA Yusuf, *Pan-Africanism and International Law* (Leiden: Brill, 2014), esp 186 et seq.

[115] eg H Gros Espiell, 'La Convention américaine et la Convention européenne des droits de l'homme : Analyse comparative' (1989) 218 *Collected Courses of the Hague Academy* 167.

Organization;[116] but it can equally be compared to national phenomena, like the United States or the German Federal Republic.[117] Legal diffusion or transfers may also happen in both directions: US American and German federalism has thus inspired the European Union in the past; while the latter's hybrid federalism has more recently informed British constitutional law with regard to devolution.[118] Yet *nota bene*: in every comparison so far mentioned, one unit of analysis has always been an inter-state system, like the European Union. For as soon as two states are compared – even as regards their approaches to international law, we are in the realm of comparative constitutional law – not comparative international law.[119]

What about comparisons between different branches of international law? In the last 100 years, the scope of international law has enormously expanded. In addition to dealing with 'war and peace', 'trade' and diplomatic relations, modern international law now covers, inter alia, international human rights, international crimes and international environmental issues. This ever-increasing specialisation has led to the 'fragmentation' of general international law into distinct parts or specialised 'legal regimes'.[120] To some, a comparison of these special 'systems' or 'regimes' should also fall within the discipline of comparative international law; whereas others have been more critical.[121] Yet there are good reasons to include these horizontal inter-branch

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[116] Schütze (n 101).

[117] R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009); as well as R Schütze, 'Classifying EU Competences: German Constitutional Lessons?' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States* (Oxford: Hart Publishing, 2017) 33.

[118] The most recent example here is the United Kingdom Internal Market Act 2020. For a comparative analysis, see M. Dougan et al, 'Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020' (2022) 138 *Law Quarterly Review* 650.

[119] In a similar way, the analysis of various *national* approaches to private international law would not be comparative international law but rather comparative 'conflicts' law. By contrast, *inter-state* approaches to private international law would fall within comparative international law: see E Abdallah, 'La Convention de la Ligue arabe sur l'exécution des jugements. Étude comparative du droit conventionnel comparé avec le droit interne' (1973) 138 *Collected Courses of the Hague Academy* 503. With the engagement of the European Union in this area, there is – arguably – also again a 'European' conception of private international law (G v Calster, *European Private International Law* (Oxford: Hart Publishing, 2024).

[120] B Simma, 'Self-Contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111; and more recently B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

[121] Roberts et al, Conceptualizing (n 7) 9: 'Unlike the fragmentation debate, comparative international law focuses primarily, though not exclusively, on interpretations of international law put forward by states and substate actors, such as national courts...'

comparisons, as long as their functional or cultural 'comparability' is given.[122] And the discipline of comparative international law can here be especially useful in its vertical dimension: for each special international system can not only be compared upwards to general international law,[123] the more international law specialises, the more useful downwards comparison to national law will become.

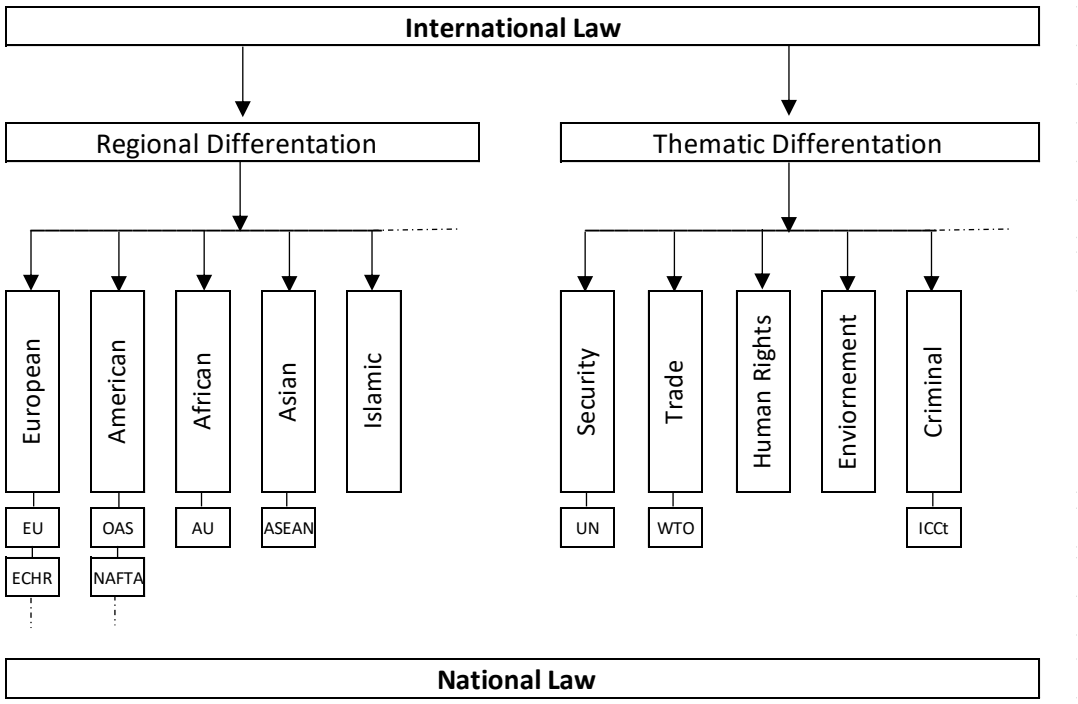

Figure 1. Overview of units of comparative international law

In conclusion, then, and building on Butler' definition, quoted in the *Introduction* above, the field of comparative international law can be historically and conceptually re-defined as follows. *Comparative international law is concerned with the identification and analysis of similarities and differences among regional or specialised systems of international law (horizontal comparison) or between them and general international or national law (vertical comparison), whereby at least one unit of comparison is international or supranational in nature.* Figure 1 gives an overview

[122] M Siems, 'The Power of Comparative Law: What Type of Units Can Comparative Law Compare?' (2019) 67 *American Journal of Comparative Law* 861.

[123] J Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016).

of the various international 'units', whether regional or thematic, that fall within the discipline of comparative international law. This new definition is primarily focused on synchronous comparisons, yet – with Butler – a broadened temporal frame might here also accommodate inter-period comparisons of different historical systems of international law.[124]

[124] See n 21.