

COMPARATIVE INTERNATIONAL LAW: FRAMING THE FIELD

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At first blush, “comparative international law” might sound like an oxymoron. In principle, international law—at least when it arises from multilateral treaties or general custom—applies equally to all parties or states. As a result, international lawyers often resist emphasizing local, national, or regional approaches due to the field’s aspirations to universality and uniformity.¹ Comparativists, meanwhile, frequently overlook the potential to apply comparative law insights to international law on the basis that “rules which are avowedly universal in character do not lend themselves to comparison.”²

However, the traditional division between international law and comparative law is increasingly coming under pressure. Some scholars have challenged the field’s claim to universality by highlighting its Eurocentrism and emphasizing the diversity of national and regional traditions of international law.³ Others have adopted a comparative approach to examine how various

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¹ See, e.g., Mark W. Janis & Ian Brownlie, *Comparative Approaches to the Theory of International Law*, 80 ASIL PROC. 152, 154–57 (1986); Hersch Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT’L L. 31 (1931).

² H. C. Gutteridge, *Comparative Law and the Law of Nations*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 13 (W. E. Butler ed., 1980); see also Mathias Reimann, *Comparative Law and Neighboring Disciplines*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 13, 18 (Mauro Bussani & Ugo Mattei eds., 2012) (“[C]omparative lawyers normally do not study classic international law . . . because the traditional law of nations is perceived as a fairly uniform (international) system that provides little, if any, opportunity to compare anything . . .”).

³ See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); LUCIE DELABIE, APPROCHES AMÉRICAINES DU DROIT INTERNATIONAL: ENTRE UNITÉ ET DIVERSITÉ [AMERICAN APPROACHES TO INTERNATIONAL LAW: BETWEEN UNITY AND DIVERSITY] (2011); XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW (2012); LAURI MÄLSKÖ, RUSSIAN APPROACHES TO INTERNATIONAL LAW (2015); 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. 83, 86 (2011); Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. 292 (2006); Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT’L L.J. 283 (2006); Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT’L L.J. 475 (2010); Francesco Messineo, *Is There an Italian Conception of International Law?* 2 CAMBRIDGE J. INT’L & COMP. L. 879 (2013); Liliana Obregón, *Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America*, in INTERNATIONAL LAW AND ITS OTHERS 247 (Anne Orford ed., 2006); Symposium: *French and American Perspectives Towards International Law and International Institutions*, 58 ME. L. REV. 281 (2006); Onuma Yasuaki, *A Transcivilizational Perspective on International Law*, 342 RECUEIL

state actors, like national courts,⁴ and nonstate actors, like academies,⁵ engage with or approach international law. Still others have explored the effect of legal cultures, families, and traditions on approaches to international law.⁶

The use of comparative approaches in international law finds important antecedents in earlier scholarship.⁷ However, an abundance of new work and a spate of recent conferences evidence renewed interest in this area,⁸ which may reflect the growing globalization of legal practice, the increased penetration of international law into the domestic realm, the rising

DES COURS 77 (2009); Abdulqawi Yusuf, *Diversity of Legal Traditions and International Law: Keynote Address*, 24 CAMBRIDGE J. INT'L & COMP. L. 681 (2013).

⁴ See, e.g., INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA (Magnus Kilander ed., 2010); INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011); NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW (Janne Nijman & André Nollkaemper eds., 2007); THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009); INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS (Helmut Philip Aust & Georg Nolte eds., forthcoming 2016); Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 61–64 (2011).

⁵ See, e.g., ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (forthcoming 2016); Anthony Carty, *A Colloquium on International Law Textbooks in England, France and Germany: Introduction*, 11 EUR. J. INT'L L. 615 (2000); Guglielmo Verdirame, "The Divided West": *International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553 (2007).

⁶ See, e.g., DROIT INTERNATIONAL ET DIVERSITÉ DES CULTURES JURIDIQUES [INTERNATIONAL LAW AND DIVERSITY IN LEGAL CULTURES] (Société Française pour le Droit International ed., 2008); LES PRATIQUES COMPARÉES DU DROIT INTERNATIONAL EN FRANCE ET EN ALLEMAGNE [COMPARATIVE INTERNATIONAL LAW PRACTICE IN FRANCE AND GERMANY] (Société Française pour le Droit International ed., 2012); SARA MCLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS (2011); DANA ZARTNER, COURTS, CODES, AND CUSTOM: LEGAL TRADITION AND STATE POLICY TOWARD INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW (2014); Marco Benatar, *International Law, Domestic Lenses*, 3 CAMBRIDGE J. INT'L & COMP. L. 357 (2014); Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1086 (2008); Colin B. Picker, *The Value of Comparative and Legal Cultural Analyses of International Economic Law* (May 13, 2013) (unpublished Ph.D. dissertation, University of New South Wales), available at <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:11254/SOURCE01?view=true>.

⁷ See, e.g., Emmanuel G. Bello, *How Advantageous is the Use of Comparative Law in Public International Law*, 66 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 77 (1988); Eric Stein et al., *International Law in Domestic Legal Orders: A Comparative Perspective*, 91 ASIL PROC. 289 (1997); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AJIL 427 (1994); Eric Stein, *National Procedures for Giving Effect to Governmental Obligations Undertaken and Agreements Concluded by Governments*, in RAPPORTS GÉNÉRAUX AU IXE CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 581 (1977); Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries*, 48 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 163 (1988). Other early comparative work on international law included debates on competing Western and Soviet approaches. See, e.g., INTERNATIONAL LAW AND INTERNATIONAL SECURITY: MILITARY AND POLITICAL DIMENSIONS. A U.S.-SOVIET DIALOGUE (Paul B. Stephan III & Boris M. Klimenko eds., 1991); PERESTROIKA AND INTERNATIONAL LAW: CURRENT ANGLO-SOVIET APPROACHES TO INTERNATIONAL LAW (Anthony Carty & Gennady Danilenko eds., 1990). On the attitude of newly independent states to the international legal order, see, for example, FELIX CHUKS OKOYE, INTERNATIONAL LAW AND THE NEW AFRICAN STATES (1972); T. O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1972). On the contribution of non-Western legal systems to international law, see, for example, C. G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE (1988).

⁸ See, e.g., Toronto Grp. for the Study of Int'l, Transnational & Comparative Law, Call for Papers: Concerning States of Mind, Disturbing the Minds of States (Jan. 29–31, 2010), available at <https://torontogroup.files.wordpress.com/2009/08/toronto-group-2010-call-for-papers.pdf> (describing a panel entitled "Stories of the

transnational flow of law students, the greater accessibility of diverse national sources through electronic databases, and the movement towards an era of multipolar power. Some scholars have explicitly proposed creating or reviving a field of “comparative international law,”⁹ though its contours and methods remain undefined.¹⁰

The goal of this symposium is to showcase a range of contributions that reflect different aspects of the comparative international law phenomenon and to begin laying a theoretical and methodological foundation for this field. In the following sections, we thus provide a provisional definition of comparative international law, examine some of the methodological questions raised by such comparative scholarship, and explore some of the normative implications of this research. In doing so, we hope to stimulate further research in and debate about this emerging field.

I. CONCEPTUALIZING COMPARATIVE INTERNATIONAL LAW

As a developing field, the contours of comparative international law are necessarily fluid and contingent. Aware of these difficulties, we offer a provisional definition: *comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law*. It differs from debates about fragmentation, which typically concern differences that arise between different subfields of international law, like human rights and trade, or different international institutions, like the International Court of Justice and the international criminal tribunals. Instead, it focuses largely on similarities and differences between national or regional actors in their approaches to international law.¹¹

To provide a framework for analysis, we suggest that comparative insights may be deployed in international law in three main ways: (1) in *identifying* what constitutes international law; (2) in explaining similarities and differences in the *interpretation and application* of international law; and (3) in comparing the *approaches* of national or regional actors to international law.

Gently Civilized: National Traditions in International Law”); Cambridge Journal of Int’l Law, Conference Schedule, 2013 CJICL Conference: *Legal Tradition in a Diverse World* (May 18–19, 2013), available at <http://cjicl.org.uk/wp-content/uploads/2014/01/CJICL-2013-Legal-Tradition-in-a-Diverse-World.pdf>; Duke Univ. Sch. of Law, *Duke University-Geneva Conference on Comparative Foreign Relations Law* (Jan. 29, 2015), at <https://law.duke.edu/news/duke-university-geneva-conference-comparative-foreign-relations-law>; Univ. of Va. Sch. of Law, *27th Annual Sokol Colloquium Brings International Law Luminaries to UVA* (Sept. 12, 2014), at http://www.law.virginia.edu/html/news/2014_fall/sokol.htm.

⁹ See, e.g., Martti Koskeniemi, *The Case for Comparative International Law*, 20 FINNISH Y.B. INT’L L. 1 (2009); Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 389 (2011); Roberts, *supra* note 4, at 61–64.

¹⁰ For instance, in the *American Journal of International Law*’s symposium on the methods of international law, comparativism barely rates a mention. See *Symposium on Method in International Law*, 93 AJIL 291 (1999). The original symposium also did not include a contribution on third world approaches to international law, which forms part of the comparative international law project, though one later appeared in an edited book based on the symposium and was republished in the *Chinese Journal of International Law*. See Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, in *THE METHODS OF INTERNATIONAL LAW* 185 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004); Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2003).

¹¹ Although this forms the core of comparative international law, in some circumstances it may also entail comparisons of how national, regional, and international bodies understand, interpret, apply, and approach international law.

First, comparative law methods may be relevant in *identifying* the existence and content of international law. Identifying customary international law requires international lawyers to look for general and consistent state practice and *opinio juris*. Establishing a general principle of international law often involves analyzing whether certain principles are common to national legal systems, as Neha Jain's contribution analyzes with respect to the approaches adopted by international criminal tribunals.¹² Undertaking comparative analysis may be relevant in codification exercises, as Mathias Forteau describes with respect to the International Law Commission's work.¹³ Comparing national practices may also be relevant when seeking to interpret treaties in light of subsequent practice,¹⁴ as has been done or suggested in fields like human rights law and investment treaty arbitration.¹⁵

Second, comparative studies may be useful in identifying and explaining similarities and differences in the *interpretation and application* of international law. For example, do executives offer different accounts of the same international law rule?¹⁶ Do legislatures adopt uniform approaches when transforming treaty obligations into domestic law or do they vernacularize those obligations in particular and predictable ways?¹⁷ Do national courts provide similar or different interpretations of treaty obligations and, when doing so, do they engage in a transnational dialogue with courts from other states? What explains these similarities and differences and what do they mean for our understanding of international law? Christopher McCrudden takes up this challenge in his analysis of 324

¹² See Neha Jain, *Comparative International Law at the ICTY: The General Principles Experiment*, 109 AJIL 486 (2015).

¹³ See Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, 109 AJIL 498 (2015).

¹⁴ See generally Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT'L CT. & TRIBUNALS 443 (2010); *Analytical Guide to the Work of the International Law Commission, Treaties over Time/Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*, INTERNATIONAL LAW COMMISSION (Sept. 22, 2015), at http://legal.un.org/ilc/guide/1_11.shtml. The U.S. Supreme Court has also wrestled with this problem in interpreting private international law treaties. See *Abbott v. Abbott*, 560 U.S. 1, 16–20 (2010) (discussing state practice with respect to *ne exeat* rights under the Hague Convention on the Civil Aspects of International Child Abduction); *Olympic Airways v. Husain*, 540 U.S. 644, 655 n.9 (2004) (distinguishing British and Australian judicial interpretations of the Warsaw Convention); *id.* at 658–63 (Scalia, J., dissenting) (criticizing the majority for not giving greater weight to other countries' judicial interpretations).

¹⁵ On the use of comparative surveys in interpreting the scope of human rights provisions, see Paul Mahoney, *The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law*, in *COMPARATIVE LAW BEFORE THE COURTS* 135 (Guy Canivet et al. eds., 2004); Kanstantsin Dzehtsiarou & Vasily Lukashovich, *Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court*, 30 NETH. Q. HUM. RTS. 272 (2012). On similar proposals in investment treaty arbitration, see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010); Stephan W. Schill, *General Principles of Law and International Investment Law*, in *INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS* 133 (Tarcisio Gazzini & Eric De Brabandere eds., 2012).

¹⁶ For instance, the executive arms of the American and Russian governments have produced different national security statements that have a bearing on the interpretation and application of the use of force. Compare U.S. DEPARTMENT OF STATE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2010), available at https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf with Министерство Иностранных дел Российской Федерации [The Ministry of Foreign Affairs of the Russian Federation], Концепция Внешней Политики Российской Федерации [Foreign Policy Concept of the Russian Federation] (2000), available at <http://archive.mid.ru/Bl.nsf/arh/19DCF61BEFED61134325699C003B5FA3>.

¹⁷ For instance, a number of states have adopted the international prohibition on genocide in their domestic laws, but with definitions that are broader or narrower than the Rome Statute's definition. See WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW BY NATIONAL COURTS 2 (2006).

national judicial decisions from fifty-five jurisdictions that cite the Convention on the Elimination of Discrimination Against Women.¹⁸

Third, insights from comparative law, comparative politics, and sociology may be useful in explaining different national *approaches* to international law. For instance, how might cross-national legal, political, cultural, and economic differences inform distinct approaches to international law? Do we see similarities or differences based on core/periphery status or membership in different legal families? Are the approaches of different states changing over time and, if so, how and why? An example of this work is Pierre-Hugues Verdier and Mila Versteeg's study of the relationship between international and national law in 101 countries from 1815 to 2013.¹⁹ By studying a large number of countries over time, they are able to show several trends, such as the rise of legislative approval requirements for more treaties in more countries, the increasing prevalence of direct application and hierarchical superiority of treaties, and the almost universal subordination of customary international law to domestic legislation.

II. THE METHODS OF COMPARATIVE INTERNATIONAL LAW

Comparative international law scholarship can draw on theories and methodologies from a wide range of neighboring fields and disciplines, including comparative law, comparative politics, anthropology, and sociology.

An important challenge in deploying comparative analysis in international law is that comparative law itself is fraught with theoretical and methodological debates. Comparative law scholars wrestle with questions such as: whether to focus on formal or functional equivalence across legal systems;²⁰ whether to compare systems' approaches at a high level of generality or focus on specific rules;²¹ and whether to analyze formal legal rules only (thin comparativism) or take into account actual practices (thick comparativism). In cross applying approaches, scholars will also need to critically examine whether some of the standard comparative law debates, such as the existence and importance of legal families, are relevant when applied to international law. Jain's contribution wrestles with a number of these issues in her critique of the methods used by international criminal tribunals to find general principles of law.²²

A recurring issue in comparative international law will be the tension between the breadth and depth of comparative analysis. Given the number of states in the international legal system and the fact that international law rules are often premised on a claim of generality, breadth

¹⁸ Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW [Convention on the Elimination of Discrimination Against Women]*, 109 AJIL 534 (2015) [hereinafter McCrudden, *CEDAW*]; Christopher McCrudden, *Operationalizing the Comparative International Human Rights Law Method: A Case Study of CEDAW in National Courts*, in *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts et al. eds., forthcoming 2016).

¹⁹ Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AJIL 514 (2015).

²⁰ For an overview, see Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006); see also Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 679 (2002) (describing functionalism as the requirement to "analyze not only what rules say, but also what problems they solve in their respective legal system").

²¹ See John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 620 (1998); see also MATHIAS SIEMS, *COMPARATIVE LAW* 26 (2014).

²² Jain, *supra* note 12, at 490–95.

is often important. However, there is an inevitable tension between how many states one can study (horizontal analysis) and how deeply one can delve into the details of any particular state (vertical analysis). Thick descriptions that focus on living cultures rather than formal legal rules may offer the best chance of understanding the function certain international legal concepts play in particular societies. But the thicker the vertical analysis, the less likely it is that international lawyers will be able to undertake wide-ranging horizontal analyses, and vice versa. As a field, we should thus expect to see a combination of approaches developed.

As Verdier and Versteeg's contribution shows, it is possible to develop large *n* databases and employ statistical techniques such as regression analysis to identify trends and eventually causal relationships. This big picture horizontal work, which is in keeping with the recent wave of empirical scholarship in comparative and international law,²³ is likely to be an important aspect of future comparative international law work. But it is also important to develop case studies that allow a deeper understanding of how international law is approached within a smaller number of states. It may also be helpful to turn to methods developed in social science about how to select case studies in order to test hypotheses. For instance, Katerina Linos cautions against "convenience sampling" where a general rule is inferred from a handful of prominent and easily accessible examples of state practice. Instead, drawing methodological lessons from comparative politics, she suggests ways to make theoretically informed case selections so that small *n* studies might be used to speak to larger issues.²⁴

Comparative international law may also draw on insights from anthropology and sociology. Anthropology draws attention to the way that international norms might be vernacularized in different legal systems.²⁵ Sociology provides tools for understanding how approaches to international law are developed and transmitted through professional and educational networks. For instance, Roberts works from a constructivist assumption that the field is partly constituted by social processes, including how it is presented in commonly used materials (like textbooks and casebooks) and how it is conveyed interactionally between actors (such as professors and students). By examining the diffusion of international law textbooks, she highlights one of the mechanisms through which different visions of international law are exported from core states, like the United Kingdom and France, and imported into more peripheral states, like India and Senegal.²⁶

III. THE IMPLICATIONS OF COMPARATIVE INTERNATIONAL LAW

Some international lawyers view the notion of comparative international law as threatening to the field's universalist assumptions and aims.²⁷ For instance, Forteau suggests that comparative international law seems like "a catch-22: If one admits that there are different

²³ See, e.g., SIEMS, *supra* note 21; Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1, 12 (2012); Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015).

²⁴ Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AJIL 475 (2015).

²⁵ See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); Sally Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006); Susanne Zwingel, *How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective*, 56 INT'L STUD. Q. 115 (2012).

²⁶ ROBERTS, *supra* note 5.

²⁷ See David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 32 N.Y.U. REV. L. & SOC. CHANGE 641, 649 (2007).

approaches to international law (i.e., a real comparative international law), is there still room for an ‘*international law*’?”²⁸ Many of the concepts that international lawyers celebrate, such as human rights, the rule of law, and free trade, rest on universalist ideals.²⁹ The notion that these concepts might be interpreted and applied differently in different national contexts might seem to undermine the field’s aspirations.

Yet we believe that comparative international law has the potential to enrich our understanding of how international law operates now and how it might function better in the future. By looking for similarities and differences in the way that states understand, interpret, apply, and approach international law, it is possible to see instances where the system is successful in spreading general norms as well as examples of where international law rules give rise to local adaptation or noncompliance. Indeed, as McCrudden’s CEDAW analysis shows, adopting more systematic comparative studies may reduce the risk of allowing a handful of high-profile examples of divergence to overshadow a larger body of less sensational convergence.³⁰

Even where divergences exist, studying them does not pose an existential threat to international law. While some scholars celebrate the virtues of pluralism in promoting error correction, norm articulation, and creative innovation,³¹ others emphasize that international law has its own mechanisms for working out how to respond to divergent interpretations and practices, which turns at least in part on shared understanding of the difference between plausible and pretextual arguments.³² Similar fears were expressed about the potential threat posed by international law’s fragmentation, but the international system has learned to live with some degree of divergence among different subfields and international institutions without descending into crisis.³³

Identifying and explaining similarities and differences on a descriptive level is also a distinct project from the normative exercise of endorsing or seeking to counteract those findings. For instance, comparative international law analysis has the potential to uncover power dynamics that privilege certain actors and their preferred interpretations of international law. What to make of such revelations, however, is not dictated by the analysis. Realists might celebrate the manner in which international law adapts itself to serve state interests, while critical legal theorists might use the same findings to argue for measures to counter such power differentials and pursue a more equitable world order.³⁴

The knowledge derived from comparative analysis may help to design treaties and international institutions that are more responsive to diversity within the international legal system. For example, if comparative analysis reveals that domestic courts implement treaty commitments more consistently than legislatures, making a treaty directly applicable may be desirable

²⁸ Forteau, *supra* note 13, at 499.

²⁹ Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521, 543–46 (2006).

³⁰ McCrudden, *CEDAW*, *supra* note 18, at 535.

³¹ See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190–91, 1210 (2007).

³² Forteau, *supra* note 13, at 507–13.

³³ Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, UN Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

³⁴ Compare Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L.J. 1 (2011) with ANGHIE, *supra* note 3, at 312 and Koskenniemi, *supra* note 9, at 4.

in areas where uniform application is important. Likewise, if comparative analysis demonstrates that the practices of some states are given disproportionate weight in assessing the existence and content of international law, this may bolster calls to create repositories of state practice and translations of key legal instruments from a wider variety of states.

Thinking of comparative international law as a field makes it easier to identify blind spots in existing work and suggest directions for future research. For example, much of the detailed comparative international law scholarship to date examines how different domestic courts interpret and apply international law. However, focusing on court decisions often skews comparative scholarship towards certain states, particularly core, Western, common law, English-speaking states, and towards issues that arise before courts, such as human rights and refugee law.³⁵ This sets up the importance of other comparative international law projects, such as studies of legislatures, executives, and administrative bodies,³⁶ as well as accounts of practices from other states, like China.³⁷

Finally, conceptualizing comparative international law as a distinct field allows us to better connect the work of different scholars on different continents and across different generations and to focus greater attention on the field's historical evolution and future trajectory. In particular, situating the current surge in comparative work in the context of a longer tradition allows us to consider how it can—and often does—innovate, for example, by considering a more diverse array of countries and legal systems, devoting more attention to the causes and consequences of different national and regional approaches, and drawing on social sciences methods. In sum, by encouraging international law scholars to pursue comparative projects and engage with the fundamental theoretical and methodological questions they raise, we hope to further the development of comparative international law and to thereby contribute to a better understanding of international law.

³⁵ ROBERTS, *supra* note 5.

³⁶ Verdier & Versteeg, *supra* note 19, at 515.

³⁷ Congyan Cai, *International Law in China's Law and Courts*, in *COMPARATIVE INTERNATIONAL LAW*, *supra* note 18.