

# Conceptualizing Comparative International Law

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## I. INTRODUCTION

At first glance, “comparative international law” might sound like an oxymoron. By definition, international law—at least when it arises from multilateral treaties or general custom—applies to all treaty parties or states equally. It is perhaps the one area of law where cross-country comparisons seem inappropriate, because the same rules ostensibly govern all states. Accordingly, internationalist Hersch Lauterpacht concludes that “international law is the only branch of law containing identical rules administered as such by the courts of all nations.”<sup>1</sup> Likewise, comparativist Harold Gutteridge explains that employment of the comparative method with respect to international law “would at first sight appear to be excluded, because rules which are avowedly universal in character do not lend themselves to comparison.”<sup>2</sup>

Real-world international legal practice, however, does not always follow this classical conception. Many scholars and practitioners have noted that international law is often understood, interpreted, applied, and approached differently in different settings. David Kennedy, a US international lawyer, observes that international

\* We would like to thank participants of the 2014 and 2015 Sokol Colloquia for helpful comments and suggestions. This chapter is a revised and expanded version of our short introduction to the July 2015 American Journal of International Law symposium on comparative international law: Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467 (2015).

1. Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT’L L. 65, 95 (1929).

2. H.C. Gutteridge, *Comparative Law and the Law of Nations*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 13 (W.E. Butler ed., 1980).

law is “different in different places.”<sup>3</sup> B.S. Chimni, an Indian international lawyer, explains that “location matters” when it comes to international law, “be it in terms of the issues that are addressed or the ways in which these are approached.”<sup>4</sup> Likewise Xue Hanqin, the Chinese Judge at the International Court of Justice, observes that: “Notwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among States.”<sup>5</sup>

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, sometimes strategically, other times unaware of the differences. In some cases, these varying interpretations may subsist with minimal attention, while in others they may change or destabilize the international rules themselves. The field of *comparative international law* studies these phenomena and, in the process, brings together two fields—international law and comparative law—that often sit alongside each other but rarely interact.<sup>6</sup> It utilizes insights and methods from comparative law in order to identify, analyze, and explain similarities and differences in how international law is understood, interpreted, applied, and approached by different national and international actors.

Although the use of comparative approaches in international law finds important antecedents in earlier scholarship,<sup>7</sup> distinct attention to “comparative international

3. David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 17 (1999).

4. B.S. Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3 TRADE L. & DEV. 14, 22 (2011).

5. XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW 16 (2012).

6. Mireille Delmas-Marty, *Comparative Law and International Law: Methods for Ordering Pluralism*, 3 U. TOKYO J.L. & POL. 44, 44 (2006) (“the two disciplines tend to ignore each other, isolated by their own specific languages, rites, dogma and clergy.”); Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1086 (2008) (“most international law scholars are not comparatists” and “most comparatists study domestic legal systems, primarily their private law dimensions, and not the international legal system”).

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 AM. J. INT'L L. 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., 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

law” as an emerging, or re-emerging, phenomenon has grown in recent years.<sup>8</sup> Some scholars describe distinctive contemporary approaches of particular states or regions toward international law, such as US, Chinese, and EU approaches to international law.<sup>9</sup> Others offer historical accounts of specific regional approaches to international law, such as Latin American approaches during the nineteenth and early twentieth centuries,<sup>10</sup> or rival Western and Soviet approaches during the Cold War.<sup>11</sup> Some explore how different national actors, such as domestic courts, interpret and apply international law in diverse ways.<sup>12</sup> Others identify similarities and

systems to international law, see, for example, C. G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* (1988).

8. See, e.g., *THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE* (Helmut Philipp Aust & Georg Nolte eds., 2016); Martti Koskeniemi, *The Case for Comparative International Law*, *FINN. Y.B. INT'L L.* (2009); 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); Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 *BROOK. J. INT'L L.* 385, 389 (2011); Abdulqawi Yusuf, *Diversity of Legal Traditions and International Law: Keynote Address*, 4 *CAMB. J. INT'L & COMP. L.* 681 (2013); *Symposium on Comparative International Law*, 109 *AM. J. INT'L L.* 467 (2015). A spate of recent conferences also evidence renewed interest in this area. For example, in addition to the 2014 and 2015 Sokol Colloquia on Comparative International Law at the University of Virginia, at which the contributions to this volume were presented, there were a 2010 conference organized by the Toronto Group for the Study of International, Transnational, and Comparative Law, which included a panel entitled “Stories of the Gently Civilized: National Traditions in International Law”; a 2013 Cambridge Journal of International and Comparative Law conference entitled “Legal Tradition in a Diverse World”; and a 2015 Duke University-Geneva Conference on Comparative Foreign Relations Law.

9. See, e.g., Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 *HARV. INT'L L.J.* 1 (2011); XUE, *supra* note 5 (Chinese approaches); Yasuaki Onuma, *A Transcivilizational Perspective on International Law*, 342 *RECUEIL DES COURS* 1 (2009) (Asian approaches); Francesco Messineo, *Is There an Italian Conception of International Law?*, 4 *CAMB. J. INT'L & COMP. L.* 681, 879 (2013).

10. See, e.g., 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); Liliana Obrégon, *Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America*, in *INTERNATIONAL LAW AND ITS OTHERS* 247 (Anne Orford ed., 2006).

11. See, e.g., Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, in *THE LEGAL DIMENSION IN COLD WAR INTERACTIONS: SOME NOTES FROM THE FIELD* 141 (Tatiana Borisova & William B. Simons eds., 2012).

12. See, e.g., *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 E. Nijman & Andre Nollkaemper eds., 2007); 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 *AM. J. INT'L L.* 241 (2008); Roberts, *supra* note 8, at 61–64.

differences in the textbook and scholarly traditions of international law academics in different states.<sup>13</sup>

Building on these earlier works, the purpose of this volume is to bring together contributors who are engaged in different aspects of the comparative international law phenomenon to give some sense of the contours of this emerging field. By its nature, we believe that the field of comparative international law benefits from collective endeavors. Any particular comparative international law analysis necessarily will be partial. One may compare the approaches of two or more states to international law. Or one may examine how multiple authoritative actors have interpreted or applied a particular international law rule or principle. Or one might theorize about how and why similarities and differences arise across states and among lawmakers. Only by combining multiple perspectives and approaches to the topic can one begin to develop a sense of the field of comparative international law as a whole.

Our project thus has three goals: to establish comparative international law as a field of research in a way that has some coherence but remains sufficiently broad to embrace a variety of perspectives and approaches; to identify various theoretical perspectives and methodological approaches that scholars have brought, or might bring, to bear on this subject; and to conduct an initial array of comparisons across issue-areas and legal systems to illustrate some of the types of projects that can be conducted, and range of insights that might be derived, from this field. To these ends, we first explain what we mean by comparative international law (Part II), how one might go about finding and analyzing similarities and differences (Part III), what hypotheses have been suggested for explaining similarities and differences (Part IV), and what some of the normative challenges and implications of this field might be (Part V).

## II. WHAT IS COMPARATIVE INTERNATIONAL LAW?

As a newly emerging field, the contours of comparative international law necessarily are fluid and contingent. Aware of these difficulties, we offer only 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.*<sup>14</sup> Although the field is primarily descriptive and explanatory, it also brings to the fore normative and theoretical questions, such as whether divergence or convergence should be celebrated or feared, encouraged or discouraged, and what findings of similarities and differences might mean for how one conceptualizes international law.

In order to provide a framework for analysis, we identify three ways in which comparative law insights might be particularly helpful in the field of international law.

13. See, e.g., ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017); Antony Carty, *A Colloquium on International Law Textbooks in England, France and Germany: An 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).

14. See Roberts et al., *supra* note \*, at 469.

First, comparative law methods may be relevant in *identifying* the substantive content of international law. International lawyers are called on to engage in comparative analyses when they seek to identify custom, which requires a review of state practice and *opinio juris* from different states, and general principles, which may require an analysis of whether certain principles are common to many, or the main types of, legal systems. For instance, as Mathias Forteau shows, the International Law Commission (ILC) engages in comparative analysis of different understandings, interpretations, and applications of international law in determining whether and how to codify or progressively develop international law.<sup>15</sup> Likewise, as Neha Jain demonstrates, international criminal tribunals have drawn on comparative studies of national legal systems in seeking to identify general principles that might apply in criminal trials.<sup>16</sup>

Comparative approaches can also be useful in identifying outlier approaches, which may be characterized as violations of existing international law or as innovative attempts at progressive development. For instance, Alec Knight examines the way in which the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee encourages what it views as progressive interpretations of the CEDAW Convention while discouraging what it views as regressive attempts to limit the Convention's application.<sup>17</sup> Similarly, Makane Mbengue and Stefanie Schacherer examine the Pan-African Investment Code from a comparative perspective, showing how the treaty departs from existing approaches propagated by developed states because it was drafted from the perspective of developing and least-developed countries with the aim of fostering sustainable development.<sup>18</sup>

Second, comparative law approaches are relevant in identifying, analyzing, and explaining similarities and differences in the *interpretation and application* of international law. For instance, as some of our contributors show, common treaty provisions may be interpreted in similar or different ways by national, regional, and international courts.<sup>19</sup> Different interpretations of international law norms may be put forward by executives from different states in a range of settings, including in the formulation of treaty reservations and understandings and corresponding

15. See Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission* (this volume).

16. See Neha Jain, *Comparative International Law at the ICTY: The General Principles Experiment*, 109 AM. J. INT'L L. 486 (2015).

17. Alec Knight, *An Asymmetric Comparative International Law Approach to Treaty Interpretation: The CEDAW Committee's Tolerance of the Scandinavian States' Progressive Deviation* (this volume).

18. Makane Moïse Mbengue & Stefanie Schacherer, *Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code* (this volume).

19. See Christopher McCrudden, *CEDAW in National Courts: A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context* (this volume); Jill I. Goldenziel, *When Law Migrates: Refugees in Comparative International Law* (this volume); Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement* (this volume).

objections,<sup>20</sup> and claims about whether international law applies to areas such as espionage and, if so, what it requires.<sup>21</sup> The content of international legal obligations might also be domesticated similarly or differently by legislatures in different states.<sup>22</sup>

Third, methods from comparative law and politics provide a useful way of understanding and explaining different *approaches* to international law. For instance, states differ in the degree and types of power and influence they enjoy, which may affect whether they function primarily as exporters or importers of international law norms.<sup>23</sup> They differ in their fundamental ideological commitments, which may affect their interpretations of central international law notions such as sovereignty and human rights. Pierre-Hugues Verdier and Mila Versteeg further show how states also differ in their constitutional structures, legal traditions, and rules on the reception of international law and its application by domestic legal institutions.<sup>24</sup> These differences empower different domestic actors, which may help to explain similarities and differences in the understanding, interpretation, or application of international law by those states. Finally, as Nico Krisch and Anthea Roberts show, states also have different legal academies with their own norms and incentive systems, which may affect how international law is conceptualized, taught, and written about in those states.<sup>25</sup>

While these categories provide a useful typology of comparative international law inquiries, we should not understand them as exhaustive or hermetically sealed. In some cases, similarities or differences in the way in which international law is interpreted and applied might affect what is identified as international law. Likewise, similar or different approaches to international law might result in similar or different interpretations and applications of international law with respect to particular issues.

## A. Distinguishing Comparative International Law from Related Fields

As explored in more detail by Christopher McCrudden and Paul Stephan, these comparative international law inquiries relate to, but are distinct from, several

20. See Tom Ginsburg, *Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation* (this volume).

21. See Ashley S. Deeks, *Intelligence Communities and International Law: A Comparative Approach* (this volume).

22. See Kevin L. Cope & Hooman Movassagh, *National Legislatures: The Foundations of Comparative International Law* (this volume).

23. See ROBERTS, *supra* note 13.

24. Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation* (this volume).

25. Nico Krisch, *The Many Fields of (German) International Law* (this volume); ROBERTS, *supra* note 13.

existing bodies of scholarship, most notably those dealing with the fragmentation of international law, comparative constitutional law, and comparative foreign relations law.<sup>26</sup>

The fragmentation literature typically looks at how different understandings of international law are adopted in different subfields of international law (e.g., human rights and humanitarian law) or by different international bodies (e.g., the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia). Comparative constitutional law examines how different states interpret and apply particular constitutional norms, which are sometimes drawn from or influenced by international instruments, such as human rights treaties. Comparative foreign relations law looks at the rules, institutions, and practices in different states with respect to how that state conducts relations with foreign states and other actors.

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, rather than on interpretations put forward by different international actors. Our definition does not, however, limit the focus of inquiry to different national actors, as both national and international actors might put forward interpretations of the same norms. For example, Jill Goldenziel's chapter compares interpretations of the Refugee Convention adopted by Australian, American, and EU courts,<sup>27</sup> while Knight contrasts the CEDAW Committee's interpretations of the Convention and those of several state parties.<sup>28</sup>

Unlike comparative constitutional law, comparative international law looks primarily at cross-national understandings, interpretations, applications, and approaches to international law rather than constitutional law. However, as both may implicate common issues, such as human rights, there is often overlap between the two. For instance, Verdier and Versteeg argue that national constitutional rules governing treaty-making and the domestic status of international law may influence how states interpret and apply their international law obligations, and Alejandro Rodiles situates his analysis of the dialogue within the Inter-American human rights system as emerging from a merger of national constitutional law and international law.<sup>29</sup>

Our definition is also broad enough to include certain aspects of comparative foreign relations law that concern similarities and differences in how states understand, interpret, apply, and approach international law. For instance, Stephan examines how the movement to develop a field of foreign relations law differed significantly between the United States and the United Kingdom.<sup>30</sup> In the former, it

26. Christopher McCrudden, *Comparative International Law and Human Rights: A Value-Added Approach* (this volume); Paul B. Stephan, *Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?* (this volume).

27. Goldenziel, *supra* note 19.

28. Knight, *supra* note 17.

29. Verdier & Versteeg, *supra* note 24; Alejandro Rodiles, *The Great Promise of Comparative Public Law for Latin America: Towards ius commune americanum?* (this volume).

30. Stephan, *supra* note 26.

was promoted by scholars who were skeptical about international law and wanted to emphasize the role of domestic law constraints on international law entering the US legal system. In the latter, it was developed by courts and scholars who wished to use international law to confine the Crown Prerogative, which had formerly walled off much executive conduct with respect to foreign relations from judicial oversight. The recent decision of the Supreme Court on the process for leaving the European Union confirms the growing importance of the field.<sup>31</sup>

## B. The Unit of Analysis

The effort to conceptualize comparative international law also calls attention to the appropriate unit of analysis. In studying similarities and differences in understanding, interpreting, applying, and approaching international law, to which actors should scholars turn? Cross-national studies can have multiple potential units of analysis, including: states as unitary actors, domestic state institutions (such as courts, legislatures, and executives), and nonstate actors (such as academics, non-governmental organizations, and social and political movements). Comparative international law studies may also focus on the understandings, interpretations, applications, and approaches of various international actors, such as the ILC and international courts, which sometimes coincide, and at other times conflict, with each other and with national approaches. Thus, our definition of comparative international law includes both horizontal (state-to-state) and vertical (state-to-regional and state-to-international) studies.

The bulk of existing scholarship on comparative international law has focused on states (as unitary actors) or decisions of domestic courts (as substate actors). Domestic courts constitute a natural object of comparative international law analysis because of their dual relationship with international law: on the one hand, they are often called upon to implement international law (as impartial law enforcers), while on the other, they are in a position to shape international law through their interpretations (as partial law creators).<sup>32</sup> However, other state actors, such as legislatures, executives, and administrative bodies, also interpret and apply international legal rules in ways that may help to enforce or create international law.<sup>33</sup> Focusing too heavily on court decisions tends to skew comparative international law analysis

31. *Miller v. Ministry of Justice* [2017] UKSC 5.

32. See Roberts, *supra* note 8. As an example of a court-centered approach, see the recent edited volume on international law in domestic courts by Helmut Aust and George Nolte, *supra* note 8.

33. For instance, the executive arms of the United States and Russian governments have produced different national security statements that have a bearing on the interpretation and application of the use of force. Compare NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2010) with Концепция Внешней Политики Российской Федерации [Foreign Policy Concept of the Russian Federation, 2000], Jun. 28, 2000. Likewise, a number of states have adopted the international prohibition on genocide in their domestic law but have made its definition broader or narrower than the Rome Statute's definition. See W.N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW BY NATIONAL COURTS 5 (2006).



toward consideration of certain states, particularly Western, common law, English-speaking states;<sup>34</sup> and certain issues that arise before courts, such as human rights and refugee law.<sup>35</sup>

Conscious of these biases, this volume includes contributions by Congyan Cai, Neha Jain, Bakhtiyar Tuzmukhamedov, and Lauri Mälksoo that provide more detailed consideration of court practices in certain non-Western states (China, India, and Russia) that often receive less attention in international law scholarship on domestic courts.<sup>36</sup> The book also features contributions that focus on other international and national actors, including Forteau's chapter on the ILC, Ashley Deeks's analysis of different executive approaches to espionage, Knight's study of executive practice before the CEDAW Committee and the Committee's responses to such practice, Tom Ginsburg's review of executive practice with respect to reservations to the International Covenant on Civil and Political Rights and objections to such reservations, and Kevin Cope and Hooman Movassagh's study of domestic legislatures.<sup>37</sup>

We also highlight the way in which cross-national similarities and differences may be reflected in and shaped by the practices of nonstate actors. For example, international law academics, whose writings constitute a subsidiary source for the determination of international law, may play an important role in creating uniform or diverse constructions of the field. To the extent that distinct national or regional "epistemic communities"<sup>38</sup> of international lawyers exist, as suggested by Krisch and Roberts, this may reflect and perpetuate national differences in the interpretation and application of international law.<sup>39</sup> Rodiles takes up this idea in his study of the idea of a *ius constitutionale commune* in Latin America by tracing debates in regional academic and judicial dialogues.<sup>40</sup> The interpretation and application of international law across countries may also be shaped by other nonstate actors, including

34. ROBERTS, *supra* note 13.

35. Cf. Congyan Cai, *International Law in Chinese Courts During the Rise of China* (this volume) (noting that Western international lawyers often focus on national courts applying human rights treaties, which Chinese courts almost never do, but that certain non-Western courts might be more active in applying international law in other contexts, such as private international law).

36. *Id.*; Neha Jain, *The Democratizing Force of International Law: Human Rights Adjudication by the Indian Supreme Court* (this volume); Lauri Mälksoo, *Case Law in Russian Approaches to International Law* (this volume); Bakhtiyar Tuzmukhamedov, *Doing Away with Capital Punishment in Russia: International Law and the Pursuit of Domestic Constitutional Goals* (this volume).

37. Forteau, *supra* note 15; Deeks, *supra* note 21; Knight, *supra* note 17; Ginsburg, *supra* note 20; Cope & Movassagh, *supra* note 22.

38. Peter Haas, *Epistemic Communities and International Policy Coordination*, 46 INT'L. ORG. 1 (1992); David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641 (2007).

39. ROBERTS, *supra* note 13.

40. Rodiles, *supra* note 29.

nongovernmental organizations, social and political movements, and the public at large.<sup>41</sup>

### III. THE METHODS OF COMPARATIVE INTERNATIONAL LAW

A necessary first step in most comparative international law enquiries is descriptive, and involves identifying similarities and differences in how international law is understood, interpreted, applied, and approached across different legal systems. Several contributors to this volume undertake this descriptive task by mapping common and divergent approaches to international norms in areas such as espionage, refugees, and women's rights, among others. A possible next step, undertaken by some contributors, is to seek to explain similarities and differences: Why do different legal systems set forth similar or different interpretations and applications of international legal rules?<sup>42</sup>

In this section, we consider what lessons and insights might be brought to comparative international law from the related fields of comparative law and comparative politics. From comparative law, we suggest that scholars' long-standing preoccupation with the functional method, appropriate benchmarks for comparison, and classifications of the world's legal systems into families or traditions can inform comparative international law inquiries. With respect to methods, we suggest that comparative politics and other social science fields offer valuable insights on topics such as case selection and the relative merits and drawbacks of different approaches, such as detailed qualitative case studies versus large-N quantitative studies.

#### A. Lessons from Comparative Law

One of the core insights from comparative law is that seemingly different legal rules and doctrines may have similar functions and produce similar outcomes.<sup>43</sup> Thus, when taking into account the actual operation of rules in particular legal systems, we may find that facially different rules are in fact functional equivalents. To illustrate, the constitutions of the United States and the United Kingdom look very different from one another (one is written and the other unwritten), and yet, both serve to coordinate and constrain government behavior. Likewise, facially similar rules might actually serve different functions in different domestic contexts. For

41. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013).

42. See John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 626–27 (1998).

43. For an overview, see Ralf Michaels, *The Functional Method in Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (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”).

example, while many nations protect the freedom of expression in similar terms, the actual meaning given to these provisions differs substantially across countries.<sup>44</sup> Functionalist scholars in comparative law thus emphasize the need to look not merely at formal similarities and differences, but also at functional ones.

The functional method is intuitively appealing for comparative international law inquiries. As a general matter, international law does not dictate how states implement their international legal obligations as long as they comply with the relevant rule.<sup>45</sup> For example, while international law provides that states are immune from the jurisdiction of foreign courts for their acts *de jure imperii*, it is usually immaterial whether that rule is implemented by statute, applied directly by courts, or secured by executive decree. In this sense, international law is usually concerned with results rather than means; it insists on functional rather than formal similarity. From this perspective, comparative international law could consist of studying the ways in which different states implement a given international obligation in their respective legal systems. Indeed, this functionalist impulse may help explain why comparative international law has not yet emerged as a systematic field of enquiry. As long as outcomes are the same—or at least represent satisfactory compliance with the rule—there is no need for international lawyers to dig deeper.

However, although the functional method is prominent in traditional comparative law scholarship, it does not lack critics.<sup>46</sup> The most common criticism is that, in its focus on functional equivalence, this method neglects interesting and important differences both in the details of each legal system and in the relevant economic, social, and cultural context.<sup>47</sup> Indeed, an important insight from the comparative law debates over the functional method is that functional analyses tend to result in more observed similarities than do formal analyses. In turn, this can understate important differences in how the rule truly functions in different legal systems. Thus, critics of the functional method suggest that instead of searching for similarities, convergence, and globalization, comparative law should focus on difference, divergence, and diversity.<sup>48</sup>

This suggests alternative approaches for comparative international law. First, researchers could deliberately search for functional differences, thus emphasizing cases where differences in interpretation and application produce substantively different outcomes across different states, which may include non-compliance with the relevant international rule. Another approach is to search not just for functional

44. See Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., 2005).

45. ANTONIO CASSESE, *INTERNATIONAL LAW* 218 (2d ed. 2005) (“States are only interested in the final result: fulfilment or non-fulfilment of an obligation. They show no interest in the factors that brought about that result. . . . [T]his state of affairs reflects the individualistic structure of the international community and the paramount importance of respect for other States’ internal affairs.”).

46. For a summary, see MATHIAS SIEMS, *COMPARATIVE LAW* 37–39 (2014).

47. See, e.g., William Twining, *Globalization and the Common Law*, 6 *MAASTRICHT J. EUR. & COMP. L.* 217 (1999).

48. Reimann, *supra* note 43, at 681.

differences, but for formal ones as well. Even if the states compared ultimately comply with the relevant international legal rule—thus reaching the same functional outcome—the fact that they use formally different ways of getting there can be interesting and worthy of study in its own right. Finally, analyses could search for functional differences in the face of formal similarities. Here, the focus would be on states that invoke formally identical treaty or customary norms, but use these to achieve different functions in their domestic legal systems. For instance, Jain argues that the Supreme Court of India’s invocations of international human rights law often serves—and is shaped by—domestic political objectives.<sup>49</sup>

A second, and related, debate in comparative law involves identifying the appropriate benchmark for comparison. The seemingly simple question, “[w]hat is going to be compared to what?” has stirred substantial controversy in practice.<sup>50</sup> In order for comparison to be possible, the units of comparison—usually countries or legal systems—need to have something in common. Comparative law scholars have suggested that any comparative analysis requires a *tertium comparationis*, which is a common point of departure, typically “a real-life problem or an ideal.”<sup>51</sup> For a functionalist, the *tertium* may be a functional outcome (e.g., the legal protection of private property rights); for a formalist, a formal rule (e.g., a constitutional clause prohibiting expropriation); for those engaged in normative analyses, an ideal (e.g., the importance of protecting private property). Whether one finds similarities or differences depends in part on what the *tertium* is, and the level of generality with which it is defined.<sup>52</sup> As a rule, the higher the level of generality, the fewer the differences. For comparative international law, the benchmark for comparison could be the international legal rule itself, as it is common to the legal systems under study.<sup>53</sup> Yet, even with a seemingly clear point of departure, the degree to which international law is interpreted and applied similarly or differently across national systems depends on whether one looks for functional, formal, or normative similarities or differences. We do not privilege any particular approach but believe that it is important for comparative international law studies to be explicit about their benchmark for comparison.

Another potentially useful idea from comparative law is that of dividing the world into legal families or traditions. The main distinction is usually between the common law and the (Romanist, Germanic and Nordic) civil law, with smaller

49. See Jain, *supra* note 36.

50. Reitz, *supra* note 42, at 620.

51. *Id.* at 623.

52. See Katerina Linos, *Methodological Guidance: How to Select and Develop Comparative International Law Case Studies* (this volume).

53. There is some debate in comparative law regarding whether single country studies of foreign systems count as comparative law, the objection being that a description of a foreign system does not entail a comparison. See, e.g., Reitz, *supra* note 42, at 618–19; Hirschl, *infra* note 73, at 126. The fact that international law offers a benchmark of comparison, however, suggests that single-country comparative international law studies do arguably count as comparative. Indeed, a number of our contributors perform single-country studies that we believe qualify as comparative work.

groups of countries classified as Confucian systems, Islamic legal systems, Hindu systems, and (prior to the 1990s) socialist systems.<sup>54</sup> Many other groupings exist as well, such as Ugo Mattei's distinction between the "rule of professional law," the "rule of political law," and the "rule of traditional law."<sup>55</sup> While the specific features of such classifications and their usefulness remain controversial, they may be relevant to comparative international law scholarship. For example, the chapter by Verdier and Versteeg suggests that states in different legal families might approach the relationship between international and domestic law differently.<sup>56</sup> Roberts's work suggests that legal families might influence transnational flows of students, legal ideas, and materials in ways that create distinct epistemic communities of international lawyers.<sup>57</sup>

Among political scientists, Beth Simmons's work finds that common law states are less likely to ratify international human rights treaties and more likely to add reservations.<sup>58</sup> Sara Mitchell and Emilia Powell argue that legal traditions inform states' approaches to international adjudication, including their support for the International Court of Justice, the International Criminal Court, and the UN Convention on the Law of the Sea (UNCLOS).<sup>59</sup> In her chapter on Islamic law states and UNCLOS, Emilia Powell examines in some detail how Western and non-Western international law notions might overlap or diverge and what consequences might follow.<sup>60</sup> She highlights the Islamic international law concept of *siyar*, which regulates the behavior of Islamic law states and individuals in the international arena and provides a parallel to Western conceptions of international law. After observing that Islamic law states have signed onto UNCLOS, which includes compulsory dispute resolution, at a much higher rate than other treaty regimes with dispute resolution, Powell examines whether a possible cause might be that UNCLOS expresses principles that have historically been present in Islamic law.

In employing such classifications, it is important to be mindful of the insights from comparative law regarding the strengths and weaknesses of relying on any

54. For prominent classifications, see ZWEIFERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 67–68 (3d ed. 1998); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (5th ed. 2014); MARTIN SHAPIRO, COURTS: A COMPARATIVE ANALYSIS (1986). For an overview of different classifications, see SIEMS, *supra* note 46, at 75–80.

55. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

56. Verdier & Versteeg, *supra* note 24.

57. ROBERTS, *supra* note 13.

58. SIMMONS, *supra* note 41, at 83–84.

59. SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS (2011). See also DANA ZARTNER, COURTS, CODES AND CUSTOM: LEGAL TRADITIONS AND STATE POLICY TOWARD INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW (2014).

60. Emilia Powell, *Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea* (this volume).

particular taxonomy. First, classifications are ideal-types.<sup>61</sup> They always involve simplifications, and they have been criticized for “overemphasizing the differences between categories, underemphasizing the differences within these categories and ignoring hybrids.”<sup>62</sup> Second, these classifications are not static and exogenous, but dynamic and subject to change. For example, while many countries became members of a legal family through colonial imposition,<sup>63</sup> some of the pathways this established continue to have considerable contemporary influence.<sup>64</sup> There is substantial debate over whether common law systems and civil law systems have converged.<sup>65</sup> Transplanted rules may also take on unique meanings as they interact with indigenous norms and traditions.<sup>66</sup> Indeed, to capture this dynamism, some comparative lawyers have suggested that the term legal *tradition* is more appropriate than that of a legal *family*.<sup>67</sup> Thus, while classifications can suggest important insights for comparative international law research, scholars should recognize their limitations and be careful when attributing specific similarities and differences to putative general characteristics of legal traditions. As the field of comparative international law develops, scholars will likely rely on additional classifications, such as Western and non-Western states, liberal and illiberal states, or democratic and authoritarian states.<sup>68</sup>

## B. Lessons from Comparative Politics

As described above, comparative law offers important substantive insights that may be useful in comparative international law inquiries. However, in recent years comparative law has come under criticism for its lack of concern with methodology in the social scientific sense of the word. In assessing the successes and failures of comparative law in the second half of the twentieth century, Matthias Reimann

61. See Reimann, *supra* note 43, at 677.

62. SIEMS, *supra* note 46, at 80.

63. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–22 (1974); Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP L. 111, 116–18 (1997).

64. See, e.g., Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1851 (2009).

65. See, e.g., John Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT’L L. 357 (1981).

66. Legrand, *supra* note 63; SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 39 (2006).

67. Reimann, *supra* note 43, at 678; GLENN, *supra* note 54.

68. See ROBERTS, *supra* note 13; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

concludes that “attempts to develop even a moderately sophisticated method of comparison have been exceedingly rare, and, as far as I can see, happily ignored.”<sup>69</sup> In practice, traditional comparative law research tends to consist either of detailed doctrinal comparison (as epitomized by the European project of searching for a “common core” in private law)<sup>70</sup> or studies inspired by anthropological approaches, which view comparative law as a “way of life”<sup>71</sup> requiring immersion in a foreign system’s culture, language, and legal tradition.<sup>72</sup>

More recently, scholars have drawn on social science disciplines, including comparative politics, to inject greater methodological rigor into comparative law studies. A decade ago, political scientist Ran Hirschl raised the issues of case selection, causal inference, and controlled comparisons in comparative constitutional law.<sup>73</sup> For example, comparative constitutional studies tended to rely on a limited set of cases, mainly English-speaking common law systems, without any justification for the case selection.<sup>74</sup> While focusing on a limited set of cases might allow scholars to reflect upon their own system, this approach does not allow them to set forth causal explanations on why certain types of provisions are adopted, or what their impact is.<sup>75</sup> Hirschl’s call is by no means universally embraced today, but it did influence the methodological standards in comparative constitutional law, and such methodological guidance may also prove useful in comparative international law.

Many comparative international law researchers may choose to conduct qualitative case studies, a method that is relatively familiar to legal scholars. While this approach has significant merits, the focus on a limited number of cases raises the issue of how these cases are selected. Katerina Linos’s contribution draws on comparative politics to discuss principles of case selection that allow researchers to make general claims.<sup>76</sup> She cautions against “convenience sampling,” which consists of selecting cases that are easily accessible or that the researcher is familiar with, and suggests that sampling choices be theoretically informed. This requires defining “important traits that could explain the phenomenon of interest,” based on which the researcher can “select among the many countries in each theoretically defined

69. Reimann, *supra* note 43, at 689.

70. Holger Spamann, *Empirical Comparative Law* (Manuscript 2015) (noting that “in practice, however, classical comparative law has been almost exclusively doctrinal”).

71. David Kennedy, *The Methods and the Politics, in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand & Roderick Munday eds., 2002) (quoting William Twining).

72. See, e.g., Reitz, *supra* note 42, at 628, 631–33; Merry, *supra* note 66.

73. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005). See also Ran HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 224–81 (2014).

74. Sujit Choudhry, *Bridging Comparative Constitutional Law and Comparative Politics: Constitutional Design in Divided Societies, in* CONSTITUTIONAL DESIGN FOR ETHNICALLY DIVIDED SOCIETIES 1, 8 (Sujit Choudhry ed., 2008).

75. Hirschl, *supra* note 73, at 132.

76. See Linos, *supra* note 52.

category.”<sup>77</sup> Through theoretically informed sampling, researchers can make statements about how general a practice is. For example, if one wants to show that a legal principle is “fundamental to our notion of the rule of law,” one could point out that this principle is found in legal systems that otherwise differ in many respects, such as “in ancient Egypt and modern Germany as well as in tribal Afghanistan.”<sup>78</sup>

This example illustrates one approach to case selection, which consists of looking at the “most different” cases to establish commonalities. If one is trying to prove that a general rule exists, finding that this rule holds with respect to states that might otherwise be considered very different is probative, as illustrated above. By contrast, if one is trying to identify a relevant difference and its causes, it can help to look for evidence through comparisons between states that are otherwise “most similar.” Thus, Deeks’s work on international law and intelligence communities examines the very different approaches adopted by two states that might otherwise be considered similar: the United Kingdom and the United States.<sup>79</sup> After identifying these divergent approaches, she then analyzes some of the differences between these states that might explain them, such as whether domestic or regional courts require their governments to justify the conformity of their actions with international law.

Qualitative case studies can also be used to make more general causal claims about what explains differences or similarities in formal rules or outcomes across legal systems. As Linos notes, qualitative techniques are particularly well-suited “to the development and testing of mid-range theories that seek to develop causal mechanisms that apply under particular conditions.”<sup>80</sup> For example, Ran Hirschl relies on in-depth case studies of the establishment of judicial review in Israel, New Zealand, South Africa, and Canada to set forth the theory that elites who fear losing political power establish judicial review to protect through the judiciary values they can no longer advance through the political process.<sup>81</sup> Making causal claims, however, requires careful case selection. We refer to Linos’s contribution for a discussion of relevant selection techniques, such as the use of most-similar and most-different cases, and the use of critical and deviant cases.<sup>82</sup>

Further methodological pressure on comparative law has come from economists who have taken the field’s classic legal families and examined their impact on outcomes such as economic growth, the structure and equity of debt markets, judicial independence, and the content and quality of corporate law.<sup>83</sup> This body of research

77. *Id.* at 43.

78. *Id.* at 49. See also Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 *TULANE L. REV.* 235 (1986).

79. Deeks, *supra* note 21.

80. Linos, *supra* note 52, at 39.

81. HIRSCHL, *supra* note 73.

82. Linos, *supra* note 52.

83. See, e.g., Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 *J. LEG. STUD.* 503 (2001). For an



has resulted in calls for “large-sample, quantitative research design” in comparative law.<sup>84</sup> While the quantitative approach has by no means replaced traditional methods,<sup>85</sup> large-N research designs are becoming more common. Mathias Siems’s 2014 comparative law textbook devotes an entire chapter to numerical approaches, and Holger Spamann recently announced the field of “empirical comparative law.”<sup>86</sup> Examples of this new empirical scholarship include (re-)coding and classifying legal systems as well as mapping the extent to which higher courts cite each other.<sup>87</sup> Comparative constitutional law has also seen a wave of large-N studies that map global developments and (to varying degrees) rely on social science methods to make causal claims.<sup>88</sup>

Likewise, comparative international law inquiries could benefit from the use of large-N samples and statistical analysis in appropriate cases. Such research designs are particularly useful in systematically mapping differences and similarities across a large number of legal systems, evaluating how common a practice is, and showing how it has changed over time. Verdier and Versteeg introduce an original data set for 101 countries for the period 1815–2013 that captures numerous features of national approaches to international law, including treaty-making procedures, the status of treaties, and the reception of customary international law. It is only because they study a large number of systems over time that they are able to show several long-term trends, such as the increase in legislative approval requirements for ratification of more treaties in more countries, the increasing prevalence of direct application and hierarchical superiority of treaties over domestic statutes, and the subordination of customary international law to domestic legislation.<sup>89</sup>

Quantitative approaches can also be useful to explore possible explanations for observed similarities and differences through the use of regression analysis.<sup>90</sup>

overview of the voluminous literature spurred by this research agenda, see Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

84. Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009). See also Mathias Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in Order to Reduce Complexity?*, 13 CARDOZO J. INT’L & COMP. L. 521 (2005).

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

86. SIEMS, *supra* note 46, ch. 7; see also Spamann, *supra* note 70. A similar development is taking place in international law. See Gregory Schaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 12 (2012).

87. See, e.g., Martin Gelter & Mathias Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts*, 8 UTRECHT L. REV. 88, 98 (2012); Martin Gelter & Mathias Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, 21 SUP. CT. ECON. REV. 215, 215 (2013).

88. See, e.g., ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

89. Verdier & Versteeg, *supra* note 24.

90. But see Spamann, *supra* note 70 (expressing skepticism of the ability of empirical comparative studies to make causal claims).

Regression analysis allows researchers to examine the relationship between two variables of interest while controlling for confounding factors. For example, one can explore the relationship between national treaty ratification procedures and the number of treaties a country ratifies, while holding constant other factors such as the country's level of economic development or democracy.<sup>91</sup> While such methods help make causal claims more plausible, regression analysis using cross-country data also raises complex methodological challenges, such as controlling for unobservable confounding factors and establishing the direction of causation.<sup>92</sup>

However, it is worth emphasizing that large-N studies do not necessarily require the use of statistical methods: as illustrated by the Verdier and Versteeg chapter, the systematic mapping of differences and similarities can be illuminating in its own right, painting a larger picture that could not be discerned from traditional qualitative case studies. Likewise, Tomer Broude, Yoram Haftel, and Alexander Thompson conduct a large-N analysis of how states have renegotiated investor-state dispute settlement provisions in their investment agreements over time, providing an overall picture of the substantive trends and of cross-regional variations that can inform legal analysis and policy debates.<sup>93</sup> Chris McCrudden's extensive analysis of domestic court decisions interpreting and applying CEDAW, although not quantitative in nature, shows how a large-N sample can reveal meaningful similarities and differences in national approaches.<sup>94</sup>

#### IV. EXPLAINING SIMILARITIES AND DIFFERENCES

As noted above, once similarities and differences have been identified, a further step for comparative international law analyses is to explain them. Indeed, an important objective of this volume is to encourage scholars to move beyond traditional descriptive accounts and toward articulating and supporting hypotheses to explain similarities and differences in how international law is understood, interpreted, applied, and approached by different actors. To this end, this section introduces several explanatory accounts that may assist in such efforts. These accounts are general in nature, and as such do not provide ready-made explanations for any specific case. However, because they emphasize different actors and mechanisms, their central ideas can be deployed as the building blocks for theoretically coherent and empirically validated accounts of cases or issue-areas of interest to comparative international law.<sup>95</sup>

91. See Pierre-Hugues Verdier & Mila Versteeg, *Domestic Law and the Credibility of Treaty Commitments* (working paper 2017).

92. See Spamann, *supra* note 70 (discussing these challenges).

93. Tomer Broude, Yoram Z. Haftel & Alexander Thompson, *Who Cares About Regulatory Space in BITs? A Comparative International Approach* (this volume).

94. McCrudden, *supra* note 19; Verdier and Versteeg, *supra* note 24.

95. It goes without saying that these explanations are not exhaustive, nor is our classification the only possible one. In his chapter, Daniel Abebe proposes theoretical conjectures about comparative international law arising from three schools of international relations theory: realism, institutionalism, and liberalism—a classification that in some respects overlaps with, and in others departs from,

## A. Geopolitical Factors

A first set of explanatory factors is geopolitical in nature. In such accounts, the interpretation and application of international law may vary along the lines of power divides and competitive relationships in the international system. In the past two decades, analyses of the effect of power dynamics on international law emphasized the hegemonic role of the United States.<sup>96</sup> More recently, as the “unipolar moment” has receded, scholars have turned to analyzing the effect of shifting power configurations on international law. Thus, Paul Stephan proposes:

[A] powerful state will seek to impose its own version of international law. If the international system contains multiple great powers, each will offer up a distinct and competing version of the subject. Symmetry in power promotes selectivity in international law. As a corollary, a single superpower will provide an exclusive vision, even if its claims face a critical response and calls for reform. Asymmetry in power promotes universality in international law.<sup>97</sup>

He contends that in periods with two or more great powers (more symmetry), such as during the Cold War, it is possible to recognize greater selectivity—and more comparativism—in the approach of great powers to international law.<sup>98</sup> By contrast, in the 1990s, the emergence of the United States as a unipolar power (greater asymmetry) coincided with attempts to project a more universal—and less comparative—theory of international law. In a similar vein, Roberts argues that comparative international law was more salient when the two Cold War superpowers held conflicting visions of international law, and is likely to rise again as the world moves into a period of greater multipolarity.<sup>99</sup>

The effect of shifting power configurations on international law is attracting increasing attention. Scholars such as Congyan Cai and William Burke-White have outlined the ways in which international law is likely to change as Old Great Powers, namely Europe and the United States, decline and New Great Powers, including Brazil, China, India, and Russia, emerge.<sup>100</sup> Lauri Mälksoo has studied

the one we propose below. Daniel Abebe, *Why Comparative International Law Needs International Relations Theory* (this volume).

96. See, e.g., UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Georg Nolte & Michael Byers eds., 2003); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

97. Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT'L L. 91, 107 (2009).

98. Similarly, Anu Bradford and Eric Posner identify the European Union, China, and the United States as international law powerhouses that promote distinct interpretations of international law based on their own preferences. See Bradford & Posner, *supra* note 9.

99. Roberts, *supra* note 13.

100. Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUR. J. INT'L L. 755 (2013); William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1 (2015).

how Russian approaches to international law have changed since the end of the Cold War and the dissolution of the USSR.<sup>101</sup> A number of commentators are now focusing on Chinese and/or Russian approaches to international law and how these differ from Western conceptions or approaches.<sup>102</sup> These analyses draw on developments in state practice, such as the “Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law” issued in June 2016.<sup>103</sup>

The diversity of approaches within this tradition makes it difficult to articulate general features, but two recurring themes can be identified. First, geopolitical explanations give a central place to the role of power relationships in explaining similarities and differences in approaches to international law. Power-based explanations feature in the work of those working in the “realist” tradition of international relations, but also in Critical Legal Studies and historical analyses of the international system. Second, scholars within this tradition often focus on states (or geopolitical blocks of states) as the central unit of analysis, downplaying the role of substate actors (such as national courts) and nonstate actors (such as academics and NGOs). To the extent they include an analysis of substate actors, these may be viewed as “national actors seeking to create and shape international norms”<sup>104</sup> to advance their state’s interests rather than as independent actors faithfully implementing international legal rules. Third, geopolitics implies the persistence of the boundary between international law and domestic law, both formally (through dualist doctrines) and informally (through doctrines that avoid engagement with international law when important state interests are involved).<sup>105</sup> Finally, geopolitical approaches tend to regard state interests as generally consistent and stable, which suggests that differences in approaches to international rules and doctrines—and to international law in general—are likely to be persistent, shifting only when the balance of power of the system as a whole shifts.

101. Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. SOC’Y INT’L L. 211 (2008); LAURI MÄLKSOO, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* (2015).

102. See, e.g., Anthea Roberts, *Crimea and the South China Sea: Connections and Disconnects Among Chinese, Russian and Western International Lawyers* (this volume); Anne Peters, *After Trump: China and Russia Move from Norm-Takers to Shapers of the International Legal Order*, EJIL: Talk! (Nov. 10, 2016), <http://www.ejiltalk.org/after-trump-china-and-russia-move-from-norm-takers-to-shapers-of-the-international-legal-order/>; Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: Talk! (Jul. 15, 2016), <http://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>; Ingrid Wuerth, *China, Russia, and International Law*, LAWFARE (Jul. 11, 2016), <https://www.lawfareblog.com/china-russia-and-international-law>.

103. The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law (June 25, 2016), [http://www.mid.ru/en/foreign\\_policy/position\\_word\\_order/-/asset\\_publisher/6S4RuXfeYlKr/content/id/2331698](http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698).

104. Roberts, *supra* note 8, at 60.

105. See Benvenisti, *Reclaiming Democracy*, *supra* note 12.

## B. Domestic Institutions and Politics

Another set of explanations draws attention to domestic institutions and politics. In such accounts, the principal unit of analysis shifts from the unitary state to the multiple domestic institutions—including courts, legislatures, executives, and regulatory agencies—that engage with international law.<sup>106</sup> At an institutional level, this approach requires examination of the fundamental structural features of the relevant legal system, such as constitutional rules that govern the reception of international law and allocate responsibility for interpreting and applying it.<sup>107</sup> At a political level, this approach requires consideration of the incentives and constraints that shape the relationship of domestic institutions with international law, and how they may affect the interpretation and application of international rules.<sup>108</sup> Several contributions, such as those by Cope and Movassagh, Deeks, Goldenziel, and Jain, reflect on how domestic incentives and constraints may shape how different arms of government engage with international law.<sup>109</sup>

For example, at an institutional level, “dualist” legal systems that present the domestic legislature with an opportunity to introduce interpretations or modifications to international obligations when adopting implementing legislation may tend to produce more competing interpretations of international law.<sup>110</sup> By contrast, “monist” legal systems where courts are empowered to interpret and apply international laws directly may produce more convergence, as courts may be less likely to introduce political considerations in their reasoning and more likely to follow precedent set by international and foreign cases.<sup>111</sup> Beyond these formal institutional

106. This is a central theme of the “liberal” school of international relations theory. See Andrew Moravcsik, *Liberal Theories in International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

107. See Verdier & Versteeg, *supra* note 24; Stephan, *supra* note 26. More generally, this work overlaps to some extent with the emerging field of comparative foreign relations law, which is being developed by scholars such as Curtis Bradley, Karen Knop, and Campbell McLachlan. See CAMPBELL McLACHLAN, *FOREIGN RELATIONS LAW* (2014); Curtis Bradley’s project on “Comparative Foreign Relations Law and Democratic Accountability,” supported by a Carnegie Fellowship; and Karen Knop’s new course at University of Toronto entitled “Foreign Affairs and the Canadian Constitution,” which according to the syllabus aimed at “help[ing] to inaugurate foreign affairs and the Canadian constitution as a field of legal inquiry in Canada.”

108. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005).

109. Jain, *supra* note 36; Deeks, *supra* note 21; Goldenziel, *supra* note 19; Cope & Movassagh, *supra* note 22.

110. Cope & Movassagh, *supra* note 22.

111. See Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT’L L. 59 (2009). These ideas have affinities with earlier theories, such as George Scelle’s notion of “dédoulement fonctionnel” under which domestic judges play a dual role as national and international officials when interpreting and applying international law. Antonio Cassese, *Remarks on Scelle’s Theory of Role Splitting (dédoulement fonctionnel) in International Law*, 1 EUR. J. INT’L L. 210 (1990).

differences, political incentives and constraints may also play an important role. For instance, domestic courts that benefit from effective independence from the political branches of government may be more faithful implementers of international law than politicized courts, so that consistency is more likely among states with independent courts.<sup>112</sup>

While this type of analysis has primarily focused on domestic courts, scholars should not neglect the role of executives or legislatures. Legislatures have an important role in implementing treaty obligations, especially in dualist systems or where non-self-executing treaties are concerned.<sup>113</sup> Executives are often required to interpret international law in the realm of executive powers, such as warfare, national security, and international affairs.<sup>114</sup> Executives and legislatures thus routinely engage with international law, and, as with courts, their incentive structures are likely to vary in predictable ways across countries. For example, legislatures and executives in parliamentary systems are subject to different incentives and constraints than those in presidential systems, and legislatures and executives in proportional representation systems with grand coalitions are likely to be subject to different incentives and constraints than those that operate in first-past-the-post systems.<sup>115</sup> Likewise, regulatory agencies may attempt to use international standard-setting to increase their independence or discretion from their political principals.<sup>116</sup>

Beyond these examples, several other features of legal systems may affect the interpretation and application of international law. As noted above, at a general level, different legal traditions may differ in their approaches to international law. At a more specific level, different legal systems may privilege different interpretive approaches (textual, systematic, intent-based, teleological) in the domestic context, and may tend to apply their favored approach to the interpretation of treaties—perhaps disregarding ostensibly uniform interpretive rules provided by the Vienna Convention on the Law of Treaties (VCLT).<sup>117</sup> Indeed, a recent edited volume on VCLT usage finds that most domestic courts do not explicitly rely on the VCLT principles of treaty interpretation, although most domestic approaches are

112. See, e.g., Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT'L ORG. 469 (2013) (finding that countries with independent courts implement the International Covenant on Civil and Political Rights more successfully).

113. Cope & Movassagh, *supra* note 22.

114. See Deeks, *supra* note 21.

115. On the incentives of legislatures, see Cope & Movassagh, *supra* note 22.

116. See Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405 (2013).

117. Vienna Convention on the Law of Treaties art. 31–33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. See Helmut Phillip Aust, Alejandro Rodiles & Peter Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 LEIDEN J. INT'L L. 75 (2014); INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS (Helmut Phillip Aust & Georg Nolte eds., 2016).

nonetheless broadly consistent with these principles.<sup>118</sup> National constitutional traditions also differ considerably, with some more concerned about maintaining the domestic separation of powers (or its distribution among federal units), and others about established interpretations of rights and freedoms or the primacy of religious law. In some legal systems—such as in Russia—there may be a strong tradition of deference to the executive in interpreting and applying international law, with courts taking a secondary role.<sup>119</sup> All of these features may help explain similarities and differences in interpretation, application, and approaches to international law.

### C. Transnational Communities and Norms

Another approach draws attention to communities that transcend national boundaries and through which norms or attitudes toward international law diffuse. The idea that international behavior is formed in part through interactions in epistemic communities has its roots in sociological and constructivist scholarship.<sup>120</sup>

A growing literature on diffusion explores empirically how norms and policies diffuse from one country to another and tries to identify the social and political processes at play.<sup>121</sup> A related strand of scholarship emphasizes the role of experts and “disaggregated” state actors increasingly interacting with each other in the international sphere, pursuing global interests that transcend their national affiliations, and contributing to the formation and implementation of international rules and standards.<sup>122</sup> For example, scholars have studied judicial networks through which cosmopolitan judges interact with one another and converge upon the same interpretations, which are then adopted in national court decisions.<sup>123</sup> Others have studied the role of “norm entrepreneurs,” such as human rights activists, who mobilize support for international normative change.<sup>124</sup>

118. Kevin L. Cope & Mila Versteeg, *Book Review: The Interpretation of International Law by Domestic Courts*, 111 AM. J. INT'L L. 538 (2017) (reviewing INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS, *supra* note 117).

119. See Mälksoo, *supra* note 36.

120. See Peter M. Haas, *Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992).

121. See, e.g., Beth A. Simmons et al., *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning*, 33 ANN. REV. SOC. 1, 449 (2007); LINOS, *supra* note 41; Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014).

122. See Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

123. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003)

124. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Abraham L. Newman, *Building Transnational Civil Liberties: Transgovernmental Entrepreneurs and the European Data Privacy Directive*, 62 INT'L ORG. 103 (2008).

Epistemic communities are sometimes thought to be global in nature. Oscar Schachter famously described the existence of an “invisible college” of international lawyers who are “dispersed throughout the world” yet “engaged in a continuous process of communication and collaboration.”<sup>125</sup> As Roberts and Krisch show, however, distinct national communities of international law academics exist that are frequently characterized by different legal training, publishing profiles, and professional experiences.<sup>126</sup> These differences may contribute to and perpetuate differences in the interpretation and application of international law within different national contexts, as evidenced by the starkly different debates within different communities of international lawyers over Russia’s actions with respect to Crimea in 2014 and the legitimacy of the South China Sea arbitral award and China’s reaction to it in 2016.<sup>127</sup>

Likewise, the social processes by which norms and practice travel across borders that are emphasized in the diffusion literature may operate more intensely among groups of states that share common characteristics, such as language, legal origins, colonial histories, ideological commitments, economic conditions, or political arrangements.<sup>128</sup> For example, court decisions from former colonial states may have disproportionate influence in their former colonies, due to their availability in a common language, the familiarity of their legal reasoning, and the links among their legal elites.<sup>129</sup> Constitution-makers borrow primarily from countries with the same legal origins, because constitution-makers are most familiar with those foreign constitutions that are written within the same legal tradition and the same language.<sup>130</sup> Rodiles’s work on the relationship between ideas of a *ius constitutionale commune* that emerged in Europe and Latin America represents an example of such analysis.<sup>131</sup>

In the same vein, we might expect that countries facing specific challenges, such as encouraging foreign investment or revising their investment treaties to better protect regulatory space, may learn from and adopt the interpretations of international law advanced by similarly situated states, especially when those approaches are seen as successful. Thus, while sociological diffusion processes are often assumed

125. Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217 (1977).

126. Roberts, *supra* note 13; Krisch, *supra* note 25.

127. Roberts, *supra* note 102.

128. See Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACADEMY POL. & SOC. SCI. 33, 43–44 (2005); Beth A. Simmons & Zachary A. Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Economy*, 98 AM. POL. SCI. REV. 171 (2004); Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L & ECON. 1 (2014).

129. See Holger Spamann, *Contemporary Legal Transplants—Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813 (2010).

130. Goderis & Versteeg, *supra* note 128.

131. Rodiles, *supra* note 29.



to favor the development of a “world society” in which states converge on global norms and standardized patterns of behavior,<sup>132</sup> they may also create segmentation among different groups of states, which might result in differing approaches. For instance, Broude, Haftel, and Thompson engage in a comparative analysis of the different ways in which states have engaged in renegotiating their bilateral investment treaties, with certain modifications gaining popularity in Western Europe and others being pioneered in North America.<sup>133</sup> Mbengue and Schacherer’s analysis of the Pan-African Investment Code provides one such example.<sup>134</sup>

Some national traditions may also have a disproportionate impact in shaping the approaches of various international institutions. For instance, Mathilde Cohen argues that the dual English-French language policy of a number of international courts has far-reaching consequences on which individuals work at and appear before these courts, and in which national legal cultures they are trained.<sup>135</sup> While she focuses on the disproportionate influence wielded by the French legal culture, others, such as Michael Bohlander, have focused on the dominant role played by Anglo-American legal sources and approaches in various international courts and tribunals.<sup>136</sup> Apart from the language policies of these international courts, a number of scholars have pointed to common educational backgrounds as an explanation for these patterns, given that many elite international lawyers have completed at least part of their legal education in France, the United Kingdom, or the United States.<sup>137</sup>

## V. NORMATIVE QUESTIONS AND IMPLICATIONS

International lawyers often resist emphasizing local, national, or regional approaches because these are seen as threatening to the field’s universalist assumptions and aspirations.<sup>138</sup> Unlike domestic law, which we might expect to differ between states,

132. See John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 163 (1997); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147–60 (1983).

133. Broude, Haftel & Thompson, *supra* note 93.

134. Mbengue & Schacherer, *supra* note 18.

135. Mathilde Cohen, *On the Linguistic Design of Multinational Courts: The French Capture*, 14 I·CON 498, 501 (2016); Mathilde Cohen, *The Continuing Impact of French Legal Culture on the International Court of Justice* (this volume).

136. Michael Bohlander, *Language, Culture, Legal Traditions, and International Criminal Justice*, 12 J. INT’L CRIM. JUST. 491 (2014); Michael Bohlander & Mark Findlay, *The Use of Domestic Sources as a Basis for International Criminal Law Principles*, 2 GLOB. COMMUNITY Y.B. INT’L L. & JURISPRUDENCE 3 (2002).

137. See, e.g., Gleider I. Hernandez, *On Multilingualism and the International Legal Process*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 441 (Hélène Ruiz Fabri, Rüdiger Wolfrum & Jana Gogolin eds., 2010); ROBERTS, *supra* note 13.

138. See Kennedy, *supra* note 38.

international law is often premised on an assumption that it is a common law that binds all states. Highlighting national differences might be seen as running the risk of undermining the existence and unity of international law, potentially resulting in an excessive focus on the particular in a way that obscures the general.<sup>139</sup> In addition, many of the concepts that international lawyers celebrate rest on universalist ideologies, such as human rights and the rule of law.<sup>140</sup> Recognizing differences between national approaches to these issues might undermine claims to universality in these areas.

However, we believe that comparative international law should not be understood as having an implicit normative agenda or predetermined ideological commitments, for three reasons. First, comparative international law inquiries involve studies looking for both *similarities* and *differences*. In some cases, cross-national comparisons can highlight a lack of divergence, as shown by Chris McCrudden's study of substantive interpretations of CEDAW adopted by different national courts.<sup>141</sup> Such studies are important because they can provide a useful check on the tendency of commentators to focus on a handful of high profile cases of disagreement and dialogue that might not be representative of the greater universe of cases where common approaches or a lack of cross-national contestation may pass unremarked.

Second, because international law is often premised on an assumption of uniformity, many comparative international law studies will focus on examples of divergence that test the field's prevailing self-image. But such inquiries are not necessarily premised on a normative assumption that divergence is good or that all interpretations of international law are equally valid. Many comparative international law studies are descriptive or explanatory in nature; they seek to identify and account for differences without celebrating or validating them. One can note different interpretations of international law, but still conclude that some are more or less persuasive under international law's interpretive framework or according to a particular normative framework. International law also has its own mechanisms for working out how to respond to divergent interpretations and practices, as explored by Forteau's contribution on the ILC's strategies for codifying and progressively developing the law.<sup>142</sup>

Similar fears were expressed about the threat of international law's fragmentation in the 1990s and early 2000s, but the international system has learned to live with some degree of divergence without descending into crisis.<sup>143</sup> Instead of ignoring

139. See Forteau, *supra* note 15.

140. Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521, 546 (2006).

141. McCrudden, *supra* note 19.

142. Forteau, *supra* note 15.

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

differences, comparative international law projects examine when similarities and differences arise and prompts questions about how international lawyers should approach them. Given the decentralized nature of international law, some differences should be expected. And given that international law is often based on the actions and interpretations of states, differences may prove helpful in spurring its evolution over time. Moving past the assumption of universality in order to look at the facts on the ground is not the same as endorsing an “anything goes” approach. Nor does it involve any sort of prejudgment about how international law or international lawyers should respond to differences or similarities that they observe.

Third, comparative international law studies are not ideologically committed to supporting the agenda of international law’s left or right. This can be seen in some of the early writers who have explored the idea of comparative international law, who hail from both the right (such as Eric Posner) and the left (such as David Kennedy). Realist scholars and Critical Legal Scholars have in common a desire to look behind the law to uncover power dynamics that privilege certain actors and their preferred interpretations. While realist scholars tend to celebrate these power differentials as providing the key to understanding international law as an apology for state power, Critical Legal Scholars often highlight them as a part of a call to disrupt and counter these power differentials in the name of pursuing a different world order.

For instance, Anu Bradford and Eric Posner explore the idea of comparative international law as part of a claim that all powerful states and entities engage in exceptionalist behavior with respect to international law.<sup>144</sup> In seeking to counter the notion of American exceptionalism, they highlight the existence of European and Chinese exceptionalism as a way of normalizing and legitimizing US exceptionalism. They argue that international law is best understood as an overlapping consensus of the otherwise “exceptional” views of the great powers, which would mean that it has a small, core content, outside of which conflicting views exist. This example of comparative international law scholarship sits squarely within the realm of realism and can be readily associated with new sovereigntist attempts to limit the scope of international law.

At the other end of the political spectrum, Critical Legal Scholars, such as Martti Koskenniemi and David Kennedy, and scholars who adopt Third World Approaches to International Law, such as Antony Anghie and B.S. Chimni, engage in comparative international law scholarship when they emphasize how the universalist rhetoric of international law masks its Western, and largely European, origins.<sup>145</sup> For instance, Koskenniemi highlights the Eurocentrism of international law, arguing that the “view that there is a single, universal international law with a homogeneous history and an institutional-political project emerges from a profoundly Eurocentric view of the world.”<sup>146</sup> Anghie, meanwhile, draws attention to the importance of the

144. Bradford and Posner, *supra* note 9.

145. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *INT’L CMTY. L. REV.* 3 (2006).

146. Koskenniemi, *supra* note 8, at 4.

“telling of alternative histories” of international law, which include “histories of resistance to colonial power” and “history from the vantage point of peoples who were subjugated to international law.”<sup>147</sup>

An example of using a comparative international law approach to tell alternative histories is Masaharu Yanagihara’s contribution on the status of the Ryukyu Kingdom from the 1600s to the 1800s, in which he compares two concepts that were commonly used in East Asia during the relevant period, “shioki” (control) and “fuyo” (dependency), with those of “sovereignty” and “independence” propagated by modern European international law.<sup>148</sup> He argues that East Asia had its own unique international law concepts during the relevant period and that international law should not be retroactively universalized by applying ideas developed in one region (Europe) at one time to another region (East Asia) at a different time.

Daniel Abebe’s contribution further illustrates how comparative international law can accommodate a variety of normative projects.<sup>149</sup> In his account, acknowledging that domestic institutional design affects how states interpret and apply international law raises the prescriptive question of which interpretations should be preferred and what institutional designs should be adopted. This is where the normative dimension of international relations theories comes in. Abebe suggests that different theories—realism, institutionalism, and liberalism—point to different prescriptions, because they privilege different normative goals. Thus, comparative international law can help researchers draw connections between international relations theory and institutional design, without itself privileging particular proposals.

We have not engaged in a comparative international law project in order to further normative goals, nor should we shy away from normative questions about the costs and benefits of looking for and finding similarities and differences. For instance, Stephan argues that foreign relations law and comparative international law help to ensure that international law remains relevant to problems of international cooperation in an increasingly challenging world,<sup>150</sup> whereas Forteau warns of the dangers of focusing excessively on national differences in ways that overlook similarities or undermine international law’s broader legitimacy.<sup>151</sup> It may also be that costs and benefits differ across issue-areas or types of instruments. For instance, do some treaty formulations permit greater flexibility in interpretation than others, and is this a good or bad thing in particular contexts, such as human rights law?

An example of a scholar considering such issues is Shai Dothan whose contribution focuses on examining how the European Court of Human Rights applies its margin-of-appreciation doctrine.<sup>152</sup> He shows that the legislative regimes and court

147. ANGHIE, *supra* note 145, at 6–12 (2005)

148. Masaharu Yanagihara, “*Shioki (Control), “Fuyo (Dependency),” and Sovereignty: The Status of the Ryukyu Kingdom in Early-Modern and Modern Times* (this volume).

149. Abebe, *supra* note 95.

150. Stephan, *supra* note 26.

151. Forteau, *supra* note 15.

152. Dothan, *supra* note 19.

decisions in different states evidence diverging approaches to the voting rights of prisoners, and that these differences can be traced to fundamentally different conceptions about the right to vote. Dothan shows how the European Court of Human Rights invokes the Emerging Consensus doctrine as a mechanism for balancing between divergence and convergence in the application of a human rights treaty. In this way, he demonstrates a link between comparative international law and the approaches adopted by international courts, and in the process raises important questions about whether and when international courts should bridge differences or permit them to subsist.

Another example is Alec Knight's examination of the way in which the CEDAW Committee tolerates certain minority views about the meaning of the Convention and not others. He finds that the CEDAW Committee permits, if not encourages, Scandinavian feminist states to adopt interpretations of CEDAW that go beyond the margin of appreciation in a politically progressive direction, while simultaneously criticizing predominantly Muslim states for deviations from the text that seek to bend the Convention in a politically conservative direction.<sup>153</sup> This asymmetric approach raises questions about whether deviation should be permitted when it is seen as progressively developing a treaty rather than attempting to regressively limit its application. As this chapter and others show, the field of comparative international law spurs participants to ask important normative questions, but it does not provide preordained answers to those questions.

## VI. CONCLUSION

This edited collection is intentionally eclectic. It showcases a range of contributions that reflect different aspects of the comparative international law phenomenon and begins laying a theoretical and methodological foundation for this field. 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.

153. Knight, *supra* note 17.