I. INTRODUCTION

The principal issue that effectively defines the idea of comparative international human rights law scholarship is whether the interpretation of international human rights law at the domestic level has resulted in similarities or differences between jurisdictions that require explanation. By “interpretation” I mean to include within that term what the editors of this volume have described more accurately as “the way in which international law is understood, interpreted, applied, and approached.”

If striking similarities of interpretation, thus defined, are apparent at the domestic level when we might expect differences, or significant differences are found when we might expect similarities, the primary question is why these similarities and differences have emerged, and what these tell us about the use to which international human rights law is put at the domestic level. It is this question that raises the most interesting scholarly puzzles, not least because, ultimately, it may help us understand better what international human rights law is.

Discrete approaches within international law, and within comparative law, suggest some, already well-known, answers to why similarities and differences exist at the domestic level: some international law scholarship suggests that differences can

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* This chapter was written whilst I was a Fellow of the Wissenschaftskolleg zu Berlin (2014–2015). I would like to thank Veronika Fikak, Benedict Kingsbury, Christoph Möllers, Brendan O’Leary, Daniel Peat, Steve Ratner, Anthea Roberts, Mila Versteeg, participants of the Sokol Colloquium on Comparative International Law, participants at a seminar at Humboldt University, and several anonymous referees, for helpful comments and suggestions on earlier drafts.

1. See Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, Conceptualizing Comparative International Law (this volume).
be explained by the fragmentation of international law at the level of the relevant international institutions (domestic jurisdictions simply reflect these differences); some comparative constitutional law scholarship suggests that broad institutional differences between national jurisdictions explain substantive differences in interpretation (domestic jurisdictions differ no more in interpreting international human rights law than they do in interpreting human or constitutional rights more generally, and for the same reasons).

This chapter suggests that previous explanations either from comparative constitutional law or from international law are not exhaustive in explaining similarities and differences, and that the field of comparative international law usefully draws attention to additional factors. The field of comparative international law shares with comparative constitutional law a focus on the operation of domestic bodies rather than international bodies, and a focus on comparing how these domestic bodies operate. The field differs from comparative constitutional law in focusing primarily on the interpretation of international norms, rather than domestic constitutional norms. The field shares with the "fragmentation" literature a focus on the differences in the interpretation of international law, but differs from it in focusing on the way these differences in interpretation arise at the domestic level rather than the international level.

My argument is, however, that within the field of comparative international law, there is an additional element that needs to be taken into account. My hypothesis is that what similarities and differences are observable in the pattern of domestic implementation of international human rights law result, at least in part, from the different functions that international human rights law, as such, fulfills in different domestic contexts.

For example, in a recently published article in the American Journal of International Law concerning the domestic interpretation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), I argued that the observable patterns of references to CEDAW in national level courts may result, to a significant degree, from the combination of four elements that, taken together, are unique to international human rights law: that it is international law; that it concerns human rights; that it is law; and that it is being applied domestically. The first three elements combined offer domestic courts a set of norms that is consensus-based ("international") and purportedly universal ("human rights"), which courts and legal advocates are able to draw on ("law"), to help address domestic concerns, or escape from otherwise troublesome "domestic" constraints.

Courts and advocates in different jurisdictions draw on such norms to address similar or different domestic constraints, and similarities or differences may therefore emerge between these different jurisdictions as to the meaning and scope of the human right in question. The similar or different functions played in different jurisdictions by this set of four elements contribute to an explanation of similarities or differences in substantive interpretation at the national level that

neither previous international law literature taken by itself, nor the scholarship of comparative human rights taken by itself, delivers. I suggested that the study highlighted a role for domestic judicial use of international human rights standards that differs from orthodox interpretations, demonstrating the utility of a comparative international human rights analysis.

In this chapter, I hope to offer a more sustained justification for separating comparative international human rights law from other related scholarly approaches. CEDAW will be used as a running example throughout. The chapter proceeds as follows. In Section II, I attempt to isolate the field of comparative international law from other connected fields, distinguishing it from, but showing its links to, comparative constitutional law and general international law scholarship. Section III, drawing on this analysis, sets out conceptually what I understand to be necessary and sufficient elements that define the field of “comparative international human rights law.” In my view, to qualify as “comparative international human rights” each of the following three elements must be present: (1) an element of international human rights law, (2) domestic legal “use” of this international human rights law, and (3) a comparison between two or more of these domestic legal uses of international human rights law. The implications of this definition for what is included and what is excluded are identified and considered.

In Section IV, I consider differences between the approach I suggest and the broader approach adopted by the editors in their introduction to this volume, and I suggest that such differences as exist may be due to the fact that I am primarily concerned with human rights, and that comparative international human rights law has features that distinguish it from comparative international legal scholarship more generally. This has important implications for future research, and I then turn to consider some fundamental issues. I suggest some of the practical questions that arise when one is attempting to undertake a comparative international human rights legal analysis, including the type of issues that might best form the basis for such an analysis. In particular, I develop the functional hypothesis for why it is important to separate the role of international human rights law at the domestic level from other domestic level systems of rights, I suggest a broad defense of the modestly functionalist approach suggested against possible criticisms, and I consider some possible implications of a comparative international human rights law analysis if this hypothesis is correct, returning at the end to the issue of how far it matters that I am dealing with human rights. Section V concludes.

II. DEFINING THE FIELD

A. Human Rights and Comparative Constitutional Law

The phenomenon of “human rights law” (the definition of which will be considered further below) has contributed to at least three particular sets of scholarship that are of immediate importance for a comparative international human rights law approach. It is necessary to identify these with some particularity to clarify what added value a fourth set of scholarship (“comparative international human rights law”) brings.
The first is the growth of comparative constitutional law, much of which is primarily concerned in practice with comparing how the courts of domestic jurisdictions have interpreted provisions in their domestic Bills of Rights in similar or contrasting ways, although it often purports to be broader than this, investigating structural and institutional issues, such as federalism and the separation of powers. The roots of comparative constitutional law are in comparative law and in constitutional law, rather than in international law, and those engaging in comparative constitutional law have largely ignored international law, seeing it as a separate discipline.³

International human rights law is of some interest to comparative constitutional law, but principally in two respects. First, different domestic legal systems have different constitutional relationships with international law, and this is regarded as a topic suitable for comparative study in itself.⁴ So, for example, whether a state is monist or dualist (or somewhere in-between) is largely a matter of domestic constitutional law, and is a topic that generates comparative scrutiny. International human rights law, in this field of study, tends to be considered largely from this constitutional perspective, analyzing the who, what, where, when, and why of the relationship between the domestic constitutional law of different states and the body of international human rights law. How far, for example, do domestic courts directly apply international human rights law as part of their domestic legal system, and is it hierarchically superior or inferior to other legal norms in that system?

In this context, the primary interest of constitutional law comparativists is, understandably, in the structural and institutional implications of international human rights law for domestic legal systems, rather than in its substantive human rights content. This approach maintains a strict distinction between international law and domestic law, identifying the comparative constitutional issue as being the different ways in which domestic systems bridge the gap between these two different systems. The approach taken is appropriately regarded as comparative where the comparison involves norms, each of which is binding.⁵

³. It is invidious to try to date the modern growth of comparative constitutional law's engagement with human rights but a rough starting point would probably be Thomas M. Franck, Comparative Constitutional Process: Cases and Materials (1968), followed by Comparative Human Rights (Richard P. Claude ed., 1976), both of which demonstrate these characteristics. This tradition has continued to the present day: two of the most widely used American law school casebooks on comparative constitutional law, Norman Dorsen et al., Comparative Constitutionalism: Cases and Materials (2d ed. 2010) and Vicki Jackson & Mark Tushnet, Comparative Constitutional Law (3d ed. 2014), well illustrate some of these tendencies. A significant proportion of each concerns the interpretation of constitutional rights; in each, the material considered relevant primarily comprises domestic constitutional interpretations by constitutional courts or cognate bodies. The European Court of Human Rights is accorded a sort of honorary status of “European constitutional court” for these purposes. Apart from this exception, there are relatively few references to international law materials, and where they occur they are treated primarily as equivalent to domestic sources.


⁵. This seems particularly the case as regards scholars from civil law-influenced backgrounds who tend to resist this blurring. See, e.g., Michal Bobek, Comparative Reasoning in European
Second, international human rights law has also come, more recently, to have considerable importance in comparative constitutional law, particularly in systems based in the common law, where international human rights law is drawn on in judicial decisions as an interpretative resource—rather than a binding norm—in the course of adjudicating disputes concerning domestic constitutional law. How far, for example, do domestic courts consider international human rights law when interpreting domestic Bill of Rights provisions, what we might call the “indirect application” of international human rights law? The growth in practice of domestic courts engaging in “indirect application” has contributed to a view emerging among some comparative constitutional law scholars that international human rights law is to be regarded as a subset of, and contributing to, the development of a human rights jurisprudence that has become transnational. There is, in this context, little emphasis on strict separation of sources into national and international, monist and dualist systems, binding and non-binding in domestic constitutional law. This second approach now dominates comparative constitutional law and has led to several studies of particular issues, such as comparative studies of the meaning and enforcement of socioeconomic rights across several jurisdictions, and methods of judicial reasoning in human rights cases, in which international law is shown to have been regarded by several domestic judiciaries as one of several normative systems that are to be included in the interpretative exercise.

This brief survey shows that, within the field of comparative constitutional law thus defined, there are no studies, so far as I am aware, attempting to apply the comparative method to the interpretation of international human rights as such in different domestic legal systems. So, for example, although there are many comparative studies of the movement to secure women’s rights in different domestic systems,

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6. Two recent studies exemplify this approach. See Vicki C. Jackson, Constitutional Engagement in a Transnational Era 10–11 (2010) (“This book is concerned less with defining those situations in which international law, as such, is internally binding than with exploring the possibilities of international law serving as a reflective or persuasive resource in the interpretation of domestic constitutions themselves . . . , including the degree to which aspects of international law should be regarded as in a sense constitutional.”); Erin Daly, Dignity Rights: Courts, Constitutions, and the Worth of the Human Person 150 (2013), 150 (describing how “the once rigid lines between international and municipal law have begun to blur”).


these effectively tend to treat international norms, such as CEDAW, as hardly worth distinguishing from the national norms.

B. International Human Rights and International Law

If we turn now from comparative constitutional law to the field of general international law, there are two strands of international law scholarship that are of particular relevance to our study.

The first is the strand of international legal scholarship that has traditionally been concerned with the incorporation of international law into domestic law, and has developed a sophisticated set of concepts with which to analyze how this is accomplished in different domestic legal systems. This is the point at which international law scholarship comes most closely into contact with comparative constitutional law, which, as we have seen, has similar interests. The approach is comparative, but instead of focusing on the substantive interpretation of the relevant international law, and whether, for example, the interpretation differs significantly because of whether it has been incorporated or not, this field of scholarship is more concerned with distinguishing the techniques of incorporation and the differences in the legal status of the international law norms depending on which techniques of incorporation have been adopted. It is primarily concerned, then, with differences in the authority that international law norms have been accorded, rather than with their substance.9

A second scholarly development of importance in international law is more concerned with substantive similarities and differences in the meaning of the international legal norms as interpreted by relevant international actors. This international law scholarship has effectively split into two competing approaches. In one approach, which I suggest is the dominant, indeed one can say orthodox, approach, international legal scholarship incorporates diverse materials, including from national legal systems, primarily to illustrate, or to bring about, the coherence of the international human rights system.

In contrast, a second approach challenges this orthodox approach and tends to focus on what has been termed “fragmentation.” International law has been described as “fragmenting,” meaning that it is losing its coherence amid the plethora of institutions responsible for interpreting these norms. Fragmentation emphasizes the absence of consensus in practice in the interpretation of the substance of international law.10 This fragmentation, however, is primarily seen as emerging at the international level itself, and is less concerned about identifying fragmentation at the domestic level. We are now seeing the (re-)emergence of an approach to


international law that emphasizes the multiplicity of different, and sometimes competing, international regimes. This literature often sees the substantive legal norms that international legal regimes develop as differing in significant respects.

The primary focus of the “fragmentation” literature is on international law in general, but there is also considerable interest in particular areas of international law, including human rights. International human rights law is seen as also subject to fragmentation; indeed, it is often seen as a principal example of the phenomenon. There have been studies, for example, examining differences in the treatment of religious dress by the ECtHR and the UN Committee on Human Rights. Attention has been given to how particular areas of international human rights law have developed differently from core aspects of general international law (for example, differences between general international law and international human rights law in how customary law is developed and recognized).

Although focused on international law, both general and specific, the fragmentation literature borrows its basic methodology from comparative law; it involves comparing, for example, how and why different international law bodies have taken similar or contrasting approaches in interpreting relatively similar norms. The difference between this international law scholarship and comparative law scholarship (including comparative constitutional law) is that the focus of the former is on comparing “international” institutions (broadly defined to include prominent regional organizations, such as the ECtHR) rather than on comparing domestic institutions.

In the context of the implementation of CEDAW, for example, we see excellent examples of this second type of international law scholarship, with both coherence- and fragmentation-oriented approaches in evidence. Recently, a Commentary on CEDAW has been published that exhibits the features of a classic international law analysis, in which the dominant focus is on the interpretation of the text of CEDAW by international bodies, primarily the Committee established to oversee its implementation, the Committee on the Elimination of all Forms of Discrimination Against Women. The Commentary brings together the Committee’s interpretations, introduces the reader to interpretations of CEDAW by other international and regional human rights bodies (such as the European Court of Human Rights and the Inter-American Court of Human Rights), systematizes them according to the particular Article of the Convention, and aims to produce a coherent account of the existing interpretative practice. Occasionally (perhaps in this Commentary somewhat more than in equivalent Commentaries on other international law instruments),


13. Few of the many highly regarded commentaries on the major international human rights treaties pay any attention to domestic interpretations of the treaty, and in those commentaries that do, references to domestic case law occupy very little space. See, e.g., SAUL ET AL., supra note 10.
there are occasional references to a domestic court’s interpretation or application of CEDAW, but there is no attempt to survey these decisions systematically.

The academic literature on CEDAW also contains attempts to address the issue of fragmentation, and recently there has been a significant set of studies that compare CEDAW with other multilateral (international and regional) regimes, with a view to establishing significant differences between the interpretation of CEDAW and other international or regional regimes attempting to further women’s equality, particularly that of the European Union, or between CEDAW and other international law regimes outside the human rights field that appear to be cutting across CEDAW, such as areas of international economic law.

C. “Comparative International Law” Introduced

Into this already crowded field of human rights scholarship, another approach is currently being developed, which has been termed “comparative international law.” Scholars working in this field of study have identified a gap between scholarship on comparative constitutional law and international law scholarship. This new field of study explores comparatively how different domestic institutions interpret the same or broadly similar international law norms (e.g., whether the United States and the United Kingdom have distinct interpretations of international investment arbitration law). This would include comparisons between international bodies interpreting international law and domestic courts interpreting constitutional and other domestic rights that are seen to be the close equivalent to the international legal requirements, in the sense that the domestic standards satisfy the obligation to have already or to adopt for the first time such laws or other measures as may be necessary to give effect to the norms recognized by the international standards.

In the international human rights context, this is a surprisingly underdeveloped approach. There is only one major study, so far as I am aware, attempting to apply


the comparative method to the interpretation of international human rights law as such in different domestic legal systems, and that is a very recent study of how selected domestic jurisdictions have interpreted CEDAW.17

III. FIELDS OF INQUIRY OF COMPARATIVE INTERNATIONAL HUMAN RIGHTS

What emerges from the discussion so far, therefore, is that both the existing international law and comparative constitutional law literature have strengths and weaknesses in seeking to understand the phenomenon of domestic interpretation of international human rights law at the domestic level, and that the new field of comparative international law is a welcome additional perspective that can be brought to bear. But what of comparative international human rights law scholarship? What does it involve? In this section, I consider the fields of inquiry of comparative international human rights law, attempting to specify precisely where comparative international human rights analysis adds value to existing approaches. In the next section, I consider the extent to which comparative international human rights law is sui generis even within the field of comparative international law, and what the implications are if it is.

A. Multilayered Governance

Before proceeding to a discussion of fields of inquiry, there is one key point that needs to be made. It has been clear for some time that the standard dichotomy between the domestic level and the international level no longer captures the multiplicity of governance structures that we find in practice. The term that is used to capture this phenomenon is “multilayered” governance, and the spatial metaphor continues in the adoption of other terms that seek to describe the relationships between institutions that are involved at the various layers. So, for example, it is now common in the legal literature to speak of “vertical” and “horizontal” relationships, which describe the relationship between institutions that are or are not hierarchically structured.18 We would speak of the “vertical” relationship that exists between the devolved government in Scotland and government of the United Kingdom, sitting in London. In contrast, we may speak of other institutions, not in a hierarchical relationship with each other, as in a “horizontal” relationship, for example the horizontal relationship between the devolved government in Scotland, and the devolved government in Wales. Although relationships between institutions and governments are often more complex than this simple dichotomy presumes, it is useful for heuristic purposes, and the terminology of “vertical” and “horizontal” will be adopted in the subsequent discussion.


B. Necessary and Sufficient Conditions

To qualify as “comparative international human rights” all three of the following conditions must be present: (1) there must be an element of international human rights law, (2) there must be domestic “use” of this international human rights law, and (3) there must be a comparison between two or more of these domestic uses of international human rights law. For the purposes of this chapter, “international human rights law” includes human rights treaty law developed and applied at the international level, such as in various United Nations bodies, and human rights treaty law developed and applied by regional human rights bodies, such as the European Court of Human Rights. International human rights law also includes customary international human rights law.

C. Domestic Interpretation of International Human Rights

The principal focus of this chapter is on a particular subset of the second category of comparison suggested above, that is, horizontal comparisons of the ways in which different domestic bodies have interpreted international human rights norms as such. The prime example of what is included is a horizontal comparison between domestic courts interpreting international human rights law (treaty or customary), for example comparing how the Canadian courts interpret the concept of “jurisdiction” in human rights treaties, with the interpretation of equivalent provisions by the United Kingdom Supreme Court or the United States Supreme Court; or comparing the extent to which national courts consider nonstate actors to be subject to international human rights obligations; or comparing how different national courts exercise their responsibilities in applying the human rights aspects of international criminal law.

The principal focus on judicial interpretation should not be taken as excluding the potential focus on other units of analysis, for example nonstate actors at the state level and transnationally, various international actors, and other state actors such as legislatures, executives, and administrative agencies. Indeed, one of the actors most studied comparatively are national level human rights institutions, given the task of interpreting international human rights law at the domestic level.

Although not traditionally included with the scope of “comparative law,” another area of comparison included in this chapter is a vertical comparison between domestic bodies within the same jurisdiction in the way they interpret international human rights law, for example, comparing how the US federal courts interpret international human rights law with how the California Supreme Court interprets it, or comparing how national human rights agencies interpret international


human rights law with how domestic courts interpret international human rights law.

We can now identify more clearly what comparisons are and are not included in the field of comparative human rights. We can distinguish between: (1) horizontal comparisons of international and regional human rights bodies, (2) horizontal comparisons of national human rights bodies, and (3) vertical comparisons of international human rights bodies with regional human rights bodies, and with national human rights bodies.

D. Horizontal Comparisons

This chapter does not consider that the first of these, that is, horizontal comparisons of the way in which different international bodies interpret international human rights norms, constitutes comparative international human rights law. This particular horizontal comparison is the primary focus of attention in the “fragmentation” literature, from which “comparative international law” seeks to distinguish itself. Comparing, for example, how the International Court of Justice interprets particular human rights with how the International Criminal Court interprets the “same” rights, under treaty or customary international law, is primarily an issue of international law “fragmentation.” Also not included are horizontal comparisons between “regional” bodies, comparing, for example, how the ECtHR and the Advisory Committee on the Framework Convention interpret freedom of religion, or comparing the interpretation of the ECtHR with that of the Inter-American Human Rights Court relating to the “same” concepts in human rights law, such as the notion of the “person.”

So too, horizontal comparisons between “regional” courts’ interpretation of international human rights law are not included, where a comparison is drawn, for example, between how the European Court of Human Rights receives and interprets international human rights law compared with the approach adopted by the Court of Justice of the European Union, or compared with how the Inter-American Court receives and interprets the “same” international human rights law, such as


that regarding freedom of expression, or prisoners’ rights. Nor, in the context of CEDAW, are we concerned with comparing the treatment of women’s rights by different international committees overseeing different human rights treaties.

E. Vertical Comparisons

I have stipulated that two or more state jurisdictions must be involved for it to be regarded as truly “comparative” in my understanding of the term. Therefore, the third type of comparison distinguished above, viz. vertical comparison between international bodies interpreting international human rights law (treaty and customary) and one particular domestic court interpreting international human rights law (treaty and customary), will not be included in the field of “comparative international human rights law.” For example, how the UK Supreme Court interprets a particular human right protected under customary international law compared with the interpretation of the same right under customary international law by the International Court of Justice will not be included, nor will comparisons between one jurisdiction’s approach to the interpretation of human rights compared with that of the Human Rights Committee be included. But it would be appropriate to include a comparison between multiple domestic courts and a regional or international body.

F. Constitutional and Statutory Rights

Just as several comparisons are not included because they are already included within what the fragmentation literature would consider, several other understandings of comparative human rights law are also not included as they are essentially the subject matter of comparative constitutional law. As a result, only a subset of the second category of comparison sketched out above (horizontal comparisons of national human rights bodies) is included. Of course, constitutions are influenced


27. See, e.g., Piet Hein van Kempen, Positive Obligations to Ensure the Human Rights of Prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family Under the ICCPR, the ECHR, the ACHR and the AfChHPR, in Prison Policy and Prisoners’ Rights: The Protection of Prisoners’ Fundamental Rights in International and Domestic Law (Peter J.P. Tak & Manon Jendly eds., 2008).


29. See, e.g., The International Covenant on Civil and Political Rights and United Kingdom Law (David Harris & Sarah Joseph eds., 1995).
by international law (and vice versa), but that is not the project on which comparative international human rights law is intended to focus. The comparative study of constitutional rights protections that are merely equivalent to international and regional rights, such as socioeconomic rights, will also not be included, even where the international standards are used as the baseline for assessing the different approaches adopted nationally.\textsuperscript{30}

Comparisons of how ordinary domestic statute law seeks to protect rights equivalent to international human rights, such as the right to private life, insofar as it applies to state and public bodies, will not be included. So, too, domestic law that protects equivalent rights between private persons, including domestic antidiscrimination law, for example, is not included as it falls more clearly into comparative law in the traditional way in which it has been conceptualized above. A horizontal comparison between domestic constitutional law regimes preventing discrimination, for example comparing the approach taken by the United States Supreme Court on a particular right with that taken by the Indian Supreme Court, where no international or regional human rights law issues arise, will not be included. Although not included as the primary object of study, these understandings of “human rights” have links with those issues that are included, and would therefore have to be kept in mind in the course of a comparative international human rights law study.

G. Shared Meta-principles

Although several other comparisons may be at the margins of comparative international human rights law, seeming to fall more squarely into comparative constitutional law or “fragmentation,” I suggest that, in the human rights context at least, excluding these comparisons entirely from the field of inquiry weakens the explanatory richness that the project of comparative international human rights law seeks to achieve. In particular, horizontal comparisons between domestic courts interpreting meta-principles that appear to be shared between the different levels and jurisdictions should be included. For example, there is now significant domestic reference to “human dignity,” even where the domestic court does not advert to the fact that the meta-principle is also present in international human rights law. A comparative examination of this phenomenon should be included.\textsuperscript{31} However, where the comparison is only between interpretations of such meta-principles by international and regional bodies, it would not be included.\textsuperscript{32}


\textsuperscript{31.} See, e.g., Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 Eur. J. Int’l L. 655 (2008); Daly, supra note 6.

H. Equivalent Standards

So, too, *vertical* comparison between international bodies interpreting international human rights law (treaty and customary) and domestic courts interpreting constitutional and other domestic rights that are equivalent to the international rights, might also usefully be included. Thus, for example, how the Inter-American Court interprets the right to freedom of expression under the IACHR might usefully be compared with the approach taken by the United States and the UK Supreme Courts to freedom of speech under domestic law. Although these additional comparisons appear to be less related to international human rights law proper, they are necessary for a fuller understanding of the reasons for similarities and differences in the interpretation of international law, not least because they are thought to satisfy the obligation to have already or to adopt such laws or other measures as may be necessary to give effect to the rights recognized by the international standards.

I. Transnational Human Rights Law

It is more uncertain whether *transnational* human rights law should be included, in the sense of human rights legal standards that apply across two or more legal jurisdictions but are not international or regional within the meaning of these terms that I have proposed previously; the protections under the Alien Tort Statute (ATS) might fit within this controversial category. After some consideration, I suggest that these “transnational” standards should be included. Several of these types of provisions, like ATS itself, are based on a domestic law provision but are regarded domestically as based on international law, so they are sometimes indirect attempts to apply international law, particularly customary international law. They often involve some of the more interesting hybridization between domestic and international law, leading to distinct national interpretations of international law, and thus seem to fit into my general understanding of the project.33

IV. IS COMPARATIVE INTERNATIONAL HUMAN RIGHTS LAW DIFFERENT?

The approach taken in this chapter to defining the field of comparative international human rights law has resulted in a rather narrower definition of the field than the editors of this volume have considered useful regarding other fields of comparative international law. The editors offer a provisional definition: “the field of comparative international law entails,” they write, “identifying, analyzing, and explaining similarities and differences in the way in which international law is understood, interpreted, applied, and approached by different national and international actors.”34


34. *Supra* note 1 (emphasis added).
While we all agree that the primary focus should be on how different national bodies interpret these norms, the editors’ “provisional definition” wouldn’t exclude from the analysis how different international and regional courts might interpret these norms (without reference to domestic interpretation), particularly when this is likely to have an effect within particular states. And whilst they agree that the focus of the project is not on the fragmentation debate, which tends to look primarily or exclusively at differences between international law fields and interpreters, if an issue is being dealt with by the ECtHR and national courts, then it seems artificial to separate the regional level out.

One possible reason a narrower approach might be justified in the human rights context is that, as we have seen, there already exists a rich comparative constitutional law literature applying to constitutional law (one that often talks about norms and transnational issues), as well as a rich fragmentation literature applying to human rights. In the absence of a clear distinction among the various fields, the likelihood is high that what we have termed comparative international human rights law could easily fuse with comparative constitutional law, or with the fragmentation literature. This would be a matter of regret, in my view, because keeping the three distinct brings out the extent to which different explanations apply to similarities and differences in the context of comparative international human rights law than apply in the context of comparative domestic human rights law or fragmentation, and it is to this issue of added value that we now turn.

A. Undertaking Comparative International Human Rights Law Analysis: Some Testable Hypotheses

There are several important issues that arise in any attempt to undertake a comparative international human rights law analysis. I shall focus on only three of these. The first, obvious but critical, issue is what hypotheses we are testing when we engage in a comparative international human rights law analysis. My suggestion is that a suitable issue, indeed one that I suggest should dominate comparative international human rights law analysis generally, is whether international human rights law plays similar or different functions in different jurisdictions. Similarities (and differences) in the domestic interpretation of international human rights law arise when national bodies adopt the same (or different) views as to how, and in what circumstances, international human rights law is best applied to address what are perceived to be domestic legal problems. The investigation of this hypothesis, that there are different functions of international human rights law at the domestic level, should constitute the core of the study of “comparative international human rights law.”

There is an important point that needs to be emphasized at this juncture. This suggestion is not following a crude realist international relations perspective, which suggests that similarities and differences arise from the interests that states have and consider important, and that domestic interpretation of international human rights simply tracks this self-interest. My suggestion is more sympathetic to disaggregating the different domestic actors that make up the state and treating each as having
different roles and functions. So whilst my approach emphasizes the important
dynamics and concerns of the local context as the primary determinant of similarity
and difference between states in the domestic interpretation of international human
rights law, it is significantly institutional in its understanding of that context.

What I suggested was the case in the domestic interpretation of CEDAW by
domestic courts may be true more generally, viz. that four elements taken together
(international + human rights + law + domestic context) may contribute to an
explanation of similarity and difference in substantive interpretation at the national
level that neither the international law fragmentation literature taken by itself, nor
the scholarship of comparative law (and its subset, comparative constitutional law)
taken by itself, provides. It is, therefore, a discrete area of study, but one that sits
somewhat uneasily among existing scholarly endeavors, poised between the con-
cerns of international law scholarship and the study of “comparative constitutional
law.” It does not replace these existing approaches; rather it complements and
supplements them.

The second, again obvious but important, issue concerns the choice of which
area of international human rights law to focus on. This is likely to be affected
not only by the interests of the researcher, but also by the availability of research
resources. In particular, if the examination (as I suggest it should) attempts to
undertake an analysis across a range of jurisdictions, compiling a dataset may prove
no easy task. Take the example of undertaking a comparative international human
rights law analysis of CEDAW. We might decide that we wanted to test the hypoth-
esis that CEDAW plays a different role in different states from that which it plays at
the international level, and that we will analyze CEDAW’s domestic judicial inter-
pretation of its provisions to do this. But how is a dataset of domestic cases to be
compiled for the purposes of this analysis? There are multiple domestic law data-
sets, but accessing them, and collating the material is no easy task.\footnote{See
Christopher McCrudden, \textit{CEDAW in National Courts: A Case Study in Operationalizing
Comparative International Law Analysis in a Human Rights Context} (this volume).}

Third, assuming that we have identified a suitable hypothesis, and compiled a suit-
able dataset, what are the questions we might ask of the dataset to test our hypoth-
esis? The difficulty of undertaking this analysis should not be underestimated. The
temptation in this mode of comparison is to see equivalences or differences depend-
ing on the predetermined theoretical assumptions that the comparativist brings to
the analysis. If one is a Marxist comparativist, one is more likely to see phenomena
fulfilling materialist functions. The danger at this stage is that it may be difficult to
get beyond the mere assertion that a particular use of CEDAW in Tonga is the func-
tional equivalent of the use of CEDAW in Belgium.

To deal with this as best we can, a structured approach is helpful, using a two-
stage approach. The first stage involves asking to what extent “traditional” explana-
tions for similarities and differences at the domestic level, for example those drawn
from fragmentation and comparative constitutional law, account for observable dif-
fferences and similarities. There are four particular issues that we can identify in our
current state of knowledge to test this: (1) the process of norm transference and
diffusion, seeking to explain similarities and differences as a function of external force, persuasion or acculturation; (2) the legal status accorded by the courts to this international law instrument in their own legal systems; (3) the interpretative methods used by the courts, considering, for example, whether differences emerge between states that are part of different legal families (common law versus civil law, for example), or different legal cultures, or as a result of different institutional characteristics of the interpretative bodies; and (4) the extent to which similarities and differences in interpretation at the international level are reflected in similarities and differences at the domestic level.

To the extent that similarities and differences between jurisdictions across these four issues do not correlate with the differences and similarities in substantive interpretations of an international legal norm, then this indicates that a more systematic second-stage analysis, going beyond “traditional” explanations is necessary.

The second stage requires, I suggest, an analysis of what, more exactly, the different functions of international law are at the domestic level. Arising from my study of CEDAW, it would be useful to test the hypothesis that international human rights law more generally offers domestic bodies, such as courts, a set of consensus-based, purportedly universal legal norms that courts and advocates are able to draw on to address the particular local context in which the issue arises. Does international human rights law operate in a way, or to a degree, that other legal sources do not, for example in helping the domestic court to escape from otherwise troublesome domestic legal constraints? Do courts and advocates in different jurisdictions draw on such norms to address similar or different domestic contexts, resulting in observable similarities and differences emerging between these different jurisdictions as to the meaning and scope of the human right in question?

B. Functionalism

A functionalist account is, of course, prone to criticism, particularly if it is seen as part of a larger “structural-functionalist” understanding of the world in general. It is important, therefore, to stress the relatively modest role I have given to the suggested functionalist account, and to make clear what I am not arguing. I am not suggesting that functionalism should be seen as a grand theory that can explain society in all its forms; it provides a limited (but useful) perspective in this particular context, one way of understanding human rights that other approaches may miss, or underestimate. This modesty has three important implications.

I do not, first, account for the development of human rights generally solely through recourse to a functionalist explanation. I do not assume, therefore, that determining the current function of international human rights law provides an explanation of the efficient cause that produced international human rights law in the first place. Mine is not a teleological explanation. Indeed, my functional analysis does not seek to explain why international human rights happened at all, but how it operates and develops today.

Second, I do not downplay the importance of agency in my functionalist explanation, and agency must be accorded appropriate space. Particularly in the human
rights context, we are constantly reminded that individual actors matter, in terms of mobilizing human rights, in terms of interpreting human rights, and in terms of implementing them successfully. My functionalist explanation has a significant limitation, therefore, in not being able to explain in what circumstances particular actors choose to exercise their agency, but to the extent that we are dealing with courts and judges this will involve an analysis of judges’ understanding of their role and function generally.

Third, the functionalism suggested here is not partisan, in favor or against the human rights project. I do not seek to justify the human rights project by reference to the functions they fulfill in particular societies. I do not consider international human rights to be indispensable, in the sense that they are necessary in order to fulfill particular functional prerequisites, and I do consider that the functions currently fulfilled by international human rights may be able to be met by other functional alternatives. I do not, in short, seek to derive any normative argument from the functional explanation I advance. Future work in human rights law might focus on what the normative implications are of comparative international human rights law. Where differences are noted, scholars may wish to consider whether one interpretation is preferable to the other, in terms of its legitimacy, its degree of compatibility with international law, or its efficiency (in the sense that one standard is likely to be more effective than another standard in practice). In the future it is worth considering what, if anything, the hypotheses developed below might add to normative critique, but such an analysis is outside the purview of what I have described as the core interests of comparative international human rights law scholarship.

C. Do Differences Matter?

Assuming that these hypotheses turn out to be supported by the empirical evidence, as appears to be plausible, what wider implications, if any, may this have? Here, again, the implications may be somewhat different because they arise in the human rights context, as compared with an area such as international economic law, or the law of the sea. In the latter cases, empirical support for these hypotheses might call for action to better inform interpreters at the domestic levels, for example, but the issue would likely be seen primarily as a coordination problem, not an existential one. I suggest that three implications of the results of comparative international law in the particular area of human rights may be of particular importance.

First, the empirical results may well cast an interesting light on the old, and deeply contested territory, of how we should understand the different accounts we have of the evolution of human rights. One of the key issues in the debates between these different histories of that evolution is whether we see continuity or discontinuity. Is there a continuity of values across space and time, which we see currently fraying at the edges? Or has there always been a discontinuity of values across space and time, and we are merely seeing confirmation of this? Or are we observing some sort of co-evolutionary process, where human rights evolve out of a continuing discourse

36. McCrudden, supra note 2.
among the various actors and institutions? Thorough comparative international human rights law promises to throw new light on this old debate.

Second, if a comparative international human rights analysis finds a deep pluralism operating in practice, this will be troubling to those who view the ideology of international human rights law as universalistic.37 Some might well view empirical support for the hypothesis that international human rights law plays different functions in different domestic contexts as constituting an existential threat to the international human rights project. My own view, however, is that rather than challenging the normative foundations of human rights, it urges us on to attempt to produce a normative theory that is more in sync with empirical reality, but that is an issue for another day.

Third, these findings, if confirmed, appear to cast some doubt on recent constructivist accounts of why international human rights standards come to be received into the practice of states, what Harold Koh has termed “norm internalization.”38 Goodman and Jinks, for example, identify three types of social mechanisms: 39 material inducement (states are influenced by others applying “material rewards and punishments”),40 persuasion (states are “convinced of the truth, validity, or appropriateness of a norm belief, or practice”),41 and acculturation (a state grows to emulate the practice of other states with which the state wishes to establish or maintain good relationships).42

Constructivist accounts have frequently focused on state decisions regarding ratification of international norms, and in particular how states come to decide that they will formally join new or existing treaty regimes, and have paid less attention, thus far, to the important question of how “states” come to internalize these norms other than by the decisions of foreign ministries, cabinets, and legislatures. Less attention has, so far, been given to the question of how international norms come into, and are applied by, domestic courts.43

Comparative international human rights legal scholarship shows how legal norm internalization may also occur through the influence of judicial decision-making. If my suggestions are correct that a significant driver in the judicial adoption of international human rights norms is their utility in addressing domestic issues, then the extent to which this judicial norm internalization occurs through social processes of

40. Id. at 23.
41. Id. at 24.
42. Id. at 25–26.
persuasion and acculturation, in which courts are primarily concerned with relevant external and international communities, is questionable. Yet relatively little empirical work has been done on norm internalization of international human rights law at the domestic judicial level, and it is to be hoped that the emergence of comparative international human rights law will encourage other scholars to engage in further study of these issues.

V. CONCLUSION

This analysis has presented an analytical and conceptual examination of the value to legal scholarship that might be added by a comparative international human rights law analysis, compared to previous international and comparative constitutional law approaches. It concludes that the emerging field of international comparative law does, indeed, have a (limited) role to play as sketched out previously, one that is both unique and (strangely) somewhat neglected until recently in the human rights field.