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Comparative international law: enhancing migration law enquiry?

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Abstract: This article demonstrates what comparative international law (CIL) can contribute to the field of international migration law (IML). It is not an exhaustive overview of the value of a CIL approach; rather, through indicating some of the possibilities of CIL, it provokes thought as to how CIL could enhance IML enquiry. Before turning to the migration context, the key tenets of CIL are outlined. Then, I argue, using examples drawn from my ongoing research, that CIL can provide a more holistic and fine-grained understanding of IML. Moreover, CIL can offer insight into how discrete IML regimes interact within States. The assessment explores the possibilities and limitations of such an approach. I conclude by calling for increased reflection on the possibilities of CIL as a methodological approach within the field of IML.

Keywords: international law; international migration law; IML; comparative international law; CIL; comparative research; refugees; non-refoulement; United Nations Treaty Bodies; UNTBs.

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Biographical notes: Gillian Kane is a postdoctoral researcher at the Irish Centre for Human Rights, School of Law, University of Galway. She currently works on the Irish Research Council COALESCE: 'Human trafficking, forced migration and gender equality in Uganda' project. She is also a research affiliate at the Refugee Law Initiative, School of Advanced Study, University of London, and Co-Chair of the Human Trafficking Research Network at Queen's University Belfast's Human Rights Centre. Her PhD research, completed at Queen's University Belfast, assessed the role of international law in preventing and tackling human trafficking among refugees and asylum seekers in Africa in Europe.

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1 Introduction

While the phenomenon of migration and its governance is far from new, the contemporary context is one of ever-increasing global mobility. Moreover, drivers of displacement continue to prevail across the globe. Given that migration, by its very nature, often transcends state borders, international law's central role in migration governance is unsurprising. Recent decades have seen an ever-increasing proliferation of both international norms and international institutional actors in the field of migration. These norms address the rights and legal status of refugees, trafficked persons, and migrant workers, among others. Nevertheless, it has been argued that “[t]he role of international law in the field of migration is complex and frequently misunderstood” [Chetail, (2019), p.5]. This ‘complexity’, Chetail (2019, p.5) argues, “is inherent in the dual nature of migration as a question of both domestic and international concern”. Chetail (2019, p.7) defines international migration law (IML) in a broad manner, as “the set of international rules and principles governing the movement of persons between states and the legal status of migrants within the host countries”. This definition has the capacity to encompass, *inter alia*, international refugee law, international law on human trafficking, and various elements of international human rights law (IHRL).

The pursuit of enhanced understanding of the function of international norms within the field of IML is necessary, given both its growing importance and recognition as an ‘emerging field’ of international law [Kysel and Thomas, (2020), p.349], and these claims of its complexity and misunderstanding. Any methodological tool that may assist in such a pursuit is worth employing. This article conceptualises comparative international law (CIL) as one such potential tool, within which is the possibility to enhance understanding and to help navigate the ‘inherent complexity’ within IML. The attention turns first to the question of what, precisely, CIL is, with some focus on the similarities and distinctions between CIL and comparative law. Then, the focus shifts to how CIL may be operationalised in the IML context. The assessment is not an exhaustive overview of the conceptual basis of CIL; this can be found elsewhere [see, e.g., Roberts et al., 2018; McCrudden, 2018b). Rather, through indicating some of the methodological possibilities of CIL, it provokes thought and imagination as to how CIL can enhance migration law enquiry. The article concludes by looking forward, calling for increased use of CIL methods in the IML context.

2 What is CIL?

Comparison within the field of international law is hardly new. However, in recent years, interest in CIL as a *distinct* methodological approach, is ‘emerging, or re-emerging’ [Roberts et al., (2018), p.5]. But what, precisely, does CIL enquiry encompass? Some scholars, including Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg have been engaged in ‘framing the field’ [Roberts et al., (2015), p.467]. What has emerged is a broad approach, which, as is clarified below, could involve diverse analyses. A useful starting point is the ‘provisional definition’ offered by Roberts et al. (2018, p.6) “comparative international law entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law” [Roberts, (2017), p.469]. Underpinning this is a conceptual reflection on whether international law is ‘international’, in contrast to the

more common question of whether international law is ‘law’ [Roberts, (2017), p.321]. What distinguishes CIL is its focus and purpose on investigating *international law*. This means that analysis of domestic law is not necessarily an end of itself, but rather, a means to observe and understand how international law behaves within a certain context. McCrudden (2018b, p.453), for example, referring to ‘comparative IHRL’, suggests that the ‘issue’ which “should dominate comparative IHRL analysis generally, is whether IHRL plays similar or different functions in different jurisdictions”.

Since CIL focuses on ‘actors in different legal systems’, the pertinent questions are: which actors, and in which legal systems? Regarding actors, i.e., the ‘unit of analysis’, proponents assert that “cross-national studies can have multiple units of analysis” [Roberts et al., (2018), p.10]. In addition, according to proponents, CIL “includes both horizontal (state-to-state) and vertical (state-to regional and state-to-international) studies” [Roberts et al., (2018), p.10]. Thus, the range of potential actors that may be assessed is extensive, encompassing both state and non-state actors, as well as ‘state-empowered entities’ [Sivakumaran, (2017), p.350], such as the International Law Commission or international courts (Roberts et al., 2018). Given the foregoing, it is unsurprising that on the question of which legal systems may be investigated, the response is equally broad. Indeed, domestic, regional, and international systems can all be analysed within CIL.

The breadth of possibility seems logical, since the scope of application of international norms is, in principle, global. Indeed, a review of emerging CIL research demonstrates its potential breadth. For example, Verdier and Versteeg (2018) carried out a large empirical study on the role of international law within national legal systems, compiling a dataset focusing on various aspects of domestic approaches to international law, from 1815–2013. Moreover, McCrudden (2018a) conducted an analysis of the use of the Convention on the Elimination of Discrimination against Women (CEDAW) in national courts, relying on over 300 cases, across 53 states.

Significantly, it has been posited that CIL may draw inspiration from related, but distinct fields, including international relations theory and comparative law (Roberts et al., 2018). Given the focus in this special issue, particular attention is given to what CIL can glean from comparative law, as well as the key differences between the two approaches. Understanding the distinction between the two approaches is essential, so that the most suitable methodological approach is selected in any given investigation. The key distinction to bear in mind is that the focus of CIL is on how international law is understood, interpreted, applied, and approached by various actors (Roberts et al., 2018). While national law is certainly relevant, the focus in CIL is what national law can tell us about the role of international law within domestic systems (*cf.* comparative migration law, e.g., Cope, 2022; Hinterberger, 2022). With this in mind, scholars can avoid conflating the two approaches in any given investigation. Notwithstanding this distinction, an understanding of the potential points of intersection between the two approaches, including how well-established principles of comparative law may be operationalised within CIL methods, is equally important. As an emerging methodological field, the possible applicability of tried and tested comparative law principles should certainly be welcomed.

On the question of what CIL can glean from comparative law, proponents offer suggestions on methods, such as “identifying the appropriate benchmark for comparison”, in other words: “[w]hat is going to be compared to what?” [Reitz, (1998),

p.620; Roberts et al., (2018), p.14]. This could be an international norm itself, or perhaps a ‘functional outcome’ [Roberts et al., (2018), p.14]. While various approaches could be taken and none appear to be hailed as the most appropriate for CIL scholarship, Roberts et al. (2018, p.14) do posit that “it is important for CIL studies to be explicit about their benchmark for comparison”. By taking time to reflect on the benchmark for comparison, researchers can proceed with more precision. In addition, the functional method within comparative law may be particularly suited to CIL. For example, “analyses could search for functional differences in the face of formal similarities” [Roberts et al., (2018), p.14]. It is perhaps through an articulation of the benchmark for comparison, and a clear statement of methods that the difference between comparative law and CIL is most apparent. This is because in CIL, what is being compared is the international norm itself, or some other outcome related to the role or function of that norm or other norms.

As with comparative law, or indeed any methodological approach, CIL has faced criticism. Of significance is D’Aspremont’s critique, which argues that CIL “perpetuates a very modernist idea of international law, while resting on a presumption of the permanent comparability of all legal artefacts, institutions, and practices across time and space”, which is referred to as ‘commensurability thinking’ [D’Aspremont, (2020), p.92]. Ultimately, he warns that CIL ‘enables a thought-colonising enterprise’ [D’Aspremont, (2020), p.93]. However, Roberts (2017, p.321) asserts that a CIL approach “may help international lawyers to look at their field through different eyes and from different perspectives”. Since CIL is not without its opponents, it is all the more important that CIL enquiry is rigorous and even responsive to the criticism levelled against it. Moreover, perhaps it is even necessary for CIL scholars to acknowledge and engage with the limitations inherent within CIL. This may be achieved more easily when CIL’s potential to enhance understanding of international law is seen as one part of a wider international legal scholarship picture.

Already, the possibilities of CIL are apparent. Nevertheless, the questions which remain to be answered are: what insights can CIL provide? How can the use of a CIL approach illuminate understanding of international law? The answer may very well depend on the nature of any given enquiry, and the methods selected to carry out such an enquiry. For instance, is the purpose to identify similarities and differences in engagement with treaty reporting procedures? One may argue that this type of study may be best suited to a larger quantitative study. However, the same question may be approached in different ways and provide different, but no less meaningful results. For example, one might conduct a more in-depth analysis of the same behaviour of a range of actors across a small range of case-study countries. Both studies can complement each other, providing unique insights, which could assist in confirming possible explanations. Arguably, preliminary indications and observations, from a broader assessment, are a necessary first step. One could subsequently test such findings via a more detailed analysis in case study countries, or by assessing the role of a specific actor. However, the opposite could also be true. Specific findings from a more detailed analysis may be tested on a wider scale. In this example, engagement with particular United Nations Treaty Body (UNTB) could provide insight beyond the content of a particular norm, or treaty regime, revealing a more holistic picture of the role and influence of the applicable international law. It could also reveal how the Treaty Body in question interprets and understands the applicable law. Beyond this, CIL can illuminate the convergence or nuance in how a particular norm is interpreted or applied on the domestic plane.

Simply put, CIL offers the possibility to arrive at a more complete picture of the role of international norms, through insights on how different actors ‘understand, interpret, apply, and approach’ international law [Roberts et al., (2018), p.6]. Clearly, there is more than one route to arrival at such a picture. Thus, any single CIL analysis may be viewed as one piece of the overall international law jigsaw, providing limited, but necessary information relating to the picture as a whole. Since the field “is still evolving and its limits are still undefined” [Abebe, (2018), p.73], those undertaking CIL research may assist in demonstrating the possibilities of the field. What about IML research in particular? How can a CIL approach be operationalised in this area? This question is addressed in the section below.

3 CIL: illuminating IML research?

Taking time to consider the extent to which CIL can illuminate IML research is worthwhile, given the contemporary context of ever-increasing migration across international borders, and the growing proliferation of international norms governing international migration. Indeed, any tool that could assist in enhancing understanding of the content, influence, and impact of IML, should certainly be utilised. While CIL is just one possible tool in this regard, it contains much promise. For example, CIL methods could shed light on the way in which various interconnected, but discrete IML regimes interact with one another on the domestic plane. Where possible points of convergence and clash are identified at the level of norm content, one may investigate how different domestic actors address such interactions in practice. In the realm of refugee law, which has no formal supervisory mechanism, CIL methods may enlighten how it is interpreted and applied across diverse regional and domestic systems. Further, given the wide range of state-empowered entities, themselves often creations of international law, CIL could shed light on how these actors approach and understand the relevant norms, as well as how domestic actors interact with international actors, e.g., UNTBs, and how their guidance is received.

One notable example of an explicit CIL approach within migration scholarship is, ‘When Law Migrates’ (Goldenziel, 2018), which investigates “how the concept *non-refoulement* has been treated in domestic courts” [Goldenziel, (2018), p.398]. Beyond this, those familiar with IML scholarship, may well recognise methods and approaches that could certainly fall within the scope of CIL, as defined by Roberts et al. Consequently, one of the overarching ways in which CIL could illuminate IML enquiry is through the provision of an explicit framework through which to conduct research. Grounding research in CIL could foster deeper reflection on the role of comparison, which actors are being compared, and which steps to take. Ultimately, this could foster more rigorous research, with more explicitly stated methodological underpinnings. Additionally, methodological rigour would help bring further clarity as to which elements of comparative legal research are comparative law and which are CIL.

To more concretely illustrate the possibilities of CIL within the field of IML, two examples will be utilised. First, attention turns to the question of how refugee status, as defined in the 1951 Convention Relating to the Status of Refugees (CSR51) is approached by regional and domestic actors. Second, the focus shifts to *non-refoulement* communications before The UN Human Rights Committee (HRC) and Committee

against Torture (CAT) Communications procedures, with a view to further understanding the potential of *non-refoulement* provisions to play a meaningful role in practice. In each example, I identify possible relevant actors and the benchmark for comparison, along with the insights that CIL could provide. This provides clarity on what, precisely, is being measured or analysed. Given the different focus in each example, the breadth of possibility within the overall CIL framework is on display.

3.1 *Refugee status: evidence of influence?*

In answer to the question of, ‘who is a refugee?’, the starting point is typically the definition contained within Article 1A(2) of the 1951 Convention Relating to the Status of Refugees (CSR51), which defines a refugee as an individual who:

“[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.”

Ultimately, the refugee definition is the outcome of an exercise on boundary drawing. In the wake of the horrors of the Second World War, those drafters within the 1951 Conference of Plenipotentiaries, agreed upon the boundaries of the refugee definition that has remained largely unchanged to date (see, e.g., Glynn, 2011; Goodwin-Gill and McAdam, 2021). In other words, the drafters made decisions regarding which circumstances are deserving of protection and, importantly, which circumstances fall short. In this way, the concept of refugee status is a ‘legally constructed’ one [Harvey, (2015), p.34]. While the rationale and parameters of the status itself may now be so familiar that they are almost taken for granted, a CIL investigation centred on the question of ‘who is a refugee?’ reveals valuable insights about the normative influence of the definition itself. In this example, the benchmark for comparison is the norm itself, or more specifically, its function on the regional and domestic planes. The insights into the role and influence of this norm will depend on the methods chosen, as well as the actors under analysis. This is illustrated below through the examples of three different categories of actors, namely: the state as a unitary actor, regional and domestic legislators, and regional and domestic decision makers. By explicitly identifying the benchmark and the actors under investigation, the analysis can be more focused and the findings more clearly connected to what, precisely was assessed. In this example, the emphasis is on Article 1A(2) of the CSR51, i.e., the refugee definition, and not on related questions, including how the rights of refugees are approached by the various relevant actors. These questions are important, of course, and can form the subject of additional CIL enquiries. A clear statement of benchmark, though, enables precision and transparency.

First, an assessment of the state as a unitary actor can reveal how states approach and implement the refugee status norm and IRL more broadly. Analysis of this seemingly apparent information may reveal valuable insight regarding how states approach refugee law as a whole. For example, globally, 149 states have ratified either CSR51 or its 1967 Protocol (UNHCR, 2022). This seemingly unremarkable observation reveals something quite significant, which should not be overlooked. The near universal endorsement of a status-based regime and the parameters of the status within the CSR51 definition reveal,

for better or for worse, the strong normative influence of the internationally defined refugee status, and its conceptual underpinnings.

In addition, an analysis of the approach taken by specific regional or domestic actors, such as legislators or courts, can reveal further insights, such as how the norm is interpreted. Turning, then, to consider regional and domestic legislators as the actors under assessment, what observations can be made? Here, the overall benchmark remains the same, but a more precise statement of the answer to the question of ‘what is being compared with what’ would specify that it is the way in which legislators ‘understand, interpret, apply and approach’ the CSR51 definition, through an assessment of its incorporation within regional and domestic legislation. In this regard, we see that, not only has the CSR51 and the 1967 Protocol have been widely ratified, but the refugee definition contained in Article 1A(2) has been incorporated, almost or exactly word-for-word into regional and domestic legislation of a significant number of states parties (see, e.g., EU Directive 2011/95; OAU Refugee Convention; Cantor and Chikwana, 2019; Goodwin-Gill and McAdam, 2021). This reveals something of the approach of domestic legislators and executives; since the widespread acceptance and ratification provides an indication of coherence and uniformity as to how states approach the question of ‘who is a refugee’? While this consistency may be taken for granted, it is surprising, given the diversity of culture, context, and legal traditions. It also serves as an indication of the normative force and coherence of the status itself. Moreover, the normative influence may extend to states which have not formally ratified CSR51. On this topic, Janmyr’s (2020) ongoing research will provide important observations in this regard.

Nevertheless, despite broad coherence, difference and divergence in legislative approach are to be found. First, at the regional level, one may observe varying approaches to how the concept of ‘refugee’ at the international level, has been extended in differing ways. In Africa, the concept of refugee, begins with the CSR51 definition and adds to it, encompassing those displaced across borders due to “external aggression, occupation, foreign domination, or events seriously disturbing public order” [OAU Convention, (1969), Art. 1(2)]. Within the European Union (EU) context, the widening of protection takes the form of additional statuses, such as subsidiary protection and temporary protection (EU Directive 2011/95). Thus, those fleeing indiscriminate violence may be protected under a different status, depending on whether they seek asylum. While some formal difference is observable, as acknowledged by Goodwin-Gill and McAdam, “[t]he 1951 Convention and 1967 Protocol...forms the basis for Article 1” of the OAU Convention (1969, p.137). The same could be said for the EU approach, with the CSR51 definition acting as the starting point. Indeed, the influence of the treaty through the text of the EU Qualification Directive is more than apparent.

Third, the approach of regional and domestic decision makers can provide yet more insight. Again, the overall benchmark remains the same, but here the focus is on how *decision makers* ‘understand, interpret, apply, and approach’ the refugee definition. Indeed, an analysis of the interpretation of each element of the refugee definition can shed further light on the function of the CSR51 definition. It may also be here that functional differences in the face of formal similarities may emerge. While it is beyond the scope of this article to conduct an in-depth cross-national investigation of how regional and domestic decision makers approach the refugee definition, some preliminary insights may be made. For example, at the EU level, the Court of Justice of the European

Union, in *Alo and Osso*, stated that “the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees”, and “the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the member states in the application of that convention on the basis of common concepts and criteria” [Joined Cases C-443/14 and C-444/14, (2016), para 28]. On the domestic plane, evidence reveals that the CSR51 definition’s broad parameters are used by state actors, including status determinators, courts, and civil servants, on a daily basis, across very different cultural contexts and settings (see, e.g., Hathaway and Foster, 2014; UNHCR, 2019). As regards the interpretation of each element of the refugee definition, it is worth noting that domestic courts have played a significant role (Hathaway and Foster, 2014). The UN’s Refugee Agency (UNHCR), has played a significant role in providing interpretative guidance for both its own status determinators, and domestic state actors [see, e.g., Ní Ghráinne, 2015; *Januzi v Secretary of State for the Home Department*, 2006]. Indeed, the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* provides a detailed overview of its interpretation of the content of each of the aspects of the refugee status, as well as the CSR51’s cessation and exclusion clauses.

True, there is a significant degree of similarity in terms of how the broad parameters of status are ‘understood, interpreted, applied and approached’ by regional and domestic decision makers. However, nuance and divergence is present here, too, albeit in the shadow of broad coherence. This is especially the case in the realm of what might be viewed as contemporary debates, for example on the extent to which LGBT+ asylum claims fulfil the conditions of the CSR51 definition. Khan (2019) charts the debate over which kinds of harm encountered by LGBT+ asylum seekers would reach the threshold of persecution. Moreover, when it comes to climate displacement, Scott (2019) documents the recent practice of the New Zealand Immigration and Protection Tribunal (NZIPT), which has adopted a ‘human rights approach’ to the CSR51 definition, and certainly indicates that, in certain cases, those displaced by climate may fall within the CSR51’s protective ambit. However, it may be some time until this approach is observed across a range of jurisdictions. Moreover, the domestic court decisions which have been studied the most have mainly been situated in the global north and in common law systems. Thus, the prevailing interpretation of the limits of status has emerged from regions of the world which host comparatively fewer refugees. Further CIL research, particularly on decision making in the global south, can provide valuable insight in this regard.

Where similarities in implementation and interpretation occur across very different cultural contexts, this evidence may be used to support the assertion that the CSR51 refugee definition has a strong normative influence. This, despite the absence of a formal enforcement mechanism. The consequence is that both the strengths *and* weaknesses which exist at the level of norm content will have a significant impact on the domestic plane. For example, the open-ended nature of the term ‘persecution’ within the refugee definition has enabled it to capture a broad range of both state and non-state harm (see, e.g., Hathaway and Foster, 2014). However, where the parameters of status are too narrow to form a holistically meaningful gateway away from risk and towards international protection, this impact transfers to the domestic plane. On the other hand, the exhaustive list of so-called ‘convention grounds’ for persecution, mean that it could be difficult to qualify as a refugee in the context of climate-displacement (see, e.g., Scott, 2019).

The question which arises is: where variance in protection standards is identified, what explanations can be offered? While a more in-depth analysis is needed to explore the range of possible explanations, some suggestions are offered here. First, at its core, variance or divergence reveals the boundaries of coherence. Where, precisely, those boundaries lie is a significant observation in itself when it comes to assessments of the function or role of international norms. Second, the way in which states collates or assesses factual information on, for example, risk, may vary. One pertinent example which may help to illustrate this is found in the use of so-called country of origin information, i.e., evidence used by refugee status decision-makers regarding the objective risk or reality of persecution or other harm in countries of origin. At times, these are inaccurate. For example, the European Court of Human Rights, in *Ilias and Ahmed v Hungary* (2020, para 158) held that the information used by Hungary as regards the situation in Serbia was inaccurate. Moreover, Liodden (2021, pp.316–317) documents the differing ways in which country of origin information is compiled in Norway and the UK, suggesting that “political interests may carry more weight in the interpretation of country information in the UK”.

Even from this overview, insight on the role and normative influence of the refugee status is emerging. The concepts of, ‘outside country of origin’, ‘persecution’ and a nexus with a convention ground have influenced the approach of both the regional and domestic spheres in a significant way. It seems that the *broad parameters* which inform the understanding of the question of who is a refugee are now so entrenched, that drastic reform of these conceptions may be unlikely. This is, of course, only positive insofar as the parameters of each of the statuses in focus have strengths. Thus, the prevalence of status and its normative force mean that its limitations, such as difficulties in capturing the panoply of contemporary causes of displacement, also transfer to the domestic plane. Consequently, more work may be required on the international plane to bring clarity and to maximise the potential which *does* exist within the refugee status. Moreover, insight into some of the practical barriers, such as capacity, can help to direct attention towards addressing such issues to maximise the promise contained within the CSR51, while formal amendments remain out of reach.

While the key tenets of status are similarly applied, the limits of international law are apparent when evidence to support the various concepts reveals inconsistencies or even misunderstandings. To further understand the variance in protection, a deeper investigation of differences in domestic policy and practice could be undertaken. Such observations can assist in moving towards the pursuit of explanations and further insight as to the impact, and indeed the limitations of the refugee status. Rather than simply focusing on the content of the norm, a more holistic understanding of its impact and role may be achieved, through the pursuit of understanding how it operates in practice on the domestic plane. This entails asking about education, capacity and training within the domestic setting. To what extent might factors outwith the content or status of the CSR51 definition on the domestic plane, impact upon its capacity to provide meaningful protection? These questions may arise in light of the observations of formal coherence but practical difference.

Already, it is clear that CIL can provoke thought about the capacity, role, and impact of international law in ways that may be easy to overlook in the context of migration law, given their familiarity. Moreover, the steps outlined in this section reveal that some aspects of existing refugee scholarship do arguably fall within the scope of CIL. By

taking the time to consider the extent to which CIL methods may be appropriate in any given enquiry, or what insights CIL could add to existing understanding, the potential for more rigorous research, unique insights, and a more holistic understanding of IML may be realised. In this way, CIL could both complement the findings of alternative research methodologies, such as comparative law, and provoke further questions which may be addressed through different methodological approaches.

3.2 *Non-refoulement claims before United Nations Treaty Bodies (UNTBs)*

To further illustrate the possibilities of a CIL approach, this section considers the role of non-refoulement provisions under the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984). Article 7 ICCPR states that: “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Article 3(1) UNCAT, meanwhile, stipulates that: “[n]o state party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

In considering the role, effectiveness, or influence of these norms in the context of migration, what insights might CIL offer? There are various possible approaches, depending on the question(s) in focus, and the actor(s) under scrutiny. For example, if one wishes to understand how the norm’s content is interpreted within domestic legal systems, an investigation into the approach of different domestic courts may be appropriate. Çalı et al. (2020) have undertaken valuable work in this area assessing the interpretative practices of the UNTBs themselves, as well as the level of engagement with these bodies. This work would almost certainly fall within the scope of CIL, although it is not explicitly acknowledged by the authors.

By their very existence, these quasi-judicial bodies, themselves creations of international law, have the capacity to both play a role in enforcement of the applicable *non-refoulement* norms, and provide authoritative interpretation. Nevertheless, the extent to which they can perform these functions depends, in part, upon the actions of two groups of actors. First, the state, as a unitary actor, must accept the competence of the relevant UNTBs to receive communications. Second, even where a state has accepted a committee’s competence, communications will only be heard in cases where non-state actors, including private individuals, lawyers, and civil society organisations, utilise the communications procedures in cases of alleged *refoulement*. In this two-step approach, there are at least two benchmarks for comparison. First, one may compare the level of recognition of competence of each committee. Second, the level of engagement with each committee, as regards *non-refoulement* communications may be compared. In such an assessment, the emphasis is not on *how* the norm is interpreted but rather, on the capacity to bring communications, and the practice of bringing such claims.

While CIL enquiry can be focused on explanation of similarities or differences, this must be preceded by identification. In this example, there are two main aspects to the pursuit of identification:

- 1 the level of acceptance of committee competence
- 2 the extent to which *refoulement*-type communications is brought by individuals from within the states that *have* ratified the protocols.

This investigation will help to paint an initial picture as to the possible role of the respective bodies in enhancing the effectiveness of the *non-refoulement* provisions under scrutiny. By first identifying similarities and differences in this regard, the foundation is laid for analysis and the search for possible explanations, all leading to a more holistic understanding of the function of international law; one that goes beyond mere analysis of how a norm is interpreted.

HRC competence is recognised through ratification of the Optional Protocol to the ICCPR (1966). CAT's competence, meanwhile, is recognised through a declaration pursuant to articles 21 and 22 UNCAT. The ICCPR at present has 173 states parties (UNOHCHR Jurisprudence, 2021). However, only 116 parties have accepted HRC competence via ratification of the Optional Protocol to the ICCPR (UNOHCHR Jurisprudence, 2021). UNCAT has 171 states parties (UNOHCHR Jurisprudence, 2021), but only 71 states have accepted the competence of the CAT to receive communications from or on behalf of individuals (UNOHCHR Jurisprudence, 2021). Through this simple investigation, one may observe that the potential of the HRC and CAT to strengthen the effectiveness of *non-refoulement* norms is significantly reduced, due to the lower levels of ratification of the optional protocols, as compared with the conventions themselves. This provides some insight into how certain states approach IHRL. Apparently, for many states, acceptance of committee competence is a step too far.

Turning to the level of engagement with the relevant communications procedures, what can be ascertained? A useful starting point here is the work of Çalı et al. (2020), who conducted a comprehensive search of non-refoulement and extradition jurisprudence of four UNTBs between 1990 and 2019 (including the two in focus in this article). Their investigation identified 370 CAT, and 107 HRC communications. It also revealed that the majority of CAT communications were brought against Switzerland, Sweden, Canada, and Australia, while the majority of HRC communications were brought against Denmark, Canada, and Australia [Çalı et al., (2020), p.360]. I conducted a review of the jurisprudence of both Committees in March 2022, and the results (Table 1) confirm the trends identified by Çalı et al. (2020).

The overview reveals that, as compared with states that have ratified the respective optional protocols, an even smaller number of states are engaged. Individual complaints have been lodged before the CAT against only 21 states, with the vast majority communicated against only a handful of states. When it comes to the HRC, the figures are reduced further, with *non-refoulement* communications brought against only 17 states, with the majority of complaints, once again, communicated against an even smaller number of states. What may all of these insights reveal about the role of *non-refoulement* obligations within IHRL? In this respect, it is important to note that the observations which can be made from an assessment of ratification of optional protocols and engagement with relevant UNTBs form only one part of the overall picture as regards the role of the norms under investigation. Nevertheless, without these insights, the overall picture is arguably incomplete, or at the very least, is blurred.

Table 1 Non-refoulement communications: HRC and CAT

<i>Country</i>	<i>HRC communications</i>	<i>UNCAT communications</i>
Denmark	30	8
Canada	20	17
Switzerland	0	37
Australia	10	23
Sweden	5	18
Netherlands	0	9
Morocco	0	8
Kazakhstan	0	5
Russia	4	0
Hungary	0	3
Norway	0	3
Italy	2	1
Austria	2	0
China	2	0
Germany	0	2
Kyrgyzstan	2	0
Norway	2	0
Afghanistan	0	1
Angola	1	0
Azerbaijan	0	1
Belarus	1	0
Bosnia and Herzegovina	1	0
Burundi	0	1
Colombia	1	0
Finland	0	1
Georgia	0	1
Guinea	0	1
Iraq	0	1
Lebanon	0	1
Lithuania	1	0
Monaco	0	1
New Zealand	1	0
Republic of Korea	1	1
Russia	0	1
Serbia	0	1
Spain	0	1
Sri Lanka	1	0
Syria	1	0
Uzbekistan	1	1

Source: UNOHCHR Jurisprudence (2021)¹

First, one may observe that states are less willing to recognise competence of UNTBs to hear complaints, than to ratify the corresponding substantive treaties. This is, of course, well-known within international law scholarship. Without assessing the role of non-state actors, i.e., those who are filing complaints, one may conclude that, to enhance the capacity of these bodies to strengthen the protection of *non-refoulement* norms, the focus should be on achieving increased acceptance of committee competence. However, the review of the relevant jurisprudence reveals that this does not necessarily mean that private individuals will engage with the complaint procedures.

Having *identified* how two categories of actors approach international law in this regard, one may wish to turn to *analysis*, searching for possible *explanations* for the differing observable approaches. Of central importance in such an analysis, is why we see reasonably consistent levels of engagement with the relevant committees in some contexts and not in others? Why do we see more complaints lodged against countries like Switzerland, Denmark, Sweden, and Australia? It need hardly be stated that the answer is unlikely to be that these countries are engaging in more *refoulement* practices than others. Çalı et al. (2020, p.362) reflecting on similar questions suggest that one reason may be that “individuals and their lawyers who take their cases to the UNTBs may believe that they have a better chance of success” as compared to the European Court of Human Rights, for example. In addition, one might look to the domestic remedies available, assessing whether some systems may have a better record of providing redress from within the state. Moreover, investigation may reveal that some actors engage more with regional complaint mechanisms, such as the European Court of Human Rights, rather than UNTBs? By delving into such questions, further insights may emerge. An additional question worth investigating, given what has been observed, is the extent to which human rights norms within international law have been operationalised by private actors, such as lawyers and NGOs? Moreover, are these NGOs more actively engaged in litigation on the domestic plane, achieving redress that eliminates the need to bring a communication before UNTBs at all? Is this engagement stronger in countries from where complaints tend to originate? Scott Ford (2022, p.61), for example, points to the “role of strategic litigation at the national level” as a possible explanation for the significant number of UNTB migration-related cases originating from Nordic countries. An exploration of these and further questions can assist in providing a more nuanced picture of the role of international law and will help to indicate where efforts to increase effectiveness should be focused. For example, might a focus on human rights education and increased awareness on the existence and potential within UNTBs assist in increasing their potential effectiveness?

Clearly, CIL offers considerable potential to illuminate IML enquiry. Nevertheless, its potential contribution to the field should not be overstated. While CIL is an appropriate methodological approach for certain research questions, it is only one part of the wider picture. Thus, just as important as understanding what CIL can offer, is appreciating what it *cannot* do. In particular, given the focus on international law, CIL does not offer insight on domestic approaches to migration in and of themselves. While domestic systems are often in focus in CIL research, the analysis is limited only to what domestic law, policy, and practice can reveal about the international norms in focus. Thus, CIL should not be seen as a replacement or competitor of comparative law, or socio-legal research methodologies. Instead, CIL is best viewed as a complementary

approach, which can add to the overall international migration governance body of knowledge.

4 Conclusions: where to from here?

In the context of the increased use of and discussion about CIL methodology, the question for IML scholars is: where to from here? The aim in this article was to illustrate how CIL can enhance IML research. In so doing, it prompts reflection on how CIL could be operationalised in future migration research. By first considering what, precisely, CIL is, before turning to the migration context specifically, the potential added value of CIL has been highlighted. Through the examples of the impact of the CSR51 refugee definition, and the potential capacity of non-refoulement provisions in IHRL, the article has demonstrated the types of questions which can be helpfully answered through the use of CIL methods.

In provoking imagination on how CIL may be operationalised in the context of IML, the article has undoubtedly raised questions more than it has provided answers. On the final question, ‘where to from here?’, it is hoped that the reader may assist in answering. Moving forward, IML scholars could reflect on how CIL, either by itself, or in combination with additional methodological approaches could enhance their research. As IML scholars begin to explicitly adopt CIL frameworks, where appropriate, and engage in reflection about the insight and understanding which CIL can provide, the answer to the question of ‘where to from here’ will emerge in practice. Researchers themselves can demonstrate what is possible. In doing so, scholars ought to reflect upon the criticisms levelled against CIL, and consider the limits of commensurability, while simultaneously pursuing CIL research that does *not* become a ‘thought-colonising’ exercise [D’Aspremont, (2020), pp.92–93].

CIL offers considerable potential to provide a more holistic understanding of the role and influence of the applicable international norms. However, this potential will be best realised when its role is not overstated. CIL cannot do everything. The call is to the pursuit of understanding what questions CIL *can* assist in answering. From there, CIL can be operationalised as one tool in the overall methodological toolbox, complementing, rather than competing with alternative methodological approaches.

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Notes

- 1 Figures are based on search criteria in the UN Treaty Body jurisprudence database, available at <https://juris.ohchr.org/>. I searched using the term 'non-refoulement' and included admissibility and inadmissibility decisions. Data is accurate as per 10 March 2022.