

Daniel Peat, ***Comparative Reasoning in International Courts and Tribunals***. Cambridge: Cambridge University Press, 2019. Pp. 258. £95. ISBN: 9781108415477.

The expanding horizons of international law have led to the discipline's increasing interaction with domestic law. As a result, the need to understand relations between the two has become ever more important. Daniel Peat's new book is an interesting and useful contribution towards fulfilling that need. The book examines situations in which international courts and tribunals have interpreted international law in light of domestic law. Peat contends that international adjudicators rarely attempt to justify this practice by reference to the rules of treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT).¹ Instead, he says, adjudicators draw on domestic law for a range of other reasons – not because the VCLT requires them to, but simply because it assists with their interpretation to do so.

Chapter 2 commences the book's substantive content with an examination of 'the genesis of Articles 31 and 32 of the Vienna Convention' (at 12). The chapter argues that the VCLT drafters understood that interpretation was context-specific and could not necessarily be captured in a neat set of rules. This view, Peat says, paves the way for interpreters to draw on material – such as domestic law – regardless of whether this is expressly permitted by the VCLT rules. The subsequent five chapters explore the use of domestic law for interpretive purposes by international courts and tribunals hearing claims between states (the International Court of Justice (ICJ) and World Trade Organization (WTO), in chapters 3 and 4 respectively), claims by individuals against states (investment tribunals and the European Court of Human Rights (ECtHR), in chapters 5 and 6 respectively), and claims against individuals (international criminal tribunals, in chapter 7).

Leaving aside the prior question of how to determine the meaning and content of the domestic law being used,² Peat's central question in the book is 'how and why domestic law is used by international courts and tribunals to interpret international law' (at 8). The book's main thesis is therefore presented as comprising descriptive and explanatory arguments. The descriptive argument is that international courts and tribunals are drawing on domestic law for interpretive purposes, even though one might assume that the VCLT rules do not permit this (at 8). The explanatory argument, summarized in the concluding chapter 8, is that adjudicators have typically done so for three reasons: to interpret an international instrument by discovering the intention of its (sometimes unilateral) author; to interpret vague treaty-based 'standards' of conduct by structuring adjudicatory discretion and by discovering the values that such standards should protect; and to support interpretations already reached on other grounds (at 215–219).

The book is carefully written, underpinned by close reading of judgments and wide reading of literature. Despite its specific focus on the use of domestic law (which is defined as 'domestic legislation and regulations, and the judgments of domestic courts', at 9), readers will learn nearly as much about the generalities of treaty interpretation. There are extensive and informed discussions about the VCLT rules and their application in particular cases throughout the book. There are also educational excursions into international legal theory, particularly in chapter 6 drawing on the 'interactional' theory of Jutta Brunnée and Stephen Toope.³

¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

² For one effort to address this prior question in one field of international law, see J. Hepburn, *Domestic Law in International Investment Arbitration* (2017).

³ J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010).

The reference to ‘comparative’ reasoning in the title is intended to tap into the general use of the phrase ‘comparative law’ to refer to comparison of rules from different domestic legal systems. Thus, many of the examples cited by Peat involve situations where an international adjudicator has surveyed the law of several domestic jurisdictions in the process of interpreting an international rule. Perhaps the most well-known of these is the ‘consensus’ doctrine of the ECtHR, where the Court explicitly ties the interpretation of Convention rights to the existence of consensus on the extent of the right in question across domestic legal systems in Council of Europe countries – requiring such comparative surveys to be conducted by a well-staffed Research Division in Strasbourg. However, most of the central cases discussed in chapters 3 and 4 examine only the law of the respondent state, typically in relation to instruments drafted unilaterally by that state.⁴ While there might be good reasons for this (Peat explains at 220 that there is no reason to consult any other state’s domestic law when interpreting the unilateral drafting of one state), it is slightly at odds with the book’s title. Moreover, comparative surveys of several national jurisdictions will naturally raise different methodological issues (most obviously the choice of jurisdictions) than reference to a single state’s law, as Peat notes (at 220).

Peat’s argument is well made, and the book gives a plausible and interesting account of an underexplored question in international law. Nevertheless, this review focuses on five aspects of Peat’s account that arguably do not go far enough in analysing the phenomenon under consideration, followed by two aspects of the book that arguably go too far in their analysis or conclusions.

First, in the course of making the two central descriptive and explanatory arguments outlined above, Peat often takes side-tracks into apparently normative arguments. An extended discussion in chapter 6, for instance, analyses and rejects criticisms of the ECtHR’s consensus doctrine. The chapter then also rejects existing defences of the consensus doctrine, concluding by offering a new defence – that this use of domestic law by the ECtHR ‘provides an objectively verifiable benchmark against which the Court can assess the proportionality, necessity or fairness of a state’s actions’, and prevents the Court from ‘foisting its own conception of the Convention’ on states (at 177). Although framed only as an explanatory point, it is difficult to avoid the impression that such use of domestic law by the ECtHR is seen by Peat as normatively desirable. In chapter 7, Peat defends the use of domestic law in international criminal law against a charge that this use violates the principle of legality. Again, while not necessarily presenting a normative case in favour of the use, the defence suggests Peat’s view. In chapter 4, Peat also briefly notes his support (at 95) for using domestic law to determine a state’s intention in the context of interpreting WTO schedules of commitments. The book might therefore have been stronger if it openly acknowledged these normative arguments, extending its aim (and consequent impact) not only to describe and explain an existing unrecognized practice but to justify it as well.

Second, in a similar vein, in chapter 5, Peat examines the ‘comparative public law’ method of interpretation proposed by scholars to give content to certain broadly worded clauses contained in investment treaties.⁵ Under this method, roughly speaking, investment arbitrators would interpret treaty clauses by reference to equivalent rules found in domestic legal systems. Peat appears to support the idea that ‘what matters [for an international adjudicator choosing which domestic jurisdictions to cite] is the approval of the values embodied by that domestic legal system that is implicit in the citation’ (at 136). Thus, he says, investment arbitrators should

⁴ *Anglo-Iranian Oil (UK v. Iran)*, Preliminary Objection, (1952) ICJ Rep 93; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, (1978) ICJ Rep 3; Panel Report, *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R (30 May 2005) (viewing EU law as domestic law); Panel Report, *Mexico – Measures Affecting Telecommunications Services* WT/DS204/R (2 April 2004).

⁵ See, e.g., S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010).

consider 'the fundamental values underpinning the investment regime', and choose jurisdictions that 'live up to those ideals' (at 137). Although Peat seems agnostic about *which* values exactly underpin the investment treaty regime (and therefore which jurisdictions to choose), others have offered an answer to this question. Kleinheisterkamp, for instance, has argued that investment treaty protections should be capped at a level determined by a comparative survey of *developed* country laws, on the grounds that developed countries have no reason to grant higher levels of international law protection to incoming foreign investors than is already granted by their domestic laws.⁶ Alongside the book's other unacknowledged normative arguments, a further normative argument might have been usefully developed here to provide a more complete road-map for adjudicators.

Third, also in chapter 5, Peat examines the use of domestic law to interpret the 'fair and equitable treatment' (FET) standard in investment treaties, and echoes earlier authors in finding that arbitrators have used domestic law to confirm conclusions on FET reached on other grounds.⁷ Peat also finds that arbitrators have used domestic law to give content to the vague FET standard. This use of domestic law fits with its use in other areas of investment law, most notably in elaborating the meaning of the similarly broad 'due process' condition for the legality of expropriation under many investment treaties.⁸ Peat's specific argument that tribunals use domestic law to substantiate the vague FET standard, though, seems likely to be affected by the debate over whether FET clauses create an 'autonomous', treaty-based standard, or instead refer to and incorporate the content of the customary international law rules on treatment of aliens.⁹ If FET reflects custom, the appropriate interpretive method for determining its content would involve not reference to domestic law but the traditional identification of state practice and *opinio juris*.¹⁰ The question of choosing which domestic jurisdictions to consult would not arise. Rather than being forced to consult domestic law benchmarks of fairness because they 'have little or no relevant international precedent upon which to draw' (at 218), investment arbitrators would instead draw on the extensive precedents elaborating the customary rule in (for instance) classical inter-state arbitrations, mixed claims commissions, the Permanent Court of International Justice and the ICJ, human rights courts, the Iran-United States Claims Tribunal, and state pleadings, diplomatic statements and protests relevant to investment protection.¹¹ Although Peat purports only to explain rather than justify existing investment tribunal practice, it seems necessary at least to acknowledge the possibility that existing practice is simply misguided.

Fourth, although purporting to address adjudicators' interpretation of 'international law', Peat focuses on treaties, as well as treaty reservations, WTO schedules and Optional Clause declarations (at 8, clarifying his definition of 'international law' to include the latter three instruments). The book does not consider the use of domestic law to interpret the other two principal sources of international law – custom and general principles. Its focus is on 'interpretation for content-determination purposes', to 'understand[] the meaning of an extant legal instrument' (at 11), rather than to ascertain the existence of a legal rule. In relation to custom and general principles, domestic law more naturally assists with the latter task, perhaps explaining the lack

⁶ Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty', 78 *Modern Law Review* (2015) 793.

⁷ Hepburn, *supra* note 2, ch. 2 (although the examples discussed there perhaps shade more into application, rather than interpretation, of FET).

⁸ *Ibid.* ch. 3.3.

⁹ See, e.g., K. Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (2013), at 339.

¹⁰ M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013) 171.

¹¹ *Ibid.*, at 16–17.

of focus on domestic law's use for the former task. However, customary rules are rules, and may therefore require interpretation to determine their content, as Peat has acknowledged elsewhere.¹² Even if this is not true for general principles, there might be fruitful extensions of the book's argument to sources of international law beyond treaties and the treaty-related instruments examined. This would have provided a more comprehensive examination of the issue, potentially also helping to remedy the issue of limited evidence discussed further below.

Fifth, early in the book (at 2), Peat briefly skips past the 'well-trodden' path of considering whether international law treats domestic law as fact or law. But this question may hold some explanatory power for his topic. If domestic law is indeed merely fact (or evidence of a fact), there is less mystery in its use by adjudicators for interpretive purposes; all sorts of facts and evidence might be validly used to discern the ordinary or special meaning of a term. In many of the situations identified by Peat, domestic law does appear to be being used as evidence – of a state's intention, or of what is generally considered to be 'fair', 'reasonable' or 'necessary'. In the international criminal context examined in chapter 7, by contrast, one might emphasize the *legal* quality of the domestic law under consideration, as adjudicators have adapted rules (on rape, guilty pleas, and subpoenas) from one legal system to the needs of another. The issues that arise in relation to this adaptation – most notably, the claimed *sui generis* nature of international criminal law and the consequent (in)appropriateness of the adaptation (at 195) – arise only because domestic law is being treated here as law, not fact. Given this, further consideration of the law/fact distinction might have yielded some interesting insights.

In these five respects, the book holds back where more might be wanted. It is, of course, a credit to Peat that his work prompts such further questions left unanswered for readers; one book cannot address everything. Nevertheless, a greater attention to normative concerns, and a greater openness to other sources of international law and other possible explanations for the phenomenon under consideration, would have completed the picture for readers.

In a final two respects, by contrast, the book is perhaps too quick in drawing conclusions, or too extensive in its justification of a claim that might be better made elsewhere, if it is needed at all.

First, the book is premised on the benefits of a 'cross-cutting analysis of comparative [law] reasoning'; Peat suggests that the lack of such analysis to date has 'obscured the pervasiveness of domestic law as an interpretative aid and stymied an explanation of its theoretical underpinnings' (at 7). Nevertheless, the promised cross-cutting analysis is itself somewhat stymied by the book's acknowledgment that drawing general conclusions from the study is difficult, owing to the differences between the areas of international law addressed (at 214). Peat does offer a final categorization of the uses of domestic law in chapter 8, but these categories are quite siloed in themselves: largely, the ICJ and the WTO use domestic law in one way; the ECtHR and investment tribunals use it in another way; international criminal tribunals use it in a third way.

Even within each silo, conclusions are drawn on fairly limited evidence. Chapter 3 analyses only three ICJ judgments, while chapter 4 considers a mere two WTO rulings in detail, and in each chapter Peat agrees that it is 'difficult to draw any general conclusions' (at 74, 104). While

¹² Peat and Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law', in A. Bianchi, D. Peat, and M. Windsor (eds), *Interpretation in International Law* (2015) 3, at 4: 'Undoubtedly, interpretation pertains to sources of international law other than treaties.' On interpreting customary rules, see P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (2015), ch. 4; cf. M. Herdegen, 'Interpretation in International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (last updated 2013), para. 2: 'Whether customary international law rules are susceptible to the same forms of interpretation as written texts is most doubtful.'

it may be true that there is little other evidence that might also have been examined (at 84),¹³ this hampers any effort to provide a comprehensive examination. Peat indeed clarifies that he aims only to examine ‘certain illustrative examples’ of domestic law reasoning rather than to provide an ‘exhaustive and comprehensive overview’ (at 12). But choosing only certain examples risks pre-judging the question of ‘whether there are certain commonalities that exist between the tribunals’ interpretative approaches’ (at 11). Similarly, alongside the ICJ and WTO cases, Peat relies on an investment treaty case, *Saar Papier v. Poland*,¹⁴ to illustrate (at 136, 216) the suggestion that international adjudicators might look at domestic law to find the intention of parties to a treaty (thereby affecting the treaty’s interpretation). Apart from the fact that the *Saar Papier* tribunal only examined the law of one of the relevant treaty’s parties (Germany),¹⁵ there are reasons to think that the *Saar Papier* case is entirely unrepresentative. The case was only the second one ever known to have been commenced under an investment treaty, leaving the tribunal to feel its way forwards in a novel context. The arbitrators claimed no particular expertise in international law, and it is not clear that they even considered themselves bound to apply international law in the case.¹⁶ In this particular respect, the illustrative example chosen may not be the best one.

Lastly, the place of chapter 2 in the book raises some questions. The chapter undertakes an extended study of the origins of the VCLT rules, and concludes that the VCLT was not intended to prescribe a single accepted approach to treaty interpretation, instead leaving the matter largely to ‘the good judgment of the interpreter’ (at 47; see also at 21, 214). Peat draws on this position to argue that adjudicators’ use of domestic law in interpretation cannot therefore be criticized by reference to (an absence of reference to) the VCLT rules. However, Peat also identifies several ways in which reference to domestic law might be justified under the VCLT rules in any event. Section 4.3 suggests that domestic law constitutes a ‘circumstance of conclusion’ of a treaty, recourse to which is permissible under Article 32 VCLT to confirm an interpretation or resolve an ambiguity. Given the central role that Peat accords to adjudicators’ contextual judgments on interpretation, it would presumably be relatively easy (and entirely acceptable) for an adjudicator to find an ambiguity and thereby resort to domestic law in many situations. In addition, section 4.4 suggests that domestic law can be used to demonstrate treaty parties’ intention to attribute a special meaning to a term, in the sense of Article 31(4) VCLT. Domestic law might also ‘assist in elucidating an ordinary meaning under Article 31(1)’ (at 103), or constitute subsequent practice affecting the meaning under Article 31(3)(b) (at 6, 215). As Peat notes (at 57–58, 67, 74–77), it is arguable that the VCLT rules do not even apply to interpretation of the unilateral instruments (Optional Clause declarations and treaty reservations) considered in chapter 3. Given all this, it is not entirely clear that chapter 2’s extensive justification of the VCLT’s flexibility is necessary to make out the book’s explanatory argument; adjudicators could use domestic law for the reasons that Peat says they do even if the VCLT constituted a prescriptive set of fixed rules.

Furthermore, even if it is true that reference to domestic law cannot be criticized for breaching the VCLT rules, the argument would seem to extend beyond use of domestic law, to suggest that almost any plausible method of interpretation is compatible with the VCLT. While certainly

¹³ However, see S. Bhuiyan, *National Law in WTO Law* (2007) for an extensive discussion of other uses of domestic law in WTO dispute settlement.

¹⁴ *Saar Papier Vertriebs GmbH v. Poland* (UNCITRAL), Final Award, 16 Oct. 1995.

¹⁵ Hepburn, ‘Comparative Public Law at the Dawn of Investment Treaty Arbitration’, 15 *Journal of World Investment and Trade* (2014) 705, at 708, 714; cf. Peat, at 136, 216.

¹⁶ Hepburn, *supra* note 15, at 712–714.

relevant to the book's specific examination of use of domestic law, the point seems much more general, and this book is therefore an unexpected place to find the point being made.

As a result, in these respects, the book arguably over-extends. While chapter 2's argument on the VCLT is credible and carefully made, it seems to speak to a different audience than the remainder of the book. Meanwhile, given the available evidence to date, the conclusions of chapter 8 ought perhaps to be taken more as a predictor of future approaches in international adjudication rather than a clear taxonomy of current approaches.

However, neither these over-extensions nor the unanswered questions outlined above detract from the technical quality and sophistication of the book's arguments in themselves. Throughout the book, Peat demonstrates attention to detail, a welcome appreciation for the insights of theory, and an impressively wide knowledge of international law and adjudication. The book sharpens thinking and blurs boundaries, adding yet further evidence of 'the complexity . . . of the international/national legal interface'.¹⁷ As this interface comes under increasing scrutiny, Peat's work will play an important guiding role.

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The Rome Statute is now complete.¹ Indeed, at its 16th Session in New York, the Assembly of States Parties (ASP) of the International Criminal Court (ICC or the Court) decided to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018.² The 'activation decision' renders homage 'to the historic significance of the consensual decision at the 2010 Kampala Review Conference to adopt the amendments to the Rome Statute on the crime of aggression'.³ Truly, both the Kampala amendments and the New York's activation decision are of historical significance. The former defines the hitherto undefined; the latter, though an activation decision, signifies the end of negotiations.

Yet, several issues with respect to the crime of aggression, as defined in (now) Article 8bis of the Rome Statute, and how the Court will exercise its jurisdiction, pursuant to Articles 15bis and 15ter, are still in need of clarification. Claus Kreß and Stefan Barriga, two leading experts in the process leading to the adoption of the aggression amendments in Kampala, provide (much of) these clarifications (and considerably more) with their edited book, *The Crime of Aggression: A Commentary*. The Commentary forms with *The Travaux Préparatoires of the Crime of Aggression*, published by the same editors in 2012, the *Crime of Aggression Library*. With its more

¹⁷ H. Charlesworth *et al.*, 'International Law and National Law: Fluid States' in H. Charlesworth *et al.* (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press 2005) 2.

¹ Rome Statute of the International Criminal Court, 2187 UNTS 9, 17 July 1998 ('Rome Statute').

² ICC, Activation of the Jurisdiction of the Court over the Crime of Aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017, § 1.

³ *Ibid.*, Preamble.