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Book Review

Daniel Peat. *Comparative Reasoning in International Courts and Tribunals*. 1st edition. (Cambridge University Press, 2019). 258 pp. £95. ISBN 978-1-108-41547-7.

As has been well explored, avenues for the international and domestic legal planes to interact have multiplied and diversified significantly, driven by international law's substantive broadening and deepening, growth in third party dispute settlement, and the proliferation of 'inward-looking' obligations.[1] Aware of these processes, scholars in recent years have increasingly framed the international-national interface as dynamic,[2] and have particularly focused on mapping the often complex discourse between domestic and international adjudicators concerning the ascertainment and application of international law.[3] Less attention has been directed to the ways international adjudicators engage with domestic legal materials when identifying and applying rules of international law.[4] In *Comparative Reasoning in International Courts and Tribunals* Daniel Peat addresses that latter issue, to thereby improve our understanding of the varied interactions between the international and domestic legal orders. He makes a valuable contribution to that larger project, albeit one that raises almost as many questions as it answers.

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1 C.f., esp.: A. Tzanakopoulos and C.J. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' 26(3) *Leiden Journal of International Law* (2013) pp.531–540.

2 C.f.: 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) pp. 1–16.

3 Notable works include: K. Knop, 'Here and There: International Law in Domestic Courts', 32 NYU Journal of International Law and Politics (2000) pp. 501–536; A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011); A. Nollkaemper, 'Conversations Amongst Courts: Domestic and International Adjudicators', in C.P.R Romano, *et al.* (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) pp. 523–549; A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', 60(1) *International & Comparative Law Quarterly* (2011) pp. 57–92. C.f. too, the various contributions to the symposium in: 26(3) *Leiden Journal of International Law* (2013).

4 With the notable exception of: J. Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017).

Peat seeks to explore 'how and why domestic law is used by international courts and tribunals to interpret international law' by examining how adjudicators have engaged with 'domestic legislation and regulations, and the judgments of domestic courts' when constructing and applying international legal materials.[5] Based on an analysis of adjudicative practice in five 'international jurisdictions',[6] Peat argues that courts and tribunals often use domestic materials in ways that cannot readily be explained using 'orthodox' approaches to sources doctrine and the rules on interpretation reflected in the Vienna Convention on the Law of Treaties ('VCLT').[7] Instead, Peat contends, 'domestic law has been used by international courts and tribunals in a variety of different ways' and is 'often motivated by—and is only comprehensible in relation to— certain factors that are extrinsic to [the VCLT], such as the presence of lacunae in the relevant legal regime or the character of the norm being interpreted.'[8] For these reasons, Peat contends that meaningfully assessing the appropriateness of adjudicative recourse to domestic law requires us to carefully consider the context in which the interpretative act occurs, and the values a legal regime aims to promote.[9]

Peat's study consists of eight chapters. Chapter 1 sets out the book's structure, scope, and objectives. Chapter 2 re-examines the codification of rules on interpretation from the early 1950s to the completion of the Vienna Convention on the Law of Treaties (VCLT). The book's most significant contributions to our understanding of international courts' and tribunals' varied uses of domestic law appear in Chapters 3–7. Peat analyses: (i) the International Court of Justice (ICJ)'s use of domestic materials when considering States' optional clause declarations, and reservations to multilateral treaties (Chapter 3); (ii) World Trade Organization (WTO) panels' and the Appellate Body's engagement with domestic materials

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5 D. Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP, 2019), p. 8

6 *Ibid.*, p.10

7 What Peat also refers to as 'formal, positivist', or 'traditional' approaches: *ibid.*, pp. 4–8. Peat argues that the key features of such approaches are to: (i) view the national/international interface through monist/dualist theories; (ii) seek to channel domestic legal materials through the sources of international legal obligation recognised in Article 38 ICJ Statute; and (iii) to confine domestic law's relevance in interpretation to constituting evidence of subsequent agreement or practice (establishing authoritative interpretation of treaty terms) under Articles 31(3)(b) and (c) VCLT. C.f. *ibid.*, pp.3–7.

8 *Ibid.*, p. 214

9 *Ibid.*, pp. 48, 214, 221

when considering Members' schedules of commitments (Chapter 4); (iii) tribunals' recourse to domestic materials when interpreting the open-textured provisions of international investment agreements (IIAs) (Chapter 5); (iv) the European Court of Human Rights (ECtHR)'s engagement with domestic practice under the (so-called) 'consensus doctrine' (Chapter 6); and (v) the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s use of domestic materials when constructing the definition of rape, considering the effects of guilty pleas, and addressing its powers to issue subpoenas and binding orders (Chapter 7). Chapter 8 briefly highlights some common themes in the studied practice.

Peat carefully and usefully develops a (descriptive) taxonomy of factors and purposes seemingly affecting adjudicators' recourse to domestic materials (in Chapters 3–7 and in Chapter 8) and highlights areas of similarity and diversity. Peat argues that adjudicators in the five jurisdictions studied made use of domestic law in three main ways: (i) to substantiate the intent of a State; (ii) to structure (or, we might say, legitimate) the exercise of discretion afforded by broadly-worded 'standards';[10] or (iii) as an ancillary method, to buttress an outcome reached by other means.[11] Peat usefully highlights that in many cases, adjudicators do not expressly attempt to justify their recourse to domestic materials within the VCLT framework. We might be concerned that these findings erode the view of interpretation as minimally predictable. Given his views on the limits of the VCLT and the nature of interpretation (explored below), Peat does not, however, frame this as problematic *per se*. Further, and as others have rightly noted,[12] given in much of the practice identified adjudicators examined materials from *only one* domestic jurisdiction, we might query whether Peat's book is truly about 'comparative' reasoning, and not merely domestic law's role in the construction of international legal norms.

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10 In elaborating this argument in Chapters 5 and 6, Peat relies heavily on certain legal theorists' distinction between 'rules' and 'standards': *ibid*., esp.: pp. 128–133; 167–170.

11 *Ibid.*, pp. 215–218.

12 C.f.: J. Hepburn, 'Comparative Reasoning in International Courts and Tribunals', 31(3) *European Journal of International Law* (2020) pp. 1171–1176, at p. 1172; A. Tzanakopoulos, Antonios, 'Book Symposium: Comparative Reasoning in International Courts and Tribunals', *EJIL:Talk!* (Blog Post, 15 September 2020) <https://www.ejiltalk.org/book-symposium-comparative-reasoning-in-international-courts-and-tribunals-2/>.

The breadth of Peat's study is ambitious. He nevertheless approaches case law from the five substantively and procedurally diverse areas selected with commendable confidence and due attention to detail and context. His examination of practice provides useful insights for both specialists working in the fields studied and generalists interested in the themes of normative interaction, sources of law and interpretation, and the functions, legitimacy, and authority of international adjudication. For example, Peat's examination of certain WTO panels' and the AB's express invocation of Articles 31(4) and 32 VCLT when interpreting schedules of commitments provides a detailed and nuanced account of often-overlooked practice of general relevance.[13] Peat similarly usefully shows that investment tribunals' (rather limited) express recourse to domestic materials does not accord with the idea that these tribunals are identifying and applying general principles of law within the meaning of Article 38(1)(c) ICJ Statute.[14]

Despite its notable strengths, Peat's study ultimately raises as many questions as it answers due, especially, to two sets of issues. The first concerns the selection of materials and methods of inquiry. Although Peat explains that the studies in Chapters 3–7 do not 'provide an exhaustive and comprehensive overview of every instance in which domestic law has been invoked by the surveyed jurisdictions', but rather highlight 'certain illustrative examples which pose questions of particular interest',[15] he provides little information concerning how the jurisdictions —and, especially, the cases— studied were selected and, vitally, what was excluded. For example, the choice to focus on ICJ and WTO practice concerning, respectively, optional clause declarations and treaty reservations, and schedules of commitments results in the peculiar outcome that none of the five studies consider adjudicative practice engaging with domestic legal materials in an inter-State dispute directly concerning the terms of a treaty. Peat similarly does not articulate the 'moment' of interpretation or method of identifying recourse to domestic materials; we can impute that this was limited to instances where a court or tribunal

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13 *Ibid.*, pp. 90–95, 98–104.

14 *Ibid.*, esp. pp. 137–139; c.f., e.g.: S.W. Schill, 'General Principles of Law and International Investment Law' in T. Gazzini and E. De Brabandere (eds), International Investment Law: The Sources of Rights and Obligations (Nijhoff 2012) pp. 133-182; and B. Kingsbury and S.W. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality' in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) pp. 75–104.

15 Peat, *supra* note 5, p. 12.

expressly cited domestic legislation or case law when constructing terms in a legal text. There is also something of a methodological mismatch between the studies in Chapters 3–7. For example, unlike in the remaining chapters, Chapter 6's examination of ECtHR practice employs a mixed quantitative-qualitative approach, surveying a much wider range of decisions and expressly considering examples against the broader body of practice.[16] It is not clear, however, why such an approach was merited when assessing the ECtHR's practice, but not, for example, the ICJ's, WTO's or investment tribunals' — especially given their routine and varied engagement with domestic practice and materials, including in ways that accord with the conventional view of domestic law as legally relevant 'fact'.

However, more complex questions are raised by a second set of issues stemming from the study's conceptual foundations. In Chapter 2 and throughout the book, Peat stresses the limits of the VCLT —in terms of the types of reasoning captured and excluded by Articles 31–33 and its broader normative dimension. Peat rightly argues that these provisions are 'permissive, non-hierarchical and eminently capable of being invoked in a wide range of different scenarios' and do not 'dictate to the interpreter how to interpret a text',[17] but rather 'set the outer limits of the interpretative enquiry by prescribing the materials that should be taken into account by the interpreter, where those materials are present'.[18] Peat thus concludes that 'the VCLT articles have [only] a "thin" evaluative dimension':[19]:

> whether an interpreter has acted in accordance with the VCLT provisions tells us something — but not very much — about the appropriateness of an interpretation […] to evaluate whether an interpretation is appropriate in a given instance, we need to enquire further into the context in which the interpretation occurs and the [political] values that underpin the particular legal regime.[20]

Peat elaborates in Chapter 5's inquiry into investment tribunals' practice that assessing whether recourse to domestic materials 'is "bad" or "good"' thus requires us 'to make a searching enquiry into the values that we want [a legal] regime to uphold and how those are furthered by

16 *Ibid*., esp. pp. 146–154.

17 *Ibid.*, p. 44.

18 *Ibid.*, p. 21.

19 *Ibid.*, p.47.

20 *Ibid.*

referring to domestic jurisdictions'[21] —a task he considers 'both necessary and unavoidably subjective'.[22]

Yet Peat's approach leads us into potentially tricky terrain. While he convincingly (but perhaps uncontroversially) argues that the VCLT's drafters —and, we can infer, the States ratifying the VCLT— never intended Articles 31–33 to prescribe a single, or normatively 'thick', approach to interpretation,[23] Peat's observation that these provisions hold only a 'thin evaluative dimension' does not actually depend on his core flexibility thesis. Even if we consider them highly prescriptive rules uncontestably binding adjudicators to a single methodology,[24] the Vienna rules can only ever provide a normatively 'thin' understanding of interpretation. In other words, Peat's argument can be extended to any validity-based inquiry; to the extent Articles 31–33 VCLT constitute positive rules of law —definitely in the *inter se* relations of State parties, and arguably as a matter of general custom— they can *only ever* provide a 'thin' evaluative tool: a conclusion concerning validity is *always* only (normatively and causally) 'thin' —it says nothing about the values or functional objectives pursued by behaviour, its 'true' causes, or actors' subjective motivations. Thus, while Peat is right that 'the VCLT articles' can only ever 'tell half the story',[25] this is true whether we consider the use of domestic legal materials or any other aspect of interpretative practice. The bigger questions—that Peat does not directly contemplate— are how to tell the other half? and who should tell it?

Moreover, Peat's argument that we can only assess the 'appropriateness' of recourse to domestic materials by examining, *ex post*, the context in which it occurs and the respective values promoted at the domestic level and by the legal regime in which the interpreted norm appears, raises further questions. While he uses the term extensively, Peat does not expressly address what examination of 'appropriateness' entails, or who should be the one to assess it. Rather, his analyses in Chapters 3–7 oscillate somewhat between considering the application

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21 *Ibid.*, p. 138.

22 *Ibid.*, pp. 138–139.

23 *Ibid.*, esp. pp. 15–22, 46–48.

24 C.f.: J. Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' 86(2) Nordic Journal of International Law (2017) pp. 125–150, esp. pp. 125–129, 142–150.

25 Peat, *supra* note 5, p. 48.

of the Vienna rules (in most, but not all cases), examining contextual and functional explanations for recourse to domestic law, and rather untethered normative assessment of recourse to domestic materials in certain circumstances.

While he notably refrains from using the L-word, Peat employs 'appropriateness' in the same sense as others use the term 'legitimacy'.[26] However, as has been eloquently cautioned, moving from a 'normative vocabulary' based on formal validity to 'legitimacy' (or 'appropriateness') involves redirecting our attention from the substance of conduct (e.g. in formal or moral terms) toward the *perception* of that conduct.[27] While Peat entreats us to consider the 'values' underpinning international legal regimes and alleged domestic analogues, he stops short of providing a frame through which to identify or compare such values or indicate the actors whose perceptions matter most in their identification, or what the effect of competing or contradictory values might be on the appropriateness of an interpretative outcome. Indeed, Peat never really explains what he means when referring to such 'values', which seems to capture essentially functional considerations (e.g. the security and predictability of legal obligations, or the fulfilment of instrumental objectives),[28] cultural-performative consideration (e.g. the professional values attaching to the judicial or arbitral function),[29] and moral or ethical considerations (e.g. notions of the sanctity of life, the dignity of the human person, or substantive justice).[30] Further, while he occasionally cites it, Peat does not directly engage with the broader, now abundant, literature considering the legitimacy and authority of international adjudication.[31]

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26 Indeed, Peat employs the term 'legitimacy', understood largely in sociological terms, as a central organising concept in the PhD thesis on which *Comparative Reasoning* is based. See: D. Peat, *Legitimate Interpretation: Comparative Reasoning in International Courts and Tribunals*, Dissertation submitted for the Degree of Doctor of Philosophy, University of Cambridge, October 2015 <https://idiscover.lib.cam.ac.uk/permalink/f/t9gok8/44CAM_ALMA21432638210003606> esp. pp. 116–121 (electronic copy on file with author).

27 Cf.: M. Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' 15(3) European Journal of International Relations (2009) pp. 395–422, p. 408. See too: J. Crawford, 'The Problems of Legitimacy-Speak' 98 American Society of International Law Proceedings (2004) pp. 271–273.

28 C.f., esp. Peat, *supra* note 5, pp. 104–106.

29 C.f., implicitly, i*bid.*, pp. 167–177.

30 *Ibid.*, eg. pp. 201–213.

31 Of this vast and ever-growing literature, see, e.g.: W Sadurski, 'Supranational public reason: On legitimacy of supranational norm-producing authorities' 4(3) Global Constitutionalism (2015)

Similarly, while Peat laudably weaves meaningful engagement with legal theory throughout his analyses, he rather eclectically draws on, but never quite fully endorses, ideas originating in, for example, natural law, New Haven, realist, constructivist, and critical approaches.[32] Had he more clearly pinned his conceptual colours to the mast (perhaps in place of some of the discussion in Chapter 2), Peat's study might have possessed a stronger guiding thread that would have bound together the sometimes disparate assessments of practice. Peat comes close to doing so in Chapter 6 when he engages at length with the idea of congruence in *inter alia* Fuller's and Brunnée and Toope's work,[33] but it is unclear whether these ideas equally informed the remaining chapters. As it is, one wonders whether Peat's approach, if fully followed through, might not simply lead us toward unguided, interminable, *ex post*, and radically functional review and risk further collapsing any distinction between interpretative *process* and interpretative *outcome.*

But the above points, which might be understood as criticisms, equally highlight the timeliness of Peat's study and the significance and complexity of the questions it raises; it invites us to reflect more critically on the interactions between the international and national planes, and, for many, to broaden the parameters of our enquiries when considering when international courts and tribunals ought to make use of materials, concepts, and approaches derived from domestic legal orders. Peat thus injects much-needed fresh insight and energy into long-standing debates; his book will likely spur further research and novel approaches.

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pp. 396–427; A. von Bogdandy, 'The Democratic Legitimacy of International Courts: A Conceptual Framework' 14(2) Theoretical Inquiries in Law (2013) pp. 361–380; and L.R. Helfer and K.J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' 14(2) Theoretical Inquiries in Law (2013) pp. 479–504.

32 Peat, *supra* note 5, e.g. pp. 41–46, 128–130, 170–177.

33 *Ibid*., pp. 170–177.