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Introduction

The interaction between domestic law and international law is a topic of perennial interest for international lawyers.[1] Domestic law has long been recognised as a source of international law,[2] an inspiration for legal developments[3] or the benchmark against which a legal system is to be

[1] In this book, the term 'domestic law' is preferred to 'municipal law' or 'national law'. Municipal law is sometimes used in a narrow sense of the term to refer to law emanating from a local municipality, thus excluding legislation passed by a central legislature. National law, on the other hand, refers only to laws passed by the central legislature, to the exclusion of regulations enacted by the executive or laws passed by regional or municipal authorities. As this study examines principally the use of domestic legislation passed by the central legislature but also touches upon regulations passed by the executive, it will refer to 'domestic law' in the broad sense of the term. See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (2001) II [2] YBILC 31, 38, para 9; J. Ketcheson, *The Application of Domestic Law by International Tribunals* (PhD University of Cambridge 2013) n 1.

[2] See for example, ILC, Second Report on the Identification of Customary International Law, by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/672, para 34; 2 BvR 1506/03 (German Federal Constitutional Court), para 51; R. Jennings & A. Watts, *Oppenheim's International Law*, vol 1 (9th edn, OUP 2008), § 12; *Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th–July 24th 1920 with Annexes*, 306, 335. Similarly, 'umbrella clauses' in bilateral investment treaties enable obligations entered into under domestic law between the investor and host state to be enforced before an international investment tribunal; see for example, Article 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, entered into force 19 February 1993.

[3] See for example, ILC, 'Identification of Customary International Law: Text of the draft conclusions', Report of the ILC on the work of its seventieth session, 30 April–1 June and 2 July–10 August 2018, UN Doc. A/73/10, conclusion 5 and conclusion 6 (2); H. Thirlway, *The Sources of International Law* (OUP 2014) 95; P. M. Moremen, 'National Courts Decisions as State Practice: A Transjudicial Dialogue?', (2006) 32 North Carolina JIL 259; W. Friedmann, 'The Use of 'General Principles' in the Development of International Law', (1963) 57 AJIL 279.

assessed.[4] Often, it is simply treated as mere fact, indicative of the legality of a state's actions.[5] Academic commentary normally re-traces these well-trodden paths, leaving one with the impression that the interaction between domestic and international law has been thoroughly mapped, and is unworthy of further enquiry. However, a different – and surprisingly pervasive – nexus between the two spheres has been largely overlooked: the use of domestic law in the interpretation of international law. The present book aims to fill that gap in the literature.

When Hersch Lauterpacht wrote his seminal thesis, *Private Law Analogies in International Law*,[6] in 1926, international law was still a system in which states were the only actors and in which uncodified rules of custom and general principles of law played a pivotal role. Even at that time, positivist doctrine failed to grasp the pervasive influence of domestic law on international rules and principles. In the words of Lauterpacht,

> States and tribunals have recourse to analogy [with domestic law] because international relations give rise to such analogies, and because international law is not developed enough to supply a solution in such cases. But the science of international law gives here no guidance to judges and arbitrators, because it rejects, under the influence of positivist theory, any analogy whatsoever.[7]

Since that time, however, international law has profoundly changed. The international legal system has expanded both horizontally and vertically. The concept of the subjects of international law has broadened to include not only over 100 new states but also international organisations, whilst the scope of international law has expanded to cover matters that were previously considered to be solely in the domestic domain, such as the protection of human health, environmental protection and criminal law. As a result, individuals, corporate entities and non-governmental organisations all unavoidably interact with international law on a daily

[4] H. L. A. Hart, *The Concept of Law* (3rd edn, OUP 2012) Chapter X; G. Van Harten, *Investment Treaty Arbitration and Public Law* (CUP 2008).

[5] See for example, *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, 1926 PCIJ Series A, No. 7, 19. ('From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.')

[6] H. Lauterpacht, *Private Law Analogies in International Law with Special Reference to International Arbitration* (LLD London School of Economics 1926). This was subsequently published as H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (Longmans, Green & Co. 1927).

[7] Lauterpacht, *Private Law Analogies*, iii.

basis.[8] Put simply, contemporary life is indelibly shaped by international rules.

As a result of these changes, the interactions between domestic law and international law occur more frequently and in more contexts than ever before.[9] It is perhaps unsurprising therefore that the line between domestic and international law is increasingly blurred, with legal concepts, rules and principles crossing freely between the two spheres.[10] However, just as when Lauterpacht wrote *Private Law Analogies*, the mainstream literature fails to appreciate fully the ubiquitous influence of domestic law on international law.

1.1 Conceptual Framework

1.1.1 Traditional and Contemporary Accounts of the Interaction between Domestic and International Law

Mainstream scholarship has often focussed on the more traditional relations between the domestic and international systems,[11] such as whether domestic systems adopt a 'monist' or 'dualist' approach in relation to the incorporation of international law.[12] This approach has

[8] See A. Cassese, *International Law* (2nd edn, OUP 2005) Chapter 7; K. Parlett, *The Individual in the International Legal System* (CUP 2011).

[9] See the Foreword by Lord Bingham in S. Fatima, *Using International Law in Domestic Courts* (Hart 2005) xii. ('To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.')

[10] For a sceptical viewpoint, see M. Shahabuddeen, 'Municipal Law Reasoning in International Law', in V. Lowe & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996).

[11] This book proceeds on the basis that domestic and international legal systems are, in fact, distinct systems of law. This is the most common characterisation of the two legal systems but one that has been criticised, most notably by Hans Kelsen, who considered international and domestic law to form one system; see H. Kelsen, *Pure Theory of Law* (2nd edn, University of California Press 1967) 328–44.

[12] See for example, D. T. Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar 2015) 16 ('most authors start their exposition of issues relating to the relationship between international law and national law by referring to those theories'). Cf J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 48–9 (recognising that the 'relationship between international and national law is often presented as a clash at a level of high theory, usually between "dualism" and "monism"', but that 'neither offers an adequate account of the *practice* of international and national courts'); B. Conforti, 'Cours général de droit international public' (1988) 212 Recueil des cours 9, 31 (stating that 'nous

long been recognised, however, as an unhelpful and outdated way of characterising the interaction between international and domestic legal systems,[13] and many authors now acknowledge that 'the orthodox international and public law theories about how international and domestic law interact do not recognise the complexity, and sometimes contradictory nature, of the international/national legal interface'.[14] In particular, the vast majority of contemporary scholarship recognises that international law is not just passively received by the domestic legal system as an immutable set of rules.[15] Instead, there is a symbiotic relationship in which domestic legal systems play not only a role in the identification of international rules,[16] but also a more direct role in shaping, enforcing and ensuring the coherence of international law.[17]

Understanding how the domestic and international legal spheres interact in practice is crucial because it often diverges from formal, positivist notions of the relations between the two systems. Within the traditional sources doctrine of international law (as reflected in Article 38 of the Statute of the International Court of Justice), domestic law or the judgments of national courts may constitute state

sommes peu intéressé par la manière classique dont ce sujet est habituellement abordé, et qui consiste à reprendre les disputes séculaires entre les monistes et les dualistes').

[13] G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', (1957) 92 Recueil des cours 1, 71 (stating that 'the entire monist–dualist controversy is unreal, artificial and strictly beside the point').

[14] 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* (The Federation Press 2005) 2.

[15] See K. Knop, 'Here and There: International Law in Domestic Courts', (2000) 32 NYU JILP 501, 505–6.

[16] See for example, H. Thirlway, *The Sources of International Law* (OUP 2014) 124; A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', (2011) 60 ICLQ 57, 61–3.

[17] See for example, H. Schermers, 'The Role of Domestic Courts in Effectuating International Law', (1990) 3 LJIL 77; A. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G. Boas & W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003); A. Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice', (2006) 5 Chinese JIL 301; A. Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011); Roberts, 'Comparative International Law?'; A. Nollkaemper & O. K. Fauchald (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012); A. Nollkaemper, 'Conversations Amongst Courts: Domestic and International Adjudicators', in C. P. R. Romano et al. (eds), *The Oxford Handbook of International Adjudication* (OUP 2013). Also in this context see *Oxford Reports on International Law in Domestic Courts*, available at http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

practice capable of establishing a rule of customary international law, evidence the existence of a general principle of law or act as a subsidiary means of determining the content of international law within the meaning of Article 38(1)(d) of the Statute.[18] The influence of domestic systems on international law, however, extends well beyond the role that it occupies in the traditional sources doctrine. Domestic court judgments, for example, are 'routinely cited as evidence of the meaning of international law, often without States or commentators critically analyzing whether they accurately reflect existing international law'.[19] As such, those judgments obtain an authority that cannot be explained in terms of custom or general principles of law, which far surpasses mere identification of the law.[20]

This insight is particularly important because the manner in which domestic systems interpret and apply international law cannot be understood as the mere transliteration of a rule from one sphere to another. Rather, it is a creative process in which rules and principles take on their own shape.[21] Recent scholarship on comparative international law builds on this by exploring how and why international law 'might take on different qualities as it is domesticated in particular States or regions'.[22] Linguistic, geopolitical, institutional and social factors all play a role in determining how international law is understood within domestic legal orders, creating diversity that challenges our conception of international law as universal.

[18] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 218; Thirlway, *Sources*, 124–6; Roberts, 'Comparative International Law', 61–2. As an example, see *Jones* v. *Saudi Arabia* [2006] UKHL 26, paras 59–63.

[19] Roberts, 'Comparative International law?', 63. See also, A. Nollkaemper, 'The Independence of the Domestic Judiciary in International Law', (2006) 17 Finnish YBIL 261, 272.

[20] Nollkaemper, 'The Independence of the Domestic Judiciary', 272–3.

[21] Knop, 'Here and There', 506; Roberts, 'Comparative International law?', 60–1 (stating that the uncritical use of domestic decisions to identify domestic law 'gives great discretion to those engaged in comparative analysis to upgrade foreign decisions they like (characterizing them as impartial law enforcement) and downgrade ones they dislike (dismissing them as partial State practice)').

[22] Roberts, 'Comparative International Law?', 79. See also, A. Roberts et al., 'Conceptualizing Comparative International Law', in A. Roberts et al. (eds), *Comparative International Law* (OUP 2018) 6 (defining comparative international law as follows: 'comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law'); A. Roberts, *Is International Law International?* (OUP 2017).

1.1.2 *The Orthodox Approach to Domestic Law and the Interpretation of International Law*

Within the field of interpretation, scholarship has often treated domestic law as being of relatively marginal importance. It is widely acknowledged that domestic law may be pertinent if it constitutes subsequent practice in the application of a treaty that is relevant under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, or if it evidences the existence of a customary rule of international law or general principle of law that is a relevant rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention.[23] Beyond these bounds, the study of the interaction between domestic and international spheres is normally limited to describing and evaluating how domestic courts interpret and apply treaties.[24] Such studies are crucial if we are to comprehend how international law is understood and applied 'on the ground'. But they approach the question from a largely unidirectional perspective; that is to say, they examine how domestic legal systems interpret and apply international law, and not how domestic law influences or shapes the interpretation of international rules and principles by international courts and tribunals.

Literature within certain sub-fields, notably European human rights law and the law of the European Union, has recognised that domestic law plays a more influential role with regards to interpretation of international law than might be suggested by the provisions of the Vienna Convention.[25] By focussing on the reasoning of specific courts, however,

[23] See R. Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 257–9; ILC, 'Identification of Customary International Law: Text of the draft conclusions', Report of the ILC on the work of its seventieth session, 30 April–1 June and 2 July–10 August 2018, UN Doc. A/73/10, conclusion 5 and conclusion 6(2).

[24] See for example, C. McCrudden, 'CEDAW in National Courts: A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context', in Roberts et al. (eds), *Comparative International Law*; H. P. Aust & G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016); E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015); D. Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2010).

[25] See for example, P. Mahoney & R. Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights', in M. Andenas & D. Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015); P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet et al. (eds), *Comparative Law Before the Courts* (BIICL 2005); P. G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', (1998) 73 Notre Dame Law Review 1217;

the influence of these studies has been insulated from the mainstream general international law literature. The resulting lack of a cross-cutting analysis of comparative reasoning has obscured the pervasiveness of domestic law as an interpretative aid and stymied an explanation of its theoretical underpinnings. Outside of those relatively circumscribed confines, the role that domestic law plays in the interpretation of international law has not been fully examined.

This stands in stark contrast to the proliferation of literature examining the use of comparative law by domestic supreme courts. Spurred by a spate of highly contentious judgments handed down by the US Supreme Court in the early 2000s,[26] comparativists and constitutional lawyers have thoroughly examined the normative arguments for and against the use of comparative law by domestic courts, gathering empirical evidence to corroborate their claims.[27] This rich literature – most of

K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015); K. Lenaerts & K. Gutman, 'The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited', in Andenas & Fairgrieve (eds), *Courts and Comparative Law*; K. Lenaerts, 'Interlocking Legal Orders or the European Union Variant of *E Pluribus Unum*' in Canivet et al. (eds), *Comparative Law Before the Courts*; M. Kiikeri, *Comparative Legal Reasoning and European Law* (Springer 2001); C. K. Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities', (1994) Pace International Law Review 282; Y. Galmot, 'Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes', (1990) 6 Revue française de droit administratif 255.

[26] *Graham* v. *Florida*, 560 US 48 (2010); *Roper* v. *Simmons*, 543 US 551 (2005); *Atkins* v. *Virginia*, 536 US 304 (2002); *Lawrence* v. *Texas*, 529 US 558 (2003).

[27] See for example, J. Bell, 'Researching Globalisation: Lessons from Judicial Citations' (2014) 3 CJICL 961; J. Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht LR 8; G. Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation' (2009) 32 Harvard Journal of Law and Public Policy 653; V. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard LR 109; J. Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 Harvard LR 129; E. A. Young, 'Foreign Law and the Denominator Problem' (2005) 119 Harvard LR 148; N. Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law 519; S. Calabresi & S. Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision' (2005) 47 William & Mary LR 743; M. D. Ramsey, 'International Materials and Domestic Rights' (2004) 98 AJIL 69; A. -M. Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191. For monograph-length treatments of the topic see for example, E. Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013); M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013); J. Waldron, '*Partly Laws Common to All Mankind*': *Foreign Law in American Courts* (Yale UP 2012); B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (UCL Press 2006).

which dates from the past 15 years – has shone a fresh light on the use of extrinsic materials by courts, allowing commentators to delve into the theoretical questions that the use of foreign law raises. Why, for example, do courts give weight to sources extrinsic to their legal system? What – if anything – constrains a judge's discretion when interpreting a provision, and what provides the benchmark against which to assess the appropriateness of an interpretation? Underpinning these debates are disagreements about the very nature and purpose of interpretation itself.

1.1.3 The Concept of Comparative Reasoning and Scope of This Book

The purpose of this book is to build on the aforementioned bodies of literature by examining how and why domestic law is used by international courts and tribunals to interpret international law.[28] It analyses the practice of five international jurisdictions and explores the issues of methodology and principle raised by their use of domestic law, demonstrating that such law is often invoked outside the context of Articles 31 and 32 of the Vienna Convention and outside the remit of the traditional sources doctrine. In doing so, it shines new light on the interaction between the domestic and international spheres, whilst also showing that interpretation is a more complex and nuanced activity than is commonly supposed.

A few words on the scope of this study are required. 'Comparative reasoning', as reflected in the title of this book, is capable of being understood in a broad or a narrow sense. In the broad sense of the term, it refers to all interpretative material used by a decision-maker, including domestic legislation, judgments of domestic courts, judgments of international courts and tribunals and other international treaties.[29] For example, the International Criminal Tribunal for the former Yugoslavia has referred to the case law of the European Court of Human Rights in the context of examining when a defendant is unfit to stand trial,[30] investment tribunals have drawn on the reports of the

[28] In this book, international law refers to not just treaties, but also reservations to multilateral treaties, declarations made under Article 36(2) of the Statute of the ICJ ('Optional Clause declarations'), WTO schedules of commitments, and the Statute and Rules of Procedure and Evidence of the ICTY.

[29] For an example of the broad use of the term, see E. Bjorge, 'Comparative Law and the Method of Law: Ascertainment of the International Court of Justice', in Andenas & Fairgrieve (eds), *Courts and Comparative Law*.

[30] *Prosecutor* v. *Strugar* (Appeals Chamber Judgement) IT-01–42-A (17 July 2008), para 47.

Appellate Body of the World Trade Organization in order to elaborate what is required by 'necessity',[31] and the European Court of Human Rights has made numerous references to the case-law of the Inter-American Court of Human Rights.[32] The meaning of the term as it is used in this book, however, is narrower: it is used to refer solely to domestic legislation and regulations, and the judgments of domestic courts.

This book focusses on the use of domestic law for two reasons. First, unlike the use of other extraneous interpretative material (such as the case-law of other international courts and tribunals),[33] the use of domestic law has not been the subject of recent academic attention. This practice raises issues not just regarding the age-old question of if and when domestic law should act as a source of or inspiration for international law, but also more general issues regarding the proper role of the interpreter and the interpretative method. Second, as a practical matter, it would be very difficult to address thoroughly in a monograph all the issues raised by comparative reasoning, broadly understood. The choice has thus been made in this book to focus on the use of domestic law by international courts and tribunals.

The scope of the present study is limited to the practice of international adjudicative bodies. It is clear that the bulk of the day-to-day life of international law is constituted by the practice of non-judicial bodies, such as government legal advisors and lawyers in private practice. However, the accessibility of the interpretative practice of these actors is limited, with only a handful of states producing edited collections of materials that could be drawn on. The practice of many international courts and tribunals, on the other hand, is easily accessible as publicly available, electronic versions of judgments and in searchable databases. The focus on judicial practice is

[31] *Continental Casualty Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), para 192. On the use of extraneous precedent by international investment tribunals more generally, see A. K. Bjorklund & S. Nappert, 'Beyond Fragmentation', in T. Weiler & F. Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Brill 2011).

[32] See for example, *Sergey Zolotukhin* v. *Russia* (10 February 2009), App. No. 14939/03, para 40. See more generally, ECHR, *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights: Research Report* (Council of Europe 2012); G. Ulfstein, 'Interpretation of the ECHR in light of other international instruments', Pluricourts Research Paper No. 15–05.

[33] See in particular, H. G. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi, D. Peat & M. Windsor (eds), *Interpretation in International Law* (OUP 2015); Bjorklund & Nappert, 'Beyond Fragmentation'.

hence a function of practical considerations rather than a reflection of the relative import of judicial institutions in international law.

The courts and tribunals that are the focus of this study – the International Court of Justice (ICJ), the panels and Appellate Body (AB) of the World Trade Organization (WTO), international investment tribunals, the European Court of Human Rights (ECtHR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) – were selected in order to examine the use of domestic law over a wide range of subject-matter and within diverse legal regimes. Three differences between these jurisdictions are particularly noteworthy.

First, the book surveys the practice of courts and tribunals that adjudicate upon inter-state disputes (the ICJ and the panels and AB of the WTO), as well as those that decide cases brought by individuals against states (international investment tribunals and the ECtHR) and those pertaining to individual criminal responsibility (the ICTY). By examining this range of tribunals, we are able to see if differences in their practice with respect to the invocation of domestic law may be influenced by the structure of the dispute settlement body. Second, the courts and tribunals operated, and continue to operate, in different historical and legal contexts. For example, the ECtHR has delivered over 20,600 judgments since its inception,[34] and is able to draw on a large body of jurisprudence to guide its interpretation of the European Convention on Human Rights. In contrast, when the ICTY was created in May 1993, it was faced with a statute that contained 'not much more than the skeletons of crimes'[35] within its jurisdiction and scant international criminal precedent on which to draw.[36] As will be demonstrated, the context in which the court or tribunal operates is of crucial importance in understanding its recourse to domestic law. Third, the character of the applicable law before each court and tribunal is largely distinct, and these differences might lead one to think that domestic law would be more readily invoked in certain legal regimes as opposed to others. For example, domestic law might seem *prima facie* to be more relevant to the interpretation of an international crime as opposed to the interpretation of a multilateral trade treaty, as both domestic and international criminal law address individual criminal responsibility. By examining how domestic law is used over a range of

[34] European Court of Human Rights, *ECHR: Overview 1959–2017* (Council of Europe 2017) 3.
[35] G. Mettraux, *International Crimes and the ad hoc Tribunals* (OUP 2005) 5.
[36] See for example, *Prosecutor* v. *Dusko Tadić*, IT-94–1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), para 20.