COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS

Domestic law has long been recognised as a source of international law, an inspiration for legal developments, or the benchmark against which a legal system is to be assessed. Academic commentary normally re-traces these well-trodden paths, leaving one with the impression that the interaction between domestic and international law 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.

This book examines the practice of five international courts and tribunals to demonstrate that domestic law is invoked to interpret international law, often outside the framework of Articles 31 to 33 of the Vienna Convention on the Law of Treaties. It assesses the appropriateness of such recourse to domestic law as well as situating the practice within broader debates regarding interpretation and the interaction between domestic and international legal systems.

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FOREWORD

Daniel Peat's important book throws new light on the practice and theory of treaty interpretation. Although there has long been sustained attention to various aspects of the relationship between international and domestic law on the one hand, and to the rules of treaty interpretation on the other hand, the intersection of both questions, which is the subject of the book, has – surprisingly – not been seriously addressed. The book identifies this serious gap in scholarship and offers a novel and sophisticated approach to fill that gap. The book's contribution to legal scholarship is significant not only for its treatment of this specific question but also for the more general insights it offers to the theory of treaty interpretation and to the theory on the relationships between international and domestic law.

The book's first original and convincing contribution is in addressing the interpretation of international texts. Peat rejects the view that regards the rules on treaty interpretation grounded in the Vienna Convention on the Law of Treaties as the only possible rules. He examines the drafting history of the Vienna Convention, as well as the codification efforts that preceded it, to demonstrate that those rules were never intended to have what he terms an 'evaluative dimension'. This understanding provides the basis for the subsequent analysis of the interpretative practice of international courts and tribunals, much of which falls outside the scope of the Vienna Convention provisions. The book's findings challenge conventional wisdom and question the centrality of Articles 31–33 of the Vienna Convention of the Law of Treaties as constraining treaty interpretation.

Second, and more broadly, the findings of the book introduce a new dimension to the debate about the complex interdependency between international law and domestic law that has captured the attention of many scholars over generations. It does so by elucidating a relationship between domestic and international law that has until now passed relatively unnoticed and is undertheorised. In fact, the debate was grounded on the assumption that these two bodies of law were neatly separated into two layers, inviting scholars to argue which layer was hierarchically

superior to the other. The book's findings question this assumption by showing that international rules of interpretation are not insulated from domestic law influences. These findings demonstrate the sterility of the ancient debate about monism vs. dualism, and invite us to reflect upon the appropriateness of referrals by international tribunals to domestic law in interpreting legal texts and about the extent to which domestic courts may, in turn, do the same when they interpret international law.

Eyal Benvenisti
Cambridge, November 2018

PREFACE

This is not the book I intended to write. The book grew out of a doctoral thesis at the University of Cambridge, which I completed in 2016. Initially, that project aimed to look at the role general principles of law might play in the regulation of transboundary damage and, in particular, whether a general principle of strict or absolute liability could be said to exist for extremely hazardous activities. The first stage of the project entailed conducting research into the nature of general principles as a source of law. It soon became clear to me that the very concept of general principles was unsettled: to some, such principles were inherent in the operation of all legal systems; to others, they were to be induced from domestic legal systems. As was pointed out to me during my preliminary defence, this was scarcely the basis on which I could build a convincing normative argument.

Whilst conducting this research, however, I started to find something that looked strange: courts and tribunals often drew on domestic law not as a means to substantiate or evidence a general principle of law but rather as an interpretative tool, frequently without explaining how or why that domestic law was relevant. As I examined this phenomenon more closely, I realised that the practice challenged some widely held preconceptions: namely, the centrality of the Vienna Convention to the interpretation of international law and the relatively strict division between domestic and international legal systems.[1] This sat uneasily with the canonical approach that marked most of my legal education and merited, in my opinion, further study.

But this book has also been marked by another chapter in my life. Three years spent working at the International Court of Justice taught me some valuable lessons. Amongst the most important of those was the realisation that international law is not always neat; it cannot always be rationalised in the manner that academics are trained to do. The use of

[1] For non-Kelsenians, at least.

domestic law is, I think, one of those instances. It would be nice to justify tribunals' comparative reasoning within the framework, for example, of a novel theory of interpretation or an evolution of the doctrine of sources. But to do so would be to neglect the nuances in interpretative practice, and the enormously different legal, historical and political contexts in which the courts and tribunals operate. Sometimes it is better just to lay out a hitherto unrecognised practice and tackle the issues – both broad and narrow – it raises. That is what this book tries to do.

Of the myriad people and institutions that have assisted me during the process of this research, a few deserve special mention. First and foremost, I would not be in the position in which I now find myself without the support of my parents, Yvonne and Gerald Peat. Gonville & Caius College generously provided me with a WM Tapp studentship for the duration of my doctoral research, without which this book would not have been possible. My doctoral supervisor, Michael Waibel, provided constant support and advice throughout this process, which I appreciate immensely. Andrea Bianchi and Matthew Windsor have been exemplary friends and collaborators over the course of our *Interpretation in International Law* project, and my thinking has developed greatly as a result of our work together. I have also benefitted immensely from my interaction with colleagues during the work of the International Law Association Study Group on the Content and Evolution of the Rules of Interpretation, and especially with Panos Merkouris, Fay Pazartzis and Geir Ulfstein. Thanks are also due to the many friends and colleagues that have commented on parts of this book, including Julian Arato, Andrea Bianchi, Eirik Bjorge, Daniel Costelloe, Richard Gardiner, Asier Garrido-Muñoz, Nina Grange, Cristina Hoss, Valentin Jeutner, Jessica Joly Hébert, Amelia Keene, Massimo Lando, Odette Murray, Giulia Pinzauti, Joe Sampson, Stephan Schill, Andreas Televantos, Ingo Venzke and Matthew Windsor.

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ABBREVIATIONS

AB	Appellate Body of the World Trade Organization
AJIL	*American Journal of International Law*
BYIL	*British Yearbook of International Law*
CJICL	*Cambridge Journal of International and Comparative Law*
CLJ	*Cambridge Law Journal*
CoE	Council of Europe
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
EJIL	*European Journal of International Law*
GATT	General Agreement on Tariffs and Trade 1994
HRLR	*Human Rights Law Review*
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	*International & Comparative Law Quarterly*
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
JICJ	*Journal of International Criminal Justice*
JIDS	*Journal of International Dispute Settlement*
JIEL	*Journal of International Economic Law*
JWIT	*Journal of World Investment & Trade*
LJIL	*Leiden Journal of International Law*
LNTS	League of Nations Treaty Series
NYU JILP	*New York University Journal of International Law and Politics*
OJLS	*Oxford Journal of Legal Studies*

PCIJ	Permanent Court of International Justice
Recueil des cours	Collected Courses of the Hague Academy of International Law
RGDIP	*Revue Générale de Droit International Public*
RIAA	Reports of International Arbitral Awards
RPE	Rules of procedure and evidence
SCSL	Special Court for Sierra Leone
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties 1969
VJIL	*Virginia Journal of International Law*
WTO	World Trade Organization
YBILC	*Yearbook of the International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*