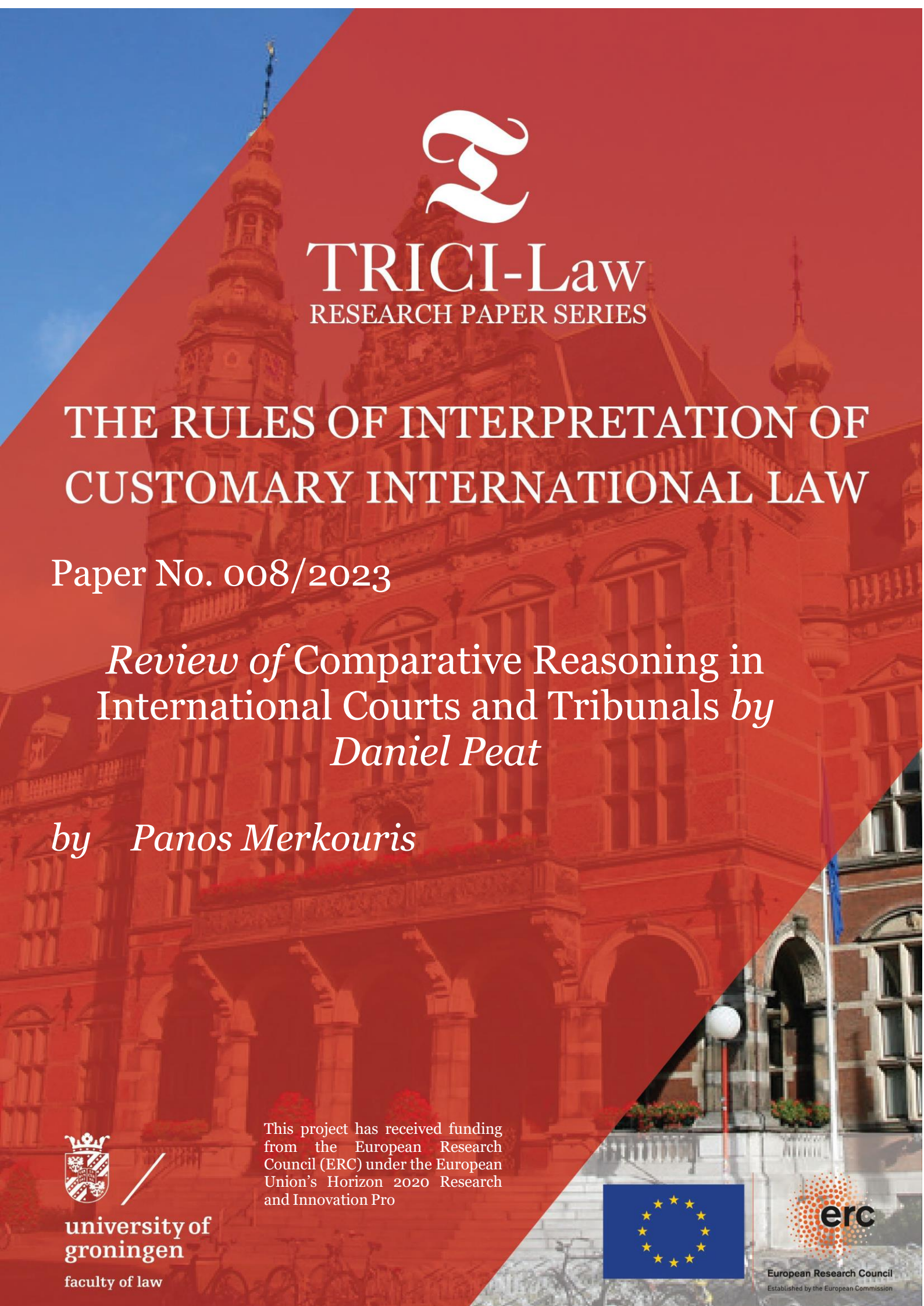

TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 008/2023

Review of Comparative Reasoning in International Courts and Tribunals *by Daniel Peat*

by Panos Merkouris

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Pro

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Published version available at:

P Merkouris, '*Review of* Comparative Reasoning in International Courts and Tribunals *by Daniel Peat*' (2019) 89 BYIL
https://doi.org/10.1093/bybil/brad006

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

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Comparative Reasoning in International Courts and Tribunals. By DANIEL PEAT. Cambridge University Press, Cambridge, 2019. 292 pp. HB £99.99.

There is no dearth in academic literature of both individual and collective explorations of the theme of interpretation. After all, interpretation is not only ubiquitous but also central to the continued existence and relevance of any legal rule. The International Law Commission ('ILC') as well, is no stranger to such forays into the mercurial lands of interpretation. A most recent example of this is when the ILC added in its program of work the topic 'Subsequent agreements and subsequent practice in relation to interpretation of treaties'.[1] With so many articles and publications on interpretation, one would wonder if there is anything truly novel to be said on interpretation. In *Comparative Reasoning in International Courts and Tribunals*, Peat achieves precisely that.

In this book, one that as the author playfully states in his preface 'is not the book [he] intended to write', Peat undertakes an examination of the role of domestic law in international jurisprudence within the context of interpretation. The term 'comparative reasoning' is employed in its 'narrow' sense as referring 'solely to domestic legislation and regulations and the judgments of domestic courts' (9). The focus is on when and under what circumstances international courts and tribunals have resorted to this method of 'comparative reasoning', ie when they have referred to domestic law while trying to determine the content of an international instrument. Whereas the term 'comparative reasoning' may give the impression of a comparison amongst multiple domestic legal systems, that is not always the case. Given the fact that international courts and tribunals, employ 'comparative reasoning' in so many different contexts and in such a divergent manner the term is left somewhat open-ended. It is used as an umbrella term to cover the wide spectrum of instances of recourse to domestic law, irrespective of whether such a comparative process indeed entails a comparison between multiple domestic legal systems or rather focuses on the system of one or both of the disputing parties (for the latter, see chapters 3 and 4 in particular). The choice of the international courts and tribunals analysed, as is discussed below, was guided by considerations of whether the structure, context and applicable rules of these bodies were factors that influenced the nature and application of comparative reasoning in their judgments.

[1] Renamed in 2013, from the original title 'Treaties over time' so as to better reflect the focus of the ILC.

Before embarking on an examination of how comparative reasoning has been addressed in international jurisprudence, chapter 3 addresses the role and nature of Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT),[2] which enshrine the rules of interpretation. Surveying the manner in which these rules emerged, Peat concludes that the VCLT articles cannot be viewed as 'discipling rules' (16). This term, initially coined by Fiss, refers to rules that 'constrain the interpreter, thus transforming the interpretive process from a subjective one into an objective one, and they furnish the standards by which the correctness of the interpretation can be judged' (16).[3] According to Peat, the VCLT rules of interpretation were not intended to possess what Postema called an 'evaluative dimension' (18), ie the attribute according to which 'law provides standards by which law-subjects evaluate their behaviour and that of others'.[4] At the end of chapter 2, having traced the drafting history of Articles 31-32 VCLT, Peat qualifies this by distinguishing between a 'thick' and 'thin' evaluative dimension. [5] On the one hand, a 'thick evaluative dimension' means that the rule permits us to determine with relative certainty whether a particular act or omission is consistent with that rule or not. On the other hand, a 'thin evaluative dimension' does not provide such a degree of certainty, but merely sketches the outer limits of what is permissible or not, without however offering such directive guidance as a rule that possesses a 'thick evaluative dimension'. Peat argues that 'it could be said that the VCLT articles have a "thin" evaluative dimension', but that at the end of the day this leaves the interpreter with quite a bit of freedom of choice in the elements that she will resort to, and the emphasis to be put on such elements.[6] For the above reasons, chapter 2 concludes that '[t]o simply rally the relevant practice under the rubric of the VCLT articles would only tell half the story' (48). It is this approach to interpretation that colours the analysis in the following chapters, where the relevant judgments are discussed in a highly contextualized manner.

Chapters 3-7 explore the recourse to domestic law for interpretative purposes by a number of international courts and tribunals. The ones selected are: i) the International Court of Justice (ICJ) (chapter 3); ii) the World Trade Organization (WTO) Dispute Settlement Body (DSB)

[2] Article 33 dealing with plurilingual treaties is not addressed in chapter 2 (17, note 8).
[3] Citing O Fiss, 'Objectivity and Interpretation' (1982) 24 Stanf Law Rev 739, 745.
[4] G Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in M Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008), 45, 55.
[5] Peat has elaborated more on the 'thick' and 'thin evaluative dimension' in his later writings; see D Peat, 'Disciplining Rules? Compliance, the Rules of Interpretation, and the Evaluative Dimension of Articles 31 and 32 of the VCLT' (2002) 69/2 NILR 221.
[6] A conclusion that is in broad strokes reminiscent of Kelsen's views on interpretation and his 'frame theorem'; H Kelsen, *Reine Rechtslehre* (Deuticke 1960) 347–54; in more detail, see J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 113–7.

(chapter 4); iii) investment tribunals (chapter 5); iv) the European Court of Human Rights (ECtHR) (chapter 6); and, finally v) international criminal tribunals (chapter 7). As the author notes, the wide variety of international judicial bodies selected, with some focusing on inter-state disputes, others on cases brought by individuals against states, and others on cases brought by states against individuals, allowed him to test whether the structure of the judicial body, the historical and legal context in which it operates, and the applicable legal rules, are influencing factors in any potential divergent approaches as to the invocation of domestic law. The book concludes with the author finding that there are some common patterns that seem to emerge from the examined case-law. The patterns are three: that domestic law has been used as evidence of the intention of a state; as a way to interpret 'standards';[7] and as an auxiliary means to interpretation (215-20).

A notable common thread that permeates the analysis across all these chapters, is that although in discussing the recourse to domestic law for interpretative purposes there is an engagement with Articles 31-32 VCLT, the author remains steadfast in his approach of offering a more contextualized and refreshing reading of the interpretative exercise. In addition, and in the context of theorizing comparative reasoning, Peat also addresses, either in the course of discussing the relevant jurisprudence or by devoting specific sections to it (see, for instance chapters 6.4.1 and 7.6) the very important issue of methodological criticisms in the way comparative reasoning has been employed. In doing so, he engages with such criticisms in a two-fold manner, depending on whether his analysis leads him to conclude that these criticisms are warranted or not. In the latter case, he addresses head on these criticisms and presents arguments that respond to them, thus, bolstering his argument on the importance and viability of 'comparative reasoning' in international jurisprudence. In the former case, when his analysis leads him to that conclusion, he concedes the methodological shortcomings of 'comparative reasoning' but offers then his own insightful thoughts on how these could potentially be overcome.

Naturally as with any monograph that attempts to approach a topic from a new direction there are areas depending on each reader's personal predilections that one would want the author to have delved deeper into. One could wonder whether the limited number of cases involved in the analysis of certain courts and tribunals, the variety of the nature of instruments being interpreted (focusing not only on treaties but also unilateral and other instruments) lends itself

[7] in the Anglo-American common law sense of the term (58).

to drawing airtight conclusions. However, these are points that the author has taken great pains to address by clarifying that the book is not meant as the final word on the issue. Instead, it was written so as to act as an invitation to engage more critically with the under-researched and under-valued area of the utilization of domestic law during interpretation. This goal is one in which the book undoubtedly succeeds.

One area that could perhaps have been explored further would be the connection of comparative reasoning with the rules of interpretation as enshrined in the VCLT. Peat already was clear on his stance on the VCLT rules on interpretation not being the alpha and omega on interpretation. Through chapters 3-7 he builds a strong case not only on the reality of the deployment of comparative reasoning in the interpretative analysis of international courts and tribunals but also on the methodological soundness of such an approach (and/or improvements to such methodology). Despite this, throughout all the chapters the analysis of comparative reasoning employed by international courts and tribunals is also, at least partially, discussed by referring to the elements included in the text of Articles 31-32 VCLT. This is most likely unavoidable, given that it is the common vocabulary that all academics, judges and practitioners are trained to think in. To try and break completely free from such language would have been a tall order. However, precisely because of this impossibility to break free from the language of Articles 31-32 VCLT, in chapter 8 where the author's main findings are summarized, I would have wanted the author to bring everything full-circle and address what in his view was the place of comparative reasoning *vis-à-vis* the VCLT rules on interpretation. Is comparative reasoning to be seen as a method that depending on the context falls under multiple elements, e.g. Article 31(1), 31(3) or 32 of the VLCT, as is often discussed in the analysis of the cases? Is it something that can be evolutively read into the terms used in Articles 31-32 VCLT, a kind of further development or refinement of the rules based on modern international practice? Something akin to what the Tribunal in *Aguas del Tunari SA v Republic of Bolivia* called a 'process of progressive encirclement'[8]. Or is it something that cannot and does not fit neatly in the box entitled 'Articles 31-32 VCLT' but exists outside the VCLT? In the latter case, this would then lead to the follow-up question: namely, whether the VCLT rules on interpretation and customary rules on interpretation perhaps have a different content, despite the constant mantra-like incantation by international courts and tribunals that the VCLT rules on interpretation

[8] *Aguas del Tunari SA v Republic of Bolivia* (21 October 2005) Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, para 91.

reflect customary law.[9] This is also somewhat *in passim* hinted by the author in his analysis on the case-law of the WTO DSBs (84). Naturally, the author's approach to 'the irreducibly context-dependent nature of the interpretative process' (221) may explain this, but the consistent engagement with the VCLT in all the chapters may have required addressing this point a bit more closely. Yet, and to play devil's advocate, perhaps such questions would open up one or multiple different lines of inquiry that would have required a second monograph to properly address them.

In summary, *Comparative Reasoning in International Courts and Tribunals* is a timely contribution to the ongoing discussion on interpretation. It highlights the until now neglected importance of domestic law in the interpretation of international instruments[10] and opens up new venues for further refinement of our approach to the rules of interpretation and the interpretative exercise. As the author noted in his book launch, if he were to describe interpretation he would think of it as the sounds one hears while walking in a garden. Using this image as inspiration, then this book is a welcome, intriguing and harmonious addition to that garden's soundscape.

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[9] And the underlying premise that they have the same content.
[10] Not only treaties, but also other instruments such as optional clause declarations and reservations as is done in chapter 3.
* This review is based on research conducted in the context of the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).