RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS

Comparative International Law. Edited by Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg. New York, NY: Oxford University Press, 2018. Pp. xi, 623. Index.
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Comparative International Law—an impressive edited volume by Anthea Roberts, professor at Australian National University, Paul B. Stephan, professor of law at the University of Virginia School of Law, Pierre-Hugues Verdier, professor of law at the University of Virginia School of Law, and Mila Versteeg, professor of law at the University of Virginia School of Law—frames an issue that is intuitively clear, if not always fully articulated, to many international lawyers: beyond the universal character of international law, there are different perceptions and understandings of what international law is, how international law is applied, how it is interpreted, and how it is identified in different domestic settings.

By naming and framing this phenomenon clearly, the authors provide an important analytical tool to better understand the diverse viewpoints that separate different actors' understandings and interpretations of international law. And by explicitly providing explanations of the underlining reasons for this phenomenon, the book also helps the reader acknowledge variations in interpretations, appreciate that different approaches exist, and—ultimately and hopefully—enhance the understanding, mutual learning, and effectiveness of international law.

One of the book's many virtues is to situate international comparative law as a separate field of study that is critical to understanding international law as it exists, in its many variations. This approach is, necessarily, diverse and heterogeneous and encompasses a variety of topics, methods, and theories. *Comparative International Law* does not provide a comprehensive systematic approach to international law; rather, its important contribution is to give readers a new way of thinking about the many diversities in the application and interpretation of international law.

The authors provide a provisional definition of comparative international law (p. 6) and assert that "comparative international law entails identifying, analyzing and explaining similarities and differences in how international actors in different legal systems understand, interpret, apply, and approach international law." They identify three advantages of comparative law methodology (pp. 6–8). First, it helps in identifying the substantive content of international law. This can be very important when attempting to find custom and general principles, as well as to recognize outlier approaches, both to identify violations of international law and to signal novel approaches developed by some actors. Second, comparative international law could also be helpful in identifying similarities and differences in the interpretation and application of international law in different domestic systems. Third, and finally, comparative international law can be helpful in understanding different approaches to international law as well as their reasons and significance.

The authors also distinguish comparative international law from other related fields, although the differences at times seem minor. For example, differently from the fragmentation debate, comparative international law focuses mostly on how state and sub-state actors (including courts) interpret international law, rather

than focusing solely on international actors. However, even comparative international law studies interpretations by international actors, and the fragmentation debate has also included considerations of domestic differences. Still, the novel framing provided by an comparative international law method is useful as it approaches different interpretations as a helpful and instructive comparison study, rather than characterizing it as a negative and perilous process of fragmentation. Giving the process a more neutral connotation is helpful in framing differences as normal and inevitable, rather than as a danger to the system. In that way, it can help appreciate and possibly bridge differences in interpretation and understanding.

The authors also distinguish comparative international law from comparative constitutional law *tout court*. Comparative constitutional law is rather straightforward and focuses only on constitutional law, while comparative international law looks "at cross-national understandings, interpretations, applications, and approaches to international law rather than constitutional law" (p. 9). Thus, while the two fields at times overlap, they remain distinct. There are also distinctions and overlap between comparative international law and comparative foreign relations law, as they both concern similarities and differences in the way states understand, interpret, and approach international law, yet the latter focuses particularly on the domestic institutions charged with the conducting a state's relations with outsiders, including foreign states, persons, and international organizations, while the former analyzes the variations in the national and regional practice of international law (pp. 53–55).

The book includes an impressive and varied roster of authors, who represent wide-ranging theoretical perspectives and methodologies, as well as geographical, gender, and background diversity. Given the subject matter of the book, this variety is particularly appreciated and even more of it—including more contributors from Spanish- and Arabic-speaking countries—would have been welcomed.

The volume comprises seven parts, quite diverse in focus and length. The book overall is primarily descriptive, and chapters approach the topic from a variety of perspectives. The structure demonstrates the pluralistic approach of the book and the diverse range of theoretical, political, and social underpinnings of international law.

Part One discusses comparative international law and other related fields. Paul Stephan explains the relations between comparative international law, foreign relations law, and fragmentation, with a particular eye to the *Restatements of the Foreign Relations Law of the United States* developed by the American Law Institute, whose fourth iteration he very ably co-chaired (p. 53). Katerina Linos offers a methodological guide to selecting and developing comparative law case analysis (p. 35). As empirical studies are becoming a staple of international legal scholarship, her guidance on how to properly select cases to establish generality across cases and within cases is particularly helpful to ensure that international lawyers select cases that are not only familiar, but can offer real theoretical insights proved or disproved by comparative evidence based on proper and meaningful sampling techniques. This chapter is also particularly helpful in explaining the book's main claim and achievement of comparative analysis, and provides an important backbone to the study. Daniel Abebe concludes the section with a compelling study on why comparative international law needs international relations theory.

Part Two focuses on international lawyers, the academy, and competing conceptions of international law. Nico Krisch discusses the many fields of German international law (p. 91), and Masaharu Yanagihara focuses on the status of the Ryuku Kingdom in early-modern and modern times (p. 141). Anthea Roberts shows comparative international law in action by focusing on how the Crimea and South China Sea crises are seen differently by, respectively, Russian, Chinese, and Western international lawyers (p. 111). Building on her own prior publications on the subject, she provides a real eye-opening analysis regarding a high-stakes issues whose differences seem insurmountable. Her lucid analysis demonstrates how important it is to understand the reasons and genesis that resulted in such

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different understandings and conclusions over the same facts. The next step, yet to come, is how best to use these insights as tools for both policymaking and to strengthen the international legal regime.

Part Three includes two chapters that focus on comparative international institutions. Mathias Forteau writes on the International Law Commission (ILC) to discuss comparative international law within, rather than against, international law (p. 161). He warns of the potential pitfalls of putting too much emphasis on the cultural and national aspects of international law and focuses on the ILC's role to assess the uniformity of state practice on international law, and the extent to which it is possible to overcome existing divergences to find consensus by the codification or progressive development of international law. In particular, Forteau cogently shows the necessity of maintaining the interplay of distinct legal cultures to inform the development of international law and demonstrates well that "this task requires reliance on representative international organs, which have to develop specific tools to formulate international rules in harmony with national or regional cultural approaches or concerns" (p. 164). In practice, this may require the articulation of international legal norms in very general terms to guarantee sufficient flexibility. His analysis also focuses on the substantive tools used by the ILC including linguistic and drafting rules, and providing normative flexibility. Mathilde Cohen's interesting chapter discusses the continuing impact of French legal culture on the International Court of Justice (p. 181).

Part Three is thought-provoking, and the chapters are both interesting and well-written. Yet, they seem to be separated from the core of the book and its heterogenous analysis. One wishes the editors had included more chapters comparing institutions, and had explained more thoroughly the content of and reasons for each specific part.

Parts Four and Five contain the gist of the comparative international law analysis. Part Four explores comparative international law in legislatures and executives domestic institutions. Chapters Ten and Eleven are particularly interesting. In Chapter Ten, Pierre-Hugues Verdier and Mila Versteeg make a remarkable contribution on international law in national legal systems, delving on a fascinating study on treaties (p. 209). They draw from a new dataset that covers 101 countries for the period 1815–2013, and resulting from a multi-year research project on international law in domestic legal systems. The dataset includes data on treaty-making procedures, the status of treaties in domestic law, and the reception of customary international law in domestic systems.

The authors first focus on the essential roles played by national legislatures in treaty making and offer some compelling conclusions on the critical importance of the legislatures in treaty making and treaty implementation. First, they show that systems in which treaties apply directly ("monist" systems) "almost universally require the executive to obtain legislative approval prior to ratification" (p. 214 and figure at p. 215). Conversely, dualist countries generally do not require prior legislative approval, as treaties are subsequently required to be implemented by domestic legislation. Second, and more interestingly, the authors also demonstrate that as international treaties have proliferated in both numbers and subject matters, legislative approval has become more common for treaties that modify domestic law, while it has remained more constant for treaties that relate to more traditional subjects, such as trade, military, friendship, and territorial treaties.

The authors next assess how international treaties are given effect domestically after ratification. The data show that the overwhelming majority of systems that in general apply treaties directly also recognize exception to the direct application and grant courts substantial discretion in determining when a treaty is self-executing and when it requires further domestic actions (p. 219, and figures at p. 220). Indeed, the authors identify only ten states (Belarus, Egypt, Estonia, Iran, Latvia, Morocco, Tajikistan, Turkey, Turkmenistan, and Ukraine) where there is no difference between self-executing and non-self-executing treaties. Data also show

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that more and more states consider treaties as hierarchically superior to ordinary laws (p. 222).

Next, the authors look at the relationship between customary international law (CIL) and the domestic system and find that under most circumstances CIL rules are directly applicable, without requiring legislative implementation (pp. 225–27). Interestingly, the data shows that from the 1950s onward, as more and more countries recognized the superiority of treaties over domestic law, the opposite was happening for CIL, so that it has become more common to make CIL inferior (pp. 226–27), although exceptions exist for *jus cogens* and CIL incorporated by statute or by constitutional principles. This is an important contribution and the chapter clearly demonstrates the (practical) usefulness of comparative international law.

In Chapter Eleven, Tom Ginsburg offers a similarly compelling and in-depth study of objections to treaty reservations (p. 231). In his study he provides a systematic and quite novel study on the purpose of objections to treaty reservations, and why they are made, given the political costs implied. Ginsburg focuses on human rights treaties, and specifically the International Covenant on Civil and Political Rights (ICCPR). In his well-argued and thoroughly researched chapter (see tables at pp. 241, 243, 245–50), he concludes that objections to reservations are very common in human rights treaties. Objections reflect different approaches to treaty interpretation, and particularly over the reading of what is the "object and purpose" of the treaty. Objecting states generally read the object and purpose more broadly than reserving states. In Ginsburg's view, objecting states have "helped overcome a free-riding problem" that may lead to a race to the bottom in terms of the extent and interpretation of human rights obligations (p. 244).

Two additional chapters are equally instructive. Ashley Deeks writes meaningfully about intelligence communities in international law through a comparative approach, discussing specifically the divergent approaches to compliance of international law by the intelligence communities of the United Kingdom and the United States (p. 251). Kevin L. Cope and Hooman Movassagh concentrate on the foundations of comparative international law in national legislatures (p. 271).

Part Five focuses on comparative international law in domestic courts. Its instructive chapters include "International Law in Chinese Courts During the Rise of China" by Congyan Cai (p. 295); "The Democratic Force of International Law: Human Rights Adjudication by the Indian Supreme Court" by Neha Jain (p. 319); the "Case Law in Russian Approaches to International Law" by Lauri Mälksoo (p. 337), and "Doing Away with Capital Punishment in Russia: International Law and the Pursuit of Domestic Constitutional Goals" by Bakhtiyar Tuzmukhamedov (p. 353). These are all fine pieces and are particularly instructive insofar as they demonstrate how international law is applied by specific domestic actors in different systems. They demonstrate another facet of the comparative international law polyhedron.

Part Six concentrates on comparative international law and human rights. Its six chapters include: a comparative analysis of the right to vote in international law and specifically the case of prisoners' disenfranchisement by Shai Dothan (p. 379); an interesting study on refugees in comparative international law by Jill I. Goldenziel (p. 397); and an intriguing chapter on asymmetric comparative international law approach to treaty interpretation and the specific tolerance by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee of the deviation by the Scandinavian state by Alec Knight (p. 419). Two contributions by Christopher McCrudden follow, the first one on comparative international law and human rights and the second providing an informative case study of CEDAW in national courts (pp. 439, 459). A chapter by Alejandro Rodiles on the promise of comparative public law for Latin America concludes the section (p. 501). All six chapters are interesting and instructive, and Part Six provides a cohesive and diverse dive into the specialized field of

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comparative international law that is human rights.

Part Seven, which concludes the collective volume, includes a disparate group of three chapters relating to comparative international law in investment and law of the sea. This section also contains some of the most captivating chapters in the volume. Tomer Broude, Yoram Z. Haftel, and Alexander Thompson begin with a chapter entitled "Who Cares About Regulatory Space in BITs? A Comparative International Approach" (p. 527). Makane Moïse Mbengue and Stefanie Schacherer then elaborate on the Pan-African Investment Code (PIAC) as an example of comparative international law (p. 547). The authors take PIAC as an example to identify similarities and differences between the Pan-African approach and what is considered the norm in international investment law and also with the new reform process that investment law is undertaking. They identify some of the novelties of the treaty—for example the requirement that an investor has substantial business activity in the host state, its take on the most-favored nation and national treatment standards, and the absence of a provision on fair and equitable treatment. This contextualization of PIAC within the larger framework of international investment law is an apt demonstration of the advantage of the comparative international law approach. In the book's last chapter, Emilia Justyna Powell presents a fascinating study of the United Nations Convention on the Law of the Sea (UNCLOS) in Islamic Law states (p. 571). She observes that while Islamic Law states are generally skeptical of international law, they have mostly ratified UNCLOS. She then uses a comparative international law approach to explain why that occurs, and concludes that the substantive and procedural congruence of Islamic law with the UNCLOS regime, as well as the possibility of adding stipulations, including declarations and restrictions. The chapter is particularly novel and makes an interesting contribution to the volume.

Overall, this is noteworthy and valuable volume. It makes a significant case as to the important learning available from the understanding of how and why nations' approaches of international law are different.

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Research Handbook on the Theory and Practice of International Lawmaking. Edited by Catherine Brölmann and Yannick Radi. Northampton, MA: Edward Elgar, 2016. Pp. xvii, 484. Index.
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The concepts of "international law" and "lawmaking" have long been a favored subject of debate among international legal scholars. However, the recent developments on the international scene—the complex problems on the global agenda calling for regulation; the deepening of the interdependence between states, economies and societies; the pluralization of actors on the international stage (including civil society organizations, public-private partnerships, networks of regulators, among many others); and the multiplication of instruments that aspire to international normativity—all have contributed to a renewed uncertainty of those concepts and to giving the traditional debate a novel urgency. In this context, the *Research Handbook on the Theory and Practice of International Lawmaking* is particularly timely.

In this volume, the editors Catherine Brölmann, associate professor of international law at the Universiteit van Amsterdam, and Yannick Radi, professor of international law at Université Catholique de Louvain and editor in chief of the Brill Research Perspectives in International Legal Theory and Practice, set out to provide an account of the different meanings and dimensions of the concept of "lawmaking" in today's international legal sphere. Their Handbook takes stock of the developments, both at the conceptual and empirical levels, of the phenomena of international lawmaking, presenting a