

## BOOK REVIEW

Odile Ammann, *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example*, Brill/Nijhoff, 2020, 383 pp, €127.00, ISBN 9789004409873  
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Upon retiring from the US Court of Appeals for the Seventh Circuit, Richard Posner, one of the most cited and prolific legal scholars in the United States,<sup>1</sup> gave an interview to the *New York Times*, in which he stated as follows: ‘I pay very little attention to legal rules, statutes, constitutional provisions . . . A case is just a dispute. The first thing you do is ask yourself — forget about the law — what is a sensible resolution of this dispute?’<sup>2</sup> For Posner, legal reasoning is a ‘practical, problem-solving activity’.<sup>3</sup> US legal pragmatism, characterized by its legal realism and instrumental orientation, has a long pedigree in US law and philosophy.<sup>4</sup> Posner even considered US legal pragmatism as ‘inevitable’, and contrasted it with Continental European legal theory, which, for fundamental institutional and cultural reasons, was ‘not pragmatic’.<sup>5</sup> In fact, however, pragmatism has been influential in continental Europe as well. As Odile Ammann shows, at least since the 1980s, the Swiss Federal Tribunal has explicitly embraced a ‘pragmatic methodological pluralist’ approach to the interpretation of the law.<sup>6</sup>

Result-oriented pragmatism is, at first sight, well-suited to the practical trade of lawyers – finding workable solutions to actual problems. Nevertheless, as Ammann sets out in her work, the anti-theoretical streak of legal pragmatism, and its attendant lack of methodological rigor, may undermine the predictable, clear, and consistent application of the law. Her mission is to reclaim the space – if there was ever such a space – for judicial creativity within the bounds of the law’s interpretative methods. The focus of her analysis lies on the interpretation of international law in Switzerland, although her insights have wider purchase for the interpretation of (international) law elsewhere. Ammann argues that respect for international law’s interpretative methods is key in constraining the judicial discretion of domestic courts. Domestic courts’ compliance with the accepted methods of interpretation, e.g., of treaties, arguably prevents arbitrary and self-serving outcomes, and renders them accountable to states, the international lawmakers. Having analysed Swiss cases in detail, Ammann argues that Swiss courts’ pragmatic approach to the interpretation of international law is not in keeping with the methodological demands imposed by international law. She highlights in particular their disregard or misapplication of

<sup>1</sup>F. R. Shapiro, ‘The Most-Cited Legal Scholars’, (2000) 29 *Journal of Legal Studies* 409.

<sup>2</sup>A. Liptak, ‘An Exit Interview With Richard Posner, Judicial Provocateur’, *New York Times*, 11 September 2017.

<sup>3</sup>‘The judicial philosophy of Richard Posner’, *The Economist*, 9 September 2017.

<sup>4</sup>See B. Z. Tamanaha, ‘Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction’, (1996) 41 *American Journal of Jurisprudence* 315.

<sup>5</sup>R. A. Posner, ‘Legal Pragmatism’, (2004) 35 *Metaphilosophy* 147.

<sup>6</sup>BGE 110 Ib 1, at 2 c) cc); BGE 114 v 219, at 3 a). The Swiss Federal Tribunal’s approach is discussed in more detail in Ammann, Section 4.2.6.

the interpretative methods of international law, their mere ‘assertions’ of legal interpretation without substantiation, the self-referentiality and circularity of the case law, and the courts’ imprecise terminology.<sup>7</sup> With ‘self-referentiality’ and ‘circularity’, Ammann means that ‘courts primarily rely on the practice of their own State, on their own case law, and on domestic scholarship, as opposed to the practice and scholarship of other States’.<sup>8</sup>

Ammann’s insights are not surprising, as other authors, including myself, had already voiced concerns over domestic courts’ lack of methodological rigour when engaging with international law.<sup>9</sup> However, Ammann’s original contribution lies in her systematic treatment of the topic, as well as her successful combination of legal theory on the ‘art’ of interpretation with a close reading of relevant case law. While the monograph focuses on Swiss interpretative practice, it has obvious relevance beyond the Swiss case-study. The theoretical chapters, which draw on Joseph Raz’s triptych of ‘what’, ‘why’, and ‘how’ to interpret, contain original insights on the necessity of methodological rigour, and on the interpretative methods of international law. Non-Swiss readers, like this reviewer, can also learn from Ammann’s assessment of Swiss case law. Implicitly, in fact, she invites the reader to carry out a similar assessment of the case law in her own jurisdiction. Her final recommendations on improving the legality and the quality of domestic rulings, and enhancing the accessibility of domestic rulings,<sup>10</sup> while aimed at Switzerland, have general validity. They can be applied to any other jurisdiction, albeit with due respect for the particularities of each jurisdiction’s constitutional structure and modes of giving effect to international law in the domestic legal order. Lack of methodological consistency, in fact, plagues interpretative practices in other jurisdictions as well, as Ammann shows,<sup>11</sup> and as readers familiar with their own jurisdiction may be well aware.

In spite of its title and the general thrust of the argument, the book is not just about interpretation of the law, but also about law-ascertainment. In international law, the concept of ‘interpretation’ is typically used in the context of treaty law; Articles 31–33 of the Vienna Convention on the Law of Treaties famously lay down the methods of treaty interpretation. However, Ammann is of the view that the concept of interpretation can also be applied to the determination of the two other formal sources of international law mentioned in Article 38 of the Statute of the International Court of Justice (ICJ), namely customary international law and general principles of law. To her credit, Ammann admits that this is not a mainstream view.<sup>12</sup> Indeed, in respect of customary international law, the term ‘identification’ is rather used. The International Law Commission’s (ILC) Draft Conclusions on Identification of Customary International Law, for instance, in the ILC’s own words, ‘concern the methodology for identifying rules of customary international law’.<sup>13</sup> The process of identifying customary international law revolves very much around the ascertainment of the ‘two elements’: state practice and *opinio juris*.<sup>14</sup> For Ammann, ‘[t]hese elements are not methods, however, but constitutive elements of custom that require to be

<sup>7</sup>O. Ammann, *Domestic Courts and the Interpretation of International Law* (2020), 322.

<sup>8</sup>*Ibid.*

<sup>9</sup>C. M. J. Ryngaert and D. W. Hora Siccama, ‘Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts’, (2018) 65 *Netherlands International Law Review* 1. This lack of rigour is, in fact, not unique to domestic courts’ practice. International courts also tend to underperform. See, e.g., on customary international law ascertainment by the ICJ: S. Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, (2015) 26 *European Journal of International Law* 417.

<sup>10</sup>Ammann, *supra* note 7, at 323–32.

<sup>11</sup>Analysing literature and international databases, such as OUP’s ILDC, Ammann argues that the problem is, indeed, pervasive. See Sections 7.2, 8.2.1, 8.3.1 on respectively treaty law, customary law, and general principles.

<sup>12</sup>Ammann, *supra* note 7, at 196–7.

<sup>13</sup>ILC Draft Conclusions on Identification of Customary International Law, With Commentaries, 2018 YILC, Vol. 2 II (Part Two), at 122.

<sup>14</sup>*Ibid.*, Draft Conclusion 2 (‘To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).’).

ascertained – and doing so requires using specific methods’.<sup>15</sup> She then goes on to apply the four methods that are well-known in treaty interpretation – textual, systematic, teleological, and historical interpretation – to customary international law and general principles. While I find this approach refreshing, I am not entirely convinced that Ammann sees this through. It appears to me that, in her assessment of how Swiss courts ‘interpret’ customary international law, Ammann in fact focuses on how the courts identify state practice and *opinio juris*, not on the extent to which they resort to canons of construction to interpret a customary norm. I agree that customary international law (and general principles) can be interpreted, but this arguably requires that one accept that, at a prior moment, the core content of a customary norm has more or less stabilized. In this respect, I see merit in Panos Merkouris’s observation that ‘between the identification of a customary rule and its application at a later date and in a different case there is an intermediate stage: that of interpretation of the rule’,<sup>16</sup> in his view, ‘interpretation focuses on how the rule is to be understood and applied after the rule has come into existence and for its duration’.<sup>17</sup>

It remains the case that, in the case of unwritten sources of international law, the processes of identification and interpretation of international legal norms may be hard to disentangle as, in determining the existence of the norm, one necessarily has to interpret the weight of evidentiary materials supporting the norm. Accordingly, Ammann’s eliding of the distinction between both processes is understandable. More importantly, it does not weaken the force of the trenchant critique formulated by Ammann, namely that domestic courts should take their role as appliers and agents of international law seriously. Taking this role seriously implies applying rigorous methods of interpretation and ascertainment of international legal norms. At the end of the day, domestic courts should realize that they cannot dispense with methodological rigour, as they occupy a pivotal position in the doctrine of the sources of international law in two respects. First, their decisions contribute to the crystallization and development of the formal sources of international law, e.g., they may constitute subsequent state practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation,<sup>18</sup> or they constitute relevant state practice for the formation of customary international norms. Second, as ‘judicial decisions’, they are, by virtue of Article 38(1)(d) of the ICJ Statute, ‘subsidiary means’ (or ‘auxiliary means’, as Ammann calls them) for the determination of rules of international law. Accordingly, for domestic courts to engage with the methodological demands of international law ascertainment and interpretation is not an unnecessary luxury.

Such an engagement with international law is likely to be time-intensive, however. This is especially the case where domestic courts resort to ‘comparative international law’,<sup>19</sup> namely when they parse and compare other states’ practice in the context of treaty interpretation (subsequent practice) and customary international law. Combined with national judges’ relative lack of international law training, and the limited room which domestic legal systems may reserve for international law, it is then not all that surprising that international law gets short shrift from domestic courts. These limitations are not immutable, however, and it goes to Ammann’s credit that, at the very end of the monograph, she makes a number of practical recommendations to strengthen domestic courts’ international law capacity. Some of these recommendations are quite straightforward, e.g., allocating judges ‘with in-depth knowledge of international law . . . to chambers in

<sup>15</sup>Ammann, *supra* note 7, at 196.

<sup>16</sup>P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (2015), 241–2.

<sup>17</sup>P. Merkouris, ‘Interpreting the Customary Rules on Interpretation’, (2017) 19 *International Community Law Review* 126, at 136 (emphasis omitted). I have myself examined whether domestic courts in fact engaged in customary international law interpretation, and concluded that they indeed do so. See C. Ryngaert, ‘Customary International Law Interpretation: The Role of Domestic Courts’, TRICI-Law Paper No. 006/2019 (2019), forthcoming in P. Merkouris, J. Kammerhofer and N. Arajärvi (eds.), *The Theory and Philosophy of Customary International Law and its Interpretation* (2021).

<sup>18</sup>1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b).

<sup>19</sup>A. Roberts et al. (eds.), *Comparative International Law* (2018).

which international legal issues are particularly likely to arise',<sup>20</sup> while others are more ambitious. Arguably the most eye-catching proposal is entrusting the UN's Office of Legal Affairs (OLA) with assembling, and making visible domestic case-law on international law.<sup>21</sup> In principle, this falls within OLA's competence, as its broad mission includes the contribution to the progressive development of international law, and the provision of legal services on questions of international law.<sup>22</sup> However, most of OLA's work so far has focused on assisting the UN as an organization. It has no expertise yet on gathering and systematizing domestic case law. Institutionally, an additional division of OLA will have to be established, which will come at an additional cost for an already cash-strapped organization.<sup>23</sup> While certainly commendable, I am afraid that Ammann's proposal is likely to fall on deaf ears. Instead, it may be more advisable to strengthen existing reporting initiatives, such as the Oxford Reports on International Law in Domestic Courts,<sup>24</sup> or Cambridge University Press's International Law Reports,<sup>25</sup> even if these initiatives may currently suffer from reporting bias.

Concluding, I found Odile Ammann's monograph both thoughtful and bold in its engagement with legal theory and its analysis of legal practice. It has something to offer to theoretically-inclined scholars with a methodological interest in the interpretation and ascertainment of international law, as well as to domestic legal practitioners – judges and attorneys – who are confronted with sometimes arcane questions of international law. An additional nugget is that the monograph is very elegantly written in a clear and precise language. While domestic courts do not meet the virtues of clarity and consistency in international legal reasoning, Ammann's work surely does.

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<sup>20</sup>Ammann, *supra* note 7, at 324.

<sup>21</sup>*Ibid.*, at 330–2.

<sup>22</sup>See [legal.un.org/ola/mission.aspx](https://legal.un.org/ola/mission.aspx).

<sup>23</sup>OLA's estimated financial resources for 2020 are a paltry US\$37,886,800. See Proposed programme budget for 2020 - Part III International justice and law - Section 8 Legal affairs - Programme 6 Legal affairs, UN Doc. A/74/6(Sect. 8) (2019).

<sup>24</sup>See [opil.ouplaw.com/page/212](https://opil.ouplaw.com/page/212).

<sup>25</sup>See [www.lcil.cam.ac.uk/publications/international-law-reports](http://www.lcil.cam.ac.uk/publications/international-law-reports).

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