THE ROBERTS CHALLENGE

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In the late 1980s, the leading international lawyer Sir Robert Jennings publicly wondered what international law is, and how we can tell it when we see it. That was a useful question, and perhaps more important still today than in 1988. The good news is that Anthea Roberts provides us with part of an answer; the bad news is that her answer is not terribly comforting. Roberts has published her excellent and thought-provoking doctoral thesis (full disclosure: I had the privilege of being one of her examiners), and the work is already making more waves than can legitimately be expected from any academic study – and deservedly so.

To Roberts, international law means different things to different people, or rather to people stemming from different states or nations: as so often with empirical studies, the study inevitably “flattens” our individual experiences a little. She studies how international law is taught and reproduced in the five states that are permanent members of the Security Council and comes to the not particularly surprising but well-substantiated conclusion that these national approaches show considerable variety: the international law taught in China differs noticeably from the international law taught in the United States or the United Kingdom, and things are different still in both France and Russia.1

Her conclusions are compelling as far as things go and have been broadly reported: this must be one of the most intensively marketed academic studies ever. So instead of focusing on her results, I thought I should focus more on some of the methodological and epistemological issues underlying her work, and conclude with the ethical question thrown up by her work.

At first sight, it would seem to make perfect sense to concentrate on the international law taught and reproduced in the five most powerful (by some measure, at any rate) states in the world. And yet, the resulting picture might flatter to deceive. Two of those five are rather authoritarian, dictatorships in all but name, which may suggest that the international lawyers working at law schools and universities might not be entirely free to speak their minds, and the version of international law they are allowed to propagate might not be all that different from the international law their governments endorse: reading some of the articles published in the Chinese Journal of International Law in recent years may confirm the point. This does not, to be sure, undermine Roberts’ point, but it suggests the existence of an additional problem: is international law whatever

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states do? Or is it what academic international lawyers say it is? Who is to take that particular decision, and how to distinguish between the two at any rate? Put differently and perhaps more generally, in principle the standards for what counts as truth in academic circles are different (although they may coincide) with the standards for truth in politics, and it might be hypothesized that in liberal democracies, academics, and teachers can adhere to academic epistemologies, whereas those in dictatorships are less free to do so. This does not necessarily mean that academics in liberal democracies are closer to the “real” truth (this would be an academic conceit), but it may imply that their truths are different, and differently arrived at, from the instrumental truths harnessed in Russia or China.

It may also be hypothesized that liberal democracies are more open to accept foreigners, and while there are few foreigners teaching international law in France (though there are some), it definitely holds true for the United Kingdom and the United States, so much so that one may wonder to what extent the leading U.K. and U.S. law schools can actually be said to be representative for the United Kingdom and the United States. A stark example is the international law faculty at New York University, where few, if any, of the international law staff have been born in the United States, and few have received their initial legal training in the United States. The same applies to Cambridge in the United Kingdom, where the British members of the leading international law center, the Lauterpacht Center, distinctly form a minority, and where the directorate is entirely in non-British hands. In the United Kingdom, it is also noticeable that some of the migrant teachers have adopted an identity more English than that of the locals, adopting gin and tonic as their favorite tipple and employing mannerisms and an accent that would have done Thatcher proud. They are not British and have not received their initial training in the United Kingdom, so how representative are they? By the same token, a popular treatise on international law, such as Evans’ edited volume, is written by a group of people of whom almost half have their roots outside the United Kingdom (and what, incidentally, do Scottish authors represent, with Scotland having a different legal system from England and Wales?). And elsewhere, the situation might be even more difficult to disentangle: what to make of a textbook in English written by a Dutch author working in Finland?

There is an additional issue here, and that is the question to what extent institutionalized scholarship in international law is really work in international law to begin with. The most obvious example is the United States, where much of what passes for international legal discussion is essentially something like foreign relations law, focusing on presidential war powers, senatorial approval, executive agreements, and generally U.S. exceptionalism. Or then U.S. scholarship focuses largely on rationalist work in which the law plays a relatively minor role: this is not work in the discipline, but about the discipline.

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The most-cited international law scholars in the United States typically include Eric Posner and Jack Goldsmith,\(^4\) scholars who are best known for their rationalist approaches and their interest in foreign relations law: one may conclude that academic international law in the United States is either not very international, or then it does not contain much law. This is not to say anything about the quality of their work – just that on some definitions, it hardly qualifies as work in international law to begin with, and here it differs from earlier strong traditions in the United States, say, the work of Thomas Buergenthal or Thomas Franck (but, on reflection, they too were immigrants…). In yet other words, the prevailing U.S. definition of international law, even in the academy, may differ substantially from that in use elsewhere, and it may be an adjunct to constitutional law rather than an independent discipline. This may well strengthen Roberts’ thesis and is something she acknowledges, incidentally, but the upshot is perhaps that it becomes well-nigh impossible to set the U.S. approach next to, say, the U.K. approach to begin with.

As noted, Roberts’ overall argument and thesis are compelling and make intuitive sense, and to some extent relies on the social sciences. Pierre Bourdieu’s theorizing provides an obvious and well-chosen point of departure but does fairly little work in the subsequent analysis. Her own framework of “difference, domination and disruption”\(^5\) is all too neat perhaps: in particular, it remains unclear whether the fragmentation of international lawyers (to coin a phrase) is itself the result of disruption, or the cause of disruption, or both – or neither, for that matter. And it is not altogether clear whether the disruption she mentions applies to scholarship being disrupted or to global politics being disrupted, and in either case, the argument requires something of a connection to the exercise of power, either by academics or by international lawyers generally.

That said, perhaps the most relevant issue the study presents (and this is testimony to its persuasiveness) is how one should approach international law if it turns out that there is no single version in existence: what does this mean for our teaching? This is the ethical question mentioned above: following Roberts, international law can no longer convincingly be taught as a universal Esperanto, yet it is perhaps only this chimera which has helped keep international law alive and which also (granted: another conceit) may have helped in keeping international affairs from descending into a Hobbesian abyss. What advice do international lawyers now have to give to their political leaders? If President Trump would read the book (or a tweeted summary, more likely) he might be inclined to draw the conclusion that anything his international law advisors (assuming he has any) tell him is open for negotiation or, worse, unilateral interpretation and decision. Roberts is absolutely correct in pointing out that there is no single version of international law available, and as an academic,

\(^4\) See *e.g.*, JACk L. GOLDSMITH & ERIC A POSNER, THE LIMITS OF INTERNATIONAL LAW (2006).

\(^5\) ROBERTS, supra note 1, at 1-17.
pointing this out was the only thing she could do: hiding uncomfortable truths is difficult to reconcile with any academic ethos. But it throws up a considerable challenge for international lawyers worldwide.