
IS PRIVATE INTERNATIONAL LAW INTERNATIONAL LAW?

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Anthea Roberts' new book, *Is International Law International?*,¹ has already made so much of a splash and had such an impact on the way international law is perceived that I need not begin by singing its praises.

The book teaches—or points out a truth that perhaps we should have known all along—that “we approach international law from our particular national perspectives.”² Roberts encourages international lawyers and scholars to take a comparative and self-reflective approach and has already inspired a growing literature on comparative international law—the study of international law from different national perspectives, for example in *Comparative International Law*,³ assembled by Roberts and her co-editors, and *Comparative Foreign Relations Law*,⁴ edited by Curt Bradley.

This comparative approach may seem familiar to private international law aficionados. Private international law, also known as conflict of laws, focuses on three main areas: jurisdiction, choice of law, and enforcement of judgments. All three of these include some form of comparison shopping in the execution. That is to say, when determining where to bring a cross-border dispute, lawyers first need to assess which states are likely to exercise adjudicatory jurisdiction—power to hear the dispute. Choice of law questions consider which substantive legal systems might govern the dispute, which often involves comparing the available options and determining whether they are really different. Enforcement can also involve comparison shopping among potential venues for enforcing judgments and awards and the likelihood that those venues will provide the enforcement sought after.

The laws being compared, however, are typically national laws—national laws governing jurisdiction, choice of law, and enforcement. As Roberts notes in the book, “[d]espite its name, private international law is considered to be a matter of domestic law or an area governed by international agreements, such as

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¹ ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

² Anthea Roberts, *Is International Law International? Continuing the Conversation*, BLOG OF THE EUR. JOURNAL OF INT’L LAW (Feb. 9, 2018), <https://www.ejiltalk.org/is-international-law-international-continuing-the-conversation/> [https://perma.cc/HT8T-CMDN].

³ *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts et al. eds., 2018).

⁴ *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* (Curtis A. Bradley ed., forthcoming June 2019).

the Brussels Regulation, rather than by customary international law.”⁵ In the book, Roberts exhaustively surveys public international law textbooks around the world to reveal the national-viewpoint focus that they reflect. Perhaps because of its inherently comparative nature, private international law textbooks, which Roberts does not discuss, are more likely to reflect contributions by scholars from different countries and include cases and case studies from a wide range of countries (although the United States and Europe likely feature prominently). Examples include the new *Global Private International Law*,⁶ which is very much framed in this comparative light. Even more “old-school” private international law textbooks, such as *Cheshire, North, and Fawcett*,⁷ tend to be self-aware about their national viewpoints and involve editors of multiple nationalities.

It is therefore interesting that Roberts highlights jurisdiction as an example of an “important, though . . . routine” area of law where public international law textbooks from different countries tend to take different approaches.⁸ U.K. and French textbooks, Roberts has uncovered, conceive of two kinds of jurisdiction that are a matter of international law: prescriptive jurisdiction (concerning the state’s authority to *make* laws that apply to certain people or conduct) and enforcement jurisdiction (concerning the state’s authority to *enforce* those laws).⁹ Under the U.S. approach, by contrast, there has traditionally been a third kind: adjudicative jurisdiction, which concerns the state’s authority to subject certain persons or things to its judicial process.¹⁰ Countries like the United Kingdom and France do not recognize a separate category of adjudicatory jurisdiction because they understand courts to exercise either prescriptive or enforcement jurisdiction, depending on the case.¹¹

Roberts suggests this divergence could be attributable to different conceptions of the distinction between public and private law. While the United Kingdom and France strongly distinguish between the two, other systems, and Roberts counts the United States among them, reject the public/private divide as problematic and permit private litigation to enforce public law values.¹² As such, in public law litigation, enforcement and adjudicatory jurisdiction are basically synonymous in the United Kingdom and France, whereas they can have different meanings in the United States. And indeed, in the United States, the enforcement of much public law is deputized to private parties by authorizing them to sue

⁵ ROBERTS, *supra* note 1, at 207.

⁶ GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS (Horatia Muir Watt, Agatha Brandão de Oliveira & Diego P. Fernandez Arroyo eds., 2019).

⁷ CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW (Paul Torremans et al. eds., 15th ed. 2017).

⁸ ROBERTS, *supra* note 1, at 205.

⁹ *Id.* at 205-06.

¹⁰ *Id.* at 206.

¹¹ *Id.*

¹² *Id.* at 207.

offending parties. Is a consumer fraud class action a function of public or private law? In such a case, the court may be exercising adjudicatory jurisdiction but not necessarily prescriptive jurisdiction. In domestic law terms, it is the difference between whether there is personal jurisdiction over the defendant and what substantive law should apply to the case. What is the role of international law if the consumers are suing a foreign company for an international scheme to defraud?

This discussion has contributed to a heated debate about whether adjudicatory jurisdiction is limited by public international law among experts such as Austen Parrish¹³ (yes), Roberts and her fellow Reporters¹⁴ (Bill Dodge and Paul Stephan) on the *Restatement (Fourth) on the Foreign Relations Law of the United States*¹⁵ (no, and the Restatement now reflects that view), and Ralf Michaels¹⁶ (maybe). Parrish points to the numerous authorities, including Alex Mills' work,¹⁷ stating that the assertion of jurisdiction in civil proceedings is the assertion of state power—and thus is governed by international law.¹⁸ Roberts, Dodge, and Stephan respond that neither state practice nor *opinio juris*—the relevant sources of international law—support this assertion because states neither protest the assertion of jurisdiction nor confine their own adjudication jurisdiction out of a sense of legal obligation.¹⁹ Michaels thinks the question “remains open.”²⁰

Perhaps this is exactly the kind of comparative international law debate that Roberts hoped the book would inspire. While Roberts' book begins by contrasting the title with the familiar question of “is international law law?”, this debate could describe the corollary for private international lawyers: “is private international law international law?”

We may be on the verge of finding out more information on this score because for the first time in a while, states may be beginning to expand—and therefore possibly test the international law boundaries of—adjudicatory jurisdiction. As

¹³ Austen Parrish, *Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law*, OPINIOJURIS (Sept. 6, 2018), <http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/> [https://perma.cc/VKS5-TRJK].

¹⁴ William S. Dodge, Anthea Roberts & Paul B. Stephan, *Jurisdiction to Adjudicate Under Customary International Law*, OPINIOJURIS (Sept. 11, 2018), <http://opiniojuris.org/2018/09/11/33646/#comment-123447> [https://perma.cc/TZ2Q-W3JM].

¹⁵ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (2018).

¹⁶ Ralf Michaels, *Is Adjudicatory Jurisdiction a Category of Public International Law?*, OPINIOJURIS (Sept. 20, 2018), <http://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/> [https://perma.cc/EE6L-SENF].

¹⁷ Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRITISH YEARBOOK INT'L L. 187 (2014).

¹⁸ Parrish, *supra* note 13.

¹⁹ Dodge, Roberts & Stephan, *supra* note 14.

²⁰ Michaels, *supra* note 16.

I discuss in *The Adjudication Business*,²¹ over the last fifteen years, and increasingly over the past few years and even months, English-language-friendly international commercial courts have been considered or established in China (2018), Singapore (2015), Qatar (2009), Dubai (2004), the Netherlands (2019), Germany (2018), France (2010), Belgium (expected 2020), and beyond.

These courts specifically limit their jurisdiction to cases that are “international” and “commercial” (with varying definitions for each). Several, including the brand-new Netherlands Commercial Court (“NCC”),²² the Dubai International Financial Centre Court (“DIFC”),²³ and the Chinese International Commercial Court (“CICC”),²⁴ do not have a territorial-link requirement for jurisdiction. That is, they may hear cases that have no ties to the forum. Many commercial cases that end up in these courts may be there by virtue of consent of the parties, a well-established basis of jurisdiction (either as a matter of international law or just common practice). But according to their founding documents and procedural rules, these courts may recognize jurisdiction in situations other than contract or consent-based disputes. It remains to be seen how aggressively they will interpret this power.

In the olden days, this might have been called “exorbitant jurisdiction,” and the United States was often the mostly heavily criticized state for exercising it. These budding international commercial courts are too new to determine whether and to what extent they will test the limits of their adjudicatory jurisdiction. The CICC accepted its first case in December 2018;²⁵ the NCC’s first hearing was February 18, 2019.²⁶ But they will be important to watch—and to compare—to see what happens.

Roberts’ new book gives us a fresh and important perspective through which to view them. In a way, they are fertile breeding grounds for the kinds of conversations Roberts is trying to encourage. Parties to the cross-border disputes that find their way to these courts will have been educated in different countries, having learned not only different national law traditions but also different international law traditions. Some of these courts are aiming to be more

²¹ Pamela Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. (forthcoming 2020).

²² NETHERLANDS COMMERCIAL COURT (NCC), <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx> [<https://perma.cc/RM6Q-NJL7>] (last visited Feb. 24, 2019).

²³ DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS, <https://www.difccourts.ae/> [<https://perma.cc/2HV7-TMR7>] (last visited Feb. 24, 2019).

²⁴ CHINA INTERNATIONAL COMMERCIAL COURT, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> [<https://perma.cc/KCG2-7RWT>] (last visited Feb. 24, 2019).

²⁵ Susan Finder, *China International Commercial Court Starts Operating*, SUPREME PEOPLE’S COURT MONITOR (Jan. 14, 2019), <https://supremepeoplescourtmonitor.com/2019/01/14/china-international-commercial-court-starts-operating/> [<https://perma.cc/2PQX-RRM2>].

²⁶ *Inaugural Hearing of the Netherlands Commercial Court is a Fact*, NETH. COMMERCIAL COURT (Feb. 18, 2019), <https://www.rechtspraak.nl/English/NCC/news/Pages/Inaugural-hearing-of-the-Netherlands-Commercial-Court-is-a-fact.aspx> [<https://perma.cc/EN3A-DFQE>].

internationalist in staffing in ways that Roberts values on law faculties. Courts like the DIFC Courts and the Singapore International Commercial Court (“SICC”) are hiring international judges. The DIFC Court judges come from the United Arab Emirates, Malaysia, Singapore, and the United Kingdom.²⁷ The Chief Justice of the SICC is from Singapore and has law degrees from Singapore and Harvard;²⁸ in addition to several Singaporean judges, the SICC also has designated international judges from the United Kingdom, Australia, Hong Kong, Canada, Japan, France, and Delaware.²⁹ These are international commercial courts, so they will deal primarily with private law, and perhaps not as much the public international law that this book focuses on. But the public/private divide is not always so clear, especially as we watch the role of the CICC in adjudicating disputes arising out of China’s Belt and Road Initiative.³⁰ The point is that Roberts’ accomplishment has vast implications for the future of private as well as public international law, and I do not feel the need to choose between them as I close by congratulating her on her tremendous achievement.

²⁷ DIFC COURTS: JUDGES, <https://www.difccourts.ae/court-structure/judges/> [https://perma.cc/25HB-LTPC] (last visited Feb. 24, 2019).

²⁸ SINGAPORE INTERNATIONAL COMMERCIAL COURT: JUDGES, <https://www.sicc.gov.sg/about-the-sicc/judges> [https://perma.cc/W332-LF5C] (last visited Feb. 24, 2019).

²⁹ *Id.*

³⁰ Zhou Qiang, *Resolving International Commercial Disputes in a Fair, Professional and Efficient Manner so as to Provide Strong Judicial Services for the Implementation of the Belt and Road Initiative*, CHINA INT’L COMMERCIAL COURT (Aug. 26, 2018), <http://cicc.court.gov.cn/html/1/219/208/209/1060.html> [https://perma.cc/S7UT-3EFP].