
REFLECTIONS ON *IS INTERNATIONAL LAW INTERNATIONAL?*

ANTHEA ROBERTS*

*Is International Law International?*¹ examines the world of international law and international lawyers and asks questions about who we are, what we are doing, and where the field is heading. Since the book's publication, I have been fortunate to receive reactions from a broad range of academics and practitioners throughout the world, in international law and beyond. In those discussions, certain themes recur, many of which appear in this excellent collection of essays. I am grateful to the contributors for engaging so thoughtfully with my book and to *Boston University Law Review* for giving me a chance to reflect on some of these themes here.

The first theme is that the book describes and evidences something that many of us have experienced: that different communities of international lawyers in different places seem to understand and approach international law in different ways. The book explains and contextualizes some of the disorienting experiences many of us have had, piecing together a meta-map for navigating this strange world and situating one's personal journey within it. It has an outsider-insider quality to it since it emanates from someone within this world who observes it somewhat at arm's length. As one listener said to me at a presentation, the book has the sociological quality of "making the familiar strange."

It is not surprising, then, as Rebecca Ingber notes,² that many within the field will see themselves within the subject-matter of the book. It can be characterized as an intellectualized autobiography of my own journey and simultaneously a generalized biography of many contemporary international lawyers. It owes much to conversations with international lawyers in many states over the years. I have been struck since publishing the work by how many international lawyers – from extremely diverse states – have approached me to tell me their own stories, including experiences of professional anxiety, personal bewilderment, and (sometimes) psychological unease.

Perhaps the most striking has been the reaction of various Chinese international lawyers. Many express surprise that a non-Chinese-speaking Western scholar would be able to capture so many elements of their experiences, from the "vertiginous" feeling of studying international law in the West after

* Professor, School of Regulation and Global Governance (RegNet), Australian National University.

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

² See generally Rebecca Ingber, *If International Law is not International, What Comes Next? On Anthea Roberts, Is International Law International?*, 99 B.U. L. REV. ONLINE 14, 16 (2019).

first encountering it in China, to the incentives created by the academic funding by the Chinese government. That many express surprise at having their experiences articulated by someone from the “mainstream” or “establishment” (as some have described me) says much about the asymmetries that pervade our field.

Of particular note, some of these lawyers have spoken about the dual pulls on their identities as *Chinese* international lawyers and Chinese *international* lawyers. Of course, this duality is not unique to Chinese international lawyers. But the disconnect seems to be particularly striking at present given the traditional Western dominance of the field, China’s growing power and search for influence, and the mounting antagonism between China and many Western states. The dilemmas Chinese international lawyers face include responding to restrictions on freedom of speech from home, which have been intensifying in the last few years, and having their perspectives discounted by Western scholars on the assumption that they simply reflect censorship. Both cause distress.

The second theme that arises from these essays is that, even though the lack of universality the book describes is not surprising, it is nonetheless (highly) unsettling. This theme emerges from the contributions, for example, of Ingber,³ Jan Klabbbers,⁴ and Ralf Michaels.⁵ Even if everyone knows that the Emperor has no clothes, if someone actually says it – and produces pie charts to prove it – it will be much harder to carry on as before. Somehow the spell has been broken. What is said cannot be unsaid. When I present, audience members often seem to admit that the book’s thesis seems correct yet immediately to seek a path back to safety, so that the field’s legitimacy is restored.

This “anxiety,”⁶ as Michaels calls it, leads to the difficult ethical question raised by Klabbbers about how international lawyers should deal with the issues raised in this book,⁷ which represents a third theme. Ingber correctly indicates that I did not write this book to challenge the entire field but, as she and Klabbbers both note, I also chose not to paper over uncomfortable truths or shy away from asking challenging questions.⁸ To me, this is the essence of being an academic. I seek to understand and analyze the world around me. I do not pick my projects to achieve certain normative ends. I know that some international lawyers are normatively driven to a large extent, but different scholars can adopt different paths. My approach is to find a puzzle and try to solve it as best as I can, following the trail where it leads without predetermining the direction or destination.

³ *Id.* at 14.

⁴ Jan Klabbbers, *The Roberts Challenge*, 99 B.U. L. REV. ONLINE 5, 6 (2019).

⁵ Ralf Michaels, *Beyond Universalism and Particularism in International Law—Insights from Comparative Law and Private International Law*, 99 B.U. L. REV. ONLINE 18, 18 (2019).

⁶ *Id.*

⁷ Klabbbers, *supra* note 4, at 7.

⁸ Ingber, *supra* note 2, at 14; Klabbbers, *supra* note 4, at 7.

Nevertheless, that detachment is the privilege of the academic. Practitioners of international law cannot approach these issues in the same way. Here, the approaches suggested by Michaels⁹, Pamela Bookman,¹⁰ and William Park¹¹ seem worth exploring further. International law may never be truly universal, but that does not mean that it does not fulfill an important function. Other fields, including private international law, comparative law, and international business transactions and arbitration, might help us develop strategies for working with pluralism while trying to achieve cross-national goals. The ideal of full universality may not exist, but that does not mean that all is lost, only that we need to find a new, more grounded way to move forward.¹²

At the same time, we have to acknowledge that some of the differences we are seeing are not a question of functional equivalence where different states adopt different ways of resolving essentially the same problem. The newly competitive world order that I predicted in the book based on a division between Western states and China and Russia has eventuated . . . and in spades. Much of the concern felt by Western international lawyers is that if we take a more international approach to international law, we must deal with and potentially accommodate the viewpoints of states that do not share our values. I can see why this possibility concerns many Western international lawyers. Nonetheless, it is also a reality that Western states are facing, and pretending that it does not exist will not make the issue go away.

This problem leads to a fourth theme, which is how to pursue cross-cultural dialogue about international law when some academies maintain strong traditions of academic freedom and others do not. Klabbers raises this point in his response,¹³ and Julian Ku and Marko Milanovic have raised it elsewhere.¹⁴

⁹ See generally Michaels, *supra* note 5.

¹⁰ See generally Pamela Bookman, *Is Private International Law International Law?*, 99 B.U. L. REV. ONLINE 9 (2019).

¹¹ See generally William Park, *Unity and Diversity in International Law*, 99 B.U. L. REV. ONLINE 22 (2019).

¹² In reverse, perhaps this study might prompt similar reflections in other fields, as Bookman suggests here of private international law and Colm O'Cinneide suggests in *ICON* of comparative constitutional law. See generally Bookman, *supra* note 10; Colm O'Cinneide, *Is International Law International?*, 16 INT'L J. CONST. L. 1368 (2018) (reviewing ROBERTS, *supra* note 1).

¹³ Klabbers, *supra* note 4, at 6.

¹⁴ Julian Ku, *Is International Law...Law?*, OPINIO JURIS (Feb. 9, 2018), <http://opiniojuris.org/2018/02/09/is-international-law-law> [https://perma.cc/U9ES-QEZE]; Marko Milanovic, *Mobility and Freedom in the International Legal Academia: A Comment on Anthea Roberts' Is International Law International?*, OPINIO JURIS (Feb. 8, 2018), <http://opiniojuris.org/2018/02/08/mobility-and-freedom-in-the-international-legal-academia-a-comment-on-anthea-roberts-is-international-law-really-international/> [https://perma.cc/NQW7-DYY7]. For my response, see Anthea Roberts, *Is International Law International? Continuing the Conversation*, OPINIO JURIS (Feb. 9, 2018), <http://opiniojuris.org/2018/02/09/>

This question is weighty and one that I touch on in the book but do not address with sufficient depth. It poses difficult issues. For example, how should Western scholars trained in systems with robust free speech engage with Russian scholars trained in a system with strong restrictions on free speech? Should they engage earnestly and run the risk of taking statements that might be the product of censorship for freely held views? Or should they discount all of these views for fear that they are tainted?

In my experience, differences of perspective and training play an important role in explaining different understandings of and approaches to international law, alongside different levels of academic freedom. It is not one or the other – it is often a combination of the two but to differing degrees. I wonder whether scholarship sometimes has a wave-particle duality quality where it can be understood as Article 38(1)(d) scholarship (when government influence is not strongly at play) or as an unofficial version of Article 38(1)(b) state practice (when government influence is strongly at play). Perhaps the two characterizations exist on a sliding scale and the way you understand a particular piece is a function of the author’s background, the country context and the topic in question.

For instance, if scholars from a state that lacks a strong tradition of academic freedom are virtually unanimous about a legal question of central importance to their state, you might suspect that their views are significantly influenced by the state. Or if scholars write on topics that they dealt with during their time in government, you might suspect that their academic approach was influenced to some degree by this former experience. For example, censorship, both official and self-imposed, clearly plays a role in the Chinese and Russian academies, but its role is stronger in some areas than others (think of the nine-dash line versus investment arbitration). Conversely, the close association of U.S. international law academics with the U.S. government has an impact on U.S. international law scholarship, despite the United States’ enjoyment of a robust tradition of academic freedom.

A fifth theme, identified by Jain, resonates strongly in the current era: “the production, practice, and profession of international law is shot through with class” within Western states but “perhaps doubly so in non-affluent semi-periphery and periphery states.”¹⁵ According to Jain, the study’s focus on elite law schools is defensible from a methodological standpoint in terms of understanding the field, but this class issue also encompasses a telling point about the field’s composition that should be acknowledged and interrogated.¹⁶ I agree.

is-international-law-international-continuing-the-conversation/ [https://perma.cc/QH6P-RT45].

¹⁵ Neha Jain, *The Many Inequalities of International Law*, 99 B.U. L. REV. ONLINE 1, 2 (2019).

¹⁶ *Id.*

Issues of inequality and elitism have come to the fore in today's political climate. Just as we are seeing increasing divisions among states in the competitive world order, so, too, a cleavage has become clear between the cosmopolitan elite in many states and those who are less privileged and/or more nationally oriented within those states. Indeed, social psychologist Jonathan Haidt identifies the new separation in politics as between the nationalists and the globalists rather than the left and the right.¹⁷ Understanding who wins or loses from economic globalization, both within and among states, has become a focal point of my current research and is a topic on which I and my co-author Nicolas Lamp are deeply indebted to thinkers like economist Branko Milanovic.¹⁸

Jain also highlights a meaningful tension that I touch on but do not develop in the book: becoming more diverse horizontally (internationally) often means becoming less diverse vertically (domestically).¹⁹ Access to the "international" from semi-periphery and periphery states tends to reflect class privilege.²⁰ I became conscious of the class issue and these two axes of diversity when I was an L.L.M. student at New York University. I came from a middle-class background in a developed state. I attended public schools and was fortunate to study in Australia, the United Kingdom, and the United States on the basis of academic scholarships. Had I not received funding, it was inconceivable that I would have elected to pay my own way at a U.S. university – the fees were beyond anything that I or my parents (a public servant and university librarian) could have comprehended. Yet it quickly became apparent at New York University that many of my cohort from less wealthy states were themselves considerably more wealthy, and they (or often their parents) viewed paying for a U.S. L.L.M. to be a wise investment, particularly in view of the possibility of working afterwards in New York or London law firms.

Similar issues arise across the field. In investment treaty arbitration, for instance, many of the arbitrators from the South not only studied in the North

¹⁷ Jonathan Haidt, *When and Why Nationalism Beats Globalism*, AM. INT. (July 10, 2016), <https://www.the-american-interest.com/2016/07/10/when-and-why-nationalism-beats-globalism/>.

¹⁸ See generally, BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (2016); Nicolas Lamp, *How Should We Think About the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements* (unpublished manuscript), <https://ssrn.com/abstract=3290590> [<https://perma.cc/GFB7-8JXZ>]; Anthea Roberts, *Being Charged by an Elephant: A Story of Globalization and Inequality*, EJIL: TALK (Apr. 19, 2017), <https://www.ejiltalk.org/being-charged-by-an-elephant-a-story-of-globalization-and-inequality/> [<https://perma.cc/ZD6J-24JP>].

¹⁹ Jain, *supra* note 5, at 2-3.

²⁰ ROBERTS, *supra* note 1, at 217; see also Yves Dezalay & Bryant G. Garth, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 9 (2002); Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 L. & SOC. INQUIRY 521, 546 (2006).

but also are permanent residents there.²¹ Many international lawyers would feel much more at home relocating from one global city to another – London, New York, Paris, Hong Kong – than moving to a provincial area within the same country. These (often privileged) horizontal experiences across states can disconnect us from the perspectives and (often less privileged) vertical experiences of those who are more deeply grounded within specific states. We need to be conscious of these issues of class, connection, and communities if we wish to understand and respond to the current backlash against globalization. If international law primarily consists of cosmopolitan “anywhere” people, we may fail sufficiently to understand and respond to the lived experiences of more locally rooted “somewhere” people.²²

Being a quintessential “anywhere” person who has returned to my hometown “somewhere” has given me much food for thought on these issues. So has relocating from New York and London – classic Saskia Sassen “global cities”²³ that are hyper-connected and hourglass-shaped economically, with a sizable wealthy elite, a hollowed-out middle class and a large service class – to Canberra, Australia – a government and university town that is quiet and relatively disconnected, as well as diamond-shaped economically, with a large middle class and few ultrarich or extremely poor people.²⁴ These choices affect many aspects of our lives, from the schooling that is available to our children (Is it good? Is it free/expensive? Is it highly competitive?) to the opportunities to engage in private practice. If I had moved to a provincial town in Latin America or India, or to an Asian hub like Singapore, my experiences and opportunities would again be different.

Jain also highlights a sixth theme that I find especially important in understanding how transnational flows of people and ideas are developing: a growing number of academics from and educated in Western states are looking for jobs elsewhere (including in India, Singapore, and China) given tight employment prospects at home.²⁵ More broadly, as economic power shifts from Western dominance to greater multipolarity, notably with the rise of Asia, increasing numbers of students and faculty are moving away from the Western core and toward regional players like Singapore and China. In *The Future is Asian*, for instance, Parag Khanna notes the rise of the American-Asian “repat” (rather than the Asian-American expat) who finds better opportunities in

²¹ Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT’L L. 387 (2014); Malcolm Langford & Daniel Behn, Remarks at ESIL Annual Conference on Does Nationality Matter? Arbitral Background and the Universality of the International Investment Regime (Sept. 14, 2018).

²² DAVID GOODHART, *THE ROAD TO SOMEWHERE: THE POPULIST REVOLT AND THE FUTURE OF POLITICS* (2017).

²³ SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2001).

²⁴ Stewart Lansley, *The Hourglass Society*, LOS ANGELES REV. BOOKS (May 28, 2013), <https://lareviewofbooks.org/article/the-hourglass-society/#> [<https://perma.cc/8K5C-V5WB>].

²⁵ Jain, *supra* note 5, at 4.

thriving Asia than declining or plateauing America.²⁶ This phenomenon links to work I am currently doing on the role of intellectual third-culture kids in fostering both cross-cultural dialogue and innovation. This sort of decentralization and recalibration is also apparent in Bookman's reference to the new English-language commercial courts springing up in France, Germany, the Netherlands, China, Dubai, and Singapore.²⁷ These developments seem likely to diminish (though not eliminate) Anglo-American Western dominance of the "international," producing forums in which East/West and civil law/common law approaches combine and hybridize.

International law is not set in stone; if anything, it is better understood as a complex, adaptive system. My understanding of it changed in the course of writing this book, but at the same time the underlying realities I was observing were changing and have continued to do so since the book was published. As Ryan Scoville suggested, this book is best understood as a conversation starter.²⁸ None of us has all the answers, and we continue to learn as we engage with each other. To this end, I am grateful to the *Boston University Law Review* and the contributors for this chance to share our perspectives. May the conversation continue.²⁹

²⁶ PARAG KHANNA, THE FUTURE IS ASIAN (2019); Parag Khanna, *The Rise of the American-Asian 'Repat'*, PARAG KHANNA (Feb. 1, 2019), <https://www.paragkhanna.com/home/2019/2/1/the-rise-of-the-american-asian-repat> [<https://perma.cc/JH78-ZHK2>].

²⁷ Bookman, *supra* note 10, at 12-13.

²⁸ Ryan Scoville, *The Divisible College of International Lawyers*, LAWFARE (Oct. 30, 2017 7:00AM), <https://www.lawfareblog.com/divisible-college-international-lawyers>.

²⁹ Anthea Roberts, *Is International Law International? Continuing the Conversation*, OPINIO JURIS (Feb. 9, 2018), <http://opiniojuris.org/2018/02/09/is-international-law-international-continuing-the-conversation/> [<https://perma.cc/QH6P-RT45>].