

REVIEW ESSAY

IS INTERNATIONAL LAW INTERNATIONAL? BY ANTHEA ROBERTS (OXFORD UNIVERSITY PRESS, 2017) 420 PAGES. PRICE £25.99 (HARDCOVER) ISBN 9780190696412.

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I INTRODUCTION

Oscar Schachter's notion of the 'invisible college' of international lawyers coined in 1977 has become a famous reference. It postulates a 'professional community, though dispersed throughout the world ... its members are engaged in a continuous process of communication and collaboration'.¹ In the later debate about the fragmentation of international law it was recovered as shorthand for a perceived unity of the field that no longer seemed plausible. But whereas the conversation on fragmentation was largely concerned with the subject matter of various sub-fields of international law and the different assumptions that underlie them, Anthea Roberts invites us to look at the sociological substance of the college. She is concerned with questions such as: Who are the teachers of international law? Where do students go to study? Who writes the textbooks that are used for study? At its core, her book is concerned with the making of international law by 'people, materials, and ideas'.² Taking a comparative approach, Roberts explores 'how international law is constructed in different international law academies and textbooks in the five permanent members of the UN Security Council'.³ Her way of examining this material is based on reading and categorising, talking, counting and visualising and, finally, systematising the outcomes. The lens she applies to her archive is concerned with nationalising, denationalising and westernising tendencies within the legal community of the permanent five states and structured by the three key terms 'difference', 'dominance' and 'disruption'. The main arguments she formulates could be restated as follows: 1) the way international lawyers understand international law is influenced by the way they learn and practice international law; 2) some actors, materials and approaches are more influential than others; and 3) disruption due to geopolitical power shifts is on the horizon, so it is necessary to become aware of the particularity of one's understanding to better cope with

¹ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217, 217.

² Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) 8.

³ *Ibid* 4.

changes to come.⁴ In order to capture the findings of her research, Roberts leaves us with the catchphrase of the ‘divisible college of international lawyers’, describing a scholarly field, divided along national communities, that is by no means committed to the same understanding of international law, but which instead collectively produces a plurality of accounts of international law.

II THE DIVISIBLE COLLEGE OF INTERNATIONAL LAWYERS

Roberts’ most important contribution is to direct our attention to the centres of knowledge production in international law, namely elite university law schools and widely distributed textbooks. It is from these sources, the teachers and the books, that the interpretations, understandings, applications and approaches to international law emerge. Roberts’ analysis gives substance to the sense that there are certain gatekeepers to the divisible college, and that most professionals populating the contemporary field have come through them. Considering the prominent role education plays in knowledge production, Roberts’ book provides a long overdue inquiry into the patterns and forces of the making of international lawyers. As Martti Koskenniemi states in the foreword of the book:

International law did not descend from the sky to settle our conflicts or to provide a ‘neutral framework’ for our debates. Its rules and institutions, ideas and symbols, its cultural and professional mores bear the history of a divided and unjust world. It would be a miracle if that burden were not borne also in the professional education that we carry and reproduce as part of what we do. But thanks to Roberts, we can no longer pretend to be in ignorance about that matter ...⁵

According to Roberts’ analysis there are multiple centres of knowledge production in international law and they are constituted and reproduced by means of dominance in language, historical configurations of centre and periphery, as well as geopolitical strategies. By the end of the book we are left with the looming prospect of a large-scale power shift in favour of China and Russia, so that the necessity of engaging with rival accounts becomes ever greater.

III WHAT IS BEING COMPARED AND WHAT ARE THE RESULTS?

In the preface, Roberts gives us an insight into her background and her reasons for writing this book. When she recounts her experience of teaching international law in the United States she walks the reader through a process of realisation that ended in the question of whether there actually was such a thing called international law. Uncertainty about the answer ‘led to a crisis of confidence: just what had I been teaching all these years?’⁶ From the very first pages Roberts invites us to go on a journey with her, a journey with a starting point familiar to many teachers of international law. Thus, instead of locating her work in distinction to other works of contemporary scholarship, she recounts a problem she encountered, a problem that required her to halt and reflect. Since

⁴ Ibid 5.

⁵ Martti Koskenniemi, ‘Foreword’ in Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) xiii, xvi.

⁶ Roberts, above n 2, xxi.

the problem she describes is profound and cannot easily be resolved, open reflection about it can appear as inadequacy. How can you be teaching and practising international law if you do not even know what it is? In this sense, Roberts makes herself vulnerable in asking the question out loud, but it is the sincerity of the question that makes her account compelling.

How, then, does Roberts approach this question? She describes her project as ‘identifying a constellation of factors that I believe reflect and reinforce similarities and differences in how international lawyers in different states understand and approach international law’⁷ in order to ‘[provide] a window into the sociology of international law as a transnational legal field’.⁸ Within this agenda she positions herself as pursuing research in comparative international law, as well as within the field of sociological approaches to law, explicitly building on Pierre Bourdieu and the sociology of the legal field.⁹ Roberts categorises and compares academics and textbooks along national lines in order to show differences in understandings and relies on Bourdieu’s notion of ‘social capital’ to explain the incentives for individuals to adopt a particular understanding.

To get a better handle on how the analysis proceeds I will try to distil the elements of the comparison. A comparative framework, at a minimum, contains two ‘things’ that are compared (*comparata*) in some common respect (*tertium comparationis*).¹⁰ In Roberts’ analysis the *comparata* are the interpretations, understandings, applications and approaches to international law in/of the five permanent member states of the Security Council. The *tertium comparationis* are nationalising, denationalising and westernising tendencies as identified in the structure and content of various textbooks, as well as routes of legal education, both in the flow of students, as well as in academic profiles.¹¹ Nationalising and denationalising tendencies tie into the larger theme of the book by describing more or less exposure to other national legal cultures and indicating the level of openness towards them, whereby the more open is considered the better.¹² The result of the comparison are the three main arguments stated above, which map onto the terms difference, dominance and disruption.¹³

Examples from the book give an idea of how this framework is put to work. Roberts describes the academic landscape by tracing where students and academics study and teach and the incentives that affect their choices. The US academy is reluctant to hire professionals who obtained their first law degree

⁷ Ibid 47.

⁸ Ibid xxii.

⁹ Roberts, above n 2, 23, citing Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805.

¹⁰ Ralph Weber, ‘“How to Compare?” — On the Methodological State of Comparative Philosophy’ (2013) 8 *Philosophy Compass* 593, 595.

¹¹ Although the selected law schools and the studies underlying the flow of students have no specific focus on international law, the broader picture of knowledge production is likely to be representative of international law.

¹² Roberts, above n 2, 67.

¹³ 1) The way international lawyers understand international law is influenced by the way they learn and practice international law; 2) some actors, materials and approaches are more influential than others; and 3) disruption due to geopolitical power shifts is on the horizon, so there is a necessity to become aware of the particularity of our understanding to better cope with changes to come. Ibid 5.

outside the US, a nationalising tendency.¹⁴ As a result, students in the US are unlikely to be exposed to other legal cultures and will construct their understanding of law accordingly. By contrast, 74 per cent of members of law faculties in the United Kingdom have obtained their first degree outside the UK, a denationalising tendency.¹⁵ Thus, the hiring priorities in the respective places shape the way international lawyers approach and understand their discipline all the way from their exposure as students, to the making of their own trajectory as professionals. Similarly, Roberts follows the global flow of students and finds the centres and peripheries of international legal thought.¹⁶ She identifies the five Western states that hosted almost half of travelling students in 2012, and contrasts the finding with the top 10 states of origin of travelling students. She finds that 7 out of 10 are non-Western.¹⁷ Putting the two angles together shows a nationalised US academy, compared to a more denationalised UK academy. The flow of students shows that both countries are centres of international legal education, so that their particular understandings have a dominant position within the broader field of international law, a westernising tendency. Ultimately, Roberts identifies multiple cores and peripheries, centred around native languages and legal families that, unsurprisingly, run along former colonial ties.¹⁸ The familiar pattern that emerges shows that bodies travel in one direction, whereas ideas travel the opposite way.¹⁹

A different image emerges from Russian and Chinese academia. The former is characterised as a closed system that exhibits nationalised tendencies in both the flow of students and faculty. The Russian landscape of international law has little exposure to non-Russian understandings. Its faculty almost exclusively holds law degrees from within Russia and only a small number of Russian students go abroad to study, though Roberts identifies tendencies of change.²⁰ The Chinese numbers point to a great difference in scholars holding their first law degree from abroad (4 per cent) and those holding law degrees from more than one country (41 per cent).²¹ China's numbers are explained through national policies encouraging nationals to study abroad with the goal to 'better equipping its lawyers to protect China's national interests'.²² Thus, while the Russian national understandings appear to be operating in an even more secluded silo

¹⁴ Ibid 80.

¹⁵ Ibid 81.

¹⁶ It should be mentioned, as Roberts does, that the numbers relied upon are taken from a United Nations Educational, Scientific and Cultural Organization ('UNESCO') study tracing the flow of students for tertiary education in general combined with a UNESCO study tracing the flow of law students in 35 states: Ibid 52. These numbers might be representative of students of international law, however, the original studies were based on a broader data set.

¹⁷ The top five destinations for students completing a tertiary degree outside their home country are identified as the United States, the United Kingdom, France, Australia and Germany. Ibid 54.

¹⁸ Ibid 53, 57–9.

¹⁹ See J M Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).

²⁰ Roberts, above n 2, 73–6.

²¹ Ibid 73.

²² Ibid 79.

than the US academy, Chinese scholars actively seek exposure to Western approaches, which cannot not be said vice versa.

Roberts' analysis of international law textbooks comes to a similar result, and lays the groundwork for the final chapter of the book 'Disruptions Leading to a Competitive World Order'. After drawing out the distinction in the various approaches to international law, Roberts predicts a significant change in geopolitical power that affords a prominent place to both China and Russia.²³ Thus, the ultimate finding of the book is a call for more engagement with other (so far not so dominant) approaches and a call to denationalise the academy, to be better prepared for the future.

IV NON-INTERNATIONAL BUT UNIVERSAL — WE CANNOT HAVE IT BOTH WAYS

I agree with Roberts when she says that '[i]n the end, engaging in a dialogue across communities ... at least permits awareness of diverse perspectives within a common debate'.²⁴ However, I would also argue that awareness of difference is not enough if the consequences of finding a pluralist landscape remain obscure. Roberts holds that: 'taking an intellectually honest look ... means acknowledging in a pluralist — or realist — way that there *may not* be just one universal way of understanding and applying international law'.²⁵

Similarly, she states:

A descriptive observation that certain international law values are not universal as a matter of origin, or universally accepted as a matter of sociological fact, does not necessitate a normative position that these values *should not* be recognized as universally applicable.²⁶

The 'may not' and 'should not' indicates an indecisiveness on the possibility of universality, a possibility that I believe comparative international law does not support. Whereas Roberts readily answers the question of the book's title — *Is International Law International?* — in the negative, she is reluctant to answer the question whether international law is or can be universal.²⁷ I suggest that the unsubstantiated distinction between international and universal within the book allows Roberts to have it both ways.²⁸ Despite challenging the international character of the discipline, she has not fully discarded the assumption of a transcendental/universal, international law. Further scrutinising the idea of

²³ For example, Roberts holds that: 'In terms of the Western/non-Western balance, US leadership in some areas, such as international economic law, now appears in doubt and may result in greater attention being paid to the practices of certain non-Western states, most notably China'. Ibid 12.

²⁴ Ibid 231.

²⁵ Ibid 22 (emphasis added).

²⁶ Ibid 21 (emphasis added).

²⁷ Roberts expresses this unequivocally: 'Yet is international law international in reality? Not particularly, is my answer — at least, not in the way that it tends to be conceptualized by international law academics in different states and in the international law textbooks and casebooks that they use'. Ibid 1.

²⁸ A point can be made that it is possible to understand international law as a vaguely definable common object (*Gegenstand*) of any analysis undertaken in relation to it, but this cannot be confused with consistency in assumptions about the methodology to study it or the content of rules and norms.

comparative international law helps us to see that the implications of Roberts' argument go further than the book takes them.

Comparative international law, in the way it is applied in Roberts' book, cannot rest on the stable benchmark of a universal international law. From the very beginning she relies on a plurality of 'approaches and understandings' rather than just one, so that there is no room for a single law. Pierre Legrand describes the relationship between comparativism and one law as follows: 'comparativism ... disputes the possibility and opportunity of one-law-for-all, alleged uniformity entailing the unwarrantable destruction of space's spatiality and of time's temporality'.²⁹ Taking a sociological look at the field of international legal education pays tribute to precisely the situatedness of knowledge that Legrand is referring to. It is not because different communities simply disagree as a matter of choice. The difference stems from different ways of meaning-making. A commitment to the universality of international law, however, demands a stable benchmark that defines the universal: a 'one-law-for-all'.

On the one hand, Roberts does not want to give up the possibility of deciding '[w]hether a given position reflects international law', assuming its content can be abstractly determined.³⁰ On the other hand, she relies on the idea of 'epistemic communities' due to which international lawyers 'see that world [of international law] through the prism of their location and thus understand international law differently depending on where they are situated'.³¹ The notion of an epistemic or interpretive community indicates that the production of knowledge as the means of meaning-making is idiosyncratic and thus incommensurable. As a consequence, there can be no stable, cross-cutting component from which to determine the content of an international norm. Through the metaphor of language Roberts demonstrates that she is not speaking of different accents, but of genuinely different languages.³² David Kennedy's work on the categories of law and culture in relation to the internationalist sensibility helps to point out the problem.³³ In Kennedy's account, 'culture and cultural difference precede the move to law, exist external to it as a constant challenge or threat, or live below it, beneath the veil of the sovereign state',³⁴ whereas 'cosmopolitan international law would not be another culture, one culture among many, but would have no cultural content, no subjective or political preferences of its own'.³⁵ If we take the interpretive community to be an expression of culture that produces its idiosyncratic understanding of law, a universal international law that does not stand for 'subjective or political preferences' can no longer be upheld. While Roberts' claim is 'that there may

²⁹ Pierre Legrand, 'Jameses at Play: A Tractation on the Comparison of Laws' (2017) 65(Special Issue) *American Journal of Comparative Law* 1, 2.

³⁰ Roberts, above n 2, 22.

³¹ *Ibid* 11.

³² *Ibid* 3.

³³ See David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' [1997] *Utah Law Review* 545.

³⁴ *Ibid* 552.

³⁵ *Ibid* 565.

not be just one universal way of understanding and applying international law',³⁶ I would suggest the better claim is that there 'cannot be' such understanding.

Insisting on this distinction between 'may not' and 'cannot' might appear captious, but it points to a fundamental problem in how we learn and teach international law. Almost 30 years after the publication of *From Apology to Utopia: the Structure of International Law*,³⁷ students of international law are still being taught the abstract content of international legal rules as if it could be determined and applied rightly or wrongly. In the introductory chapter to the new book *Comparative International Law*, Roberts et al write:

On issues from treaty interpretation to the content of customary international law, different states and international bodies may set forth different interpretations of the same rules, sometimes strategically, other times unaware of the differences. In some cases, these varying interpretations may subsist with minimal attention, while in others they may change or destabilize the international rules themselves.³⁸

The idea of changing or destabilising a rule is guided by the assumption that at some point there was a definite meaning. This, however, can only be the case if we think along a timeline in which one particular understanding was taken as the determined, universal understanding, but now — further down the timeline — this meaning has been called into question. What Roberts shows in her sociological study is that this is not the case. There is no such prior moment in which all was one. Textbooks in different parts of the world were always marked by differences that convey 'the professional common sense'.³⁹ To speak with Roberts' words, the appearance of universality is always, and was always, forced by *dominance* within the permanent state of *difference*.

V NATIONAL AND INTERNATIONAL — OR NO PLACE OF COMFORT

This is not to say that activities of international lawyers have no points of convergence. Legal interpretation is constrained precisely by interpretive communities and thereby enables 'professional norms ... a standard to judge the correctness of interpretation'.⁴⁰ It is only to say that these points of convergence cannot be defined or held in the abstract as idealist aspirations. Nor can they be equated with demonstrated state behaviour, the move that Roberts seems to be relying on.⁴¹ When she describes her observations with regards to the debates over the Crimea she finds 'the Western and Russian scholars' conclusions on the law tended to broadly align with the positions of their states or geopolitical

³⁶ Roberts, above n 2, 22.

³⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, revised ed, 2006).

³⁸ Anthea Roberts et al, 'Conceptualizing Comparative International Law' in Anthea Roberts et al (eds), *Comparative International Law* (Oxford University Press, 2018) 3, 4.

³⁹ Roberts, above n 2, 32, quoting Arnulf Becker Lorca, 'International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination' (2006) 47 *Harvard International Law Journal* 283, 287.

⁴⁰ Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 147, 150.

⁴¹ Knowledge production in international law through '[h]igher education represents a significant aspect of soft power'. Roberts, above n 2, 36.

regional groupings' and even though she found this 'particularly striking' for Russian international lawyers, 'Western scholars usually agreed that Russia's annexation of Crimea was manifestly illegal'.⁴² Constructing the interpretive community along national boundaries makes these boundaries appear more stable than they are.⁴³ It also somewhat does away with the foregoing analysis by conflating individuals with states.⁴⁴

Constructing the epistemic or interpretive community along the lines of national identity is a choice rather than a demand by the object of research. In international law, authors like Andrea Bianchi and Michael Waibel have pointed to other possible differentiations.⁴⁵ An interpretive community might be built along a differentiation between lawyers and judges, positivists and natural lawyers or human rights and trade law scholars.⁴⁶ Schachter himself has drawn on the idea of interpretive communities in opposition to the invisible college, but focused on differences in substantive law.⁴⁷ Roberts stages the problem as one of international divide along geopolitical lines. It is only within this framework that David Kennedy and Eric Posner can be part of the same interpretive community of American international lawyers, who despite all differences 'are often also distinctly American in some of their assumptions, preoccupations and approaches'.⁴⁸ The point here is that any construction of an interpretive community along clearly distinguishable parameters cannot fully account for all the choices individuals will have at their disposal as they are part of a variety of overlapping interpretive communities.⁴⁹

Of course, a reasonable response to this argument would be to say that the national context shapes the agenda of law schools, or that the demands of the job market in any given country shape the research agenda of scholars. But the

⁴² Ibid 237–8.

⁴³ Roberts acknowledges that the 'there are many ways of dividing the divisible college, including along national lines, subject-matter lines, or with respect to connections to practice': *ibid* 2 n 4. However, comparative international law as a framework relies on national lines.

⁴⁴ Indeed, the characterisation of comparative international law is built on the distinction between national communities, as opposed to fragmentation that distinguishes along sub-fields of international law, or international institutions. *Ibid* 6.

⁴⁵ See Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22 *Leiden Journal of International Law* 651; Waibel, above n 40. See also: Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2018) (forthcoming).

⁴⁶ Waibel, above n 40, 148.

⁴⁷ Oscar Schachter, 'Metaphors and Realism in International Law' (2002) 96 *American Society of International Law Proceedings* 268, 268–9.

⁴⁸ Roberts, above n 2, 8.

⁴⁹ Roberts seems to account for this when she says:

I suggest that it might be better to understand the transnational field of international law as comprising a divisible college of international lawyers. International law academics in different states often have distinct profiles based on where they studied, whom they teach, which languages they use, what and where they publish, and how they engage with practice. Rather than a single community, the field consists of separate, though overlapping, communities, often demonstrating distinct approaches, reference points, hierarchies, areas of expertise, and spheres of influence.

Ibid 52. However, in the next step she levels all these differences into differences of nationality.

individual scholar cannot be conflated with the state. It is as if one could replace the question of what is being taught, with the question of where it is taught.⁵⁰ Surely enough, Roberts does well in identifying that there are different national preoccupations and different readings of history that will be influential at the level of the nation-state.⁵¹ The question is, how much explanatory value can one attach to these forces and how are they embedded in a larger research framework?⁵² Drawing a direct line between understandings, approaches and interpretations of international law and the nation-state in which they are produced, in a study on geopolitical shifts, is at risk reproducing identity politics of nationalism.⁵³

My sense is that opting for this framework provides some degree of comfort when we have thrown all the pieces up in the air and do not quite know how to put them back together. However, I think that international law is a practice that cannot provide such comfort. On the contrary, holding on to the uncertainty in decision-making and the multiple means of meaning-making available at any given moment, holding on to the situatedness of the practice without resorting to nihilism, is the task of the international lawyer.⁵⁴

Returning to the focus of the book on teaching and education, much will be achieved when teachers in the gatekeeping institutions of the ‘divisible college’ openly account for the differences in approaches, understandings and practices of international law around the globe and when students come to their work knowing that their knowledge is situated and vulnerable, but that it also provides them with a powerful tool for change. By grounding the college of international lawyers in institutions, journals and textbooks that can be named and discussed, Roberts has brought us much closer to understanding the patterns of knowledge production in international law.⁵⁵ She has produced a map of international law that fills the vagueness of our imagination with palpable detail, leaving us with

⁵⁰ It is not the same to say that a particular law school follows a certain tradition of legal thought and thus infer something about the understanding of international law developed there, and the claim that studying in a particular state allows for the same inference.

⁵¹ *Ibid* 185–205.

⁵² Roberts makes a great observation with regards to the socio-economic divide that is perpetuated by the divisible college when she says that: ‘Often becoming more diverse in terms of national origin equates with becoming less diverse socio-economically. The students who are able to pursue foreign legal education, usually at a high cost, disproportionately represent the elite of their states’. *Ibid* 217 (citations omitted). But this angle is lost in the assumption of national epistemic communities as relevant entities.

⁵³ In the current political climate, the move towards emphasising national approaches seems to be a plausible description of geopolitics. However, at the same time it is reinforcing the nationalist mindset in a time when ethical choices of solidarity along various other lines of distinction seem to be ever more important.

⁵⁴ The idea of situatedness as put forward by Outi Korhonen is an interesting approach to accounting for the multiplicity of interpretive frames. See Outi Korhonen, *International Law Situated: An Analysis of the Lawyer’s Stance towards Culture, History and Community* (Kluwer Law International, 2000).

⁵⁵ Roberts draws on a study that reveals that

[o]ut of 205 sitting judges, 39 earned degrees from UK universities and 29 from US universities, including Cambridge (14), the University of London (11), Oxford (8), Columbia (7), Harvard (7), Yale (3), and New York University (NYU) (3). In France, these institutions included the University of Paris (11).

Roberts, above n 2, 40 (citations omitted).

thought-provoking descriptions, helpful ideas for how to think about international legal education and, most importantly, an invitation to imagine a practice that allows us to live together in a world that is full of difference, dominance and disruption.

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