Is International Law International?

Anthea Roberts
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Preface

Domestic legal systems differ, yet lawyers often assume that international law is universal. But my experiences as an international lawyer who has studied, taught, and worked in three jurisdictions—Australia, the United Kingdom, and the United States—have made me conscious of national differences in approaches to international law, even among three Western, English-speaking, common law, liberal democratic states. This awareness led me to wonder how different international law might look from the perspective of those who study, teach, or apply it in non-Western, non-English-speaking, noncommon law, and/or nonliberal democratic states.

I was first struck by different national approaches when I began practicing at a US law firm in 2003. One of my first assignments was to write a brief about the Alien Tort Statute (ATS) for the US Supreme Court case Sosa v. Alvarez-Machain.\footnote{Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).} I was excited because I had heard that the ATS involved enforcement by US courts of customary international law, and enforcement is the Achilles heel of international law. I also knew that some US international lawyers were very proud of the ATS, seeing it as “a source of pride, a badge of honor.”\footnote{Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. J. Int’l L. 461, 464 (1989).}

But there was a catch: I had never read an ATS case. That was absolutely normal for someone, like me, who had initially studied international law in the United Kingdom and Australia in the late 1990s, but was almost unthinkable for a US-trained
international lawyer at that time. Nonetheless, I felt little concern because it was all international law, after all.

As I read these cases, however, I felt some shock. We seemed to be using the same words and concepts, yet the analysis and conclusions felt unfamiliar. To my eye, the cases adopted a very strange approach to determining the existence of customary international law. They largely cited other US cases for propositions of international law, many of which seemed dubious to me. They involved a curious mix of international and domestic law on points like corporate liability and aiding and abetting liability. And basic steps—most notably determining whether international law permits domestic court jurisdiction over civil claims by foreigners, against foreigners, for acts occurring on foreign soil—were largely missing from the analysis.

What was I to say about these cases? “What did you think?” asked one of my colleagues. “This is like no international law I have ever seen,” I reported back. My colleague looked shocked. “I thought you knew international law,” he stammered. “I do,” I replied, feeling strangely offended. “The problem isn’t that I don’t know international law. I know international law. This isn’t it!”

What looked to my colleague (an American) like international law looked to me (a foreigner) like American law. To my eyes, the ATS was to international law what Tex-Mex was to Mexican cuisine: you could see the foreign influence, yet it seemed utterly Americanized. Was it international law, American law, or some hybrid of the two?

I had a similar dislocating experience when I arrived at Harvard Law School in 2011 to teach international law to a first-year class. Instead of the materials I had used at the London School of Economics, I prescribed a US cases and materials book called *International Law*. I had assumed that the content would be roughly the same, yet it was strikingly different in parts and seemed to have a strong focus on international law as interpreted and applied by US actors.

Even though I was the same teacher and was ostensibly teaching the same subject, my experience in that Harvard classroom felt radically different. Perhaps it was the greater domestic focus of the book or perhaps it just felt like a greater domestic focus because it was a different domestic setting. Perhaps it was that I was used to teaching international law to a broad mix of nationalities, whereas here I was teaching a class that was predominantly made up of a single nationality. Perhaps it was because that single nationality was American and the United States was the hegemon. Perhaps it was the students’ generally skeptical and realist approach compared with the reverent and idealistic approach often exhibited by my students in the United Kingdom.

One difference I found striking was that my American students often assessed international law questions from a US perspective. Would this rule be good or bad for the United States? Should or would the United States comply? I could not recall my students in the United Kingdom adopting an analogous UK perspective. Nor was I aware of approaching international law from the perspective of what was in it for my home state of Australia or my adopted state of the United Kingdom. Did the difference evidence American exceptionalism? Did I approach international law from a denationalized perspective of the international community? Or did I implicitly approach it from the position of a nonhegemonic Western state, and which state that was did not really matter?
Whatever the reasons, I found myself having a comparative international law experience in that classroom where I did not realize how national the international law we sometimes teach is (in both materials and assumptions) until I found myself in another national setting. Dislocation was the key. By dislocating myself from my normal environment, I was able to experience international law from a different location. In doing so, I became conscious not only of the located way in which my students were approaching international law, but also the (differently) located way in which I had been approaching my field.

This sort of dislocation occurred again when I was appointed in 2012 as a non-American reporter for the Restatement (Fourth) of the Foreign Relations Law of the United States. I was tasked with working on the jurisdiction section, but there was a stumbling block. The Restatement (Third) of the Foreign Relations Law of the United States stated that international law recognized a three-part approach to jurisdiction, divided among jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. My US colleagues agreed. But in the United Kingdom and Australia I had learned that international law recognized a two-part approach, divided between jurisdiction to prescribe and jurisdiction to enforce. Which was the case?

To my eyes, much of what they called jurisdiction to adjudicate could simply be described as US constitutional law, not international law at all. What made things even more confusing was that my understanding of jurisdiction to prescribe and to enforce in my two-part scheme seemed to differ from my coreporters’ understandings of the same terms in their three-part scheme. The textbooks and casebooks from our respective countries typically supported our respective understandings. When we looked at textbooks from other countries, including France, Germany, Russia, and China, we found some following the UK approach and others following the US approach.

This experience led to fundamental questions about the Restatement project. Were we trying to do a restatement of international law or of US approaches to international law? Who was to say what “international law” was? And what was the difference between international law and foreign relations law? Why did foreign relations law seem to be a big subject—one that people teach, write about, and produce casebooks on—in the United States, yet I could not think of anyone teaching or writing a textbook about this subject in the United Kingdom? Did it have something to do with the structure of government? Was it historical happenstance? Did it relate to the differential power of these states? Or was something else at play?

These questions made me recall a conversation in 2009 with a noted US international law/foreign relations law scholar. He proposed creating a Comparative Foreign Relations course with him teaching the US approach, me teaching the UK approach, and someone else teaching the German approach. That sounded fascinating, I said, but what exactly was foreign relations law and how did it differ from international law? Neither I nor anyone I knew in the United Kingdom taught a course called Foreign Relations Law, I explained. I vaguely recalled that F. A. Mann had written a book called Foreign Affairs in the English Courts in the 1980s, but I was not aware of any more recent treatment at that time.3

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3 For discussion of more recent developments in this area since 2009, see Chapter 5.I.B.
Preface

Defining foreign relations law and its relationship to international law is not an easy task, it turns out. A simple attempt at defining it led to dozens of e-mails and considerable disagreement among the Restatement’s reporters. We called a temporary truce after reaching exhaustion rather than agreement. In broad terms, it had something to do with how international law was interpreted and applied by the United States. It seemed particularly focused on how international law came into the US legal system and how authority with respect to these issues was allocated among the different arms of government. It also included issues such as when US courts could hear cases with foreign elements and recognize and enforce foreign judgments.

It was not as though there were no laws or cases on these issues in the United Kingdom; in fact, there were lots of them. Some of them, such as how international law comes into the UK system, formed a minor part of our international law courses. Others, such as the powers of different arms of government, might perhaps have come up in constitutional law classes, though I was not sure. Still others, such as jurisdiction to hear cases with foreign elements and recognition and enforcement of judgments came up in either public international law (when dealing with public and criminal laws) or private international law (when dealing with torts and contracts and the like). We just did not conceptualize the foreign relations law of the United Kingdom as a separate field. I wondered why this was so and how this difference might reflect or shape differences in the way international law was understood in different states.

When I wondered out loud whether the United Kingdom should develop a field called foreign relations law, a left-leaning US international lawyer quickly intervened to warn me against working on such a project. The turn from international law to foreign relations law was an inherently conservative move, he cautioned me; look at how it had developed in the United States. But was that true in the United States? I could think of liberal and conservative foreign relations lawyers, but did the liberals have a heavier load to lift? And, even if true for the United States, would that always be true of a movement to foreign relations law because it encouraged you to look at international law from a particular national perspective instead of from the perspective of the international community? Or did it depend on the nation in question?

I am grateful for having had these moments of dislocation because they helped open me to the possibility of comparative international law. Public international law is commonly studied as one subject in a first law degree alongside various topics of domestic law, like torts and property. Viewed in this way, whatever does not look domestic is assumed to be international. Usually, only when placed in an international context, such as competing in the international round of the Jessup Moot Court Competition or working for an international organization, or in another national context, such as studying or working in a foreign state, is one likely to become aware of national differences in approaches to international law. Instead of looking vertically (domestic to international), one is forced to look horizontally (domestic to foreign) and to consider how a foreign system might approach international law differently (foreign to international).

The key difference here is the movement from a vertical approach that considers domestic law and international law to a triangular approach that considers domestic law, international law, and foreign law. Just because something is not entirely domestic does
not make it international since it might be a hybrid of the two that looks international to domestic audiences and domestic to international audiences. And one domestic approach to international law is not necessarily the same as another: international law traditions may be nationalized, so to speak. Looking sideways at foreign approaches to international law helps to clarify both points and to encourage us to reflect on how “international” our understanding of international law really is.

My first reaction to these experiences was to conclude that these Americans that I had encountered did not know international law: “You say that this is international law, but it is US foreign relations law. Or American international law. It is not really international law.” This approach, it turns out, is not the best way to win friends and influence people.

My second reaction was more self-reflective. If the Americans thought something was international law but I did not, were they right or was I? Did I know international law, as I had previously thought? Or did I know British or Australian concepts of international law, without having realized the subconscious national lenses and filters that I had adopted in the process of learning and teaching it?

My third reaction was to wonder if none of us really knew international law because there was no “international law” to know. Our field is premised on coexistence and cooperation, but maybe we often simply talk past each other. This notion led to a crisis of confidence: just what had I been teaching all these years?

I am not alone in experiencing discomfort and disorientation upon coming face-to-face with international law pluralism. According to David Kennedy: “The professional experience of legal pluralism has two dimensions. First, encounter—encountering the other. Second, loss of confidence, destabilization. In the presence of legal pluralism, one is defeased of professional knowledge, certainty. Perhaps, one must acknowledge, the legal situation is, in fact, some other way.” My own roller-coaster ride clearly follows this pattern: dislocation, shock, and then doubt.

And so, with these experiences, my comparative international law journey had begun. But how could I start to capture what I had observed, moving beyond the level of anecdote to a point where I could find and analyze broader data to confirm, contradict, or nuance my impressions and convey them to people who had not shared the same experiences? How could I gain insights into other national approaches to international law from states with which I was unfamiliar? And what could a comparative international law approach tell international lawyers about how international law is conceptualized as a field and how universal or otherwise it might be?

These questions led me to consider the role that the globalization of law, legal education, and legal publishing might be playing in the construction of international law as a transnational field. Some fields seem inevitably international. For instance, we do not talk about German physics or American biology. Others are clearly nationally situated, like French literature and Chinese philosophy. But where does law fit in this spectrum?

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“Lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan.”5 The same could be said of international law. Yet how successfully do we transcend our national boundaries? Do some national approaches end up having significantly more influence outside their borders than others? And are these patterns likely to shift in the next generation?

By focusing on the incoming influences, and outgoing spheres of influence, of international law academics in the five permanent members of the UN Security Council, and the way academics from these states construct and pass on understandings of the field in their textbooks, this book provides a window into the sociology of international law as a transnational legal field. By encouraging international lawyers to adopt a comparative international law approach, it aims at making international lawyers more aware of how their own understandings of and approaches to the field are shaped, as well as how these influences might be similar to or different from those of international lawyers from other states, regions, or geopolitical groupings. In trying to understand how others view international law, one is often able to see the field in a different light and to view one’s biases and blind spots in sharper relief.6 This process of trying to see international law through the eyes of others represents an important step toward encouraging greater understanding of diverse perspectives and facilitating enhanced communication and cooperation among those coming from different, and sometimes unlike-minded, states.

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WE ARE FAMILIAR with the question: Is international law law? I want to ask instead: Is international law international?

In some senses, this question sounds odd. International law is certainly international by definition: instead of being the law of any particular state, it is the law that applies in relations among states. It is frequently international by design. For instance, in terms of substantive law, the test for custom requires one to look for evidence of widespread and consistent state practice. Similarly, in terms of institutional design, the composition of the International Court of Justice is intended to ensure representation of the main forms of civilization and the principal legal systems of the world. And it is also international by aspiration. For example, many concepts that international lawyers celebrate rest on universalist ideologies, such as human rights and the rule of law.

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. This book is not about international law per se in the sense of studying the formal sources of international law, that is, treaties and custom. Instead, it explores how different national communities of international lawyers construct their understandings of international law in ways that belie the field’s claim to universality and perpetuate certain forms of difference and dominance. It also calls attention to how some of these patterns are likely to be disrupted by changes, including shifts in geopolitical power. In doing so, this project encourages international lawyers to be more reflective about the particularities of their frameworks and perspectives, and more reflexive about how they engage with the field.
Instead of working from the premise that international law exists objectively somewhere out there, this book assumes that, as an abstract concept, what counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation. In this sense, this project is constructivist in nature. International lawyers’ vision of the field implicates many foundational issues, such as which areas are significant, which actors are important, which principles are fundamental, which sources are relevant, as well as which rules are settled and which are subject to change. How lawyers construct their understanding of the law is relevant in all legal fields, but it is particularly noteworthy in international law for various reasons. International law does not have a central legislator. Even where they exist, multilateral treaties often lack a compulsory dispute settlement mechanism to resolve disagreements over their interpretation. Determining the existence and content of custom on the basis of general and consistent state practice and *opinio juris* is often more of an art than a science.

In examining the process by which international lawyers construct their understanding of international law, this book challenges the assumption that international lawyers work within a single field. When asked to reflect on the professional community of international lawyers, Oscar Schachter memorably called it an “invisible college” whose members were “dispersed throughout the world” yet “engaged in a continuous process of communication and collaboration.” Instead, I suggest that international lawyers may be better understood as constituting a “divisible college” whose members hail from different states and regions and often form separate, though sometimes overlapping, communities with their own understandings and approaches, as well as their own distinct influences and spheres of influence.

In focusing on academics and textbooks, this study represents one strand in a broader, re-emerging subfield or set of approaches that I term “comparative international law,” which examine cross-national similarities and differences in the way that international law is understood, interpreted, applied, and approached by actors in and from different states. Comparative approaches are commonplace when dealing with national laws and domestic legal systems because it seems obvious that these might differ in interesting ways or that some approaches might be similar as a result of shared attributes such as language, colonial history, and legal family membership. But comparative approaches are employed less frequently when it comes to international law partly because the field’s

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2 This focus on ideas also fits with the greater prominence that has been given in international relations literature since the 1990s to the role of ideas in shaping state identities and perceptions of global status. See, e.g., Rosemary Foot, *Introduction to China Across the Divide: The Domestic and Global in Politics and Society* 1, 1–2 (Rosemary Foot ed., 2013).


4 As will be described in more detail below, there are many ways of dividing the divisible college, including along national lines, subject-matter lines, or with respect to connections to practice. See Chapter 2.I.B.

universalist assumptions and aspirations can make comparativism seem both irrelevant and potentially dangerous.\(^6\)

Nevertheless, to understand international law as a transnational legal field that encompasses multiple national traditions, international lawyers need to be aware of certain national or regional differences in approaches to international law, as well as the extent to which some of these approaches have come to dominate understandings of the “international” in a way that can make them appear, or allows them to be presented as, neutral and universal. Like processes of globalization more generally, the field of international law is defined by a dynamic interplay between the centripetal search for unity and universality and the centrifugal pull of national and regional differences.\(^7\) The balance between these forces of convergence and divergence can also be disrupted by various changes, including technological innovation, changing domestic political preferences, and shifts in geopolitical power.

One way to understand these observations of difference, dominance, and disruption is through the reality and metaphor of language. International law aspires to be the world’s Esperanto. Esperanto is a constructed international auxiliary language; it was created for mutual communication by speakers of different languages. It was intended to be an easy-to-learn, politically neutral means of expression that would transcend nationality and foster peace and international understanding among a variety of peoples. Esperanto was even proposed as the working language of the League of Nations after World War I.

Despite this ideal, international law is marked by tension between multiple languages and the increasing emergence of English as the lingua franca. The existence of multiple languages is analogous to the observation of national and regional differences. Instead of being a single community speaking a single language, albeit with different accents, international lawyers from different communities often speak different languages. People, materials, and ideas move more easily within linguistic communities than between such communities. And it is not always clear whether these communities are having the same debates, only in different languages, or whether their approaches differ in terms of their assumptions, arguments, conclusions, and world views.

Although these forces of divergence pull international lawyers apart, there are also forces of convergence that bring them together, but not ones that place all language-speakers on an equal footing. The language reality that parallels this observation of dominance is the increasing turn to English as the common tongue for international education, international conferences, international publications, international meetings, and international dispute resolution. English has gone from being one state’s national language to the world’s most common second language. One’s access to the “international” often depends on whether one can understand, speak, and read this language,

\(^6\) See Chapter 2.I.A.

which vests tremendous advantage in native English speakers, together with their concepts and approaches.

It was not always so. Greek served as the lingua franca during the Hellenistic period and was succeeded by Latin during the ascendancy of Rome and the Middle Ages. French was the language of European diplomacy from the seventeenth until the mid-twentieth century, whereas classical Chinese served as the diplomatic language of Far East Asia until the early twentieth century. The emergence of English as the modern common language owes much to the reach of the British Empire in the late nineteenth and early twentieth centuries and to the rise of the United States as the world’s most powerful state following World War II. In this way, what counts as the lingua franca and the breadth of its reach may be subject to disruption based on a variety of factors, including technological innovation, such as the Internet; changes in domestic political preferences, such as openness to immigration; and changes in geopolitical power, such as the rise and fall of different regional and global hegemons.

This book examines these patterns of difference, dominance, and disruption with particular reference to how international law is constructed in different international law academies and textbooks in the five permanent members of the UN Security Council. Although they are not the only actors or materials to reflect and shape the field, academics and textbooks are important because the teachings of the most highly qualified publicists are a subsidiary source for determining international law; international law academics often take on significant roles in practice as, for instance, international judges and arbitrators, advocates before international tribunals, and advisers to governments; and these academics and textbooks play a key role in communicating understandings of the field to the next generation. They are also worth examining because they are visible, comparable, and understudied.8

The five permanent members of the Security Council—the People’s Republic of China, the French Republic, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—present an interesting set of case studies because they have historically been granted a privileged status within the international legal system with veto rights in the Security Council and de facto permanent seats on the International Court of Justice.9 They include old great powers (like the United Kingdom and France) and new or re-emerging great powers (like China), as well as the two states that led the bipolar world during the Cold War (the Soviet Union/Russia and the United States). One of them thereafter emerged as the unipolar power (the United States) and the other recently has reasserted itself as a major power (Russia). The group also comprises a declining hegemon (the United States), a rising potential or regional hegemon (China), and two of the five states referred to as the BRICS (Russia and China).10

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8 For more explanation of this focus, see Chapter 2.II.
9 For more explanation of this focus, see Chapter 2.III.
10 The acronym BRIC originally referred to Brazil, Russia, India, and China, but it was later reframed as BRICS to include South Africa. See Jim O’Neil, Building Better Global Economic BRICs (Goldman Sachs Economic Paper No. 66, 2001); Whynot South Africa Included in the BRICS?, Economist, Mar. 29, 2013.
These states also differ along important axes, such as Western/non-Western, English-speaking/non-English-speaking, common law/civil law, and democratic/authoritarian lines. Definitions of which states count as “Western” are inevitably controversial, and many states evidence a mix of Western and non-Western characteristics. For the purposes of this study, the term refers to states with membership or observer status in the Western Europe and Others Group at the United Nations, a geopolitical regional body whose “Other” component includes member and observer states in North America, as well as Israel, Australia, and New Zealand. The United States, the United Kingdom, and France are treated as Western liberal democracies, and China and Russia as non-Western authoritarian states. The growing tension between these two sets of states over a range of issues, including the law of the sea and cybersecurity, is one reason why these case studies are interesting.

This study is not comprehensive. I do not examine all of the actors and materials that play a role in the construction of international law, and one cannot assume that the patterns that hold true for academics and textbooks necessarily hold true more generally. The case studies do not include states in Africa, Latin America, or the Middle East, nor do I focus on the experiences and approaches of international lawyers from states that are less powerful and privileged than the permanent members. The project would be improved if other observers broadened it to look at more states, deepened it by delving into greater detail within particular states, and historicized it by examining continuities and change over time. Despite these limitations, this undertaking serves as a unique window into how different communities of international lawyers in five significant states construct themselves and their understandings of and approaches to the field.

In examining the extent to which international law is international in the academies and textbooks of these states, this book makes three arguments. First, international law academics are often subject to differences in their incoming influences and outgoing spheres of influence in ways that affect how they understand and approach international law. Second, actors, materials, and approaches from some states and regions have come to dominate certain transnational flows and forums in ways that make them disproportionately influential in constructing the “international”—a point that holds true for Western actors, materials, and approaches in general, and Anglo-American ones in particular. Third, existing understandings of the field are likely to be disrupted by factors such as changes in geopolitical power that will make it increasingly important for international lawyers to understand the perspectives and approaches of those coming from unlike-minded states.

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11 For further explanation of the choice of these states, see Chapter 2.III.
13 See Economist Intelligence Unit, Democracy Index 2015: Democracy in an Age of Anxiety 4–8 tbl.2 (2016).
These three concepts—difference, dominance, and disruption—play a central role in this comparative international law study and will be explored in more detail in the rest of this chapter.

I. Difference

International lawyers from different states, regions, or geopolitical groupings often have distinct backgrounds, influences, opportunities, incentives, networks, and spheres of influence. Instead of constituting a single, uniform field, international law is an amalgamation of multiple, partially overlapping fields. Debates about fragmentation have focused on divisions within international law with respect to different subfields (like trade and human rights) and different international institutions (like the International Court of Justice and the International Tribunal for the former Yugoslavia). Comparative international law focuses attention on analogous divisions among international lawyers located in, coming from, or educated in different states, regions, or geopolitical groupings.

International lawyers typically exist at the intersection of two communities: a transnational community of international lawyers and a domestic community of national lawyers. When international lawyers are compared with their domestic peers, their international orientation often seems obvious. But comparing international lawyers from one state with their international peers in other states makes it possible to identify certain national differences as well. These differences affect how international lawyers in different states engage with the field, including which issues they treat as important, how they find and interpret international law, what assumptions they make, what questions they consider to be clear-cut or open to debate, and what arguments they view as persuasive. The approaches of international lawyers in China, for example, differ in significant ways from those of international lawyers in the United States.

Using a comparative international law approach to identify differences helps to challenge international lawyers’ romantic understanding of themselves and their field as universal and cosmopolitan. Introducing a comparative element helps to disrupt this assumption by showing that other communities of international lawyers—often in different states or geopolitical regional groupings—approach international law in different ways. This knowledge encourages international lawyers to be more reflective about the limits to their understanding of and approach to the “international,” and how much the way they have been socialized, the networks they have developed, and the sources on which they rely have led to or reinforced these limitations.

By ascertaining these differences, silos and disconnects within the field can be identified. The divisible college of international lawyers was aptly illustrated by the entirely different responses by Western international lawyers, on the one hand, and Russian international lawyers, on the other hand, to Crimea’s annexation by, or reunification with, Russia in 2014.14 These two groups spoke in different languages, assumed different

14 See Chapter 5.II.A.
accounts of the facts, had different understandings of the content of international law, and reached diametrically opposed conclusions. The former condemned Russia’s “illegal” annexation of Crimea, whereas the latter celebrated Crimea’s “self-determination” and decision to reunite with the mother country. The members of each group often spoke internally to and referenced each other in self-reinforcing echo chambers, instead of communicating with the other group and seeking to bridge the divide between them.

Although not all lawyers from the same community are likely to approach international legal questions in an identical way, the contours of the “mainstream” debate in different communities can differ in significant ways. To understand how these national divisions come about, it is helpful to be aware of how these different communities are constituted. Russian international lawyers have frequently completed all of their legal education in Russia, primarily using Russian-language materials. They have their own international law textbooks, they publish the vast majority of their academic works in Russian journals and in the Russian language, and most of the authorities they cite are Russian. Even though they may enjoy more academic freedom in the post-Cold War period than during the Cold War, dissent can still be difficult, particularly since Russia began to take a resurgent stance on the international scene and on issues (like Crimea) that strike at core national interests. On the other side of the equation, few Western international lawyers speak Russian or study in Russia. Western international lawyers have their own textbooks, publish the vast majority of their articles in Western journals in languages such as English and French, and primarily cite other Western scholars. Both sets of lawyers are also likely influenced by the media on which they rely, and Russian and Western reporting on Crimea differed significantly. Not surprisingly, these communities of international lawyers find few points of commonality and connection, despite ostensibly operating in the same field.

A somewhat different picture emerges if one looks at the reactions of Chinese and Western international lawyers to the South China Sea arbitration by a tribunal constituted under the UN Convention on the Law of the Sea (UNCLOS) in 2016. Chinese scholars were virtually unanimous in rejecting the tribunal’s jurisdiction, though a handful dissented on whether the Chinese government had adopted the right approach in refusing to appear before the tribunal. Western international lawyers split on whether the UNCLOS tribunal was right to take jurisdiction, though they have tended to be critical of China’s failure to participate and to reject China’s claim that it is not bound by the arbitral decision. The divergent approaches between the Chinese and Western international lawyers reflect many differences in their processes of socialization, including in the way their respective governments and media portrayed the arbitration and the case’s underlying merits. In comparison with the Crimean case, however, one striking difference is how many Chinese international lawyers are writing about the case in English-language outlets, permitting diverse perspectives to be considered within a single debate. The same point is not true in reverse for a variety of reasons.

15 See Chapter 5.II.B.
The ability and motivation of Chinese international lawyers to bridge this divide owes much to their language skills, educational backgrounds, and incentive structures. It is common for high-profile Chinese international lawyers to have completed a second or third law degree abroad, usually in a Western state, thereby building their language skills and transnational connections. They are given incentives to publish in foreign journals and in foreign languages. Their outwardly oriented advocacy aligned with the Chinese government’s worldwide public relations campaign to popularize its viewpoint on the South China Sea. At the same time, the language abilities and incentive structures of Western scholars, along with explicit and implicit censorship by Chinese authorities, resulted in a more limited presentation of diverse viewpoints in domestic Chinese debates.

These examples reflect the more general reality that international lawyers in different states, regions, or geopolitical groups often form separate, though partially overlapping, communities, each with its own distinct socializing forces. That does not mean that all international lawyers within a state will have identical backgrounds and beliefs. For instance, this study highlights differences between the “Old Guard” of highly nationalistic Russian international law academics and a new wave of more transnationally oriented younger lawyers, many of whom do not join the academy. But, as seen above, international lawyers within a given state are often subject to similar influences, and these influences frequently differ across states. As a result, distinct communities of international lawyers frequently develop, with similar assumptions and approaches that often exist within, but not necessarily between, groups. For instance, American international lawyers may be more liberal or conservative, but they are often also distinctly American in some of their assumptions, preoccupations and approaches. This work focuses on some of the major patterns that distinguish international lawyers in different states from one another. It also emphasizes that where significant intragroup dialogue occurs but extragroup dialogue is limited, self-reinforcing echo chambers can develop that give international lawyers from particular communities an inflated sense of the universality of their own approaches, while limiting opportunities for understanding and engagement among those holding diverse perspectives.

II. Dominance

International law does not exist only within states in a way that can be studied on a cross-national basis. The field is transnational in the sense that it is partly constituted by flows of people, materials, ideas, and approaches moving across borders. It is also sited in various transnational endeavors, like international organizations, international tribunals, international journals, and international blogs, where people from different national communities come together to produce, interpret, analyze, and apply international law. Yet if one asks how the “international” is constructed in these transnational flows and transnational sites, it turns out that they are shaped by certain forms of national and regional dominance that betray some of the field’s claims to universality.

The ideal of international law suggests that it is constructed by drawing equally on people, materials, and ideas from all national and regional traditions. But in reality some national and regional actors, materials, and approaches have come to dominate much of
the transnational field and international lawyers’ understanding of the “international.” For instance, international lawyers who work in or appear before international courts and tribunals tend to be nationals of Western states in general, and of a handful of those states in particular, often the United Kingdom, the United States, and France. Similarly, national case law that is cited in the decisions of international courts and tribunals, and imparted by international law textbooks, is often issued primarily in Western states, particularly the United States and the United Kingdom.

The dominance of people, materials, and approaches from particular national and regional traditions within the field is consistent with the findings of sociologists of globalization, like Boaventura de Sousa Santos, who defines globalization as “the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.” Ideas and materials from certain states that are successfully globalized by gaining acceptance throughout all or much of the world may be said to experience “globalized localism.” This process occurs on a horizontal level when ideas and materials move between states, and on a vertical level when certain national or regional approaches are adopted and applied at various transnational sites under the guise of being “international.”

Although no state has a monopoly on defining international law, some powerful Western states function as international law exporters because they can successfully transport some of their national approaches to the international sphere in the name of “international law.” By contrast, more peripheral states may experience “localized globalism,” whereby local conditions are restructured in response to global influences. These states function more like international law importers than exporters, though some hybridization of the international and domestic is typical. Some states may also operate in between, having enough strength to withstand some of the forces of localized globalism but not enough to affect globalized localism. These states may lack the power to globalize their localisms altogether, though they may be influential in asserting their approach to international law within a particular region, geopolitical group, or linguistic community.

A good example of globalized localisms and patterns of dominance can be found in the language of international justice. Many international courts employ two working

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16 See Chapter 5.III.
17 See Chapter 3.IV.
18 See Chapter 4.IV.
20 De Sousa Santos, supra note 19, at 179.
21 Id.
languages: English and French. This policy plays a significant role in determining which international lawyers are likely to be selected as judges, arbitrators, advocates, and staff. It privileges nationals of states whose national language is one or the other (for example, the United Kingdom, the United States, and France) and disadvantages nationals of states whose national language is neither one (for example, China and Russia). Language becomes an important filter for which nationals, and thus which national approaches, gain greater access to influencing the “international.” Such access helps to explain why some international tribunals rely predominantly on English-language sources and, to a lesser extent, French-language sources in reaching their decisions.23

At the same time, many less formalized international forums are increasingly embracing English as the field’s lingua franca. This trend can be seen in the prevalence of English in investment treaty arbitrations and awards, national and transnational journals and yearbooks of international law, and international law blogs. It can lead to the particular privileging of Anglo-American actors, materials, and approaches. As Carlo Focarelli has argued:

Language is the key to the construction of reality, including the reality of international law. The fact that the lingua franca today is English implies that the English logic, worldview, and preferences are more likely to prevail and shape what “reality” is taken to mean. The dominance of the English language forces the international law debate into a specific mode of thought, which is far from being as universal as English itself apparently is, and reinforces the Western bias in its Anglo-American variant.24

Using a comparative international law approach to identify the existence of certain forms of dominance encourages international lawyers to think about the power dynamics that permit some national and regional approaches to transcend their borders and go global. Focusing on the origins of people, materials, and ideas in transnational flows and sites reveals how globalized localisms often skew toward Western approaches in general and Anglo-American approaches in particular. This perspective helps to illuminate criticisms of Western bias in the composition of international institutions and construction of international law. It also raises important questions about whether privileging a single language or a handful of languages does more to foster diversity in terms of which actors are benefited and which sources are relied upon.25

Identifying these patterns encourages international lawyers to take a more reflexive approach, to consider how they are positioned in relation to the “international” and how this posture might influence their perceptions of the field’s universality and legitimacy. International lawyers work with a discourse that claims universality, but they are

24 Focarelli, supra note 1, at 93.
25 See Chapter 5.III.
likely to see that world through the prism of their location and thus understand international law differently depending on where they are situated. For lawyers in certain powerful Western states, international law often involves the export of domestic concepts, so they do not experience a strong disconnect between the local and the international. By contrast, international lawyers in other states are much more likely to be aware of this disconnect and to experience international law as a foreign, imported—and possibly illegitimate—construct.26

III. Disruption

Examining these observations of difference and dominance together, a comparative international law approach encourages international lawyers to think about the ways that international law, and their understandings of it, may be disrupted by a variety of factors, including technological innovation, changes in domestic political preferences, and shifts in geopolitical power.

Technological innovations, such as the creation of the Internet and the improvement of translation software, have the power to permit communication among people who speak different languages and come from far-flung parts of the world. These innovations, however, are often used by people primarily to connect with those with whom they already agree, which may reinforce particular narratives by creating echo chambers.27 The movement of sources online has made it easier for international lawyers to access foreign materials, while improving translation software will enable more lawyers to understand such sources. Yet even though technology may assure greater access to diverse sources, it often also forms a conduit for already privileged sources to achieve even greater reach and influence throughout the world.

In terms of domestic political preferences, debates now occurring in many states about the relative merits of globalization and nationalism and recalibrations of the balance struck between the two may have an impact on some of the dynamics studied in this book. One example of these changes is likely to be shifts with respect to transnational flows of people. In the 1990s and early 2000s, the world witnessed a steady increase in people crossing borders in order to study or work in foreign states. These transnational flows raised the potential for breaking down some of the barriers between different national approaches, while also providing pathways for certain national approaches to exercise outsized influence beyond their borders. For instance, the attractiveness of elite US and UK universities as destinations for transnational legal education resulted in them having diverse student bodies and enabled them to extend the influence of their Anglo-American approaches to students coming from around the world. But the pushback against globalization in a series

of states reflects a recalibration in favor of nationalism that seems likely to restrict, at least
to some extent, some of these transnational flows going forward. This may take the form
of stricter immigration rules or reduced demand where anti-immigration sentiments make
certain states less attractive destinations for foreign students.28

The writing of this book was completed in late 2016, before Donald J. Trump assumed
the presidency of the United States and before the United Kingdom negotiated its exit
from the European Union (Brexit). At the time of writing, it remains too early to tell
how the United States will engage with the international legal system during Trump's
presidency, what changes US foreign policy might bring about to the post-World War II
international order, and whether US actions will result in increasing divisions within the
West. It also remains to be seen whether and on what terms the United Kingdom leaves
the European Union and what effects this might have, such as fracturing the United
Kingdom or putting greater pressure on (or re-enlivening the commitment of other states
to) the European project. Although it is too early to tell how these developments might
change the international legal field in 2017 and beyond, it looks likely that 2016 will prove
to be a watershed year in terms of these sorts of disruptions, particularly given the seismic
shifts that have occurred in two states—the United States and the United Kingdom—
that have been leading proponents of the post-World War II international order.

Upheavals both within the West and among various Western and non-Western pow-
ers appear imminent. Within the West, Trump has the potential to cause divisions over
numerous issues, from his claimed belief in the utility of torturing terrorists to his doubts
about the usefulness of the North Atlantic Treaty Organization to his denial of the exist-
ence of climate change. This has led to wariness from other Western leaders. For instance,
Chancellor Angela Merkel of Germany responded to Trump's election with a reminder that
"Germany and America are bound by their values," such as democracy, freedom, the respect
for the law and the dignity of human beings, before providing the conditional endorsement
that "On the basis of these values I offer the future president of the United States, Donald
Trump, close cooperation."29 Similarly, the Brexit negotiations have the potential to further
fracture and sour relations between the United Kingdom and its European neighbors. This
is important because a divided West is less powerful than a united one.

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 atten-
tion being paid to the practices of certain non-Western states, most notably China. For
instance, while President Barack Obama urged the United States to ratify the Trans-
Pacific Partnership Agreement (TPP) on the basis that "if we don't write the rules, China
will,"30 Trump broke with decades of US promotion of free trade by declaring the inten-
tion to withdraw from the TPP as soon as he assumed office.31 As a result, increased

28 See Chapter 6.
29 Carol Giacomo, Angela Merkel's Message to Trump, N.Y. TIMES, Nov. 9, 2016.
30 See, e.g., Gerald F. Seib, Obama Presses Case for Asia Trade Deal, Warns Failure Would Benefit China, WALL ST.
    J., Apr. 27, 2015.
31 See Donald J. Trump, A Message from President-Elect Donald J. Trump, YouTube (Nov. 21, 2016), https://
youtube.be/7xX_KaStFT8; see also Demetri Sevastopulo, Trump Vows to Renounce Pacific Trade Deal on First Day
attention is being focused on China’s approach to global governance and various forms of regional economic governance in Asia, like the Regional Comprehensive Economic Partnership and the Free Trade Area of the Asia-Pacific. This may well result in China becoming a stronger advocate for economic globalization than the United States or new alliances being formed, such as one between China and the European Union on the importance of addressing climate change.

Despite much uncertainty in the world, what does appear to be clear is that the locus of geopolitical power is shifting from unipolarity to greater multipolarity, and the era of Western-led international law appears to be giving way to an era of greater competition, and increased need for cooperation, among various Western and non-Western states. After the relative hegemony of US and Western international law approaches in the post-Cold War period, the world is entering into what I refer to as a “competitive world order” in which divisions are becoming more apparent within the West and power is diffusing from West to East and from North to South. In the coming decades, the international order is unlikely to be dominated by Western, liberal democratic states to the same extent as in recent decades. In this new phase, it will be increasingly important for international lawyers from different states and regions to understand the perspectives and approaches of those coming from unlike-minded states, as power will be disaggregated among a larger number of more diverse states.

Interest in comparative international law is likely to wax and wane with changes in geopolitical power. A generation ago, conferences were organized around Western and Soviet approaches to international law. It made sense for international lawyers to focus on these competing approaches during the Cold War because the world was bipolar, consisting of two superpowers with radically different understandings of and approaches to international law. By contrast, little attention was paid in the 1990s and early 2000s to distinct national approaches to international law, let alone to the idea of comparative international law more generally. After the fall of the Berlin Wall and the emergence of the United States as a unipolar power, theories about the End of History reflected and

34 For more discussion of the factors leading to and evidencing this shift, see Chapter 4.IV.
reinforced the sense that Western approaches had won out,\textsuperscript{37} which resulted in a precipitous drop in interest in Russian approaches. The 1990s was a time of renewed optimism in the West about the possibilities of universal international law and the transformative potential of international organizations, such as the UN Security Council and international courts. It was also a time of ascendancy of a particularly Western, liberal vision of international law.

Yet the distribution of geopolitical power has shifted once again.\textsuperscript{38} From the bipolarity of the Cold War to the unipolarity of the post-Cold War era, the world is now moving into a competitive world order where power will increasingly be shared by a variety of Western and non-Western states, heightening both competition and the need for coordination and cooperation by various states. In terms of economic power, the international system has moved past dominance by Europe and the United States to greater multipolarity with the rise of major non-Western emerging economies (sometimes referred to as the “rise of the rest”).\textsuperscript{39} In terms of security, many Western commentators have declared that the “end of history has ended” and “geopolitics is back,” focusing in particular on increased regional assertiveness by Russia in Crimea and Georgia, and China in the South and East China Seas.\textsuperscript{40} Both individually and collectively, more states, including non-Western states, are making themselves heard on the world stage, such as by the Group of Twenty’s replacement of the Group of Seven and China’s establishment of the Asian Infrastructure Investment Bank. Meanwhile, the ability of Western states to act in a unified and decisive way on the world stage is being limited by the existence of wedge issues, such as the Brexit negotiations and climate change, and domestic problems, such as sluggish economies, popular discontent over increasing economic inequality, and rising political polarization.

Powerful states often seek to impose their own views of international law so that if the international system contains multiple great powers, each may offer a distinct and competing version of the subject.\textsuperscript{41} Whether and when their approaches result from different national traditions, from different national interests, or from a combination of the two is not easy to tell. But the diffusion of power between Western and non-Western states, as well as increased divisions within the West, means that Western states will face more checks and balances in advancing their strategic and normative agendas, whereas various


\textsuperscript{38} See generally Chapter 6.


non-Western powers will be better equipped to promote their national traditions, interests, or narratives, either singly or collectively. This conflict and competition is likely to take place among many constellations of states that will vary across fields and issues, as evidenced by the different patterns appearing in subfields like the use of force and international human rights, trade law, and environmental law.

It may well be that the biggest challenges to the existing international order will come from the United States under the Trump presidency and from the more widespread pushback against globalization being witnessed in various Western states. These challenges have the potential to significantly destabilize the existing international world order, but they remain to be played out in 2017 and beyond and are thus not the focus of this book. Instead, I explore the challenges to the Western-led liberal international order that have been posed since around 2008 by China, as an emerging non-Western superpower, and Russia and China, as an evolving though loose coalition of non-Western, authoritarian great powers. This choice should not be taken to mean that China and Russia agree on their approaches to international law in all respects or that the challenges these two states are posing to the West are the only or most important challenges to the existing world order. Neither conclusion would be warranted. China and Russia are often more united in what they stand against—Western hegemony—than in what they stand for, as evidenced by their different approaches on key issues, such as international economic law and climate change. But challenges to the Western-led international order by non-Western states form a significant part of this comparative international law story and are thus worthy of attention.

In June 2016, Russia and China issued a joint declaration, the Promotion of International Law, setting out the principles that guide their approach to international law.\(^42\) These principles, which reflect many of the themes and ideas that permeate their international law textbooks, privilege Westphalian notions of the importance of state sovereignty, sovereign equality, territorial integrity, and nonintervention over other norms such as human rights and democratic participation. These powers emphasize the centrality of states in shaping international law and constraining nonstate actors, rather than the reverse. They have a shared interest in regulating certain global commons, such as cyber-space, the seas, and outer space, so as to limit the freedom of more powerful states, like the United States. Although China and Russia differ in significant ways in their interests, capabilities, and approaches, they are acting both individually and collectively to challenge some of the Western, liberal approaches to international law that were championed by the United States and some of its allies during the post-Cold War period.\(^43\)

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\(^43\) David Shambaugh, CHINA GOES GLOBAL: THE PARTIAL POWER 83 (2014) (“China and Russia . . . have forged a geostrategic axis and voting bloc in the UN Security Council. The heart of this axis is anti-Americanism and anti-interventionism. . . . Both share a strong opposition to coercion and the use of force in international affairs, and both cherish state sovereignty as the most basic principle of diplomacy.”).
These differences are playing out in a variety of disputes within the international legal field. For instance, competition between the sanctity of state sovereignty and nonintervention, and the protection and promotion of human rights and democracy, has featured in debates about unilateral humanitarian intervention and the doctrine of the “responsibility to protect,” especially in relation to China and Russia’s decision to veto three Western-sponsored Security Council resolutions on Syria. Competition about how to strike a balance between treating the sea as a “global commons” subject to freedom of navigation and protecting the interests of coastal states is fueling clashes between China and the United States over the operation of military ships and aircraft within China’s exclusive economic zone. And a growing divide has been emerging about how best to regulate the Internet and govern information security and cybersecurity. Russia and China advocate a sovereignty-based multilateral treaty that gives states strong national control over the Internet, whereas a variety of Western states, including the United States and the United Kingdom, favor a multistakeholder process that treats the Internet as a global commons where freedom of speech and the free flow of information are protected.

Western/non-Western cleavages do not exist on all issues. For instance, even though the United States has traditionally been the primary proponent of free trade, China has actively embraced trade and investment treaties and regularly makes use of the World Trade Organization’s system of dispute resolution. Whether the United States continues to champion free trade in the same way going forward remains to be seen. The distance between the approaches of some of these states has also narrowed over time. For example, China’s hostility to humanitarian intervention has lessened and become more nuanced in recent years, while Russia invoked the doctrine with respect to Crimea despite its earlier criticism of the concept. But to gain a better understanding of these different approaches, it is important for international lawyers to diversify their sources and networks with a view to improving their knowledge of how international legal norms and regimes appear from different perspectives and through different eyes. Whether or not differences of outlook are held genuinely or promoted strategically, lawyers ought to be aware of the diverse frameworks and narratives through which international law events are understood and arguments are made. In emphasizing the importance of understanding diverse positions, I am not advocating for or against particular approaches or claiming that all approaches are equal. Rather, understanding diverse perspectives will enable international lawyers to comprehend more fully the development of international law as a transnational field, both today and in the future.

In seeking to develop such understanding, international lawyers also need to be aware that some transnational flows are likely to be asymmetrical, leading to different patterns of diffusion and knowledge. For instance, elite Chinese international lawyers are far more likely to study in the United States than vice versa. Thus, US materials and approaches are more likely to be found in China than the reverse (the power of diffusion), but Chinese international law academics are more likely to exhibit broad comprehension of US perspectives on international law than the reverse (the power of knowledge). As China becomes an increasingly important international player, it will probably want to disseminate its approaches to international law more widely, while international lawyers in the
United States will need to deepen their knowledge of China’s interests, interpretations, and approaches.

As the last point illustrates, patterns of difference and dominance are dynamic. The content and structure of international law typically lags behind changes in international power, and international law teaching typically lags behind changes in international law. The continued power of the United Kingdom and France in various international law fields owes much to their status as former great colonial powers, despite both having undergone significant declines in the past century. The same is bound to apply to the United States in the coming decades, as it remains singularly powerful in many areas—a first among equals, even if no longer a unipolar power. Yet the rise of non-Western powers in general, and China in particular, is likely to lead to changes in some of the Western-dominated international rules and institutions that have defined the field to date. This is even more so if some of the existing Western powers come to doubt these institutions or are unable to work together in a cooperative way. International law stands at an important inflection point. If international lawyers wish to equip themselves and their students with a grasp of how changing geopolitical power is likely to affect the form and substance of international law, they need to delve more deeply into the understandings of, and approaches to, international law of lawyers from a variety of unlike-minded states. They also need to be sensitive to how the approaches to international law of particular states might vary over time, including in response to changes in domestic preferences and shifts in geopolitical power.

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44 Yasuaki Onuma, A Transcivilizational Perspective on International Law 32 (2010) (predicting that "a State-centric and Western-centric international society of the twentieth-century will become a multi-polar and multi-civilizational global society in the twenty-first-century. With this change, international law will change.").