
Comparative International Law, Foreign Relations Law, and Fragmentation

Can the Center Hold?

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This chapter considers the rise of foreign relations law as a way of thinking about the legal dimensions of international relations. It connects this development to the emergence of comparative international law and anxieties about fragmentation in international law. Each of these fields challenges conventional ways of thinking about international law and thus seems to bolster those who would dismiss international law as irrelevant or ineffectual. But these challenges instead may reinvigorate international law. As a normative matter, none of these emerging fields needs be unwelcome.

Foreign relations law focuses on the domestic institutions that conduct a state's relations with foreign actors, whether states, international organizations, or foreign persons. One of its tasks is to intervene between international and domestic law.¹

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1. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 188 (1972):

It is principally the President, "sole organ" of the United States in its international relations, who is responsible for the behavior of the United States in regard to international law, and who participates on her behalf in the indefinable process by which customary international law is made, unmade, remade. He makes legal claims for the United States and reacts to the claims of others; he performs acts reflecting views on legal questions and justifies them under the law, in diplomatic exchange, in judicial or arbitral proceedings, in international organizations or in the public forum. Congress, state legislatures and even state officials also impinge on foreign relations governed by law, for example in determining and giving effect to the rights of aliens in the United States or of foreign vessels off our coasts; and Federal and state courts are major makers of international law when they determine what that law requires in order to decide a

This function makes us think about international law as embraced and implemented by states (or not), rather than the workings of the international community (whatever that may be). Foreign relations law takes us at least one step away from the conventional conception of international law as a uniform and universal body of rules and standards. At the most general level, foreign relations law provides part of an explanation for the similarities and differences in the practice, methodology, and ideology of international law among states that comparative international law studies.

Some see the contemporary version of foreign relations law as an attempt to undermine the significance and power of international law. Perhaps the same critique could be directed at comparative international law as well as at the fragmentation literature. This chapter takes up the normative challenge. It defends both foreign relations law and comparative international law as ways of ensuring that international law remains relevant to problems of international cooperation and the advancement of human flourishing in an increasingly challenging world.

The discussion proceeds in three sections. The first describes contemporary foreign relations law as a distinct field that emerged in the United States in the late 1990s and developed independently in parts of the British Commonwealth and Europe. It traces the parallels with and differences between foreign relations law and comparative international law. The second section considers the possibility that these complementary trends, as well as new concerns about fragmentation in international law, pose a threat to international law as conventionally conceived. Are all three of these developments different aspects of a general turn away from international law? The third section responds to these concerns. It argues that all these challenges may strengthen international law as a resilient and helpful means for meeting the growing and greater demands that the contemporary world places on it.

I. THE RISE OF FOREIGN RELATIONS LAW

Foreign relations law encompasses the legal standards and rules that govern dealings between a state and outsiders, whether international actors, other states, or nonstate foreign actors.² Every state, as well as supranational organizations that exercise sovereignty, might be thought of as having its own variety of foreign relations law. Part of this law's job is to define and implement the relationship between international law and a state's domestic legal system. As definition means limitation, foreign relations law necessarily qualifies the impact of international law on domestic law. Emphasis on limitations, rather than empowerment, has characterized the

case before them. But these other actors play on the domestic scene only; the President represents what they do to the rest of the world and can seek to justify them under international law or confess violation.

2. See Curtis A. Bradley, *What Is Foreign Relations Law?*, in *COMPARATIVE FOREIGN RELATIONS LAW* (Curtis A. Bradley ed., forthcoming 2018) ("For purposes of the book, the term is used to encompass the domestic law of each nation that governs how that nation interacts with the rest of the world.")

contemporary version of the field, both academic and practice, that has emerged over the last two decades.

The term goes back at least to the 1950s, when the American Law Institute (ALI) launched the first Restatement of the Foreign Relations Law of the United States (due to odd ALI naming conventions, this was called the Second Restatement, and its successor the Third).³ Both the Second and Third Restatements presented international law as uniform and universal. They explored the peculiarities of the ways in which the United States embraced and fulfilled its international obligations, including the portals through which international law entered the domestic legal system. But neither project suggested that domestic legal structures, constitutional or otherwise, might affect what we thought of as international law.

Even so, the Third Restatement contained the seeds of contemporary foreign relations law, if only in the dialectical sense. It proposed a robust role for US judges in the exposition and implementation of international law, and indicated that the application of international law could override various kinds of domestic law, including earlier-enacted statutes and all law adopted by the states of the Union.⁴ It even hinted at the use of international law as a means of modifying the country's constitutional settlement.⁵ Its project, and to a large extent its achievement, was to make international law influential in the US legal system in a way that it had not been before.

These moves had two significant consequences for the field of foreign relations law. First, the Third Restatement provoked challenges to the ways in which it characterized US law, in particular its account of the points of entry of international law into the domestic legal system.⁶ Second, by inviting US judges to apply international law, it led them to make claims about the content of international law. Because

3. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT THIRD]. Louis Henkin, a professor at Columbia Law School, was the principal reporter of the Third Restatement, assisted by Andrea Lowenfeld, a professor at NYU Law School, and Louis Sohn and Detlev Vagts, then professors at Harvard Law School. Henkin's earlier treatise, *supra* note 1, focused more on U.S. domestic legal institutions, specifically the Constitution, and less on international law as such. For a discussion of the evolution in Henkin's thinking between the publication of his treatise and his work on the Restatement, see Paul B. Stephan, *Courts, the Constitution, and Customary International Law—The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33 (2003).

4. See RESTATEMENT THIRD, *supra* note 3, §§ 111(1) & comments c–e, reporters' notes 3–5; 115(a)(2) comments c–e.

5. *Cf. id.* §§ 701–02; 721 comments b, k; 722 comments a–b.

6. An early instance, which provoked an extended debate among specialists, was Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). A search of the Westlaw database indicates that US federal courts have cited this piece at least 15 times. Judicial criticism of the Third Restatement includes *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., dissenting) (characterizing project as “proposal for change rather than a restatement of existing doctrine”); *United States v. Yousef*, 327 F.3d 56, 99–103 (2d Cir. 2003) (criticizing Restatement Third as advocacy rather than reflecting state practice).

US judges are generalists and most lack experience with the discipline, some were induced to assert interpretations that foreign observers (and others) largely found implausible.⁷ These events drove the dialectic of critique and opposition.

Foreign relations law as a field that expresses this critique emerged in the United States around the turn of the century.⁸ The dispute over the domestication of international law gained even greater significance with the 9/11 attack and the US government's response. The law of war and the new meme of lawfare suddenly became a matter of general interest and considerable consequence.⁹ New courses on foreign relations law appeared on the curriculum of the leading law schools, bolstered by new casebooks and treatises.¹⁰ Scholars began to distinguish themselves as experts in foreign relations law, rather than simply as international lawyers. Government lawyers as well as the private bar began to focus on the technicalities of translating international law into domestic legal obligations, often to resist claims about international law emanating from nongovernmental actors.¹¹

7. *E.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 63, ¶ 48 (Feb. 14) (joint separate opinion by Higgins, Kooijmans, Buergenthal, JJ.) (indicating that US judicial practice regarding universal jurisdiction “has not attracted the approbation of States generally”); *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, ¶ 20 (US decisions on universal jurisdiction do not “express principles widely shared and observed among other nations.”)

8. A key moment in the emergence of this field was a conference organized by Curtis Bradley, then at the University of Colorado, later published as a special issue of the University of Colorado Law Review. *Symposium—A New American Foreign Affairs Law*, 70 U. COLO. L. REV. 1089 (1999). For Bradley's later account of the field, see CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2d ed. 2015).

9. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–613 (2006) (plurality opinion); BRUCE A. ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); SAIKRISHNA PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007); *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* (Mark Tushnet ed., 2005); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145 (2003); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

10. *E.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (1st ed. 2003); PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* (2002). Earlier casebooks on national security law overlapped to some extent with these later works, but had less of a focus on US judicial practice. An early outlier was THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* (1987), the most recent (fourth, 2012) edition of which is authored by Michael J. Glennon, Sean D. Murphy, and Edward T. Swaine. This book, like Henkin's 1972 treatise, concentrates more on US legal institutions as such and less on foreign relations law as a constraint on the internalization of international law.

11. *See, e.g.*, Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10–1491); Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03–339).

An important part of the foreign-relations-law project focuses on particular domestic legal debates, such as the nature and scope of federal common law, the effect of the supremacy clause on treaties, and the proper defaults for judicial interpretation of statutes and treaties. These tasks, however, inevitably invite a general invidious comparison. A key move in the turn to foreign relations law involves skepticism about, if not outright disparagement of, international law.

The rules of international law, these scholars argue, can be both indeterminate and illegitimate.¹² They can be indeterminate because the compromises necessary to achieve agreement across wide divides of culture and interest rob the rules of clarity and specificity. Rather, too many function as delegations to downstream decision-makers to do what their judgment deems best. Moreover, too many are illegitimate because they rest on the claims of domestic and international bureaucrats and civil-society advocates, rather than democratically accountable political actors. Arguments for narrowing the portals for international law thus rest in part on concerns about international law itself, at least as a source of rules that independent judges might apply in concrete cases.¹³

Pushing back against international law is not, of course, the only possible response to these charges. Within the traditional international law field, many contemporary scholars seek to reform international lawmaking to address these concerns. They draw on both international human rights law and domestic concepts of administrative due process to propose the fashioning of a body of global administrative law.¹⁴

The point here, however, is that most contemporary foreign-relations-law scholars do not make this move. Rather, they see the shortcomings of international law as we find it as a reason for clarifying and strengthening the domestic institutions that filter international law as it seeks entry into domestic law. Whether this is the wisest choice is not my concern. What matters for the purpose of this chapter is that contemporary foreign relations law emerged bearing a critique of international law.

The latest Restatement of Foreign Relations Law, of which I am a co-coordinating reporter, does not disparage international law. It does, however, emphasize the domestic sources of the law in question. For example, the current preliminary draft does not repeat claims made in the Third Restatement about the existence of particular rules of international law said to limit a state's exercise of prescriptive and adjudicative jurisdiction. Rather, it seeks to embrace these limits but ground them

12. See, e.g., BRADLEY & GOLDSMITH, *supra* note 10, at 857–59.

13. A concrete expression of this skepticism is Section 6(a)(2) of the Military Commission Act of 2006, 10 U.S.C. § 948a (2006), which provides: “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [18 U.S.C. § 2442(d), dealing with war crimes in conflicts governed by Common Article 3 of the Geneva Conventions].”

14. E.g., Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2009); *Symposium: Through the Lens of Time: Global Administrative Law After 10 Years*. 13 I. CON: INT'L J. CONST. L. 463 (2015).

in domestic legal sources. The effect is not to diminish the stature of international law so much as to limit its domain.¹⁵

Developments outside the United States bear noting. In the British Commonwealth, foreign relations law also has emerged as a field. Its path and project, at first glance, seems different from what has happened in the United States. Rather than ousting international law, foreign relations law there seeks to fill a legal vacuum. Commonwealth scholars, in particular Campbell McLachlan, see it as a concept that shrinks the scope of the Crown Prerogative.¹⁶ The Prerogative, as traditionally conceived, walls off particular issues, especially the conduct of foreign relations, from judicial oversight. Foreign relations law seeks to bring judicially administered discipline to the conduct of foreign affairs.

Because courts and scholars have looked to international law as a source for the legal rules that can confine the Prerogative, Commonwealth foreign relations law seems to expand the role of international law, not limit it. Thus in *Kuwait Airways Corp. v. Iraqi Airways Co.*, the House of Lords refused to give legal effect to an Iraqi decree nationalizing the plaintiff's property.¹⁷ Even though normal rules of conflict of law would have required recognizing the validity of that decree, the court relied on customary international law governing the use of force to override the Iraqi confiscation.¹⁸

Commonwealth courts have recognized, however, that domestic law also can rein in the Prerogative, sometimes at the expense of international law. For example, the Supreme Court of the United Kingdom in *Treasury v. Ahmed* struck down the Treasury's implementation of the asset-freezing orders issued by the UN Security Council's Sanctions Committee. It held that the United Nations Act 1946, the enactment that fulfills UK obligations under the UN Charter, does not provide the executive unlimited discretion to apply a UN freezing order as it wished.¹⁹ Basic principles of respect for individual rights, including the imposition of a substantial evidentiary burden on the state to justify substantial restrictions of individual liberty and allowing an opportunity to challenge the order through effective judicial oversight, required negation of the orders. The United Kingdom's obligation under Article 25 of the Charter to implement Security Council resolutions, no matter what other international legal obligation might apply, did not justify interpreting the 1946 Act as giving the government carte blanche to enforce the UN orders in

15. Compare RESTATEMENT THIRD, *supra* note 3, §§ 401–03, 421–23 (1987) (ascribing limits on exercise of prescriptive and adjudicative jurisdiction of states to customary international law) with RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—JURISDICTION §§ 201–05, 301–06 (Tent. Draft No. 2, Mar. 22, 2016) (restating domestic law limits on exercise of prescriptive and adjudicative jurisdiction).

16. CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* (2014).

17. *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] UKHL 19.

18. *Id.* ¶ 22. See also *Habib v Commonwealth* (2010) 183 FCR 62 (Austl.) (breach of preemptory norms of international law precludes act-of-state defense).

19. *HM Treasury v. Ahmed* [2010] UKSC 2.

any manner it chose.²⁰ Most recently, litigation over the necessity of parliamentary approval of withdrawal from the European Union thrust the British courts into the center of a high stakes debate over the limits of the Prerogative.²¹

As *Ahmed* indicates, Commonwealth foreign relations law may limit, as well as expand, the domestic effect of international law. There are reasons to suspect that this tendency might gather force in the future. As judicial supervision of matters traditionally left to the executive becomes more common, these countries will encounter pressure to root that supervision in domestic rather than international law. The movement to reform international lawmaking from within, although a wonderful source of scholarship, is not likely to gain much traction in the world of affairs. As a result, the same concerns about the indeterminacy and illegitimacy of international law that influence US academics, policymakers, and judges will come to affect their Commonwealth counterparts. More generally, as judicial supervision becomes more consequential, one might expect national lawmakers to want more control, rather than less, over its content.²²

One can detect the most subtle of hints of this possible future in the decision of the Court of Appeals in *Mohammed v. Secretary of State*.²³ The court relied on jurisprudence developed by the European Court of Human Rights and embraced by the Supreme Court of the United Kingdom to rule that a person held by British troops for more than four days after his capture in combat in Afghanistan may maintain a cause of action in tort for violation of his rights. While asserting that earlier Supreme Court precedent demanded this outcome, the opinion seems to suggest that the result is problematic and that the Supreme Court would be well advised to revise its jurisprudence. The Supreme Court in turn ruled that the domestic act of state doctrine rendered the claim nonjusticiable. Its holding thus sidelined the asserted substantive rule of international law by disabling courts from applying it in the context of an overseas armed conflict.²⁴

Although the use of domestic foreign relations law to obstruct international law is furthest along in the United Kingdom, other European countries also have done this. Even supposedly monist countries such as Austria, Germany, and Italy see their constitutional law as a potential check on the enforceability of their international

20. *Id.* ¶ 76.

21. *Miller v. Ministry of Justice* [2017] UKSC 5.

22. A harbinger of increased political interest in these decisions was the ferocious press response to the High Court's decision in the Brexit controversy. Although the press received the Supreme Court's judgment with appropriate respect and deference, Lord Neuberger stated in a BBC interview that politicians did not speak out quickly or clearly enough to defend the High Court and that unjustified attacks on the judiciary undermined the rule of law. *Attacks on Judges Undermine Law—Supreme Court President*, BBC NEWS (Feb. 16, 2017), <http://www.bbc.com/news/uk-38986228>.

23. *Mohammed v. Secretary of State* [2015] EWCA Civ. 843.

24. *Rahmatullah (No 2) v. Ministry of Defense* [2017] UKSC 1.

commitments. The most vivid instance involves the 2014 decision of the Italian Constitutional Court striking down a statute meant to implement the International Court of Justice's judgment in *Jurisdictional Immunities of the State (Germany v. Italy)*. The Italian court ruled that Italy could not comply with the customary international law of sovereign immunity because its constitution guarantees access to civil justice in instances of grave violations of human rights, no matter what international law requires in the way of state immunity.²⁵

Finally, one might note that European (i.e., EU) law increasingly controls the way international law enters into the legal systems of the states that the EU comprises. The *Kadi* jurisprudence represents the most vivid instance of European law, as interpreted and applied by EU courts, interposing itself between states and their international legal obligations as conventionally conceived.²⁶ The ongoing controversy over the validity of bilateral investment treaties (BITs) in light of the *acquis communautaire* provides another example.²⁷ In each case, a kind of foreign relations law derived from European law filters the impact of international legal obligations on both the European Union and its constituent states.

II. THE THREAT TO INTERNATIONAL LAW

Anthea Roberts reports that a leftist international law scholar once characterized contemporary US foreign relations law as a conservative attempt to strip international law of its normative power and its capacity to promote human rights.²⁸ Valid or not, the claim captures something important in the contemporary US debate. Human rights lawyers were used to being the good guys, the people who harness law's expressive power to fight the greatest of evils on behalf of the most appealing of victims. Foreign relations law throws up roadblocks. If nothing else, foreign relations law tends to make it harder to invoke international law to protect persons from the worst excesses of the state. Because bad states may face few constraints other than those found in international law, this seems an intolerable outcome. The move is all the more upsetting because these barriers rest on arguments about judicial craft and the rule of law.

The political-agenda assertion does have more than a whiff of Manicheism in it. One may find its reductionism unhelpful. Without denying the basic insight that

25. Corte Cost., 22 ottobre 2014, Foro it. 2015, I, 1152 (It.), translated in *Judgement No. 238—Year 2014*, CORTE COSTITUZIONALE, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99 (Feb. 3); Paul B. Stephan, *The Political Economy of Jus Cogens*, in *THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE* (Alberta Fabricotti ed., 2016).

26. Case C-402/05, *Kadi v. Council*, 2008 E.C.R. I-6351; Case C-584/10, *Kadi v. Council*, 2013 E.C.R. I-518.

27. See, e.g., Case C-118/07, *Commission v. Finland*, 2009 E.C.R. I-10, at 899.

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

foreign relations law complicates the international human rights project, I want to explore other ways that the move threatens international law generally. This inquiry exposes the link between contemporary foreign relations law, comparative international law, and fragmentation in international law.

First, as a doctrinal matter foreign relations law operates in direct opposition to the fundamental principle of international law that domestic law cannot excuse a failure to obey international law.²⁹ The salience of this principle is, if anything, more important in the contemporary world, as a growing number of renegade states have enacted domestic measures to thwart their international legal obligations. To the extent that more reputable states invoke their domestic law of foreign relations to justify the dishonoring of their obligations, states already inclined to undermine the rule of law gain greater freedom of movement.³⁰

Second, the challenge posed by foreign relations law, as well as by the rise of comparative constitutional law and anxieties about fragmentation, differs significantly from earlier critiques of international law. For much of the last century academic critics portrayed the field of international law as an undemocratic mask for particular interests. In the recent past such charges emanated from groups such as the Critical Legal Studies (CLS) and the Third World Approaches to International Law (TWAIL) movements.³¹ Earlier expressions of the same impulse include Soviet scholars' initial position that existing international law represented only the reified power grabs of capitalists and imperialists.³²

29. See, e.g., Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. Article 46 of that instrument recognizes an exception to this principle in instances where domestic law deals with the competence to make a treaty.

30. To consider just one example, a recent decision of the Constitutional Court of the Russian Federation handed down at the government's request an advisory opinion upholding the general principle that Russia could rely on its Constitution as a basis for disregarding certain international legal obligations. The court cited the practice of the Constitutional Courts of Austria, Germany, and Italy, as well as the Supreme Court of the United Kingdom, as support for its decision. *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iulya 2015 g. No. 21-P* [Judgement of the Russian Federation Constitutional Court of July 14, 2015]. The Russian legislature responded with legislation requiring domestic judicial review of all orders of international human rights courts. *Federal'nyi Zakon Rossiiskoi Federatsii o Vnesenii Izmenenii v Federal'nyi Konstitutsionnyi zakon o Konstitutsionnom Sude Rossyiskoi Federatsii* [Federal Constitutional Law of the Russian Federation on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation], *ROSSIISKAIA GAZETA* [ROS. GAZ.] Dec. 16, 2015.

31. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT'L L.J.* 1 (1999); David Kennedy, *A New Stream of International Legal Scholarship*, 7 *WIS. INT'L. L.J.* 1 (1988); Makau Mutua, *What Is TWAIL?*, 94 *AM. SOC'Y INT'L L. PROC.* 31 (2000); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 *HARV. INT'L L.J.* 81 (1991).

32. See, e.g., E.A. KOROVIN, *MEZHDUNARODNOE PRAVO PEREKHODNOGO VREMENI* [INTERNATIONAL LAW IN THE PERIOD OF TRANSITION] (1924).

Each of these earlier challenges, however, also recognized the field's potential for transformation in the service of humanity's broader needs, once the right people took over the project. The threats discussed in this chapter seem more in the nature of an existential challenge to the discipline than an effort to displace one establishment with another. Foreign relations scholars, as well as those drawing attention to comparative international law and fragmentation, are not jousting for power within the field, but rather drawing into question whether it's worth talking about "international law" as a singular or universal field at all.

Foreign relations law acknowledges international law but shifts our focus to domestic legal systems. It intimates that at least some of the work, and perhaps the most important work, of international law takes place within, rather than among, nation-states. To understand how international law affects state behavior as well as the lives of people, we must learn how international law operates as part of domestic law. But to do this, we must understand how the relevant domestic law works. International law, at least that part that we should care about, becomes a hybrid. As it enters domestic law, it responds to the demands of the domestic legal system in ways that change its content, and ultimately its identity.

This intimation, however logical, is also subversive. It suggests that international law, rather than imposing uniform and universal rules on states, shifts shape as it encounters the states on which it is supposed to act. Accordingly, international law, stripped of its character as uniform and universal and thus becoming relative rather than absolute, may lose its majesty and capacity to compel our respect.

The problem is grave exactly because international law anticipates, and perhaps even requires, variation in domestic law. If all states were largely alike in their fundamental institutional settlements, and if these fundamentally similar inputs were to lead to largely interchangeable outputs, there should be few international differences to bridge, or at least none of great importance. It is profound differences among states that give international law its salience. But if these differences also affect the domestic arrangements that foreign relations law studies, then the relativity of international law should increase with the significance of the matter at issue.

To appreciate better the challenge that foreign relations law presents to international law, one must consider two other tendencies in recent scholarship. Fragmentation and comparative international law also convey a sense that international law, far from being uniform and universal, is more often contingent, local, and to some degree inevitably various. Each of these developments undermines the stature of international law as something transcendent and compelling. Independent of but largely parallel to the rise of contemporary foreign relations law, they also challenge the traditional conception of international law.

Take fragmentation first. Since the end of World War II, and especially since the collapse of the bipolar regime of US-Soviet rivalry, the international system has witnessed the emergence of institutions both resting on and charged with administering international law. The bodies around the United Nations, including the International Court of Justice, are the first and best instances, but the proliferation of regional governance, the rise of powerful international structures such as the World Trade Organization, and the growth of judicial bodies, both permanent and ad hoc, to resolve international disputes also have great contemporary salience. The

insight of the fragmentation literature is that, far from developing a unified body of standards and rules, these institutions create discrete and even hermetic bodies of law. What international law applies to which actors and transactions depends to a large extent on how those actors and transactions affect the jurisdiction of particular international institutions. The differences among these international laws are great, perhaps so profound as to undermine one's confidence that the concept of general international law retains any meaning.³³

Some international lawyers respond to the challenge posed by fragmentation by positing an internal hierarchy, with human rights norms dominating all other forms of international law.³⁴ Others argue that international law contains (or might be seen as containing) a body of conflict-of-law rules that are themselves coherent and authoritative.³⁵ To many, however, these moves seem more wishful than persuasive. The claim for human rights dominance rests on normative ideals that, however attractive, function externally to international law as a legal system. Moreover, these responses are aspirational and have, at best, a shaky basis in contemporary practice.

The field of comparative international law, the subject of this book, has arisen more recently and raises many of the same questions.³⁶ It focuses on variations in national and regional practice regarding international law. More empirical than theoretical, the scholarship documents the significant differences in the training, promotion, and use of international lawyers as part of a general inquiry into differences in the content and methodology of international law. Like fragmentation, this field looks at departures from the conventional ideal of uniform and universal international law, but uses states, substate actors, and supranational structures, rather than international institutions, as the main unit of analysis. Like foreign relations law, it

33. Tomer Broude, *Fragmentation(s) of International Law: Normative Integration as Authority Allocation*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* (Tomer Broude & Yuval Shany eds., 2008); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STAN. L. REV.* 595 (2007); Jonathan Charney, *Is International Law Threatened by Multiple Tribunals?*, 271 *REC. DES COURS* 101 (1998); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT'L L.* 553 (2002).

34. Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (2006), as corrected, U.N. Doc. A/CN.4/L.682/Corr.1 (2006) (finalized by Professor Martti Koskenniemi).

35. See, e.g., Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Communities*, 44 *NYU J. INT'L L. & POL.* 1049 (2012).

36. Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law—Framing the Field*, 109 *AM. J. INT'L L.* 467 (2015). Central works include this volume, as well as a monograph authored by Anthea Roberts just published this year, see *supra* note 28, and Martti Koskenniemi, *The Case for Comparative International Law*, *FINN. Y.B. INT'L L.* (2009). For my own earlier effort to link the field to a theory of international relations, see Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 *CHI. J. INT'L L.* 91 (2009).

takes as its subject differences in how states make, interpret, and apply international law, but has a wider field of vision that goes beyond the impact of domestic law on the application and interpretation of international law.³⁷

Notwithstanding their differences, these fields have commonalities that undergird their challenge to international law. First, each claims to be empirical rather than normative. Workers in each talk about contemporary practice rather than motivating norms, although each has an eye out for those practices that disrupt the traditional conception of international law. Second, each emphasizes relativism in international law. What the law is depends on who and where you are. This simple insight undermines the distinction between international and domestic law. Third, each moves us away from a normative vision with universal aspirations. By concentrating on what we get rather than what we want, each suggests that international law's moral center may not matter all that much, if indeed it exists at all. Fourth, by documenting the departures of international law practice from uniformity and universalism, each implies a critique of conventional accounts of international law. The traditional international lawyers, it seems, have missed out on the big story, even if we can't agree on what the big story is.

Consider some examples. Over the last two decades, British courts have refused to implement particular decisions of the European Court of Human Rights, not only because foreign relations law can impose a barrier to implementation of the Strasbourg judgment, but because they believe the Strasbourg court misinterpreted the Convention. The most visible conflict between the courts involves the scope of the Convention's limits on qualifications for voting. The European Court has determined that UK bans on voting by felons violate the Convention.³⁸ British courts have pushed back, partly on the ground that the Strasbourg court has misapplied the concept of proportionality.³⁹ A less prominent, but no less entrenched, dispute involves a British statute allowing a limited exception to the hearsay rule in criminal cases.⁴⁰ Even earlier the courts had skirmished over the validity of the British law of adverse possession, although the European Court then had backed down.⁴¹

37. Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Conceptualizing Comparative International Law* (this volume).

38. *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187; *Greens v. United Kingdom*, 2010-VI Eur. Ct. H.R. 57; *Firth v. United Kingdom*, App. No. 47784/09 (Eur. Ct. H.R. Dec. 15, 2014); *McHugh v. United Kingdom*, App. No. 51987/08 (Eur. Ct. H.R. Feb. 10, 2015).

39. *Chester v. Secretary of State for Justice* [2013] UKSC 63; *Moochan v. Lord Advocate* [2014] UKSC 67.

40. Compare *Al-Khawaja v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191, with *Regina v. Horncastle* [2009] UKSC 14, and *Regina v. Ibrahim* [2012] EWCA (Crim) 837 (Eng.). See Paul B. Stephan, *The Political Economy of Judicial Production of International Law*, in *THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE* 202 (Alberta Fabricotti ed., 2016).

41. Compare *J.A. Pye (Oxford) Ltd. v. United Kingdom*, 2007-III Eur. Ct. H.R. 365, with *Ofulue v. Bossert* [2008] EWCA (Civ) 7 (Eng.).

One might dismiss each of these tussles as exercises in distinction rather than as outright conflicts. A fair reading of the cases, however, indicates that British courts perceive a greater margin of appreciation, and thus greater tolerance of entrenched national practice, in the Convention than does the Strasbourg court. These cases illustrate how domestic factors—institutional structure, cultural traditions, configurations of political and economic interests—may drive a wedge between nominally disinterested judicial institutions confronted with the same international instrument. Both foreign relations law and comparative international law thus recognize—and possibly breed—heterogeneity in the interpretation and application of international obligations.

How destructive is all this? Should international lawyers double down on the field's fundamental norms, insisting that what the new fields have uncovered is epiphenomenal rather than significant? Perhaps the perceived variations in international law attributable to domestic foreign relations law, fragmentation, and comparative law represent early false starts. Perhaps, as people come to appreciate the promise of international law more, a better and unified version will prevail. A few decades from now, practitioners and jurists may wonder what all the fuss was about.

The doubling-down approach, however, suggests denial more than engagement. Empirical challenges demand responses. The mounting evidence, viewed from different perspectives and by different observers, points in the same direction. As the scope and significance of international law have become greater, so have systematic and salient differences in the methodology and content of international law. The more we have asked it to settle, the less it provides consistent answers. This presents a problem.

III. PLURALISM IN INTERNATIONAL LAW

To frame a response, I start with several fundamental questions: Is uniformity and universality essential for international law to survive as a distinct field? Would international law still command our respect even if it were to concede its instability and contingency? Can one do international law if one cannot guarantee a reliable fit-for-all-purposes product?

My answers, in short, are no, yes, and yes. These answers depend on a particular understanding of what it means to do international law, and thus of the work that international law does. To put it in reductive terms, I urge international lawyers to embrace diversity and pluralism by making clear distinctions among the multiple roles that international law can play. We need not abandon the invisible college, but we do have to admit that the college has many departments and serves multiple functions, as captured by Roberts's notion of the "divisible college of international lawyers."⁴²

42. Compare Oscar Schachter, *The Invisible College of International Lawyers*, 72 Nw. U.L. REV. 217 (1977) with ROBERTS, *supra* note 28, at 2.

International law has lots of jobs, each with its own set of tasks, customs, participants, and institutions.⁴³ To use the jargon of contemporary social science, each has a distinct hermeneutic community. The basic question is whether to see each of these functions and communities as part of a greater whole (i.e., to synthesize) or instead to focus on their differences and boundaries (i.e., to analyze). The discipline traditionally has tied all these tasks together in a general international law enterprise. This synthetic approach accepts the distributed, rather than centralized, nature of the process of making and applying international law but seeks to compensate for it.⁴⁴ Because international law comes at us from many places and many directions, making sense of the field requires assimilating and making sense of all instances where international law pops up.

The analytic perspective, in contrast, argues that context dominates content. Rather than positing metaphysical principles to unify the field, or torturing the data to exclude dissonance, we should accept that international law serves different communities. It is perfectly natural for international law to behave differently depending on what each community expects of it and what tools each can bring to bear to the task at hand.

This approach is not merely analytical, but also functional. It assumes that the complex relationship between a legal system and the society in which it operates should command our attention, at the expense of ideas as such. It marries analysis with induction and privileges engagement with social behavior over reason and imagination as ends in themselves.

What kind of case can be made for a distributed, localized, and relativistic system of international law? Two types of arguments occur to me. First, understanding how international law works in the world in which we find ourselves is useful, and not nihilist. Second, the alternative is worse. Considering international law as the province of advanced thinkers, untethered by local commitments of the sort that states and other political institutions embody, invites comparison to historically significant dystopias.

First, the positive case. Approaching international law as a tool that people may use to solve problems focuses the mind on human needs. People who find themselves governed by particular legal rules might tolerate specific requirements that vary according to circumstances, if they accept that the variations that dictate different outcomes rest on defensible distinctions.

Take an example about which I have written elsewhere.⁴⁵ Several international and domestic courts have articulated rules specifying when an actor (either a state or a legal person) should bear responsibility for others who, as a formal matter, are legally distinct from the actor but, as a practical matter, act to some degree under the

43. See Paul B. Stephan, *The Law and Economics of International Law Enforcement*, in OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi, ed., 2016); *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT'L L. 191 (2010).

44. See, e.g., Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 ILL. L. REV. 71.

45. Stephan, *supra* note 40, at 222–23.

actor's influence. Responsibility under international law turns on the rule chosen. Solutions vary between a strict standard of command and control, making it harder to attribute responsibility, versus one of general supervision, which makes attribution easier.⁴⁶ Unless context can justify this, the existence of these different rules of attribution seems evidence of international law's incoherence.

A functional perspective might indicate that each expression of the rule fits its purpose. In the case of the International Court of Justice, a strict rule makes it more difficult to hold a state accountable for the objectionable behavior of others. The International Court of Justice acts against a background of state suspicion of its jurisdiction and concern that the rules it expresses in principle apply to all parties who might appear before it. The ease of withdrawing from the International Court of Justice's jurisdiction makes these concerns significant. Caution serves the goal of protecting the Court's authority from diminution by dubious states.

In the case of the International Criminal Tribunal for the former Yugoslavia, by contrast, no downstream threats to jurisdiction exist. The court's authority already is circumscribed both geographically and temporally. Any changes in its jurisdiction must go through the Security Council. In this context, a broader rule of attribution poses no threat to powerful actors, and thus to the court.

As for US courts working within the framework of the so-called Alien Tort Statute, the disparate practice of the international tribunals might lead them to focus on the particular requirements and purposes of that statute. Asserting that international law "provides" a rule of attribution leads to lazy thinking about the basis and purpose of these tort suits. The range of outcomes we have seen to date suggests some recognition of this challenge, although lazy thinking is not completely absent.⁴⁷

The attribution example illustrates a general phenomenon. Plausible, if not necessarily compelling, reasons explain differences in domestic institutional arrangements that affect the domestication of international law, fragmentation within the international legal system, and state approaches generally to the field. These reasons may allow us to distinguish between plausible variation, on the one hand, and naked opportunism, on the other. They suggest a project for understanding international law as a complex social phenomenon with real if complicated constraints, rather than as an empty practice of *ex post* rationalization. To give way to heady optimism, a functional approach to international law—as illustrated by foreign relations law, fragmentation, and comparative international law—can help us find matches between particular legal regimes and human needs.

Next, the negative case. The alternative to a functional and thus relativistic approach to international law is one that rests on overarching ideas about justice, decency, and human flourishing. Such ideas cannot emanate solely from official

46. Compare, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 392, ¶ 115, with *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 120 (Int'l Crim. Trib. for the former Yugoslavia Jul. 15, 1999).

47. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014).

actors such as states, as these institutions necessarily have local interests that can blind them to the needs of humanity. Indeed, democratic politics, organized through states, leans toward the marginalization of the concerns of outsiders. One might consider this alternative vision of international law as a strong conception of the invisible college. Particular persons, through their exemplary powers of reasoning, expression, and moral example, illuminate a vision of a better life that inspires many and should move all of us. These people make international law, if not in all instances then at the level of fundamentals.

Normative attraction does not take place in a vacuum, but rather depends on the work of norm entrepreneurs. What these entrepreneurs do is make us all aware of the needs of humanity and therefore of the requirements of international law. Enough acclaim among a sufficiently large group of relevant actors suffices to elevate them to the level of international law's arbiters and the fabricators of its fundamentals.

One difficulty I have with this strong conception of the invisible college is the unhappy history of past efforts to construct and impose transnational norms. Going back half a millennium in European history, the universal Catholic Church claimed the authority to articulate the standards and rules that would govern the conduct of princes both with respect to each other and with regard to their subjects. The Reformation put paid to that claim, and Westphalia codified its demise. In the past century, both International Socialism, led if not necessarily controlled by the Soviet Union, and National Socialism, incarnated in Italian Fascism, the German Reich, and Spanish Falangism, among others, posited a set of scientific principles and inspirational ideals that operate above the level of existing state structures. Both of these movements, which attracted many of the era's leading thinkers, constructed international networks of supporters who regarded adherence to the movement's principles and guidance as more important than loyalty to status-quo political institutions, nation-states in particular. Neither turned out well.

It would be a mistake to reject the strong conception of the invisible college on the basis of the flaws found in earlier manifestations of the institution. Indeed, the postwar international legal establishment included many actors whose lives were disrupted by either International or National Socialism, including all four of the Reporters of the Third Restatement.⁴⁸ My point is only that persons worried about the Scylla of international law nihilism implied by excessive functionalism must also acknowledge the Charybdis of ideological absolutism implied by a universal normative system.

At the end of the day, we should embrace the turn toward foreign relations law, comparative international law, and fragmentation. It does not threaten international law so much as challenge it. Each of these developments asks international law to ground its work on richer, more empirical, and more functional foundations.

48. Henkin's family were refugees from the Soviet Union who brought him to the United States in 1923. Lowenfeld's family were German refugees from Nazism who brought him to the United States in 1938. Sohn was a Pole who came to the United States weeks before Nazi Germany invaded his country, and remained exiled after the establishment of a Soviet-dominated regime there in 1945. Vagts's family were German refugees from Nazism who brought him to the United States in 1933.

These demands do complicate the task of international lawyers, largely by demanding mastery of a greater range of disciplines. By breaking down the barrier between public international lawyers, comparative constitutional lawyers, and comparativists generally, it forces specialists to talk to a wider range of experts and to learn the tricks of other trades. This may be hard, but I don't see how it can hurt. The alternative may well be irrelevance.

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