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How International Is International Law: Remarks by Lori F. Damrosch

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HOW INTERNATIONAL IS INTERNATIONAL LAW?

This panel was convened on at 9:00 a.m., Thursday, April 13, 2017, by its moderator, Lauri Mälksoo of the University of Tartu Center for E.U.-Russian Studies, who introduced the panelists: Lori F. Damrosch of Columbia University; Vincent O. Nmehielle of the African Development Bank; María Teresa Infante Caffi, Ambassador of Chile in the Netherlands; and Jacques deLisle of the University of Pennsylvania.*

Remarks by Lori F. Damrosch†

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Our moderator's questions begin with "in what sense is international law and in what sense isn't it universal?" and continue with whether international law may be "different in different places" and what the implications of such differences may be. I am here to defend the "universalist" perspective, as the immediate past president of the American Society of International Law and before that, editor-in-chief of the *American Journal of International Law.* Though both the Society and the *Journal* have "American" in their titles and our geographic headquarters is in the United States, the Society's mission statement commits us to pursue "a just *world* under law," which I interpret as a global vision for a universal system of international law.

There is room for various kinds of diversity within that system, but the core of "what international law values" should in principle be shared on a worldwide basis. There may likewise be room for an American vision of international law, in which American intellectual contributions going back to the Declaration of Independence and the Constitution play a significant part, and for American leadership under the UN Charter–based international law of the late twentieth and early twenty-first centuries. But the Society's vision of "international relations on the basis of law and justice" would be hard to reconcile with geographic fragmentation, and still less with special rules or exemptions for one superpower (what Detlev Vagts called "hegemonic international law" and others have called "American exceptionalism") in a polycentric world.

Law professors typically challenge the underlying premises of the assignment, which I will do by asking why "places" in the regional or geographic sense are the organizing principle for the theme statement and the selection of speakers—all of whom, apart from myself, are experts in a region or country, including Africa, Latin America, Asia, and Eastern Europe. It is true that traditional international law doctrine contemplates the possibility of regional customary international law, and that the post–World War II institutional order likewise envisions particular responsibilities for regional arrangements and organizations, as provided for in Chapter VIII of the UN Charter. It is also true that most UN bodies are organized on the principle of "equitable geographic distribution" through regional groupings, but geography is only a proxy for other forms of representation, and not necessarily a particularly useful one.

* Mr. Mälksoo and Mr. Nmehielle did not contribute remarks for the *Proceedings*.

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International lawyers are familiar with another model of representation, namely the instruction in Article 9 of the Statute of the International Court of Justice that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." Universal international law needs to integrate all the main civilizational streams, not only regional ones, but also global civilizations regardless of region.

Toward that end, I would like to draw attention to the pathbreaking scholarship of Onuma Yasuaki, whose lifelong project to provide the intellectual underpinnings for what he calls "transcivilizational international law" has reached its latest stage with the publication by Cambridge University Press of *International Law in a Transcivilizational World* (2017), building on his 2007 Hague Lectures and related work.[1]

Professor Onuma calls for relocating international law beyond its traditional "West-centric," "state-centric," and "judicial-centric" perspectives and reconceptualizing it to be responsive to the diverse perspectives of people with different cultures, religions, and civilizations. This does not mean different law for different cultures, religions, and civilizations, but rather one universal, non-"West-centric" international law. I believe this is a worthy project, with many intellectual parents—not only Onuma as an East Asian intellectual, but also, for example, the late Judge Christopher Weeramantry (who died January 5, 2017, at the age of ninety, having been a valued member of this Society for many years), who devoted much of his attention as judge of the International Court of Justice in separate and dissenting opinions (e.g., in the 1996 *Nuclear Weapons* advisory opinion) to showing how the values underlying the international law of use or threat of force and use of weapons in armed conflict have deep roots on a multicivilizational basis.

This Society has provided the venue for debating the questions of concern to this panel, notably in a symposium on Comparative International Law in *AJIL*'s July 2015 issue, coedited by Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier, and Mila Versteeg. Anthea Roberts has a forthcoming book on this very topic, which she previewed when she was a visiting professor at Columbia Law School and was at the same time immersed in her work as coreporter for the Jurisdiction chapter of the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States*. Using jurisdiction as an illustration, she has argued that there really isn't a universal international law of jurisdiction. There is no multilaterally agreed statement of the law of jurisdiction; rather, we have only failed attempts to reach a general multilateral treaty, with some regional efforts but not in every region. Courts in different countries apply their own views on jurisdiction, rather than a commonly shared global international law. Leading international cases don't point to a common view (witness the equal division of votes at the Permanent Court of International Justice in the *Lotus* case). Moreover, the academic community does not think and talk the same way about an international law of jurisdiction. This was a painful critique to hear at Columbia Law School, where Oscar Schachter wrote his famous article, *The Invisible College of International Lawyers*, claiming that members of the invisible college do share a common language and approach.

Anthea Roberts likewise charges that profound divergences extend to the leading textbooks in use in international law classrooms around the world, with even the Anglophone, common law world teaching international law differently in, say, Australia, Canada, New Zealand, the United Kingdom, or the United States, and with even broader divergences between common law and civil law countries, and with developing country voices often being absent from these textbooks. She is particularly critical of American casebooks for being dominated by excerpts from U.S. Supreme Court cases and giving much less coverage to international and foreign sources than is found in the textbooks of other countries. I take this critique to heart as coeditor of one such casebook, often

[1] Onuma Yasuaki, A Transcivilizational Perspective on International Law (2010).

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called the "Columbia" book, first developed by Wolfgang Friedmann—the consummate cosmopolitan—later edited by Louis Henkin and Oscar Schachter, and now about ready to be revised for its seventh edition, which I am preparing with Sean Murphy. In defense of the editorial selections made in successive editions, I observe that reliance on U.S. international law cases in a U.S. casebook is a way of showing U.S. law students that, contrary to what they may have gleaned outside law schools, international law actually is law, and is universally accepted, and is even applied by the U.S. Supreme Court—not always, but significantly so. Canonical U.S. cases like *Paquete Habana*, where the Supreme Court confirms that international law is part of our law, draw on sources from many countries (limited, however, to what was then known as the "ranks of civilized nations").

The panel's theme statement draws attention to the recent issuance by China and Russia of a Declaration on the Promotion of International Law, which is characterized as reflecting approaches to foundational principles of international law diverging markedly from those common in the West. While leaving it to the panel's experts on Chinese and Russian perspectives to comment specifically on those perceived divergences, I offer an observation stemming from my having represented ASIL in Beijing at a 2014 colloquium commemorating the sixtieth anniversary of a document in which the People's Republic of China takes particular pride, the *Five Principles of Peaceful Coexistence*. The colloquium's Chinese organizers gave me an intriguing assignment: to comment on human rights and the Five Principles. Human rights would, of course, be high in the hierarchy of any values-oriented approach to international law from the perspective of twenty-first-century Western mainstream scholars. By contrast, China's Five Principles stress sovereignty, explicitly in the first principle and implicitly in the others. In my Beijing commentary, I took a human rights–based approach to sovereignty (with a nod to Louis Henkin, who as president of this Society insisted that we should banish the "S-word" from polite discourse) and argued that sovereignty in modern international law needs to be understood as proceeding in the most fundamental sense from the human rights of the people. States are not "sovereign" *over* people, but "sovereignty" proceeds from the people; sovereignty assumes and requires that human rights be respected. It was gratifying that at the end of the colloquium, the Chinese organizers issued a conference summary containing the significant statement that "States shall, in accordance with the Charter of the United Nations and other international treaties, respect, protect and promote individual and collective human rights," which I take as confirmation of the universality and pervasiveness of human rights values in international law.

Remarks by María Teresa Infante Caffi*

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China and Russia stated in 2016 that "It is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are *based on consent and used in good faith and in the spirit of cooperation*, and their purposes shall not be undermined by abusive practices." Does this sentence reflect their shared view of the signing states or are these ideas endorsed by other international players?

The role hereby assigned to the principle of nonintervention in the internal or external affairs of states, and the condemnation of any interference by states in the internal affairs of other states aiming at forging a change of legitimate governments, has deserved a thorough analysis. There is also

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