# With Blinders On?: How International Law Casebooks Teach Students in the United States

**by Anthea Roberts**

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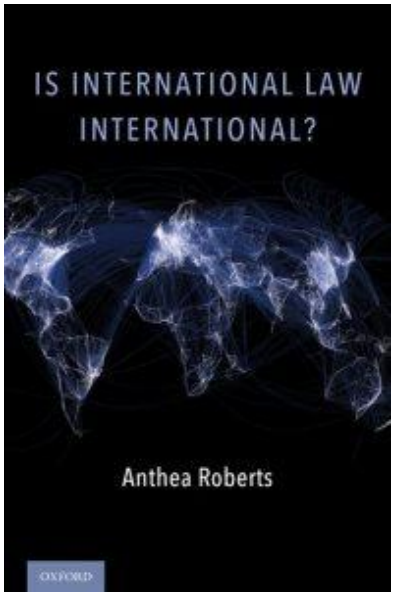


The United States disagrees with many countries, including key allies, on important questions of international law, including the geographical scope of armed conflict, the extraterritorial application of human rights, and the existence and scope of a right to preemptive self-defense. Underlying these particular disagreements is a broader divide between US and non-US approaches to international law. One could identify many features of this divide (such as in approaches to WTO dispute resolution), but an underlying aspect worth highlighting is the way in which American international lawyers often privilege US views and practice above not only those of other states but also of international institutions, such as international courts and tribunals.

US international law often gives the impression of being US foreign relations law under a different name. In his Manley Hudson Lecture at the American Society of International Law in 2012, for instance, Professor (now Judge) James Crawford lamented that "much that passes for the study of international law in the United States academy is at best the foreign relations law of the United States with ideological interpolations." The overwhelming impression on reading this body of scholarship, he concluded, was one of isolationism: "It is as if we heard the sound of

one hand clapping; a conversation in which the United States is its own and only interlocutor." If this approach had a theme song, Crawford ventured, it would be "it takes one to tango."

When comparing commonly used international law textbooks and casebooks across a range of states in my new book Is International Law International? (OUP 2017), I frequently recalled Crawford's observations. These books form the bread-and-butter materials used to teach the next generation of lawyers about how to conceptualize and approach the field. The US casebooks stood out for being exceptionally nationalized in terms of how heavily they relied on US cases, executive practice, legislation, academics and publications. This approach reflects and reinforces what Samuel Moyn has insightfully described as the parochialism of American cosmopolitanism: "international law in American debates [is often] not so much a breakthrough to an external perspective as a continuum of positions tightly bound to local assumptions and audiences."

There are many ways one could demonstrate the highly nationalized focus of US international law casebooks. One graphic way to illustrate the point is to look at the percentage of cases referenced in the textbooks and casebooks published in different states: the exercise here is to compare the degree to which books from each state refer to cases issued by international courts and tribunals, cases by that state's domestic courts, and cases by foreign courts (see Figure 1, below, from Chapter 4 of my book). The US international law casebooks were the only ones that contained a higher – and, indeed, significantly higher – percentage of cases from their own domestic courts (64%) than from international courts and tribunals (31%). They were also distinctly (though not uniquely) non-comparative, featuring few foreign court cases.

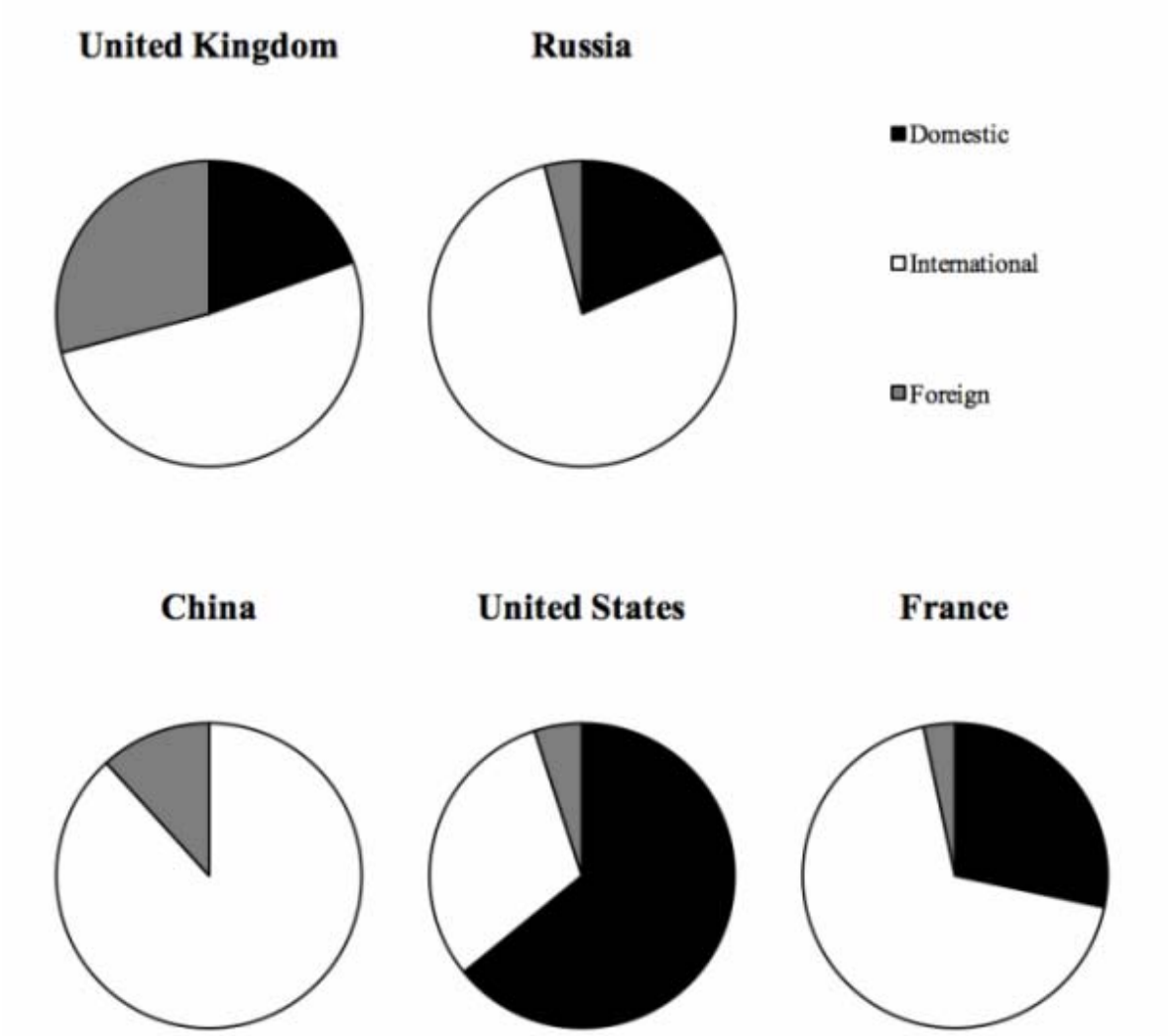


**Figure 1: Percentage of Domestic, International and Foreign Cases Cited in the Main International Law Textbooks/Casebooks from each State**

There are likely many reasons why US casebooks might rely heavily on US practice, including that US courts produce a lot of case law relating to international issues, and the United States is a major world power whose practice is particularly important in constituting international law. Part of it may also have to do with the common profiles of the international law academics in the United States (see Chapters 1 and 3 available on SSRN). When looking at foreign cases, textbooks and casebooks from a wide range of other states also looked strongly to US and UK case law, a point that I develop more fully in the book. However, one result of this difference is that the US casebooks often contain a much stronger focus on US practice and foreign relations law than is true of the books used in many other states.

One can get a sense of how extreme this divergence can be by looking at the word clouds in Figures 2 and 3 below, which show how frequently different cases are referred to in a leading US casebook (Carter & Weiner) and a leading UK textbook (Evans). Both are called "International Law," yet their content and focus differ radically.


**Figure 2: Word Cloud of Cases in a Major US International Law Casebook (Carter & Weiner)**


**Figure 3: Word Cloud of Cases in a Major UK International Law Textbook (Evans)**

Most of the cases featured in the US casebook (Carter & Weiner) were decided by US courts, primarily the US Supreme Court, and many deal with important issues of US foreign relations law. These issues include whether and when US courts have jurisdiction to hear claims based on customary international law under the Alien Tort Statute (*Filartiga* and *Sosa v Alvarez-Machain*), the power of the President/executive to settle claims by US nationals and establish military commissions (*Dames & Moore* and *Hamdan*) and the application of immunity and act of state doctrines by US courts (*Samantar* and *Sabbatino*).

By contrast, most of the cases featured in the UK book (Evans) were decided by international courts and tribunals, mainly the International Court of Justice, and most do not focus on UK foreign relations law issues. Few domestic cases feature prominently. The main exception is *Pinochet*. After that, it is possible to identify *Jones v Saudi Arabia*. Other than that, UK domestic cases are not particularly prominent. There is a much greater focus on cases before international courts and tribunals than there is on cases concerning the reception of international law into the UK legal system. Even the cases before international courts did not seem to be particularly geared toward cases involving the United Kingdom as a party.

The one major case both books had in common – *Nicaragua v. United States* – represents the intersection of US foreign relations law and international courts and tribunals. It is the case in which the US objected to the International Court of Justice's jurisdiction and, when the Court nevertheless took jurisdiction, the US withdrew from the case and revoked its recognition of the Court's compulsory jurisdiction.

Not all of the books in a single state necessarily have the same profile. While the Evans textbook was characteristic of the other UK books in its predominant focus on international case law, the Carter & Weiner casebook was the most domestically oriented of all of the US books and, indeed, of the entire study. The Damrosch & Murphy casebook (US) included an even higher percentage domestic cases (73% compared to 71%), but gave greater emphasis to some of the international cases, resulting in a more nationalized/denationalized mix. Nonetheless, as I detail in case studies in my book, on many issues it still relied very heavily on US materials and practice in a way that sometimes made it hard for US students to get an external perspective.

The Dunoff & Ratner casebook (US) was the least nationalized of the US books with only 46% of the cases referenced being domestic. However, even this book contained a higher percentage of domestic cases than the vast majority of the textbooks and casebooks of the other states surveyed. Some non-US books even deliberately made a point of featuring domestic practices, including Don Rothwell's *International Law: Cases and Materials with Australian Perspectives*, Dugard's *International Law: A South African Perspective*, and Hugh Kindred and Jean-Gabriel Castel's *International Law: Chiefly as Interpreted and Applied in Canada*. Yet even these books contain lower percentages of domestic cases (28 percent, 27 percent, and 45 percent, respectively).

The divergence among the approaches adopted by these books raises a broader point, also asked by the ILA's Committee on the Teaching of International Law, which is whether the teaching of international law should be "internationalist" (denationalized) or "municipalist" (nationalized) in its broader orientation. To what extent should textbooks seek to present a denationalized approach to international law or situate the field within the foreign relations law of a particular state? What do students gain or lose through each approach? And does it make a difference which state one is talking about?

A number of scholars have been critical of US international law casebooks for overemphasizing US materials and perspectives in a way that "tacitly equat[es] what is American with what is international or universal." For instance, in a review of an earlier edition of the Carter & Weiner casebook (US), US international lawyer David Bederman criticized it for being "strikingly parochial" in its selection of materials, stating that the authors seemed to "purposefully . . . reject a diversity of voices for international law." The unmistakable message of this "selection bias," he concluded, was that "the only tribunals really competent to opine about international law—the only version of international law that actually matters to American lawyers—is that espoused by US courts."

Although US casebooks might be critiqued for being too nationalized, taking **too denationalized** an approach can also be problematic as it may fail to situate students in their own state's legal system and foreign relations law. This seemed to be a particular problem when textbooks from former colonial powers, such as France and the United Kingdom, were imported for use in some of their ex-colonies, such as Senegal and India. Students in those states often learned little, if anything, from these imported textbooks about how international law was received into their own states or what positions their states took on key questions of international law. It may be that these issues are covered in other subjects, like constitutional law, but it is also possible that many of these issues end up falling between the cracks.

When it comes to international law and foreign relations law, perhaps it inevitably takes two to tango. Maybe we need to aim for a balance between the two approaches within each book or, at least, a balance across books that are available within a given state. In some states, this might mean taking a more denationalized approach than currently exists to encourage more of an external and global perspective, whereas in others it might mean developing a more nationalized approach in order to foster a stronger internal focus. Arguably, the best approach may be to help students understand the international law approach and to situate their own state's foreign

relations law within that context so that they are able to move comfortably between the two without confusing one for the other. This approach would be more of a "compare and contrast" than an "either/or."

Either way, it should be imperative for international law textbook and casebook writers and teachers to be explicit about when they are adopting a more nationalized or denationalized approach and what their choices are likely to reveal and obscure. Depending on the state in question, a particular state's foreign relations law may be particularly important in constituting international law. For instance, international law cannot be understood fully without taking US practice into account because the United States is unusually influential in shaping the field. Yet international law also cannot be understood fully by focusing primarily on US practice because US perspectives on and approaches to international law are often not representative of those of the vast majority of other states.

There is room for a focus on international law and on a particular state's foreign relations law but we should be careful not to confuse one for the other. We should also engage in the study of international law with self-awareness about where these boundaries exist and what biases and blind spots our approaches and materials might contain.

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