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REGIONAL APPROACHES TO INTERNATIONAL LAW

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[A] INTRODUCTION

International law is often presented as a universal system that applies in the same way across different countries and regions of the world, yet, in recent years, this view has increasingly come under challenge. Different regions and countries, especially outside the West, have developed practices and views towards international law that show that international law is perceived and practised differently in different parts of the world. The rise of countries outside the West, particularly Brazil, Russia, India, China and South Africa (BRICS), has also shown these countries to be more assertive on the international stage, including on issues of public international law. The idea of ‘comparative international law’ has also received more academic attention in the literature (Roberts et al 2018). The book *Is International Law International?* (Roberts 2017), for instance, challenges the concept that there is one view of international law, demonstrating how different regions have developed diverging understandings of international law. The phenomenon of regional approaches to international law is not new, however, and the different approaches taken towards international law can often be explained by looking at issues such as the region’s history, politics, religion and economic development.

The theme of regional approaches to international law was the subject of a workshop held on 3 July 2019 at City Law School, University of London.¹ The need to understand the historical, political and economic reasons that drive regional approaches to international law emerged as one of the key themes. Lauri Mälksoo, University of Tartu, discussed his research on Russian approaches to international law (Mälksoo 2015).

¹ The workshop was part of the [GLOBALLAW@CITY Research Dialogue Series](#). For a report on the series, see Fahey et al (2019).

These have developed both at the level of the Russian government, as well as in Russian scholarship. Professor Mälksoo discussed the implications of Russian approaches to international law for the claimed universality of the field in Europe and globally, and whether comparative perspectives can be drawn for the study of international law generally. Wim Muller, University of Maastricht, discussed the concept of ‘International Law with Chinese Characteristics’, a title that refers to the concept of ‘socialism with Chinese characteristics’ used by the People’s Republic of China (PRC). Just as socialism is to be adapted to the social and economic conditions of China, international law may also undergo a similar change, whereby international law is adapted to suit the situation of China. Muller discussed how, with China’s economic rise, there has also been a more assertive attitude towards international law, but that this assertiveness is sometimes curtailed by China’s historic experience with international law. Mauro Barelli, City Law School, continued with this theme in ‘China and the Responsibility to Protect’. Although China has asserted that sovereignty is a central part of its foreign policy, Chinese policy has shown to be more pragmatic and influenced by developments in international politics. This is an example of a common theme in the debate: what is the relationship between rhetoric about international law, both in academia and official statements, and the practice of international law, and how do they shape each other?

Russian Approaches to International Law

Lauri Mälksoo began with the complex question as to whether there was, or could ever be, a discipline labelled as ‘comparative international law’? Anthea Roberts ignited a significant debate on this topic, examining its subject contours, content and intellectual limits. Mälksoo asked whether there are truly regional approaches to public international law. Moreover, he asks, where did this question come from? Those studying international law have always known of different approaches to international law, such as the approaches of dualism and monism, but they did not appear to be important enough to challenge the universality of the established shared European vision. The interest in regional approaches, Mälksoo argues, comes with the relative rise of powers outside the West.

Mälksoo reflected on how his study of Russian approaches to international law has been informed by his personal experience living in Estonia during the breakup of the Soviet Union and after. Having lived through different political discourses and regimes, this awakened his sense for the relativity of things and allowed him to notice the ideology behind the law. For instance, human rights were viewed in the West

(relatively recently) as of primary importance, whereas in Russia, there were other values that were of importance. Was there something in the Russian, Eastern European or the Orthodox world that made the reality of international law different? Mälksoo points out that in Russia (communist and post-communist), political discourse and literature spoke a lot about international law, but that it was predominantly used as a political weapon, particularly against the West. When Western states criticised the Soviet Union for a lack of respect for human rights or democracy, it could respond by arguing that it was in fact Western countries that were violating those principles.

Mälksoo also discussed the importance of language in the study of international law. In the past, European international lawyers were expected to speak English and French, perhaps also German or Italian. Today, international law scholarship in the West is predominantly in English, and the principal journal of international law, the *American Journal of International Law*, publishes articles that do not include non-English language sources. Even the challengers to the Anglo-Saxon tradition, the German scholars, publish largely in English, he argued. Mälksoo argued that the same could not be said of discourse on international law outside the West. There are entire debates and discourse on international law in languages other than English. Mälksoo also commented on the phenomenon of different academic accents when writing in different languages. A Russian scholar may feel comfortable writing things in Russian for a Russian audience that they would not write for a wider audience, in English.

So what is a Russian approach to international law? Mälksoo noted that, for the most part, public international law has *not* been universal; in the 19th and early 20th centuries, it was used to govern ‘civilised nations’. Russia sat in an awkward position. It saw itself as the Eastern-most country of the ‘civilised nations’, but was also told by Western states that it was not civilised. Such disjuncture, sitting in between traditions, can also be seen in the development of the Chinese approach to international law, discussed below.

Mälksoo discussed how domestic concepts of law can influence approaches to public international law. Mälksoo notes a paradox in the way that international law is viewed. On the one hand, Russia argued that, in its tradition, it would rather regulate without law, a view informed by the legal nihilism in Russian and Orthodox tradition. On the other hand, Russia saw itself as a protector of international law in its international relations. Mälksoo notes how the Russian tradition is not a

rejection of international law, but more an emphasis on certain principles. The UN Charter, for instance, starts with the principles of the non-use of force and the principle of non-intervention. While the emphasis on human rights and democratic legitimacy increased in the West, nothing had changed the central importance of state sovereignty. Indeed, such Western interventionism could be viewed as a *violation* of international law. Mälksoo finds this ‘clash’ of visions to be related to underlying differences in political philosophy. Similar to the Chinese approach, discussed below, Russia not only emphasises the importance of sovereignty, it views it as a core value of international law.

Another related feature of the Russian approach was a certain distrust towards international adjudication. While supporting public international law in its ‘propaganda’, Mälksoo shows how Russia was reluctant to utilise international dispute settlement bodies, especially to resolve legal disputes with post-Soviet states. As an example, he discussed how in the Alabama arbitration, the United States and the United Kingdom shared the same language and religion and could ‘trust’ one another. The same could not be said of Russia, which looked at the imperialists as the enemy, and which had a different concept of what international law is.

Mälksoo makes an interesting parallel between the United Kingdom and Russia regarding the relationship with its former colonies. Diverging approaches to international law can be seen, and are most acute, when empires disintegrate and there remains a phantom understanding of the spheres of influence. In both situations, countries became independent, but the former empire was not willing to accept them as *de facto* fully sovereign. Today Moscow views the former empire in these terms: they are separate, but not foreign countries. The same approach is taken by the United Kingdom, which, although it recognises the compulsory jurisdiction of the International Court of Justice, has made a reservation regarding disputes with current or former members of the Commonwealth. In this post-imperial experience, there appears to be a disjuncture between the law and reality, one where public international law may apply in theory, but has no connection with reality. According to the maps, and to public international law, Transnistria, South Ossetia, and Crimea are not part of Russia, but this does not accord with the reality on the ground, and will not likely change in the near future.

Chinese Approaches to International Law

Wim Muller highlighted the need to understand history in international law. Lawyers tend to think of international law as universal and

unchanging, Muller argues, especially if they have only had training in law. This does not fit with reality, and there is a tension in international law between universality and regional variation. Looking at history, and regional approaches to international law, also helps us understand the deeper function of public international law in international society. As discussed by Mälksoo, one should look at the links between approaches to law and political philosophy, and the question of what goals international law sets out to achieve. International law can be limited to the relations between states and resolving inter-state disputes, but it can also take multiple other forms, including one that deals with rights of individuals. Studying regional approaches thus allows us to understand these different views about the underlying purpose of international law.

Muller emphasised the need to understand the role of Chinese history in the development of a Chinese approach to international law. The modern international legal system is not indigenous to China and had a disruptive effect when it was introduced. China historically viewed itself as the centre of an empire and a world order. Such perception was challenged up the invasion of foreign powers. International law was further used to open up China, for instance, when the British used international law arguments to sell opium in China (although not a correct reading of international law at the time). The League of Nations did little to prevent the Japanese invasion of China. Such treatment was indicative of the century of defeat and humiliation suffered by China. Such feelings of distrust towards international law, based in feelings of humiliation, continued after the end of the Second World War, when China was invited to be a member of the UN Security Council (UNSC), but the PRC did not take up the seat until 1971. Such non-participation at the UNSC furthered this narrative of humiliation.

China itself was also undergoing a turbulent period. When the PRC replaced the Republic of China (ROC) in 1971, its foreign policy also changed. During this period, China accepted the international legal order and would seek to achieve its aims within that order. Its foreign policy identified three core interests: territorial sovereignty, regional security, and development. Since 1989, the foreign policy goals of China evolved further. China undertook market reforms in service of its development in the 1990s, and the fruit of such change was seen in the 2000s. China sought to assuage concerns about the 'rise of China' by coining the term 'peaceful rise', emphasising that Chinese economic development would not lead to it becoming a military or other threat. The 1989 Tiananmen incident also put the issue of human rights on the agenda, as the world community had concerns about human rights and democracy in China.

Until 2010 China pursued these three ‘modest’ goals and did not want to be seen as an aggressive power.

Under the leadership of Xi Jinping, China has found itself becoming more ambitious and assertive on the world stage. Such global ambition has called into question its traditional foreign policy and its place in the international legal order. China’s foreign policy priorities, moreover, are reflected in its approach to the international legal order. First, it seeks to adhere to the principles in the Charter of the United Nations, of which sovereignty is viewed as an overarching value. China’s five principles of co-existence, which were included in a peace treaty with India, are presented as one of China’s main contributions to public international law. These principles include the respect for territorial integrity, non-aggression, non-interference in the internal affairs of other states, and the principle of equality and mutual benefit. Muller reminds us that such importance placed on state sovereignty is linked to China’s history. From a Chinese perspective, sovereignty is the main foundation of international law, and as Wang Tieya (1990: 290) argues ‘a legal barrier protecting against foreign domination and aggression’.² Moreover, as Xue Hanqin (2011), now judge of the International Court of Justice, has argued, there is also an important cultural dimension. International law is a relatively new system for China, compared to European states. Muller argues in this vein that for China international law is not as familiar as it is in Western Europe. China’s emphasis on state sovereignty can also be seen as connected to other approaches to international law, such as the Soviet approach, or the Third World Approaches to International Law (TWAIL) approach with its emphasis on colonial history. While China takes this position on sovereignty, its practice is sometimes more pragmatic than expected, Muller argues.

Since around 2014, China no longer has a ‘modest’ approach to international law and has sought to challenge the interpretation of norms or shape international law. The Fourth Plenary Session of the 18th Communist Party of China Central Committee (2014) Outcome Document states that China will:

vigorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, strengthen our country’s discourse power and

² Wang Tieya developed his point thus (1990: 290): ‘The PRC sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the only main foundation upon which international relations and international law can be established and developed. The Chinese put emphasis on sovereignty because it is the hard-worn prize of their long struggles for their lost sovereignty. They take sovereignty as a legal barrier protecting against foreign domination and aggression.’

influence in international affairs, use legal methods to safeguard our country's sovereignty, security and development interests. (Communist Party of China Central Committee 2014)

The development of the law is thus at the centre of Chinese Communist Party policy. While China seeks to be a shaper of international norms, the way in which this occurs is subtle, and is beginning to unfold. There are a number of areas where China seeks to shape international law. In the area of human rights, for instance, China accepts the universal character of human rights, but asserts that the way they are interpreted and applied must take into account history, culture, and the specific circumstances of the country. China assumes that the interpretative authority of human rights is biased in favour of Western cultures.

Another area of engagement has been in the South China Sea arbitration. The Philippines brought the case before an arbitral tribunal, as both states are party to the United Nations Convention for the Law of the Sea (UNCLOS). Although China challenged the jurisdiction of the tribunal, it was not confident enough to make these arguments before the tribunal itself, and declined to participate in the proceedings. For Muller, this was a strategic error on the part of China. It also puts China in the same group as other major powers such as the United States and Russia, which have refused to appear before international dispute settlement bodies. China is different, Muller argues, as China remains insecure about how to use international law arguments. As China is viewed as a rising power, it may appear strange that China is not confident enough to assert its legal position. This is an example, Muller argues, of how China's unfamiliarity with international law still plays a role and shapes the ability of China to use international law.

China also seeks to be a power and shaper of international norms in the field of cybersecurity. China argues that 'cyber sovereignty' should be a guiding principle regulating cyberspace. So far, such view has gained little traction, although some states, including Russia, align with this position. This is an example, Muller argues, of an emerging gap between Western and non-Western states.

China and the Responsibility to Protect

Barelli continued with the discussion of Chinese approaches to international law by focusing on China's approach to one debate in particular: the responsibility to protect (Barelli 2018). The contemporary debate in international law about the responsibility to protect doctrine (R2P) has forced China to confront its traditional opposition to

intervention and intrusions into state sovereignty. While conducting research on the use of force, and in particular on humanitarian intervention, Barelli became interested in the idea about how different regions, and states, have very different understandings and interpretations of international law, and the development of the R2P principle is a case in point.

In essence, the principle of R2P means that when a state allows or commits atrocities against its people, the responsibility to protect these people can shift from the state to the international community. This, of course, is a question that goes to the very heart of sovereignty. Barelli points out that China was recently criticised for failing to live up to its responsibility, as a permanent UN Security Council member, to resolve the unfolding crisis in Syria. While China called for a political resolution to the crisis, it vetoed any UN resolution that would impose sanctions, or allow the use of force, against Syria.

This presents a potential dilemma for China. China has an interest in maintaining the principle of respect for sovereignty, the non-use of force, and non-intervention. It is often used as a ‘shield’ against criticism of China, as it views such criticism as ‘meddling’ in its internal affairs and an affront to its sovereignty. At the same time, however, as China has become a military and economic power, it has interests in maintaining international stability, as its continued prosperity and economic growth are tied to peace and stability. How, then, has China sought to reconcile these differences?

While R2P is recognised as a principle—it is a ‘guiding principle’, rather than a rule, Barelli argues—there remains uncertainty about how it applies and under which circumstances. It is emerging as a recognised tool to shape the international response to atrocities, but the precise contours have not been shaped. It is still viewed as an exception. It recognises that the international community should do ‘something’, but there are different conceptions of what this entails. R2P is understood as comprising three main pillars. The first, and least controversial, is that states have the primary responsibility to protect their population against atrocity crimes—genocide, war crimes, ethnic cleansing, and crimes against humanity. According to the second pillar, in cases where the state does not, or cannot protect its population, the international community may intervene peacefully to assist a state. This includes diplomatic and other support, or the use of peacekeeping, with the consent of the state. Like the first pillar, China views this as being in accordance with the principle of state sovereignty, since intervention can only take place with

the consent of the state. The third pillar, on the other hand, means that, if the circumstances require, the international community should be willing to take coercive measures, including military intervention. In order for such measures to be compatible with the R2P principle, they must be authorised by the UN Security Council.

Rather than outright rejecting the validity of the third pillar, China has sought to engage with it. When discussions on R2P took place in international forums, including the UN Security Council, China actively took part in the process. This is an example, as discussed by Muller, of China moving from a 'rule-taker' to a 'rule-maker', as China sought to shape the emergence of a new principle. How did it do so? First, it sought to limit as much as possible the circumstances that would trigger the third pillar. It also endorsed the so-called sequential approach under which military intervention would only be considered once all other options had been tried. Such an approach, however, was not accepted by the international community, and a report of the UN Secretary General argued against such an interpretation. China has consistently argued that every effort should be made to resolve the crisis with consent of the state involved, but it has not ruled out the use of intervention authorised by the UN Security Council. The position of China is that it supports R2P, but only as long as it does not challenge state sovereignty. Clearly, there is a contradiction in such an approach, as R2P challenges unlimited state sovereignty by its nature.

Barelli argues that it is important to also look at the practice of China, rather than focusing on rhetoric and official statements. Here, a more pragmatic picture emerges. On some occasions, China has shown a willingness to support R2P, such as in the case of Libya. While China supported sanctions against Libya and the referral of the situation to the International Criminal Court, it abstained on a resolution authorising the use of force. In this case, China did not object to the use of force in response to a humanitarian crisis.

It is understandable, Barelli argues, that China would take such an ambivalent position. China cannot take action, either rhetorically or in practice, that expressly undermines its commitment to the principle of state sovereignty. However, the practice of China, including the use of peacekeepers and implicit support of R2P operations, is beginning to challenge this. Interestingly, states in the Association of South East Asian Nations (ASEAN) have taken a position very similar to China as far as understanding the concept of R2P goes (e.g., support of pillars 1 and 2, and reluctance to accept pillar 3). Yet, ASEAN states have not taken the

same approach taken by China on the ground (also because of China's privileged position as one of the UNSC). This shows how different states and regions can take different approaches to international law, but also that such approaches are ultimately guided by political considerations. Slowly, China has begun to align itself with the position taken by a majority of other states, showing that its principled support of state sovereignty can also be mediated by politics.

[B] CONCLUSION

A number of key issues emerged from the debate. All the speakers emphasised the importance of looking to history in understanding how regional approaches emerge, and how they continue to influence the way states approach international law. Moreover, it is important to look at both the rhetoric—what academics and government statements say about international law—and the actual practice of states. While Russian and Chinese approaches emphasise the importance of sovereignty as an underlying value of international law, the practice of those states shows a more complex story. Regional approaches to international law tend to show a different emphasis or accent on certain values or principles (sovereignty, human rights, international adjudication), but they have not presented a fundamental challenge to those norms as such. At what point do such different conceptions of international law move from regional variation, to be expected in a decentralised legal order, to regional fragmentation?

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