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ANDREAS ZIMMERMANN & RAINER HOFMANN, ED., *UNITY AND DIVERSITY IN INTERNATIONAL LAW* (BERLIN: DUNCKER & HUMBLOT, 2006)

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Citer ce compte rendu

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By Mario Prost[*]

"Multiplicity without unity is chaos; unity without multiplicity is tyranny." This quote from French philosopher Blaise Pascal expresses in terms of unity/multiplicity one of the most stringent dilemmas of the liberal doctrine of politics: the somewhat opposing demands for individual freedom and social order. The inner tension within political liberalism is now well characterized: to preserve individual freedom, a normatively compelling and coherent social order—a political *unity*—is needed. Therein lays social order's justification. Yet, as social order is instituted to preserve individual freedom, it must also be responsive to individuals' choices and interests. To avoid lapsing into a "tyranny of the majority", social order must be receptive of society's *multiplicity*. Therein lays its legitimacy.[1]

This inner tension between individual freedom and social order, political unity and social diversity, and authority and legitimacy informs most of the present-day debate about the so-called "fragmentation" of international law.[2] The facts are now well known and warrant only brief mention here. Faced with the explosion of legal norms, increasing normative specificity, and the proliferation of international institutions (including international tribunals), many commentators have stressed the risk of "fragmentation" of international law into a more or less coherent set of partial, autonomous and perhaps even "self-contained" legal sub-systems. They feel that unless international law remains somehow coherent, rational and predictable, it might lose its ability to foster the peaceful regulation of international relations. Without legal unity, there can be no legal community and no social order. In line with Pascal's first statement, law, without unity, is chaos. Others, however, have expressed more positive views on the phenomenon. "Pluralization" or "diversification", as they often refer to, is but further evidence of the complex world we live in. It essentially mirrors States' desire for more diversified and specialized legal regimes, instituted to deal with a variety of international needs. In line with Pascal's second statement, law, without multiplicity, is tyranny and inadequacy. To seem acceptable, most commentators tend towards reconciliation of these two imperatives. "Middle of the road" doctrines, however, amount to little more than a plain acknowledgement of the liberal contradiction. They neither explain it nor offer alternatives to escape from its oppositions and its frustrations.

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[1] On the distinction between justification and its legitimacy, see John Simmons, "Justification and Legitimacy" (1999) 109 Ethics 739.

[2] In fact, as Martti Koskenniemi has devastatingly demonstrated, this inner contradiction gives its inherent structure to the discipline as a whole. See Martti Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

Unity and Diversity in International Law [hereinafter *Unity/Diversity*] largely reflects international lawyers' uneasiness and discomfort with this conventional dilemma. The volume consists of the proceedings of an international symposium held in Kiel, Germany, in November 2004. The aim of the symposium was to "analyze and discuss whether, to what extent, and in what regard international law has indeed developed into separate areas of law, which are either in conflict with each other, have found different solutions to the very same question – or whether instead we can still refer to the very notion of 'general international law' as such."[3] In order to answer these important questions, the organizers have asked five scholars to prepare reports based on a common questionnaire[4] in their respective field of expertise, namely the law of the sea, international humanitarian law and international criminal law, human rights, international environmental law and finally international economic law. Based on these sectoral studies, different scholars have then prepared cross-cutting reports on issues of sources, subjects, domestic implementation, dispute settlement and State responsibility, in order to show whether in the various areas divergent trends have emerged and, if so, to what extent. Following each cross-cutting reports are comments by leading international scholars.

Little can be said about the five questionnaires. They essentially offer practical responses to practical questions. Intended to provide raw material for further reflection, the questionnaires reveal the specific features of each field of study, but leave to others the task of reaching general conclusions as to international law's unity.

The six cross-cutting reports, for their part, all seem to be reaching the same sort of "middle of the road" conclusion: even though there is no substantive homogeneity in international law, every special field of law somehow "falls back" upon the principles of "general" international law. In other terms, there is both a certain degree of conceptual unity and of empirical diversity in international law. Monika Heymann's essay on "unity and diversity with regard to international treaty law" is particularly topical in this respect. The author shows that the way treaties are developed, applied and interpreted varies according to the relevant subject matter. She comes to the conclusion that there is "no inner homogeneity concerning international treaty law."[5] Yet, the author feels as if a certain degree of coherence is preserved

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[3]   Andreas Zimmermann & Rainer Hofmann, eds., *Unity and Diversity in International Law* (Berlin: Duncker & Humblot, 2006), at 23.

[4]   The main questions were: 1) To what extent have NGOs played a role in the development and implementation of applicable rules? 2) Have individuals or transnational corporations been granted the status as subjects of international law in your field? 3) Are there *erga omnes* obligations or norms of *jus cogens* in your field? 3) Are there specific rules in your field concerning the conclusion, application, interpretation, termination, succession and reservation of/to treaties? 4) What is the relevance of customary law in your field, and its relative importance in relation to treaty-based law? What is the function and importance of soft law in your field? 5) To what extent is international law applied/referred to in your field by national authorities/courts? 6) What are the representative characteristics of dispute settlement in your field? 7) What are the rules governing state responsibility in your field?

[5]   Monika Heymann, "Unity and Diversity with Regard to International Treaty Law", at 238.

insofar as the *Vienna Convention on the Law of Treaties* applies to all kind of treaties.[6]

Similarly, Anja Seibert-Fohr, in her contribution on "unity and diversity in the formation and relevance of customary international law", shows that the traditional concept of custom seems to prevail in certain areas of the law, while new approaches, disjointing the objective and subjective elements of custom, emerge in others.[7] The author, however, suggests that there exists a common pattern with respect to custom's formation: traditional mention to article 38 of the ICJ Statute, emphasis on "consensus", and reference to "common values."[8] This common denominator, she feels, "may ultimately strengthen the unity of international law", despite ongoing differences in the process of "finding" custom. This, the author concludes, is evidence of a "diversified unity."[9]

Christian Tams, in his essay on "unity and diversity in the law of state responsibility", also attempts, with his concept of "unity light", to strike a balance between unity and diversity. Tams is clear that special regimes, which operate on the basis of a special *rationale*, differ from the general approach to responsibility. The law of state responsibility is thus diversified; one might even say, he submits, fragmented.[10] Yet, however diversified the different regimes might be, Tams finds that they all rest on the general foundations laid out by the International Law Commission in its draft Articles on State Responsibility: they all accept the notion of breach-based responsibility, they all accept the duty to make reparation, and, by and large, they do not exclude general means of enforcement, such as countermeasures. Accordingly, and on balance, the author finds that there is "more unity than diversity."[11]

In the end, the reader is left with little answer, if any at all, to the important questions raised by the organizers of the symposium. In essence, what the various contributions end up proving is that, whilst international law works in different ways in different areas of social regulation, no special regime is totally remote from "general" international law. This, however, is hardly new. By definition, "general" international law is made of principles which, over time, have proven common to all international regimes. Besides, the concept of "self-contained" regimes has long been discarded in legal literature.

To state that special regimes generally reveal the same structure tells us little about the existence of normative conflicts among and within these regimes. Most importantly, it tells us nothing about possible ways to cope with such conflicts. Surely, all international regimes are composed of treaties, whether universal, regional or bilateral, and customs, whose breach will usually entail the same kind of legal

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[6]   *Ibid.* at 239.
[7]   Anja Seibert-Fohr, "Unity and Diversity in the Formation and Relevance of Customary International Law", at 258-273.
[8]   *Ibid.* at 273-278.
[9]   *Ibid.* at 281-283.
[10]   Christian J. Tams, "Unity and Diversity in the Law of State Responsibility", at 440-458.
[11]   *Ibid.* at 459.

consequences. But to assert this, as the contributors do, amounts to little more than to state, say, that all domestic legal systems are composed of laws, written or unwritten, whose violation will normally entail the same sort of remedies.

Regrettably, *Unity/Diversity* falls short of addressing the most pressing issues regarding the "unity/fragmentation" of international law: is there such a thing as "general" international law? In the affirmative, how can it possibly be a unifying force where there remains so much uncertainty regarding its definition, its sources and its content? Where common values, rather than formal principles, are said to constitute the common core of international law, its centre of gravity, whose values shall prevail? Where two regimes conflict, shall one prevail, and, if so, on the basis of what rule or what principle?

One possible explanation for this is the lack of a common theoretical framework for the symposium, of a point of reference against which the unity and/or diversity of international law can be measured. Two essential questions, to which the answer informs the entire debate, have notably remained unaddressed. First, what is unity? To be fair, some contributors touch upon the issue in passing. Vera Gowlland Debbas, for instance, mentions, albeit elliptically, the unity of secondary rules, substantive unity, institutional unity and the unity of the participants.[12] Beate Rudolf differentiates formal and substantive unity.[13] Yet, a comprehensive definition is blatantly lacking, and it is somehow ironical that Rainer Hofmann, one of the organizers of the symposium, waits until his concluding remarks to finally wonder: "what do we mean by unity and diversity?"[14]

Second, why is unity a concern in the first place? Virtually all the contributors agree that "fragmentation" or "excessive diversification" constitutes a "risk" or a "challenge" to the coherence of the international legal order. Even those who see some possible merits to the diversification of international law "strongly favor" its unity[15] and insist that "we need structures and unifying principles."[16] Why structure and unity are needed, however, remains rather unclear. Beate Rudolf mentions unity as a means to enhance international law's authority.[17] Ahmed Abou-el-Wafa, for his part, writes that unity is justified "by the rule *ex consensus advenit vinculum*, the principle *solus consens est obligat* and the rule *pacta sunt servanda*,"[18] with no further elucidation.

The mere resort to Latin formula does not do the job. Unity is not a technical problem. Unity is an ideology and must hence be justified, or contested, on ideological grounds. In any case, whether international law is unitary and why it

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[12]   "Comment by Vera Gowlland-Debbas", at 285-286.
[13]   Beate Rudolf, "Unity and Diversity of International Law in the Settlement of International Disputes", at 414.
[14]   Rainer Hofmann, "Concluding Remarks", at 491.
[15]   See "Comment by Alain Pellet", at 251.
[16]   Eibe Riedel, "Overall Statements", at 484.
[17]   Beate Rudolf, "Unity and Diversity of International Law in the Settlement of International Disputes", at 410.
[18]   "Comment by Ahmed Abou-el-Wafa", at 376.

should be are questions to which there are no simple answers. Stefan Oeter seems to be the only contributor to the present volume to agree that "there is no logically stringent answer to [these] question[s]."[19] The answer, as he rightly puts it, "depends upon basic assumptions on the nature and structure of international law."[20]

To speak of the unity of international law is to speak of the nature of social order and of the legal institutions that are needed to achieve it. Unity, in other words, essentially relates to the "politics" of international law, not to its "aesthetics". So long as the debate remains, as in *Unity/Diversity*, on a mere technical plane, lawyers will continue to vacillate between unity and multiplicity, chaos and tyranny, without there ever being a sense of why and how to cope with this political dilemma.

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[19] "Comment by Stefan Oeter", at 419.
[20] *Ibid.*