VOLUME 2 2008

Select Proceedings of the European Society of International Law

Edited by Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin

Select Proceedings of the European Society of International Law

Volume 2 2008

Edited by

Hélène Ruiz Fabri
Rüdiger Wolfrum
and
Jana Gogolin

OXFORD AND PORTLAND, OREGON
2010

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213–3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

British Library Cataloguing in Publication Data

Data Available

ISBN: 978-1-84946-064-4

Typeset by Columns Design Ltd, Reading
Printed and bound in Great Britain by
Antony Rowe Ltd, Chippenham, Wiltshire

SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW

This book continues the series Select Proceedings of the European Society of International Law, containing the proceedings of the Third Biennial Conference organised by ESIL and the Max Planck Institute for Comparative Public Law and International Law in 2008. The conference was entitled 'International Law in a Heterogeneous World', reflecting an idea which is central to the ESIL philosophy. Heterogeneity is considered one of the pillars upon which Europe's contribution to international law is built and the subject was considered in a number of panels, including such diverse topics as migration, the history of international law, the rules on warfare and international environmental law.

Preface

Between the fourth and the sixth of September 2008, the Third Biennial Conference of the European Society of International Law (ESIL) took place at the Ruprecht Karls University Heidelberg (Germany). The Conference was hosted by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

The theme of the Conference was 'International Law in a Heterogeneous World'; a topic that reflects an idea which is central to the philosophy of ESIL. Heterogeneity is considered to be one of the pillars upon which Europe's contribution to international law is built, and the subject was discussed in a number of panels as well as two keynote speeches and one concluding round table. Of the many interesting research projects that were presented, a selection is offered in this volume. The papers cover a wide range of topics, but focus on the main theme of the conference: heterogeneity. Hence, this volume covers the topics of migration and immigration, international law and religions, international organisations, legitimacy in international law, the multiplicity of the law-making process, international legal traditions, international environmental law, and several more.

This volume is the second in the series of the 'Selected Proceedings of the European Society of International Law'. The background to the ESIL conferences is the notion that European legal scholarship has always been at the heart of international law even if its legacy mingles with other influences. Theoretical works have long explored 'the European tradition of international law' and emphasised the unique character of this contribution. Some critics have, of course, scoffed at European aspirations to universality in this discipline, by arguing that Europe is essentially preoccupied with European interests which are not truly universal. Nevertheless, regardless of the perspective adopted, Europe's historical contribution cannot be denied. European theorists have played a central role in the evolution of international law, while the promotion of the international rule of law continues to permeate European foreign policy.

This special contribution of the European tradition of international law is highlighted throughout this volume and will hopefully continue to flourish in the future.

We owe many thanks to Falilou Saw, Yvonne Klein and Marina Filinberg, who organised the conference. Furthermore, we would like to thank Klaus Zimmermann for his logistic support, and Dietmar Bussmann, Florian Finocchario and Michael Brück for their technical support. Last but not least, we would like to express our gratitude to the Max Planck Society and the Fritz Thyssen Foundation for their generous financial support of the conference.

Avant-propos

La troisième Conférence biennale de la Société européenne de droit international (SEDI) s'est tenue du 4 au 6 septembre 2008 à l'Université Ruprecht Karls d'Heidelberg (Allemagne), à l'invitation de l'Institut Max Planck pour le droit public compare et le droit international d'Heidelberg.

La Conférence avait pour thème général «Le droit international dans un monde hétérogène», en écho à une idée qui est au cœur de la philosophie de la SEDI. L'hétérogénéité est l'un des piliers sur lesquels la contribution de l'Europe au droit international se construit et le sujet a été débattu tant au sein de divers panels, que par deux conférenciers prestigieux et dans le cadre de la table-ronde de clôture. Une sélection d'un certain nombre des projets de recherche présentés lors de la Conférence est offerte dans le présent ouvrage. Les contributions couvrent un large éventail de sujets, tout en restant centrées sur le thème principal de la Conférence, l'hétérogénéité. Ainsi, l'ouvrage touche-t-il des domaines aussi variés que l'immigration et les migrations, le droit international et les religions, les organisations internationales, la légitimité en droit international, la multiplicité des procédés d'élaboration du droit international, les traditions juridiques internationales, le droit international de l'environnement, et bien d'autres encore.

Ce volume est le deuxième de la série des Actes de la Société européenne de droit international. A l'arrière-plan des conférences de la SEDI, il y a l'idée que l'Europe s'est toujours située au coeur du droit international même si son legs s'entremêle avec d'autres influences. Des recherches théoriques et historiques ont largement exploré "la tradition européenne du droit international" et mis l'accent sur le caractère sans équivalent de cette contribution. Bien sûr, certaines critiques ont moqué l'aspiration européenne à l'universalité en soutenant notamment que l'Europe se préoccupe avant tout des intérêts européens, lesquels ne sont pas vraiment universels. Quoi qu'il en soit, indépendamment de la perspective adoptée, la contribution historique de l'Europe peut difficilement être niée. Les théoriciens et philosophes européens ont joué un rôle central dans l'évolution du droit international et la promotion du règne du droit au niveau international continue d'imprégner la politique extérieure européenne.

Cette contribution particulière de la tradition européenne du droit international est perceptible tout au long du présent ouvrage et continuera, peut-on espérer, à se développer à l'avenir.

Nous tenons à exprimer notre gratitude à Falilou Saw, Yvonne Klein et Marina Filinberg, qui ont organisé la Conférence. Nous souhaitons également remercier Klaus Zimmermann qui a pris en charge l'aspect logistique ainsi que Dietmar Bussmann, Florian Finocchario et Michael Brück qui ont assumé les aspects techniques. Enfin et surtout, nous remercions très sincèrement la Société Max Planck et la Fondation Fritz Thyssen Foundation pour le généreux soutien financier qu'elles ont offert à la Conférence.

Contents

Universality of International Law from the Perspective of a Practitioner

BRUNO SIMMA*

INTRODUCTORY REMARKS

A KEYNOTE SPEECH at a conference on 'International law in a heterogeneous world' devoted to the 'universality' of international law might remind the listener, especially an audience like tonight's, with, I am sure, a particularly high percentage of post-modernists, of frightened people whistling in the dark—for which there is no reason, I would submit right at the outset. But what the topic I have been asked to talk about certainly seems to evoke is a tension between the two notions of heterogeneity and universality. The choice of the topic suggests the idea (or the hope) that heterogeneity does not exclude universality, that in today's world the continued existence and vitality of universal international law will be contingent upon its capacity to accommodate an ever-larger measure of heterogeneity. Therefore, my focus tonight will be on international rules and mechanisms (particularly judicial) and international institutions serving this very purpose—that is, the accommodation of heterogeneous values and expectations by means of international law.

I am aware that my topic will necessarily engage a number of buzzwords in contemporary international law, but beyond juggling with these, my approach tonight will be characterised by two main features.

First, I will treat my topic from the perspective of a practitioner. That is, I will deal with the huge amount of theoretical writing on the subject only when absolutely necessary, and instead concentrate on practical aspects, and thus demonstrate how the theoretical problems that I come across in my presentation play out in practice. In doing so, I will have to condense or summarise quite a few issues that we will encounter on our rather extensive journey together, but with which, I trust, most of you will be familiar.

* Judge at the International Court of Justice. This paper was originally presented as the Keynote Speech at the opening session of the Biennial Conference of the European Society of International Law in Heidelberg on 4 September 2008. I would like to thank Markus Benzing for his extremely valuable and inspired assistance. I have kept the paper in its original format and only added footnotes where absolutely necessary. Also, I have not updated the text with regard to developments, for instance in the case law referred to, but only indicated such developments and commented on them in the footnotes.

As the second specific take on my topic, I will base myself as much as I can on my personal experience, that is, on insights gained through giving occasional advice to governments, by serving in a few legal teams before the International Court of Justice (ICJ), through membership in one of the UN's human rights treaty bodies, namely the Committee on Economic, Social and Cultural Rights, through my work in the International Law Commission, as an arbitrator, and ultimately in the ICJ.

THREE CONCEPTIONS (LEVELS) OF UNIVERSALITY

In the following, I will define what I understand the 'universality' of international law to mean. I will arrive at three different conceptions, or levels, each with its own range of implications and problems. I will then deal with these conceptions in turn, and select from among the clusters of problems which they encounter—which I will call 'challenges'—as well as from the ways to cope with these challenges, the one(s) on which I hope I will be able to say something meaningful.

Let me now turn to my three different understandings, or 'levels', of universality of international law.

At a first, if you want, basic level, and corresponding to what I would regard as the 'classic' understanding of our notion, universality of international law means that there exists on the global scale an international law that is valid for and binding on all states.[1] Universality thus understood as global validity and applicability excludes neither the possibility of regional (customary) international law nor that of treaty regimes creating particular legal sub-systems, nor the dense web of bilateral legal ties between states (I exclude constructs like 'persistent objection' from tonight's analysis). But all these particular rules remain 'embedded', as it were, in a fundamental universal body, or core, of international law. In this sense, international law is all-inclusive.

At a second level, a wider understanding of universality responds to the question whether international law can be perceived as constituting an organised whole, a coherent legal system, or whether it remains no more than a 'bric-à-brac', to use Jean Combacau's expression[2]—a random collection of norms, or webs of norms, with little interconnection. This question is probably best termed that of the 'unity' or 'coherence' of international law; and strong connotations of predictability and legal security will be attached to such (in my terminology) second-level universality.[3] International law has, of course, long been perceived as a legal system by international lawyers, most of them admittedly not much bothered by fine points of systems theory, while today many commentators see this systemic character threatened by a process of 'fragmentation', a challenge to which I will turn later.

[1] RY Jennings, 'Universal International Law in a Multicultural World' in M Bos and I Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (Oxford, Clarendon Press, 1987) 39, 40–1.

[2] J Combacau, 'Le droit international: bric-à-brac ou système ?' (1986) 31 *Archives de philosophie du droit* 85, 85.

[3] ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission* (United Nations, A/CN.4/L.682, 2006) 491.

At a third level, universality may be taken to refer to an—actual or perceived—(changing) nature of the international legal system in line with the tradition of international legal thinking known as 'universalism'. A universalist approach to international law in this sense expresses the conviction that it is possible, desirable, indeed urgently necessary (and for many, a process that is already under way), to establish a public order on a global scale, a common legal order for mankind as a whole.[4] International law, according to this understanding, is not merely a tool-box of rules and principles destined to govern inter-state coordination and cooperation; rather it constitutes a 'comprehensive blueprint for social life', as Christian Tomuschat has called it.[5] Universalism thus understood goes far beyond the addition of a layer of what Wolfgang Friedmann[6] has called the 'international law of cooperation' to the body of the law. The concept implies the expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain 'verticalisation' of international law, de-emphasising consent in law-making, introducing international criminal law, by the existence of institutions and procedures for the enforcement of collective interests at the international level—ultimately, the emergence of an international community, perceived as a legal community.[7] Indeed, international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states, but all human beings. In doing so, it begins to display more and more features that do not fit into the 'civilist', bilateralist structure of the traditional law. In other words, it is on its way to being a true *public* international law.[8]

Just two quick remarks completing this point: first, and addressing concerns of certain voices coming from the Left, one can perfectly adhere to an universalist view as described without entertaining, or accepting, hegemonic second thoughts. And further, one can adhere to such a universalist approach without necessarily subscribing to the view that contemporary international law is undergoing a process of 'constitutionalisation'. I will return to this issue at the very end of this address.

[4] A von Bogdandy and S Delavalle, *Universalism and Particularism as Paradigms of International Law* (Institute for International Law and Justice/New York University School of Law, International Law and Justice Working Paper no 3, 2008) 1.

[5] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century (General Course on Public International Law)' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 9, 63.

[6] WG Friedmann, *The Changing Structure of International Law* (London, Stevens, 1964).

[7] HEH Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil des Cours de l'Académie de Droit International* 1, 11–12.

[8] B Simma, 'From Bilateralism to Community Interest in International Law (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, at 231–34.

CHALLENGES FACED BY UNIVERSALITY AT ITS VARIOUS LEVELS

After the preceding brief *tour d'horizon* of what 'universality' of international law may be taken to mean, let me describe the challenges which the notion faces, and the ways to cope with them, using as a point of departure the conceptions I have just developed.

The understanding of universality of international law in the classic (level I) sense, that is, its global reach, has encountered many challenges, indeed attacks, from different quarters, both philosophical/theoretical and practical, for a long time. They embrace more aggressive strands of regionalism and related, more 'innovative', concepts like those of a 'League of (liberal) democracies' versus 'pariah' or 'rogue' states, designed to bypass the United Nations, cultural relativism in international human rights discourse, as well as what I would call 'post-modern' challenges stemming from Critical Legal Studies, Marxist theory, the theory of Empire and Feminist theory. Level II universality in particular has not only come under fire from a new species of *Voelkerrechtsleugner* (negligible intellectually, if they were not to teach at influential US universities), but has also come under more friendly, if ultra-theoretical, fire from a very specific sociological school, 'global legal pluralism', which sees many autopoietic functional systems emerge on a global scale to eventually substitute the state.[9] Finally, to formulate a challenge of my own to level III universality, universalism as thus understood appears to me not as far advanced as many of its protagonists (want to) believe; it suffers from serious practical shortcomings, and is also being attacked by several post-modern theories.

But let us now turn to tonight's specials, so to speak, from among the menu of challenges to universality. As I indicated at the outset, my choice is determined by the topic assigned to me, namely the viewpoint of a practitioner, particularly of the humble practitioner in front of you. This specific point of departure leads me to turn to a range of problems which German international lawyers would regard as belonging to *Voelkerrechtsdogmatik* rather than genuine theory, but which, wherever they may belong, have also considerable practical relevance. Thus, the challenge to level I universality, which I have selected for discussion is that of the alleged fragmentation of international law; as my 'favourite' challenge to level II universality, I will take up the proliferation of international courts and tribunals, while I could not yet find a comparable buzzword to sum up the problems encountered by the common-legal-order-of-mankind approach embodied in level III universality.

Let me emphasise that these are quite subjective choices. The links between the various understandings of universality and 'their' respective challenges are anything but mutually exclusive, and notions like 'fragmentation' and 'proliferation' are not separated by sharp dividing lines. For instance, I could have selected fragmentation as the principal threat to universality in the sense of unity and coherence of

[9] A Fischer-Lescano and G Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

international law, and many observers would regard the proliferation of international courts and tribunals as one aspect, or one prominent cause of, such fragmentation.

In Particular: The 'Fragmentation' of International Law

The Phenomenon

After these clarifications, I turn to the phenomenon of fragmentation, conceived as a challenge to the universality of international law in the sense of the latter's global validity and applicability, and to the international legal responses developed to cope with it.

Fragmentation has become one of the great favourites in international legal literature over the past years. Its connotations are clearly negative: something is splitting up, falling apart, or worse: bombs or ammunition can be designed to fragment and thus become even more destructive. In international legal parlance the term gained such prominence out of the fear that international law might lose its universal applicability, as well as its unity and coherence, through the expansion and diversification of its subject-matters, through the development of new fields in the law that go their own way, and that legal security might thereby suffer (remember that I will take up the proliferation issue separately). In particular, it is the appearance of more and more international treaties of a law-making type, regulating related or identical matters in a variety of, sometimes conflicting, ways and binding different but sometimes overlapping groups of states, that is a matter of concern.[10] Indeed, there is simply no 'single legislative will behind international law'.[11] The Arbitral Tribunal in the *Southern Bluefin Tuna* case has spoken of 'a process of accretion and cumulation' of international legal obligations.[12] The Tribunal regarded this as beneficial to international law, and I would agree in principle. However, if taken to the extreme, the question does of course arise whether this development might lead to a complete detachment of some areas of international law from others, without an overarching general international law remaining and holding the parts together. In arriving at this question, one would not have to go as far as suspecting that '[p]owerful States labour to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created'.[13]

[10] K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions' (2001) 5 *Max Planck United Nations Yearbook* 67, 71.

[11] ILC, *Report on Fragmentation* (n 3), para 34.

[12] *Australia and New Zealand v Japan – Southern Bluefin Tuna case*, Award (adopted 14 August 2001) (Jurisdiction and Admissibility), 23 UNRIAA (2004) 40, para 52.

[13] E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595.

In my view, to see such sinister motives at work behind our phenomenon is not justified. I prefer to offer a much more natural, or let me say, technical, explanation: the phenomenon described as 'fragmentation' of international law is nothing but the result of a transposition of functional differentiations of governance at the national to the international plane;[14] which means that international law today increasingly reflects the differentiation of branches of the law that are familiar to us from the domestic sphere. Consequently, international law has developed, and is still developing, its own more or less complete regulatory regimes, which may at times compete with each other.

International Law's Ways to Cope with Fragmentation

Institutional Aspects So much about fragmentation as a phenomenon. Now, what are the institutions and methods by which international law attempts to reconcile necessary functional differentiation with unity and coherence? This task places responsibilities on different international actors: First—and leaving aside the law-making activities of international organisations—states as the principal creators of international legal rules ought to be aware of the need for coherence of the international legal system as a whole, for instance when they negotiate new international agreements. Second, international organisations and courts, when they interpret and apply international law, need to bear in mind that they are acting within an overarching framework of international law, residual as it may be. Last but not least, national courts, which play an ever more relevant role in the application of international law, must also be aware of the impact that their activities can have on the development of a coherent international legal system.

Staying with the institutional aspects for a second, I would submit that—especially from my perspective as a practitioner—both the International Law Commission and the International Court of Justice represent pillars of unity and coherence of universal international law.

While the Court has to, and thus claims to, apply the law as it stands, the Commission is supposed to systematise and progressively develop it. It is not unimportant to note that the personal ties between the two organs are strong. Many ICJ judges have formerly served on the ILC (in late 2008: seven out of 15). This has led to an interesting complementary relationship between the two bodies. Specifically with regard to tonight's topic, the Commission's projects pursue the purpose of fostering universality at all the levels that I have introduced, with an emphasis on levels I and II; its work products aim to be applied as widely as possible, even though more recently the Commission has also drafted rules that are designed for concretisation at the regional, or even bilateral, plane.[15] Neither is the Commission shying away from the elaboration of special regimes if necessary. A

[14] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 4.

[15] See, eg, Convention on the Law of the Non-navigational Uses of International Watercourses (adopted and opened for signature 21 May 1997, not yet entered into force) (1997) 36 ILM 700, UN ILC 'Draft articles on the law of transboundary aquifers' (2008) UN Doc A/CN 4/L724, UN ILC 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) GAOR 56th Session

case in point would be the accommodation of specific features of reservations made to human rights treaties that is currently under way in the context of the wider ILC project on reservations: even Special Rapporteur Alain Pellet has come to accept that *leges speciales* to serve that purpose are no threat to the unity of the law, but will lead to a more responsive regime, not 'self-contained' in any sense, and thus to a progressive development of international law.

The most recent, and most direct, contribution of the ILC to the unity and coherence of international law is the 2006 (final) Report of Martti Koskenniemi's Study Group on Fragmentation with its 'tool box' of ways and means to cope with the undesirable effects of our phenomenon.[16] While this voluminous study has been criticised by some as merely stating the obvious, from my specific viewpoint it is of immense value as a piece of work which attempts to assemble the totality of international law's devices available to counter the negative aspects of fragmentation.

As to the role of the ICJ as a guarantor of the unity of international law, I will say a few words on this later, in the context of judicial proliferation.

I now turn from the institutions to the methods developed in international law to sustain its unity and coherence in the face of expansion and diversification. Again, the 2006 ILC Report on fragmentation is a great source of inspiration in this regard.

Methods Employed The first device to be mentioned here is the introduction of a normative hierarchy in international law, above all the development of peremptory limits to the making and administering of international law in states' relations *inter se*.

From a voluntarist point of departure, the idea of any hierarchical relationship between international legal rules is problematic. Nevertheless, we have witnessed the recognition of two types of norms that do imply superior status: *jus cogens*, or peremptory norms, and, possibly, norms leading to obligations *erga omnes*. As to the latter concept, it does not necessarily entail a hierarchically superior position; therefore I will categorise it as a method of sustaining coherence in its own right. Let me just mention at this point that, while the ICJ was not the first to use the notion of obligations *erga omnes*, it was the Court's famous dictum in the *Barcelona Traction* judgment of 1970 that triggered the doctrinal fascination with the concept.[17] Concerning *jus cogens*, and in rather surprising contrast, it was not until 2006, ie, no less than 36 years after the *Barcelona Traction* judgment, and 25 years after the blessing of the concept by the entering into force of the Vienna Convention on the Law of Treaties with its Articles 53 and 64, that the ICJ could finally bring itself to issue an authoritative pronouncement. This was eight years after the ICTY had first explicitly mentioned *jus cogens* in its *Furundžija* judgment

Supp 10, 370, UN ILC 'Draft articles on the allocation of loss in the case of transboundary harm arising out of hazardous activities' (2006) GA 59th Session Supp No 10 (A/59/10).

[16] See ILC (n 3).

[17] Barcelona Traction, Light and Power Company Limited, Judgment, ICJ Reports 1970, p 3, para 33.