

ZOOM IN

The Question:

Doctrinal thoughts on a doctrinal approach to the problem of diversity in International Law. Revisiting Anthea Roberts' *Is International Law International?* and Comparative International Law

Introduced by Maurizio Arcari and Paolo Palchetti

One of the most interesting trends of the recently published literature on international law is the increasing attention paid to the role and place of legal scholars in the context of the international legal order. In parallel with legal analyses concerned with the growing influence exerted by technical 'experts' in our discipline, a bulk of recent studies have been engaged in unfolding the implications of the professional engagement of academics in international law.¹ Whether or not this trend reveals a modern attempt to reevaluate the impact of scholarship against the secondary role assigned to 'the teachings of the most highly qualified publicists' under Article 38 of the Statute of the International Court of Justice,² it cannot be ignored that there are very delicate challenges behind it. In that regard, one may start with a statement made by the late Judge Baxter, according to whom 'the lawyer is indeed a social engineer and in that role, he must be able to invent or to produce machinery that will assist in the resolution of disputes and differences between the States... One of the ways in which he can do so is by understanding the infinite variety of ways in which legal norms may reflect different intensities of agreement'.³ In all likelihood, the 'infinite variety' of international law alluded to by Judge Baxter can hardly fail to be influenced, if not truly expanded or amplified, by the huge diversity in legal backgrounds, with academics coming from all different corners of

¹ See generally J d'Aspremont, T Gazzini, A Nollkaemper, W Werner (eds), *International Law as a Profession* (CUP 2017).

² See A Pellet, 'Article 38' in A Zimmermann, C Tomuschat, K Oellers-Frahm, C Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP, 2012) 868-870.

³ RR Baxter 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 566.

the world, contributing to differences in the way they approach the tenets of the discipline. To put it another way, one cannot exclude the possibility that the differing legal backgrounds of academics may eventually create a challenge to the universality of international law not dissimilar from that posed to its unity and coherence under the well-known issue of fragmentation.

An important doctrinal response to the above-mentioned challenges has recently been provided in the outstanding book by Anthea Roberts *Is International Law International?* and by the Comparative International Law (CIL) approach therein proposed.⁴ The bulk of Anthea Roberts' proposal lies in the suggestion that 'a comparative law approach may help international lawyers to look at their field through different eyes and from different perspectives, enabling them to understand others more fully and to critique themselves and their own state more perceptively'.⁵ The appeal of this cosmopolitan message is confirmed by the fact that the CIL approach has begun to spread beyond the seemingly 'dominant college' of English-speaking international lawyers from which it originates.⁶ Another issue is however that of ascertaining whether CIL, apart from its being a doctrinal machinery conceived by and for scholars, can prove to be an effective tool for coping with the 'infinite variety' of international law and with the threats to its universality and coherence. This basic issue raises many different questions: Is the diversity of legal background among international lawyers and its impact on the universality of international law a truly contemporary issue, or is it something traditionally inherent to an international legal system made of different sovereign States and studied by scholars coming from different legal cultures? And if the coexistence of different national perspectives has always characterized international law, why is it only now that this special feature of the discipline is attracting such great interest? Is CIL an autonomous discipline or simply one of the many methods for approaching international law problems? What are the normative implications, if any, of CIL?

⁴ A Roberts, *Is International Law International?* (OUP, 2017).

⁵ *ibid* 321.

⁶ See for example S El Boudouhi, 'Le droit international comparé. Mythe ou réalité?' (2017) 121 *Revue Générale de Droit International Public* 981-1009.



Attentive as it is to its role as an instrument for promoting dialogue and exchange among academics and professionals engaged with international law, QIL cannot escape considering the above-mentioned questions and has asked two scholars with a different legal background, Stavros-Evdokimos Pantazopoulos and Andrea Carcano, to try to get to grips with some of them. The analysis they propose of Anthea Roberts' book may differ, the first author being mostly concerned with the methodological implications of the proposed CIL approach to the science of international law; the second author with the normative impact of the topic. However, both contributions seem to converge in the assessment that the doctrinal approach under review is one inescapable tool for dealing with the complexities of modern international law.