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Introduction

IN RECENT DECADES there has been a considerable growth in the activities of international tribunals. We have seen an increase in the case-load of existing tribunals and the establishment of new tribunals. The practice of the International Court of Justice (ICJ), the dispute settlement mechanism of the World Trade Organization (WTO), investment arbitration (mainly through the International Centre for Settlement of Investment Disputes), the International Tribunal for the Law of the Sea and regional human rights courts illustrates the trends. Furthermore, supervisory bodies that have been established to control compliance with treaty obligations in respect of human rights, multilateral environmental agreements and international labour law, have adopted decisions in an increasing number of specific cases. National courts further add to the practice of adjudication of claims based on international law.

From one perspective, the increasing practice of courts and supervisory bodies strengthens the adjudicatory process in international law, and may be seen as strengthening the international rule of law. International law is more likely now than ever before to be followed up through formalised procedures designed to ensure that the law is applied in specific cases.

From another perspective, this development poses challenges to the unity of international law. Most of these courts operate within their own special regime (functional, regional, or national) and will primarily interpret and apply international law within the framework of that particular regime. While they may and often do apply rules of general international law, their powers to do so and the interpretations that they offer will be limited and coloured by that particular regime. The role of domestic courts poses special challenges, as the powers of such courts to give effect to international law, as well as their actual practice in applying such law, will be coloured by national law.

The challenge that the practice of (international) tribunals poses for the unity of international law is part of a much broader phenomenon of fragmentation, which also relates to such phenomena as relatively autonomous international organisations, regionalism, unilateralism and bilateralism.¹

¹ B Simma, D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *Eur J Int'l L* 483; N Thomas, *Governance and Regionalism in Asia* (New York, Routledge, 2009); AJ Grant and F Söderbaum, *The New Regionalism in Africa*

Increasingly specialised treaty regimes and international organisations with differing memberships and overlapping jurisdictions² may not sufficiently take account of one another, and thus may produce inconsistencies within the general international order.³

Of course, fragmentation is not at all a new phenomenon. It stems from a multitude of factors that are familiar to traditional international law, including sovereign equality of states, the lack of centralised organs, specialisation of law, different structures of legal norms (for example, hierarchical and non-hierarchical), parallel and sometimes competing regulations, an expanding scope of international law, and different dynamics for rule development.⁴

The proliferation and increasing activity of international courts and compliance mechanisms have provided new dimensions to the phenomenon of fragmentation.⁵ While the increasing use of international tribunals can be seen as a function of the expansion and maturity of international law,⁶ it may lead to further fragmentation. Globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled with their own specialised regimes, both in terms of organisation and self-perception, that they are likely to contribute to fragmentation.⁷

The fragmentation of international law through the operation of tribunals has institutional, procedural and substantive aspects. At an institutional level, the proliferation of tribunals and compliance organs for specific treaty regimes has given rise to a concern over deviating jurisprudence and forum-shopping. At the one extreme is the ICJ with its broad substantive jurisdiction combined with specific compulsory jurisdiction

(London, Ashgate Aldershot, 2003); D Bodansky, 'What is So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *Eur J Int'l L* 339; G Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law' (2008) 49 *Harv Int'l LJ* 323; A Reich, 'Bilateralism versus Multilateralism in International Economic Law' (2010) 60 *U Toronto LJ* 263.

² EU Petersmann, 'De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement' (2008) 6 *Loy U Chi Int'l L Rev* 209, 210.

³ International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (ILC Fragmentation Report), UN Doc A/CN.4/682 (2006) (finalised by Martti Koskenniemi).

⁴ C Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *NYU J Int'l L & Pol* 259; AC Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden J Int'l L* 1.

⁵ Leathley, *ibid* 265.

⁶ PS Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?' (2004) 25 *Mich J Int'l L* 929.

⁷ A Khrebtukova, 'A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation' (2008) 4 *J Int'l L & Int'l Rel* 55; G Hafner, 'Pros and Cons of Ensuing from Fragmentation of International Law' (2004) 25 *Mich J Int'l L* 849, 857.

as set out in certain treaties.⁸ At the other extreme are investment tribunals which are established *ad hoc* and which may or may not have an institutional affiliation.⁹ The rights and obligations of legal subjects may depend on which body is seized to recognise them.¹⁰

At the procedural level, the procedures to be followed by the tribunals differ significantly and may or may not be conducive to their coordination with other tribunals. Of particular interest are the rules on the applicable law and on interpretation. It has been suggested that procedures to seek information from, informal or formal advice from, or formal decisions by, organs established under other treaties may improve the prospects for coordination.¹¹

At the substantive level, problems consist of the emergence of 'special laws', treaty-regimes, and functional clusters of rules and specialised branches of international law that raise questions in terms of their relationship *inter se* and to general international law.¹² These are factors that may lead to substantive inconsistencies in jurisprudence. Even in cases where the same case is argued on the basis of almost identical rules before tribunals following almost identical procedures, the results may differ significantly.¹³ The lack of specific rules concerning the methodology to be used in the mandates of most tribunals means that they are potentially open to a very broad range of interpretive arguments. Given the significant human and economic resources available to most parties to cases before international tribunals, we observe that such tribunals are being

⁸ See, *inter alia*, art 38 of the Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150.

⁹ OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *Eur J Int'l L* 301.

¹⁰ One frequently cited example is the *Sword Fish* case between Chile and the European Commission, which was brought before the International Tribunal of the Law of the Sea by Chile (available at www.itlos.org/cgi-bin/cases/case_detail.pl?id=6&lang=en) and before dispute settlement under the WTO by the European Communities (available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm) (both last visited 1 June 2011). None of these cases were pursued beyond the preliminary stage.

¹¹ M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J Int'l L* 553, 553–56.

¹² ILC Fragmentation Report (n 3), para 489. One frequently cited example is the *MOX Plant* case, which was brought before two separate arbitration tribunals of the Permanent Court of Arbitration; one according to the United Nations Convention on the Law of the Sea (10 December 1982) (available at www.pca-cpa.org/showpage.asp?pag_id=1148), and one according to the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992) (available at www.pca-cpa.org/showpage.asp?pag_id=1158) (both last visited 1 June 2011), as well as the European Court of Justice (*European Commission v Ireland*, Case C-459/03).

¹³ An obvious example is an investor–state dispute raised by the same investor on the basis of the same facts against the Czech Republic before two different investment tribunals, *CME Czech Republic BV v Czech Republic* and *Lauder v Czech Republic*. Both tribunals were established under the UNCITRAL Arbitration Rules, considered almost identical rights and duties under two distinct bilateral investment treaties, but came to very different conclusions.

subjected to broad ranges of such arguments, which frequently result in lengthy and complex decisions.¹⁴

The extent to which the current level of fragmentation is problematic is contested. It may well be argued that overall, the different international tribunals share a coherent understanding of international law. Moreover, the fundamentals of general international law tend to remain the same regardless of which tribunal is deciding the issue. The risk of conflicting judgments is largely a theoretical problem and whilst there are instances of overlapping jurisdiction between tribunals which share the same competence to settle disputes on the basis of international law, this does not generally lead to disagreement or disorder.¹⁵

It can even be argued that it is through the decisions of the national and regional tribunals that we are witnessing a progressive development and application of international standards. These tribunals generally act more as agents and instruments for the unity and integrity of international law than as sources of its fragmentation.¹⁶ Some authors have also downplayed the problems of fragmentation on the ground that competition for influence among institutions as a generative and market-like pluralism has produced more progress toward integration and democratisation than could have been achieved through more formal means.¹⁷ Charney has noted that the alternative fora that complement the work of the ICJ strengthen the system of international law, notwithstanding some loss of uniformity. Even different approaches adopted in relation to the same subject may only represent a healthy 'level of experimentation in a collective effort to find the best rule to serve the international community as a whole'.¹⁸

¹⁴ The length and complexity of decisions of international tribunals have increased significantly in the past decades, and this is particularly visible in cases relating to international trade and investment law.

¹⁵ M Prost and P Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5 *Chinese J Int'l L* 341. Also T Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Berlin, Heidelberg, New York, Springer, 2005) 587; PS Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?' (2004) 25 *Mich J Int'l L* 929.

¹⁶ Rao (n 15), 958–59. See also A Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in I Buffard, J Crawford, G Hafner and A Pellet (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden, Brill, 2008) 107.

¹⁷ See, eg: Treves (n 15); J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 *Mich J Int'l L* 903.

¹⁸ JI Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 101, 354. See also WT Worster, 'Competition and Comity in the Fragmentation of International Law' (2008) 34 *Brook J Int'l L* 119.

Still others have challenged the view of fragmentation as a negative development and a threat to the legal system, by suggesting that international law is not fragmenting, but rather is being transformed into a pluralist system. Instead of being undermined by fragmentation, the rules, institutions, and practices of the international legal order can be strengthened by the emergence of an international legal pluralism. It has been argued that the 'respect of legitimate difference inherent in such a pluralist conception may actually enhance the effectiveness of international law by increasing the legitimacy and political acceptability of international legal rules.'¹⁹

On the other hand, presidents of the ICJ, including Jennings, Schwebel and Guillaume, have pointed to problematic aspects of fragmentation among international tribunals. Judge Guillaume emphasised that the prospect of forum-shopping may generate unwanted confusion and distort the operation of justice. Such concerns were followed by suggestions to facilitate the resort to advisory opinions from the ICJ.²⁰

It has been pointed out that differences in the development of dispute settlement mechanisms in various areas of international law may lead to careful consideration of some interests while other interests are regarded as irrelevant or not accorded corresponding weight. Such concerns are particularly relevant where a limited range of interests is protected through mandatory dispute settlement. One example is the discussion of how the dispute settlement mechanism and the rules of the WTO could be reformed to strike an appropriate balance between trade and other interests.²¹

Others have argued that fragmentation may sabotage the evolution of a more democratic and egalitarian international regulatory system. Benvenisti and Downs have emphasised three main reasons why we should consider fragmentation to be a serious problem, all of which are relevant in the context of international tribunals. They have suggested that fragmentation limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence, that it increases the transaction costs that international legal bodies must incur in trying to reintegrate or rationalise the legal order, and that it creates a regulatory order that reflects the interests of the powerful.²²

¹⁹ WW Burke-White, 'International Legal Pluralism' (2004) 25 *Mich J Int'l L* 963, 978. See also SR Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *Am J Int'l L* 475.

²⁰ M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J Int'l L* 553, 553–56.

²¹ See JP Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard Int'l LJ* 2, 333, 364 and 376.

²² E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stan L Rev* 595, 597–98.

While the debate on the question whether fragmentation on the whole is a positive or negative force in international law is thus ongoing, and more work certainly needs to be done, in this volume we approach the issue of fragmentation from a different angle. There is a need to move beyond general statements and assumptions concerning the links between tribunals and fragmentation of international law and to increase our understanding of these links by examining in depth the practices and dilemmas within the various legal regimes.

On the whole, not much thought has been given to the question of how specific (international) courts and institutions do contribute to, or can counteract problems of fragmentation.²³ It is noteworthy that the International Law Commission in its work on fragmentation did not make any proposals as to how international courts could function, alone or in cooperation, to that end.²⁴ It did observe, however, that international law's traditional 'fragmentation' has already equipped practitioners with techniques to deal with rules and rule-systems that point in different directions.²⁵ Specific manifestations of functionally discrete international courts as well as national courts raise the question of how these techniques can be applied as part of the judicial function. With the exception of a few contributions dealing with human rights courts and the WTO, little is known as to the practices of particular courts and tribunals, whether individually or from a comparative perspective. In particular, little attention has been given to the powers and practices of international courts to counteract fragmenting patterns, and contribute to the unity and coherence of international law.²⁶

National courts face an increasingly complex web of national and international rules that will be relevant for their decision-making. As international legal regimes, in general, lack effective enforcement mechanisms, to some extent they depend on national courts for their effective application. The increase in the application of international law in national courts raises the question whether this practice further contributes to a fragmentation of international law, or whether national courts seek ways to

²³ Major contributions to this discussion were published as parts of 25(4) *Mich J Int'l L* (2003–04) publishing the proceedings from the symposium 'Diversity or Cacophony: New Sources of Norms in International Law'.

²⁴ C Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *NYU J Int'l L & Pol* 259.

²⁵ ILC Fragmentation Report (n 3), para 20.

²⁶ One notable exception is the publication of the proceedings from a symposium on fragmentation of international law and international tribunals in vol 31 of the *New York University Journal of International Law & Policy* (1999). In the foreword, Kingsbury notes that 'the initial question confronted by the contributors is whether the proliferation of international courts and tribunals, in a horizontal legal arrangement lacking in hierarchy and sparse in any formal structure of relations among these bodies, is fragmenting or system-building in its effects on international law'. B Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) *NYU J Int'l L & Pol* 679, 680.

maintain some form of unity in the interpretation and application of international law.

Even when the standards of judicial independence are satisfied, and we discount differences in interpretation due to an open political and nationalistic bias of national courts, national judicial practice may diffuse a more or less clear international standard into a multitude of particular meanings that may differ between courts of different states and even between different courts in one state.²⁷

Divergence in the interpretation and application of international law at the national level is not a new phenomenon. International law consists to a large extent of a process of continuous interpretation and application, rather than a set of abstract rules.²⁸ That process has been determined by auto-interpretation of international law. This phenomenon has always led to national colour and interpretative distortions between states.²⁹

While auto-interpretation is as enduring as international law itself, the role of national courts in the adjudication of international claims leads to a special situation. It should be recalled that while states have the right of auto-interpretation, they do not have the right of auto-decision. Their interpretation and application of international law are 'neither final nor binding upon the other parties'.³⁰ There is a difference of degree between a situation which is characterised by auto-interpretation by the state as such or its political organs, and the situation in which national courts engage in interpretation and application of international law. The degree of auto-interpretation in the various situations depends in particular on national rules concerning the relationship between domestic and international law and on the characteristics of the international legal regime in question.

While most authors have limited the term 'fragmentation' to refer to horizontal fragmentation between institutions and functional regimes within the international legal order,³¹ there is no need to confine the

²⁷ RA Müllerson, *Ordering Anarchy: International Law in International Society* (Leiden, Martinus Nijhoff Publishers, 2000) 199; A Reinisch, 'Should Judges Second-Guess the UN Security Council?' (2009) 6 *Int'l Org L Rev* 257, 284.

²⁸ M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn (Cambridge, Cambridge University Press, 2006) 135; M Koskeniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8 *Eur J Int'l L* 215, 218 f.

²⁹ M McDougal, 'The Impact of International Law Upon National Law: A Policy-oriented Perspective' (1959) 4 *SD L Rev* 25; reprinted in McDougal & Associates, *Studies in World Public Order* (New Haven, Yale University Press, 1960) 225.

³⁰ L Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in GA Lipsky (ed), *Law and Politics in the World Community* (Berkeley and Los Angeles, University of California Press, 1953) 59, 76 f.

³¹ See, eg: *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para 24 in ILC, 'Report of the ILC on its 58th Session – Suppl No 10' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 416; M Koskeniemi, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J Int'l L* 553. See also: AL Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in

concept of fragmentation to this meaning. In view of the interplay between domestic and international law, and the engagement of national courts in the international legal order, national judicial practice is a central factor for the level and characteristics of the fragmentation of international law.³² Even more than fragmentation between different international legal regimes, the fragmentation caused by divergent national receptions of international law is a reflection of a more fundamental, multi-dimensional fragmentation of global society itself.³³ Further, it should be asked which role domestic tribunals can play in efforts to counteract negative effects of fragmentation of international law.

While a large body of literature exists on the practice of national courts in general, hardly anything has been written on the specific issue of how national courts impact fragmentation.³⁴

Against the spectrum of differing assessments of empirical material and different normative appraisals on the phenomenon of fragmentation, this book aims to enhance our understanding of how international and national courts can, and do, contribute to or mitigate problems associated with fragmentation.

This book takes as its starting point that better insight in particular cases can help strengthen the empirical basis for assessment of fragmentation and related trends. Our objectives are to provide a contribution that is firmly based on some 15 years of scholarly debate and studies of the practice of international tribunals.³⁵ On this basis, we will bring case studies from international regimes and, importantly, from various national jurisdictions, providing an improved basis for our assessment to be undertaken in the concluding chapter. Finally, we intend to contribute to the discussion of principles and techniques that international and national courts have applied to counter-act negative effects of fragmentation. Such techniques are not really new.

T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (Oxford, Hart Publishing, 2008) 99; Hafner (n 7), J Pauwelyn (n 17); AK Björklund, 'Private Rights and Public International Law: Why Competition Among International Economic Tribunals is not Working' (2007) 59 *Hastings LJ* 241, 259.

³² See examples given in: P Trimble, 'Review Essay: International Law, World Order, and Critical Legal Studies' (1990) 42 *Stanford L Rev* 811, 836 f. The connection between the role of national courts and fragmentation is noted by: A Kunzelmann, 'An Australian International Law: The Impact of Australian Courts on the Fragmentation of International Law' (2008) 27 *AustLYIL* 225, 248.

³³ The phrase is taken from A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Mich J Int'l L* 999, 1004, who used this in a different context. See also VJ Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, Oxford University Press, 2010) 50 f.

³⁴ A rare exception is: Kunzelmann (n 32). See also E Benvenisti and G Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *EJIL* 59.

³⁵ A proper starting date for the current scholarly debate is the 1999 special issue of *NYU J Int'l L & Pol.*

The book contains 13 contributions that support these aims.

Shany's contribution raises the fundamental question whether we should expect international tribunals to fulfil a role as guardians of procedural order and legal uniformity. It maps the main different judicial functions of the three principal categories of international courts: classic inter-state courts focused on dispute settlement, regime-supporting courts designed to sustain a contractual and institutional equilibrium between the regime's Member States and institutions and to encourage cooperation among the relevant stakeholders, and compliance-inducing courts expected to advance the enforcement of important international norms. It then identifies possible tensions between the functions that can be served by jurisdictional regulation and norm-harmonisation, on the one hand, and other judicial functions on the other. In the process, some possible justifications for prioritising the courts' jurisdictional-regulation and norm-harmonisation functions at the expense of their other functions are discussed.

The subsequent chapters discuss more specific approaches by which international courts and tribunals can and do seek to counteract the effects of fragmentation, although the extent that they can do may well depend on the conflicting functions identified by Shany in chapter one. Gruszczynski discusses the compatibility of WTO practice with the interpretative rules provided for in the Vienna Convention on the Law of Treaties (1969) and identifies instances where WTO dispute settlement bodies have diverged from Vienna Convention on the Law of Treaties provisions. He demonstrates that functional regimes such as that of the WTO can indeed see a reason to diverge from the general rules on interpretation. The chapter connects the issue of interpretation with the problem of fragmentation/unity of international law as a whole, and proposes some tentative observations with regard to WTO practice.

Zimmermann analyses various institutional, jurisdictional and procedural aspects of the interaction between the International Monetary Fund (IMF) and the WTO. This includes a discussion of how issues of jurisdictional overlap between the two organisations are decided. The IMF-WTO relationship is an interesting illustration of policy-coordination and resolution of jurisdictional issues between two international organisations of which one (the WTO) has a highly elaborated and efficient dispute settlement system whereas the other (the IMF) relies on a quite unique set of institutional mechanisms for overseeing compliance. Selected comparative institutional and procedural elements, drawn from the interaction of the international trading and monetary systems with the realms of international environmental, labour and investment protection, are used to put the IMF-WTO relationship into a larger perspective as part of the debate on unity or fragmentation of international law.

Paparinskis considers whether and how decisions by arbitral tribunals that discuss bilateral investment treaties are legally relevant for interpreting

corresponding treaty rules in other (investment) treaties. This area is of particular relevance for the book as these tribunals are not engaged in diverse interpretations of a single treaty, but rather in the interpretation of a variety of different, but in substance overlapping treaties. Against the background of a complex mix between continuities, discontinuities and innovations, the contribution focuses on interpretative practices and considers whether they can be explained in traditional terms or require a formulation of a new framework of analysis.

Nordeide explores the European Court of Human Rights' approach to the interface between the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and other rules of international law through treaty interpretation. The contribution explores what the Court's approach tells us about the challenges of integrating a regional human rights treaty into the wider system of international law. It focuses in particular on the Court's use of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

D'Aspremont sets the stage for the second part of the book which focuses on domestic courts. He examines whether international law contains some prescriptions regarding its interpretation by domestic courts. He zeroes in particularly on the extent to which domestic courts presuppose that international law constitutes a coherent and systemic set of rules, and apply the principle of systemic integration of international law enshrined in the Vienna Convention on the Law of Treaties. The contribution simultaneously aims at appraising whether domestic courts, because of different legal and institutional constraints, construe the systemic character of the international legal order differently from international courts and international legal scholars.

Tzanakopoulos traces the development, parameters, and effects of the *Solange* argument – an argument relevant to the book as it provides a normative justification for (national) courts to refrain from doing what is assumed to be the normal situation: following a prior binding decision of an international courts or decision of an international organisation as required by international law. The contribution traces the impact of the argument on various courts in their adoption of a deferential or defiant stance towards the international organisation which exercises conferred governmental powers. It concludes that by using the *Solange* argument, domestic courts, being agents of state practice, assert the existence of a list of 'core' or 'fundamental' rights which must be substantively and procedurally protected at whatever level the exercise of governmental powers takes place.

Harbo examines whether and to what degree national courts have entered into a judicial dialogue with the European Court of Human Rights, using as a case study the practice of the courts of the United Kingdom (UK) and Norway with regard to the proportionality analysis.

Whereas the Court is applying this proportionality analysis as an instrument of judicial review, UK and Norwegian courts have traditionally applied different assessment schemes. While it might be expected that the degree to which these national courts adopt proportionality analysis in law relevant to the Convention could be the consequence of judicial dialogue with the Court, an inquiry into relevant case law reveals, however, that the respective national courts have been reluctant to take on the proportionality analysis in human rights law. Furthermore, to the extent the respective national courts have taken on proportionality analysis this may not exclusively be a consequence of judicial dialogue.

Currie and Kindred illustrate the flux and fragmentation in the principles of state jurisdiction by examining Canada's treatment of the prevention, punishment and reparation of international human rights law violations. Canadian courts have recently issued a number of decisions that reflect the struggle over jurisdictional issues. In the public law case of *R v Hape* and subsequent decisions, the Supreme Court of Canada refused to apply Canada's international human rights obligations extraterritorially, arguing that to do so would violate the principle of foreign state sovereignty. In *Bouzari v Iran*, a leading appellate court declined jurisdiction in a private law suit involving serious human rights violations that took place abroad, based on traditional readings of the limitations of territorial jurisdiction and the privileges of state sovereignty. In each case, there are international law precedents or instruments that suggest a contrary result, but it cannot be said that there is a solid principle demanding it.

Webb considers how national courts are engaged in dialogue on immunities, examining the circumstances that encourage a high level of dialogue and those that discourage it. The contribution reviews the dialogue among international courts, including their use of national decisions to identify international custom.

Constantinides discusses the main justifications and patterns of transjudicialism and its relevance to the coherence of international law and jurisprudence. He presents a case study on transjudicial dialogue on diplomatic assurances against torture with a view to testing the theoretical propositions put forward. The practice of diplomatic assurances involves the return of aliens to their home country despite the prohibition on non-refoulement, on the basis of assurances that the returnee will receive humane treatment, most notably that she/he will not be subjected to torture. There is a burgeoning international and domestic jurisprudence on the topic despite the lack of any specific international legal norm regulating it. The concluding remarks stress both the positive and negative aspects of transjudicialism, in particular the need not to lose sight of the interests of justice in transjudicial dialogue's quest for consistency.

Webster focuses on the concepts of unity and fragmentation as they emerge in the application of international human rights law by the courts

of Japan. In his contribution, unity refers to relatively strong adherence to the letter of international treaty law, as well as relatively close conformity with the legal practices of other courts around the world. In the absence of such unity, one faces fragmentation of international law, when domestic practice deviates significantly from international practices or trends. Both elements, unity and fragmentation, are critical for understanding Japan's engagement with the international normative community, as the Japanese judiciary's response to these norms and obligations have been mixed. For example, international standards of criminal justice have had an impact on Japanese conceptions of certain trial rights. But there is less consistency on issues such as the right to equality and minority rights.

Ziegler addresses the application of WTO law in domestic courts, mainly on the basis of experiences in Swiss jurisprudence. The fact that WTO law is increasingly defining substantive rules regarding domestic administrative law has led to important changes in the relevance of WTO law for domestic courts. Nevertheless, absolute numbers of cases remain relatively low as domestic courts in most countries remain reluctant to use WTO law as a legal basis for their decisions. The contribution observes that domestic courts seem to be increasingly open to preferring an interpretation of domestic law that is compatible with a country's WTO obligations to one that leads to incoherence. It seems that slowly the concept of multilayered governance is being accepted by courts, but that interpretation of domestic legal sources in accordance with existing obligations is still preferred to giving priority to international obligations over domestic law.

In the concluding chapter, we draw on the main elements of the contributions and examine the extent to which, and in particular how, international and national courts contribute to or counteract negative effects of fragmentation in the international legal order.