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### Conclusions

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## Conclusions

OLE KRISTIAN FAUCHALD AND ANDRÉ NOLLKAEMPER

**I**N THE INTERNATIONAL legal order a certain degree of fragmentation is inevitable and, moreover, fulfils important functions. States have to respond to a multitude of challenges that vary with subject area and over time. Given the essentially decentralised nature of the international legal system, and the fact that priorities are defined by different political systems, fragmentation is an inevitable consequence of the positive function that international law fulfils for varying constellations of states.

While international tribunals largely are in the hands of states and thus reflect such fragmentation, and thereby can further the positive functions of fragmentation, they have also recognised that they function in a system that is wider than the specific jurisdiction or treaty regime by which they were established. Their practices contribute incrementally to a relatively coherent structure of international law. Indeed, they provide some evidence for the following prediction by Georges Abi Saab:

Can there be a 'judicial system' without a centralized 'judicial power' invested in it, and with the jurisdiction of its components remaining in general ultimately consensual? I answer in the affirmative. Such a system can develop through the 'cumulative process' of international law, of which custom is the most visible, but not the only, example. This process would progressively condense and crystallize the different particles of consensual or authoritative jurisdictional empowerment into a certain structure.<sup>1</sup>

One aim of this book was to contribute to our understanding of the extent to which, and the ways in which, national and international courts contribute to the 'de-fragmentation' in the international legal order and, thereby, to the development of the 'structure' referred to by Abi-Saab.

Based on the chapters in this volume, in this concluding chapter we shall first consider how and through what principles and procedures *international tribunals* seek to counteract fragmentation and contribute to a

<sup>1</sup> GM Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *NYUJ Int'l L & Pol* 919, 926 f.

coherent approach to international law (section I). Thereafter, we shall discuss principles and techniques that *national courts* have applied to counteract fragmentation of international law as applied in domestic legal systems (section II). We end with some concluding observations on the normative and empirical aspects of the subject matter of the book (section III).

## I. THE PRACTICE OF INTERNATIONAL TRIBUNALS

The chapters in this volume have helped to clarify three issues. First, we will assess whether international tribunals have developed common approaches to treaty interpretation (section II.A). This will focus in particular on the application of the principles contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties and on how different characteristics of tribunals may influence the way they rely on the Vienna Convention. The underlying hypothesis is that to the extent that international tribunals follow the rules set out in the Vienna Convention, and/or attach weight to methods of interpretation used by other tribunals, in particular the International Court of Justice (ICJ), this may counteract to some extent fragmenting effects of tribunals that are organised by separate regimes.

Second, we will assess the evidence concerning the communication among international tribunals (section II.B). The underlying hypothesis here is that communication among international tribunals to some extent counteracts fragmentation resulting from the lack of centralised law-making institutions in international law. International tribunals could thus, through communication, contribute actively to the coordination of substantive rules of international law. This hypothesis thus focuses on norm-harmonisation from the perspective of substantive rules.

Third, we reflect on the need to develop a methodology for coordinating conflicting or competing functions of international tribunals and the possibility of doing so (section II.C).

### A. Approaches to Treaty Interpretation

Some treaties have addressed the interpretive methods that international tribunals are to apply. In most of these cases such methods are those that are commonly used in international law,<sup>2</sup> sometimes with certain specifi-

<sup>2</sup> One example is the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) (DSU) art 3.2, see: Gruszczynski, this volume at 37f.

cations.<sup>3</sup> Apart from these situations, international tribunals basically have two options. First, they can assume that states that concluded treaties had the implicit intention that the interpretive method to be applied is the method that applies as a matter of general international law. Given that this method remains fairly open-textured, international tribunals would be left with considerable discretion.<sup>4</sup> Secondly, international tribunals can assume that the interpretive method to be applied falls within its discretionary power as established by the treaty regime in question; the tribunal should develop its own methodology in light of the characteristics and functions of the treaty regime in question.

In practice, these two options may not be far removed from one another. When we assess the practice of international tribunals,<sup>5</sup> the main differences between these options can probably be traced by examining the extent to which tribunals rely on the Vienna Convention, general rules of treaty interpretation, and the practice of other tribunals, in particular the ICJ. In any case, all the treaty regimes examined in Part One of this book rely on the Vienna Convention and corresponding general rules of treaty interpretation.

Within this common approach, approaches of tribunals to treaty interpretation may differ depending on their nature and characteristics. Shany distinguishes between three categories of tribunals: inter-state arbitration tribunals that focus on settling disputes between states (the arbitration tribunals examined by Paparinskis could be placed in this category), tribunals that primarily sustain co-operative relations among their member states (the WTO dispute settlement mechanism examined by Gruszczynski and Zimmermann is part of this category), and tribunals that primarily promote state compliance with specific treaty norms (the European Court of Human Rights (ECtHR), discussed by Nordeide falls into this category).<sup>6</sup> Shany observes that 'a regime's goals, structures, and procedures, shape and control the judicial functions of international courts belonging to that regime to a considerable extent.'<sup>7</sup>

As to the first category, Paparinskis explores the extent to which investment tribunals respect the Vienna Convention on the Law of Treaties and associated customary rules in the context of bilateral treaties. While investment arbitration panels extensively refer to the Vienna Convention

<sup>3</sup> See: art 6 of the Agreement on the European Economic Area (1993) as further elaborated in art 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (1992).

<sup>4</sup> See: Gruszczynski, this volume at 38.

<sup>5</sup> Constantinides, this volume at 276, questions the extent to which one may rely on statements by international tribunals: 'A study of formal citations may underestimate the extent to which judges are influenced by external decisions. In fact, express citation in international judgments is generally done sparingly, selectively and reluctantly.'

<sup>6</sup> Shany, this volume at 19f.

<sup>7</sup> *ibid* 20.

and the case law of the ICJ,<sup>8</sup> Paparinskis critically examines whether their use of interpretive arguments can be justified under the Vienna Convention or other general principles of treaty interpretation. His view is that investment tribunals in general go further in taking into account interpretive materials than they are authorised to under general international law. He also observes that such approaches cannot be justified on the basis of state consent, as there is a lack of practice among states to reform the normative framework for investment tribunals' use of interpretive arguments.<sup>9</sup>

As to tribunals that primarily sustain co-operative relations among their Member States, Gruszczynski points to the extensive use of general rules concerning treaty interpretation in the jurisprudence of the WTO, in accordance with Article 3.2 of the WTO Dispute Settlement Understanding (DSU).<sup>10</sup> His general conclusion is that:

[T]he analysis of WTO practice shows a clear tendency on the part of the dispute settlement bodies to interpret WTO provisions in accordance with the methods established by the Vienna Convention on the Law of Treaties. Deviations from its model are not very frequent and appear to be less visible in the more recent case law. Future WTO jurisprudence will show whether this is a permanent trend.<sup>11</sup>

Nevertheless, on the basis of a limited but representative assessment of the WTO jurisprudence, he identifies two areas where there is a lack of compatibility between the practice of the WTO and the Vienna Convention: the WTO dispute settlement mechanism is relying on overly textual methods, and it is limiting the role of non-WTO rules in the process of interpretation.<sup>12</sup> Hence, while Paparinskis observes that investment arbitration tribunals generally take into account too broad a range of interpretive materials, Gruszczynski observes that the WTO dispute settlement mechanism is too restrictive in its application of interpretive materials.

As to tribunals that primarily promote state compliance with specific treaty norms, Nordeide points to characteristics of the ECtHR – the special nature of human rights law and the limited regional scope of the ECtHR – that might explain why the ECtHR has developed a method-

ology distinct from the methodology of general international law.<sup>13</sup> While the ECtHR at a general level seems to adhere to the methodology of the Vienna Convention on the Law of Treaties, its application in practice seems to be unsettled.<sup>14</sup> Nordeide finds that:

[T]he Court's approach might therefore be described as an openness to the ILC's articulation of the rationale of systemic integration, but a reticence towards engaging in the finer details of the legal technique the ILC identified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. This would seem to stand in contrast to the approach taken by other international courts.<sup>15</sup>

We may thus observe that previous practice of the ECtHR would be in accordance with Shany's expectations for this category of tribunals, namely that they would 'focus their energies on promoting state compliance' with the norms.<sup>16</sup> However, as emphasised by Nordeide, recent developments in the case law of the ECtHR, including also its increasing use of general principles of international law,<sup>17</sup> indicate that the Court may be headed towards redefining its approach to international rules concerning methodology,<sup>18</sup> with more attention being paid to jurisdiction-regulation and norm-harmonisation.

It thus appears that while all international tribunals examined in Part One attach weight to the Vienna Convention on the Law of Treaties, the way in which of Articles 31 and 32 of the Vienna Convention are applied differs significantly. Indeed, they show that the Convention in itself is too open textured to be a significant force in the determination of processes of (de-)fragmentation, and that factors specific to the treaty regime, and the outlook of particular international courts, carry more weight.

Nonetheless, Part One of this book also demonstrates the problems of predicting the interpretive approaches of international tribunals on the basis of their characteristics. Further research is needed to determine which characteristics of international tribunals would be particularly significant for their methodological approaches.

Moreover, research is needed regarding less 'objective' factors affecting the approaches of tribunals. It can be argued that the impact that international tribunals' characteristics have on their approach to interpretation depends on the perception that the members of the tribunals have of such

<sup>8</sup> OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *Eur J Int'l L* 301.

<sup>9</sup> Paparinskis, this volume at 113f: 'even though practice sometimes goes further than the traditional understanding of sources and interpretation, it has not resulted in an underlying normative shift of the meta-rules. Most instances of State practice and case law confirm the traditional understanding of sources and interpretation, and the explicit and implicit attempts to change the traditional approaches are neither widespread nor consistent enough to change the VCLT and customary rules on treaty interpretation'.

<sup>10</sup> Gruszczynski, this volume at 41–46.

<sup>11</sup> *ibid* 56.

<sup>12</sup> *ibid* 38f and 41.

<sup>13</sup> Nordeide, this volume at 118, 122f and 132.

<sup>14</sup> *ibid* 121 and 134, respectively.

<sup>15</sup> *ibid* 134.

<sup>16</sup> Shany, this volume at 20.

<sup>17</sup> Nordeide, this volume at 126–28.

<sup>18</sup> Nordeide, this volume at 137 finds that 'the three judgements in 2001 regarding sovereign immunity marked a turning point; a point where the Court made a choice of principle as regards the influence of other international law.' He also remarks that the methodology developed over the years by the ECtHR 'appear[s] to sit uncomfortably with how the technique of systemic integration is articulated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (*ibid*).

characteristics. Such subjective elements may change over relatively brief periods of time.<sup>19</sup> In particular, we would call for research into how international tribunals develop perceptions of themselves and their relationship to other international institutions, and the influence of such perceptions on interpretative practices.

## B. Communication among International Tribunals

The chapters of this volume<sup>20</sup> allow us to formulate tentative conclusions on the question of whether communication among international tribunals may to some extent counteract fragmentation resulting from the lack of centralised law making institutions in international law.

Communication among international tribunals may either take the form of formal communication through citation, discussion, application, or rejection of decisions of other courts by a judge or judges;<sup>21</sup> or informal communication, especially through exchanges of personnel, joint meetings, and coordinated participation at seminars, conferences and workshops. This book has focused on formal communication.

What are the factors determining whether a tribunal is likely to refer to the case law of other tribunals? A long list of potential factors could be mentioned, including those characteristics that Shany mentions as a basis for classifying international tribunals.<sup>22</sup> Additional factors that may be significant include the extent to which the tribunal is specialised, whether it is a permanent institution or established *ad hoc*, whether it is global, regional or bilateral, and whether the parties to disputes are likely to invoke case law from other tribunals.

The ECtHR is the only regional tribunal that has been studied in some detail here. Nordeide's study indicates that the tribunal's geographical scope and its identity as a human rights tribunal have been very significant for the methodological approaches it has taken.<sup>23</sup> The practice of the ECtHR is far from settled when it comes to its relationship with other areas of international law. So far, there are few references to case law of other international tribunals, but there are indications that this may change.<sup>24</sup> One factor that may significantly affect the extent and way in which the

<sup>19</sup> It can be argued that many tribunals are currently experiencing such shifts in their 'characteristics'. One example is the recent developments in the jurisprudence of the ECtHR as exposed by Nordeide in this volume. Another example is the changing 'characteristics' of *ad hoc* investment tribunals as exposed by Paparinskis.

<sup>20</sup> In addition to the chapters in Part One, the contributions of Webb and Constantinides are of relevance here.

<sup>21</sup> Webb, this volume at 245. See also: Constantinides, this volume at 275–77 [section II.D of contribution].

<sup>22</sup> Shany, this volume at 19f.

<sup>23</sup> Nordeide, this volume at 118.

<sup>24</sup> See: *ibid* 127f, where he refers to the *Mamatkulov* case.

ECtHR refers to case law from other tribunals is its increasing recourse to general principles of international law.<sup>25</sup> We may assume that increased attention to general principles as well as to customary law<sup>26</sup> will lead to increased communication with other international tribunals.

As to the role of arguments of the parties, Gruszczynski notes that the 'WTO case law shows only small number of instances where the need to take extraneous treaty rules into account was argued by the parties'.<sup>27</sup> He confirms the general observation that the WTO dispute settlement mechanism rarely refers to case law from other tribunals.<sup>28</sup> Little empirical work seems to have done on the extent to which communication among international tribunals is related to or dependent on the claims and arguments brought forward by the parties to the disputes. This is an area that could benefit from further research.

Communication among international tribunals concerns both norm-harmonisation and jurisdiction-regulation. Norm-harmonisation aspects of communication among international tribunals are closely related to the prevention of conflicting case law. Such communication may also induce international tribunals to import concepts and norms that are foreign to their regime, and to export their own concepts and norms to other regimes. Depending on the stakeholders' viewpoint, there may thus be advantages and disadvantages associated with such communication.

Paparinskis discusses in depth one situation in which there might be good reasons to caution against norm-harmonisation: where case law is developed by *ad hoc* tribunals in relation to individual bilateral treaties.<sup>29</sup> He describes the underlying situation within investment law as follows: 'The historical record . . . shows a 30-year long process of bilateral treaty-making creating a considerable number of similarly worded rules, with the adjudications beginning at the stage when a large number of binding rules (that would be complicated to change) already existed with considerable uncertainty about their content'.<sup>30</sup> He is critical of the norm-harmonisation that is taking place among investment arbitration tribunals due to its lack of state endorsement.<sup>31</sup> The tension between inter-tribunal communication with the purpose of norm-harmonisation and state control over the norm-harmonisation process can surely be generalised

<sup>25</sup> *ibid* 123f and 129.

<sup>26</sup> Webb, this volume at 257–62.

<sup>27</sup> Gruszczynski, this volume at 51.

<sup>28</sup> *ibid*.

<sup>29</sup> See: Paparinskis, this volume at 89, where he specifies the situation as one where there is a 'case-by-case fleshing out and refinement of presumptions, criteria and sub-criteria'.

<sup>30</sup> *ibid* 95.

<sup>31</sup> *ibid* 113: 'Whatever view one takes about the merits of these changes in treaty practice, they appear to indicate strong dissatisfaction with the overly flexible interpretative practices, rejecting particular criteria, criticising broader normative foundations and searching for more appropriate approaches in other legal regimes and systems'.

to other situations, though there may be differences in the degree of autonomy that states have granted to international courts.

Zimmermann's chapter on WTO-IMF relationships provides a case-study of jurisdiction-regulation aspects of communication among international tribunals (and institutions). According to Zimmermann, the

IMF-WTO relationship is an interesting illustration of policy-coordination and resolution of jurisdictional issues between two international organizations of which only one (the WTO) disposes of a highly elaborated and widely respected dispute settlement system whereas the other (the IMF) relies on a quite unique set of institutional mechanisms for overseeing compliance with the underlying treaty framework.<sup>32</sup>

The core of the case is an unclear obligation to consult with the IMF (Article XV of GATT). The case law of the WTO and the political follow up of the provision show reluctance to make use of the consultation mechanism, also casting doubt on an alleged development in the direction of an obligation to consult.<sup>33</sup>

The chapter has wider relevance. Even if there are several proposals that jurisdictional overlaps could be dealt with through consultation mechanisms, there are few examples of such mechanisms.<sup>34</sup> Zimmermann's contribution illustrates the many complex and sometimes politically sensitive issues that need to be resolved when setting up a co-ordination mechanism.<sup>35</sup> Given the significant difficulty of predicting the outcomes, the primary interest in the WTO-IMF context seems to have been to seek a flexible approach through addressing the issues at an administrative level within the framework of a Co-operation Agreement.<sup>36</sup>

This volume has identified a number of unresolved and under-investigated issues pertaining to formal communication among international tribunals. There is a need for better knowledge regarding the factors that determine whether a tribunal is likely to refer to the case law of other tribunals, the legitimacy of formal communication, as well as the design of formalised mechanisms for communication in order to appropriately address jurisdiction-regulation and norm-harmonisation needs. Against this background, we conclude that the chapters in this volume not so much lead us to draw general conclusions regarding the question whether increasing communication among international tribunals counteracts fragmentation, but rather point to further questions for research.

It should be noted that while this book has focused on formal communication, various forms of informal communication among international

tribunals have become increasingly frequent.<sup>37</sup> In light of the above tentative assumption that the perception within tribunals of their role is likely to affect their approach to methodology (section I.A), we encourage further research on various forms of informal communication among international tribunals as well as on the effects that such communication has for the tribunals' self-perception.

### C. Developing a Method to Reconcile Tensions?

In chapter one, Shany calls for a method that reconciles tensions between the competing functions of international tribunals and that offers guiding principles for determining when certain functions should prevail over other functions.<sup>38</sup> As he observes, the resort to norm-harmonisation and jurisdiction-regulation may interfere with core tasks of the tribunal, such as prompt and effective dispute resolution, advancement of the specific goals of the regime, and limit its flexibility to find solutions appropriate to the case in question.<sup>39</sup> The question is when, and in what situations, courts should give priority to norm-harmonisation and jurisdiction-regulation, and how conflicts between these interests should be settled.

The case studies included in this volume paint a rather complex picture of the factors that determine whether and how international tribunals contribute to norm-harmonisation and jurisdiction-regulation and how they reconcile these interests with their task to settle disputes. Shany rightly argues that courts are primarily loyal to the regimes under which they operate (in the case of regime courts) or to parties to the dispute (in the case of international arbitration tribunals). Broader 'systemic welfare' interests must be legitimised through appeal to the more specialised interests of the specific regime and parties.<sup>40</sup> The case studies also demonstrate that emphasis must be placed on factors other than those identified by Shany as primary factors. For instance, this approach of international tribunals is not only determined by their formal functions, but also by subjective factors (the tribunals' 'self-perception').<sup>41</sup>

A key element in this context is the extent to which international tribunals are dependent on the views and interests of key stakeholders,<sup>42</sup> and the relative weight and role of the perception by tribunals of their own role. The range of stakeholders differs among the regimes, and there may

<sup>32</sup> Zimmermann, this volume at 58.

<sup>33</sup> *ibid* 64f.

<sup>34</sup> The most advanced systems have been established within the EU and the EEA, see: Shany, this volume at 21.

<sup>35</sup> Zimmermann, this volume at 60–67 [section II of the contribution].

<sup>36</sup> *ibid* at 63.

<sup>37</sup> Constantinides, this volume at 276.

<sup>38</sup> Shany, this volume at 15–34.

<sup>39</sup> *ibid* 16.

<sup>40</sup> *ibid* 32.

<sup>41</sup> Shany acknowledges issues relating to self-perception in some places, see: *ibid* 27 and 30.

<sup>42</sup> *ibid* 29f.

be fundamental differences in opinion regarding which stakeholders are relevant and important (for example, are environmental non-governmental organisations (NGOs) among the relevant key stakeholders in relation to the WTO?). Moreover, the views and interests of the key stakeholders are likely to vary over time, and thus add an element of dynamism (for example, how is the WTO perceived among stakeholders, essentially as 'bilateral' and 'contractual' or as 'law-making'?).<sup>43</sup> The matter is further complicated as some stakeholders indeed may have an interests in a broad reading of the function of tribunals in the wider international legal order, whereas others attach overriding weight to regime-specific factors.

Against this background, we conclude that a method to reconcile tensions between the competing functions of international tribunals will have to involve the characteristics of the international regimes, the 'self-perception' of international tribunals, and the views and interests of key stakeholders. Whether it will be feasible to develop such a method remains highly questionable. But a first step surely is to expose the methods currently used and the role of underlying factors – in this respect the chapters in this volume have provided a useful contribution.

## II. THE PRACTICE OF NATIONAL COURTS

Part Two of this book has focused on the practice of national courts and their role in mitigating fragmentation of international law. It can be assumed that because of the combination of, first, the control by national law and, second, the differences in national legal systems and national legal cultures, there is a significant possibility that interpretations of international law differ across courts and across states – thus, contributing to the phenomenon of fragmentation.

As we noted in the Introduction to this volume, while most authors have limited the term 'fragmentation' to refer to horizontal fragmentation between institutions and functional regimes within the international legal order, there is no need to confine the 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.<sup>44</sup> The fragmentation caused by divergent national receptions of international law is 'an ephemeral reflec-

tion of a more fundamental, multi-dimensional fragmentation of global society itself'.<sup>45</sup>

Such differences are not necessarily a matter of non-compliance with international obligations. They also can result from different constructions and interpretations that may even go beyond what is required by international law. To give one example from the book: a Japanese court held that a bathhouse in Osaka was liable for not admitting foreigners, basing that liability in part on the UN Conventions on the Elimination of Racial Discrimination.<sup>46</sup> That is a construction that is far removed from how the Convention operates at international level, and how it has been received in different states.

The chapters in this book have reviewed how courts sustain or mitigate the fragmentation that may result from the separation of legal orders. They examined particular approaches that national courts can take, discussed the potential and limitations of such approaches, and provided examples of how courts have actually made use of such approaches, or where they have been limited in doing so.

In this section, the main trends that emerge from these chapters are reviewed and commented upon. After commenting on specific issues relating to the divide between the international and the national legal order (section II.A), we will examine the same topics as in the preceding section: the practice of interpretation (section II.B) and communication between courts (section II.C). Finally, we will provide some thoughts on the limits to national courts' contribution to defragmentation of international law (section II.D).

### A. The Separation between Legal Orders

A key cause of the differing ways in which national courts interpret and apply rules of international law is the formal separation between the international and the national legal order. A critical question thus is to what extent, in the practice of national courts, this separation is sustained or mitigated, and what the consequences thereof for the process of fragmentation may be. The practices of states and courts under this heading can be considered in terms of 'jurisdiction-regulation'.<sup>47</sup>

Obviously, the possibility of courts overcoming the separation between the international and the national legal order is determined by the (constitutional) legislature. The rule that international law is part of the law of the land, allows courts to apply international law directly, undistorted by

<sup>43</sup> See: Gruszczynski, this volume at 50f.

<sup>44</sup> 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, 'Australian International Law: The Impact of Australian Courts on the Fragmentation of International Law' (2008) 27 *AustlYBIL* 225, 248.

<sup>45</sup> VJ Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, Oxford University Press, 2010) 50 f.

<sup>46</sup> Webster, this volume at 295–319.

<sup>47</sup> Shany, this volume at 15–34.

transformation. For the states considered in this book, this was for instance the case for Japan<sup>48</sup> and Switzerland,<sup>49</sup> but not for Norway and the United Kingdom (UK).<sup>50</sup>

The differences between these situations can be significant, but need not be. First, the principle that international law is the law of the land may be a precondition for the application of international law as such, without transformation. This may mitigate fragmentation resulting from the domestic application of international law. But it clearly is not a sufficient condition. As observed by Webster, while the conventional view concerning the effect of international law in Japan is that, upon ratification and publication by the Diet, international treaties have 'domestic legal force in Japan', 'it would be more correct to say that the effect of such treaties is *contextual*, dependent upon at least four factors: (1) the existing state or absence of Japanese law; (2) the precision of the treaty obligation; (3) the judge's individual commitment to international . . . law; and (4) the self-executing nature of the treaty'.<sup>51</sup>

This means that while courts may apply some treaties as such, they will not be able to give effect to other treaties. Thus, in Japan, judges have concluded that the International Covenant on Civil and Political Rights (ICCPR) has direct effect, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not.<sup>52</sup> Also the practice of the application of WTO law in Switzerland illustrates the barriers that may and often do exist that hinder the application of international law and that thus do in effect disallow national courts to apply international law at all.<sup>53</sup>

Second, even if courts do give effect to a rule of international law, in particular in monist states, that in itself says nothing about the key question whether they do so in a way that conforms to the understanding of that rule in the international legal order. The meaning given to a particular obligation then depends on the principles and practice of interpretation – examined below in section II.B.

Third, in all cases, whether international law is law of the land or not, the principle of consistent interpretation allows courts to apply a rule of national law in conformity with international law. In most cases courts can avoid incoherence between international and national law by interpreting domestic law in a way that makes the domestic legislation consistent with the country's international treaty obligations.<sup>54</sup> As noted by Ziegler: 'WTO rules can be of utmost importance to domestic law.

<sup>48</sup> Webster, this volume at 295–319.

<sup>49</sup> Ziegler, this volume at 321–49.

<sup>50</sup> Harbo, this volume at 167–83, who notes that the domestic legislature had a decisive influence on the national courts' relationship with the ECtHR.

<sup>51</sup> Webster, this volume at 303.

<sup>52</sup> *ibid.* 304.

<sup>53</sup> Ziegler, this volume at 57–85.

<sup>54</sup> D'Aspremont, this volume at 141–65.

Regularly, they will not set aside domestic rules, but support the interpretation of broad and open-textured domestic law by offering explicit and detailed legal text'.<sup>55</sup> He also observes that 'Swiss courts and especially the administrative bodies at first instance have been very creative in interpreting domestic legislation in a way that led to the fulfilment of, or adherence to, the international obligations. The treaty-consistent interpretation of domestic law has thus led to a high indirect effect of WTO law on the Swiss legal order'.<sup>56</sup> Whereas the principle of international law as law of the land as such does not say much about the phenomenon of fragmentation, the principle of consistent interpretation in fact can achieve a high level of consistency between an international obligation and the way in which that obligation is interpreted at the national level.

## B. Approaches to Treaty Interpretation

In cases where national courts can give effect to a rule of international law, whether 'directly' or through the principle of consistent interpretation, the question arises whether they do so in a way that somehow conforms to the meaning of that rule in the international legal order (presuming that a relatively unequivocal meaning exists in the international legal order). The practices of states and courts under this heading can be considered in terms of 'norm-harmonisation',<sup>57</sup> though they may directly reflect, and have direct consequences for the regulation of jurisdiction between national and international legal orders, and the separation between these two categories clearly is not a sharp one.

One obvious strategy to achieve relative consistency between the meaning of a rule at national level and the meaning of a rule at international level is to rely on the same international principles of interpretation that guide interpretation in the international legal order, that is: the principles contained in the Vienna Convention on the Law of Treaties.

The chapters in this volume have provided only few examples of instances where courts relied on the principles of the Vienna Convention. Webster notes that a Japanese court consulted Article 31(3) of the Vienna Convention, but since Japan is not a party to the Convention, the court found that none of the principles contained in Article 31 could apply to Japan. The court did, however, proceed to consult case law as a guide to the interpretation of Article 14(1) of the ICCPR.<sup>58</sup>

Outside the small sample of cases researched in this book, there is substantial practice from courts that have indeed resorted to the Vienna

<sup>55</sup> Ziegler, this volume at 341.

<sup>56</sup> *ibid.*

<sup>57</sup> Shany, this volume at 15–34.

<sup>58</sup> Webster, this volume at 301f.

Convention or to corresponding principles.<sup>59</sup> That practice recognises that international obligations, also when these have been made part of national law, should be given the meaning ascribed to them by the system in which they originated.<sup>60</sup>

The scope and effect of this practice and its impact on (de-)fragmentation has hardly been researched, however. It can be expected that there is considerable variation across states. Though the way in which the international norms have been made part of national law need not be decisive, it can be a relevant factor. When states have incorporated an international obligation into national law, based on a general rule of reference, such as is the case in the United States (US)<sup>61</sup> or the Netherlands,<sup>62</sup> that obligation will generally remain recognisable as such and can be subjected to rules of treaty interpretation, though it can also be expected that within this category there will be significant variation.

The situation may be different when states opt for transformation. In these cases the original international quality may go unrecognised, and it cannot be presumed at all that interpretation is subject to international rules of treaty interpretation. A comparative review of practice of interpretation would provide useful insight in the degree and way in which national courts maintain a connection with the interpretation of rules of international law at international level.

A related question that also would benefit from comparative research is to what extent the international principles of treaty interpretation actually are able to exert a significant influence over treaty interpretation, compared to national principles of statutory and constitutional interpretation.

<sup>59</sup> See eg: *King v Bristow Helicopters Ltd, Re M (CM)* [2002] UKHL 7; ILDC 242 (UK 2002) [80]; *NEC Semi-Conductors Ltd v Inland Revenue Commissioners* [2003] EWHC 2813; ILDC 260 (UK 2003); New Zealand, Supreme Court, *Attorney-General v Zaoui and Inspector-General of Intelligence and Security* (2005) NZSC 38; ILDC 81 (NZ 2005) [25]; Argentina, Supreme Court of Justice, *Office of the Public Prosecutor v Lariz Iriondo*, L.845.XL, vol 328; ILDC 125 (AR 2005); Belgium, Court of Cassation, *Sabanci v Erdal*, Case No P 05 1491 N [2006] Journal des Tribunaux 642; ILDC 592 (BE 2006); see further: R Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008) 128 ff; See also the examples given in: E Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation' (2004) 44 *Va J Int'l L* 431.

<sup>60</sup> See eg: *R (Al Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69; ILDC 234 (UK 2001) (forthcoming) [39] (in which Lord Slynn states that 'to apply to . . . treats the strict canons appropriate to the construction of domestic statutes would often tend to defeat rather than to serve [their] purpose'); see also: J Wouters and M Vidal, 'Non-Tax Treaties: Domestic Courts and Treaty Interpretation' in G Maisto (ed), *Courts and Tax Treaty Law* (Amsterdam, IBFD, 2007) 3, 5 f.

<sup>61</sup> Such as art VI of the US Constitution, providing that '[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding'. CM Vazquez, 'Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties' (2008) 122 *Harv L Rev* 599.

<sup>62</sup> JG Brouwer, 'The Netherlands' in JG Brouwer (ed), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden, Martinus Nijhoff Publishers, 2005) 483.

It seems obvious that the terms and categories of interpretation differ across states. But it is also to be recognised that the international principles are open-textured, and it seems a plausible working hypothesis that it is not so much the formal principles of interpretation that are decisive as the normative choices, and that the question whether national or international principles are used for interpretation is of secondary relevance. We return to this theme below.

### C. Communication among Courts

The practices of national courts that engage in communication with other courts can be grouped in two categories: practices that attribute weight to decisions of international courts whose interpretative competence they have accepted (section III.C.1) and practices that attribute weight to decisions of other courts, whether international or national.

#### 1. Weight of Decisions of Competent International Courts

National courts may mitigate fragmentation by giving effect to decisions of international tribunals with the competence in regard to the interpretation of a particular treaty.<sup>63</sup> The fact that international decisions, strictly speaking, are not binding on states other than the parties to the dispute does not negate that they are legally relevant and, indeed, often critical for determining the state of the law as binding on the courts.

Constantinides shows that the practice of English courts on diplomatic assurances shows a heavy reliance on the jurisprudence of the ECtHR. 'Although British courts enjoy discretion under the 1998 Human Rights Act as to how much weight to give to the ECtHR decisions (which they are only required to 'take into account'), the House of Lords did not make use of this space, showing loyalty to the ECtHR and following its case law in most cases, including in politically highly sensitive judgments'.<sup>64</sup> Other

<sup>63</sup> See, generally: M Bedjaoui, 'The Reception by National Courts of Decisions of International Tribunals' (1995–96) 28 *NYU J Int'l L & Pol* 45; CH Schreuer, 'The Authority of International Judicial Practice in Domestic Courts' (1974) 23 *Int'l & Comp L Q* 68; H Mosler, 'Supra-National Judicial Decisions and National Courts' (1980–81) 4 *Hastings Int'l & Comp L Rev* 425, 464 (discussing how national courts have made reference to principles, rules and legal arguments in the reasoning of international judgments, when the national courts are confronted with the same legal questions); TM Franck and GH Fox (eds), *International Law Decisions in National Courts* (Irvington-on-Hudson, Transnational, 1996); HD Jarmul, 'The Effect of Decisions of Regional Human Rights Tribunals on National Courts' (1995–96) 28 *NYU J Int'l L & Pol* 311; R Lefeber, 'The Last Judgment: Legal Effects of Decisions of International Courts and Arbitral Tribunals in the Proceedings of National Courts' in N Blokker (ed), *The Netherlands in Court: Essays in Honour of Johan G. Lammers* (Leiden, Martinus Nijhoff Publishers, 2006) 165; Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford, Oxford University Press, 2007).

<sup>64</sup> Constantinides, this volume at 287f.

national courts in Europe have also relied on the ECtHR jurisprudence when deciding cases on diplomatic assurances.<sup>65</sup>

In Switzerland, a commission charged with the task of applying the WTO Agreement relied heavily on its interpretation by the WTO Appellate Body.<sup>66</sup> Ziegler observes that:

Whether the reading of the Report by the Commission was accurate remains questionable . . . for our purposes it is interesting to see that the Commission used the WTO Report as an authoritative means for interpreting the meaning of the WTO obligations and thereby indirectly to interpret domestic law in a treaty-consistent manner.<sup>67</sup>

The acceptance of interpretations by international tribunals is not mechanical, however. Harbo's analysis of the reception of the case law of the ECtHR on proportionality in English and Norwegian courts shows that there is considerable reluctance to do so.<sup>68</sup> Harbo notes that the ECtHR is hardly receptive to opinions and practices at the national level, which in turn may limit the willingness of national courts or other organs to faithfully follow whatever comes out of the ECtHR.<sup>69</sup> In the *Behler* case, the Norwegian Supreme Court stated that it would apply the same methodology as the ECtHR.<sup>70</sup> However, it further stated that when Norwegian courts interpret the Convention, they may also take into account traditional Norwegian value judgments. Still, '[t]aking a proactive approach, the Court stated that the Norwegian courts should seek interaction with the ECtHR in order to influence its practice.'<sup>71</sup>

The lack of willingness and/or ability of national courts to give effect to decisions of international tribunals may be enhanced in view of the recent discussion on lack of trust in and legitimacy of international tribunals. This ties in with the 'Solange argument' considered by Tzanakopoulos.<sup>72</sup> He observes that in light of concerns over the legitimacy of international tribunals, national courts have sometimes reacted by asserting the power to control decisions of the international organisation that interferes with individual 'fundamental' rights.<sup>73</sup> This is not simply a matter of protecting individuals against decisions of the Security Council that may outright interfere with individual rights, it may in a much more subtle way come down to a differ-

ence of opinion between an international tribunal and a national court about the way individual rights should best be protected. The increasing recognition of the differences in such opinions leads to a pluralistic outlook on the relationship between international and national courts.<sup>74</sup>

Portraying the relationship between international and national courts in a hierarchical manner in which international tribunals can curtail fragmenting effects of domestication, as long as national courts faithfully follow what international tribunals prescribe is too simple. It can be expected that national courts often contest what is the better interpretation of a particular norm in a particular context. This may also lead to divergence in interpretation between states. It is also possible that international tribunals incorporate domestic practices in their future judgments, leading to continuous adjustments.

This is an area with major research questions. On what grounds do national courts follow or contest decisions of international tribunals? Are these essentially related to an equivalence of the protection of fundamental rights, or are there broader legitimacy concerns at issue and, if so, what are these? Do the grounds on which national courts contest decisions of international tribunals differ between states and, if so, how does this affect processes of fragmentation? And how do international tribunals respond to such contestation – do they recognise this as legitimate checks and balances and do they allow it to influence future judicial decision making, or do they insist on their hierarchical position, thereby consolidating the opposition between the international and the national normative sphere?

## 2. Communication with Other Courts

Apart from attributing weight to decisions of international tribunals that have been given the competence in regard to interpretation of particular treaties, there is a wide-ranging practice of communication with other national and international courts. Such communication is often referred to in terms of 'dialogues', and concerns the citation, discussion, application, or rejection of decisions of other courts by a judge or judges.<sup>75</sup> Constantinides refers in this context to 'transjudicial communication'.<sup>76</sup> The distinction with the previous point is that here we are concerned with international tribunals that do not formally have interpretive competence in regard to a particular treaty, but whose interpretation a national court somehow does find relevant for its own interpretation.

Many chapters in this book provide empirical material which shows that such communication indeed takes place. Noteworthy examples can

<sup>65</sup> *ibid* 288f.

<sup>66</sup> See: Consideration 13.4.2.

<sup>67</sup> Ziegler, this volume at 339.

<sup>68</sup> Harbo, this volume at 167–83.

<sup>69</sup> *ibid* 168f.

<sup>70</sup> Rt 2000: 996 (*Behler*).

<sup>71</sup> Harbo, this volume at 178.

<sup>72</sup> Tzanakopoulos, this volume at 185–215.

<sup>73</sup> See generally on national courts' reactions to acts of international organisations the contributions: A Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (Oxford, Oxford University Press, 2010).

<sup>74</sup> Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2011).

<sup>75</sup> Webb, this volume at 245.

<sup>76</sup> Constantinides, this volume at 267–94.

be found in Webb's treatment of the development of the law of immunities. In particular, the extent to which state officials accused of committing international crimes are entitled to immunity from jurisdiction 'is the subject of intense dialogue and some conflict among national and international courts'.<sup>77</sup> She observes that states characterised by a high level of judicial dialogue on the law on immunity, such as the UK and Italy, 'tend to not only cite cases from other jurisdictions, but also to engage in in-depth, critical analysis, drawing on a wide range of cases for a variety of points of law'.<sup>78</sup>

Japanese courts too recognise interpretations of international legal provisions as put forth by foreign courts and international tribunals, including the ECtHR and the Inter-American Court of Human Rights. Webster observes that '[s]uch dialogue would lead one to expect greater conformity with the interpretations of these foreign bodies, and Japanese courts fulfil this expectation to a limited degree'.<sup>79</sup>

Constantinides illustrates that the British case law on diplomatic assurances shows great willingness to take part in the transjudicial dialogue on the topic by referring to and relying on not only international tribunals and institutions (the ECtHR and the Committee against Torture) but also courts in Canada.<sup>80</sup> However, there are considerable differences between states. Apart from British courts, 'domestic courts in Europe have relied exclusively on the ECtHR's rulings, without paying any attention to related judicial developments elsewhere'.<sup>81</sup>

The nature and impact of citations or discussions varies widely.<sup>82</sup> They may be passing references, 'may simply be another authority used to buttress a conclusion already reached, or may reflect extensive considerations of the other courts' approaches.<sup>83</sup> Also, the dialogue on immunities in national courts ranges from in-depth, critical analyses, via confused or selective citation, to the complete absence of reference to decisions from other jurisdictions.<sup>84</sup>

It appears that in many of these cases one cannot really speak of any 'dialogue'; rather, there is more of a one-way communication.<sup>85</sup> Indeed, there are huge differences in the degree to which citation and references actually are part of what could be labelled a dialogue. Tzanakopoulos writes that the main feature of dialogue is the necessity for an exchange of

ideas between those engaged in it; otherwise it is rather a *monologue*.<sup>86</sup> This is for example the case when the argument of one international or foreign court 'is so convincing as to immediately solicit the agreement of the other, who adopts the argument wholesale'.<sup>87</sup> The exchange then can be more precisely defined as *influence* exercised by one interlocutor on the other.<sup>88</sup>

The chapters offer various explanations of why national courts do in fact engage in communication with other courts. The degree of accessibility of domestic jurisprudence clearly is a factor. Available examples of transnational judicial communication remain selective, and they over-emphasise developments in some regions and not in others. Most information on 'court-to-court' dialogue still comes from Western Europe, North America, and Australia; there is limited access to developments in Central and Eastern Europe, Asia, or Africa. As a consequence, the communication between a few dominant countries and its potential for shaping the rule of law may seem hegemonic and overly one-sided.

However, lack of accessibility is certainly not the only reason why some courts hardly ever enter the transnational judicial debate. For example, the US Supreme Court is very reticent in referring to decisions of international courts such as the ECtHR, or to the courts of other countries – even in instances when those decisions are readily available. In contrast, the South African Constitutional Court, or courts in India and Canada, have a very liberal practice in this regard and routinely refer to decisions of courts from other regions. In view of such differences, clearly availability of information is not a decisive factor. Possible explanations are cultural links between states (and courts); and the prestige of some courts (courts seem to refer more to courts that they (rightly or wrongly) deem prestigious, such as the US Supreme Court or the German *Bundesverfassungsgericht*, rather than courts from developing countries).

Webb offers a range of explanations that are of wider relevance than her discussion of the case law on immunities. For one, the variety of citations 'is a product of the interest and ability of counsel to conduct comparative research and include such material in their submissions to the court'.<sup>89</sup> Conversely, in national jurisdictions with few references to foreign courts, such as the US and Switzerland, 'the reluctance to cite cases from other jurisdictions usually originates with counsel'.<sup>90</sup> Another factor is the attitude of judges to the case law of other jurisdictions. Webb observes that this 'is to a large extent a product of the legal culture of the jurisdic-

<sup>77</sup> Webb, this volume at 245.

<sup>78</sup> *ibid* 250.

<sup>79</sup> Webster, this volume at 318.

<sup>80</sup> Constantinides, this volume at 267–94.

<sup>81</sup> *ibid* 292.

<sup>82</sup> RC Black and L Epstein, '(Re-)setting the Scholarly Agenda on Transjudicial Communication' (2007) 32 *Law and Social Inquiry* 791.

<sup>83</sup> Constantinides, this volume at 275f.

<sup>84</sup> Webb, this volume at 245–65.

<sup>85</sup> Harbo, this volume at 167–83.

<sup>86</sup> Tzanakopoulos, this volume at 188, citing AM Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *U Rich L Rev* 99, 101.

<sup>87</sup> *ibid*.

<sup>88</sup> *ibid*.

<sup>89</sup> Webb, this volume, at 250f.

<sup>90</sup> *ibid* 254.

tion in question.<sup>91</sup> Other relevant factors may be historical links between jurisdictions,<sup>92</sup> the use of experts, the style of judgment-writing,<sup>93</sup> and the availability of foreign judgments.<sup>94</sup>

On this latter point, the *lack of access* to the decisions of national courts is a serious practical obstacle to judicial dialogue. This also has implications for the extent to which national courts use international law. There is a very uneven distribution of available data across and within different regions, not to mention language barriers. Whereas most decisions of international tribunals, such as the ICJ, the International Criminal Tribunal for the Former Yugoslavia, or the ECtHR, are available online in English (and mostly also in French), this is not the case with decisions of national courts. As a result, a vast majority of national court decisions are available – if at all – only to persons who speak a certain language and are familiar with finding court documents in a particular domestic legal system.<sup>95</sup>

Constantinides points to relevant favourable conditions, such as gaps in the legal framework, lack of precedent, identical or similar legal issues, transnational nature of the problem, effective advocacy, and strong interest on the part of transnational social networks and civil society.<sup>96</sup>

Webster points to the relevance of a ‘judge’s disposition towards international law’. In their opinions, judges can signal openness to international law by citing and analysing decisions of international and foreign courts. But judges also omit discussion of the treaty and any relevant foreign or international decisions altogether, even if referenced by plaintiff, reflecting a resistance to international law.<sup>97</sup>

The chapters reveal certain factors that are, perhaps contrary to what is commonly thought, less relevant. For instance, there does not appear to be any connection between the level of dialogue in the field of immunities and the monist/dualist dichotomy. Webb observes that a dualist system like the UK is the national jurisdiction that is most engaged in dialogue, whereas ‘monist’ (or in any case more open) systems like the US, Switzerland and Austria show significantly less examples of dialogues.<sup>98</sup>

While communication between national courts and other (national or international) courts is often thought of as leading to a certain co-

ordination and uniformity in interpretation and reception of international obligations, this is by no means the only effect. Indeed, it may well lead to disconnection between the international and the national spheres. Tzanakopoulos observes that the *Solange* argument is

(implicitly) addressed to whoever is willing to listen and be persuaded that this is a good way to control conferrals of powers to another level of governance not only to the other EC Member States and in particular their courts, who are most likely to be persuaded to adopt a similar line of argument, but also any other court potentially facing the same issues arising from the complexity of multi-level governance.<sup>99</sup>

He cites Tomuschat who observed already in 1990 that ‘every *principles disobedience* of Community law constitutes in itself a precedent that will invariably find imitators’.<sup>100</sup> Decisions that refuse to follow particular interpretations of international tribunals provide other courts ‘with a theoretical framework in which to challenge themselves implementing measures within their (partial-national) legal order by asserting the importance of fundamental rights. The practice after the *Kadi* case indeed shows examples of this form of communication.’<sup>101</sup>

Communication between courts is thus a complex phenomenon that can lead both to co-ordination and some form of coherence, but can also easily lead to fragmentation. Despite a substantial body of literature on dialogues, the topic as a whole remains under-researched. What is absent from much of the theoretical discussion is qualitative and quantitative evidence to support the broader claims put forward. Academic literature is full of hand-selected ‘exemplary’ cases which make no more than a shaky empirical foundation of the respective arguments.<sup>102</sup> Most of the existing scholarship tends to focus on a single jurisdiction, or on the dialogue between the European courts and the national courts, and between the European courts.<sup>103</sup> There is more need for studies such as those undertaken by Webb in the field of immunities and by Constantinides in regard to diplomatic assurances, systematically analysing patterns of dialogues and their effects.

<sup>91</sup> *ibid* 251.

<sup>92</sup> *ibid* 253.

<sup>93</sup> *ibid* 256f.

<sup>94</sup> *ibid*.

<sup>95</sup> In addition, the practice of some states, of which Norway is one example, to ‘outsource’ databases on court decisions to self-funding institutions that depend on being paid for searches in their databases, significantly reduces the availability of such decisions.

<sup>96</sup> Constantinides, this volume at 293.

<sup>97</sup> Webster, this volume 300 [FN 25] citing M Masanao, ‘Saibansho ni yoru jinken joyaku no tekiyo ni kansuru shomondai’ (‘Various problems relating to the application of human rights treaties in courts’) in *Kokusai Jinken Kiyaku to Kokunai Hanrei (International Human Rights Covenants and Domestic Jurisprudence)* (Tokyo, Liberation Press, 2004) 24.

<sup>98</sup> Webb, this volume at 262.

<sup>99</sup> Tzanakopoulos, this volume at 194.

<sup>100</sup> C Tomuschat, ‘Aller guten Dinge sind III? Zur Diskussion um die Solange-Rechtsprechung des BVerfG’ (1990) 25 *Europarecht* 340, 343.

<sup>101</sup> Tzanakopoulos, this volume at 363.

<sup>102</sup> RC Black and L Epstein, ‘(Re-)setting the Scholarly Agenda on Transjudicial Communication’ (2007) 32 *Law and Social Inquiry* 791.

<sup>103</sup> See, eg: L Garlicki, ‘Cooperation of Courts: The Role of Supranational Jurisdictions in Europe’ (2008) 6 *Int'l J Const L* 509–30.

#### D. Limits to National Courts' Contribution to Defragmentation of International Law

The question underlying the preceding sections somehow presumes that a relatively unequivocal meaning of a rule of international law can be discerned in the international legal order. However, it is apparent from the chapters in Part One of this volume that this cannot at all be assumed. To the extent the international legal order itself is fragmented, it can hardly be expected that national courts somehow try to mitigate or resolve that fragmentation. In such situations, the question concerns not so much whether national courts connect the meaning and application of a rule of international law to the meaning of that rule in *the* international legal order, but to a particular meaning given to that rule in a particular part of the international legal order. Indeed, the practice of national courts can only reflect the fragmentation at international level.

In this volume, this point is argued by Currie and Kindred. They observe that the doctrine and principles of jurisdiction and human rights protection at the international level are in a difficult and often conflicting relationship. The principles of jurisdiction are becoming modulated, but there will remain a gap between the principles of jurisdiction and what is required from the perspective of human rights. Contradictions at the international level are reflected at the national level: 'Court decisions reflect the ongoing fragmentation in the law and, in turn, contribute to the diverse state practice that underlies the splintering of norms and needs.'<sup>104</sup> Currie and Kindred observe that the Canadian courts 'were alert to, and took very seriously, the arguments founded in international human rights law, which would have led them to reach decisions that would tend to fragment the traditional principles of jurisdiction'.<sup>105</sup> They add: 'Canadian judicial uncertainty nationally epitomises the growing legal disorder internationally'.<sup>106</sup>

However, national courts are not entirely powerless in this situation. D'Aspremont explores the relevance of the principle of systemic integration (see section I.A above) in national courts, by which national courts will attempt to interpret rules of international law in the light of other rules, in order to optimise the coherence between them. Despite the fact that international law must be regarded as a separate legal order from the perspective of national courts, he finds, on the basis of limited practice, that 'domestic judges are in a position to use the principle of systemic integration and carry out a very integrationist interpretation of inter-national

law'.<sup>107</sup> In light of our observations above concerning communication among national courts, there are apparent problems associated with such initiatives. As also highlighted by d'Aspremont, 'the use of the principle of systemic integration by domestic judges can simultaneously yield contradicting interpretations, for each domestic court . . . can carry out various systemic integrations of international law'.<sup>108</sup> In particular, he sees the potential for a dialogue between national courts and legal scholars that might be conducive to de-fragmentation of international law.

Even if we may expect national courts to, at least to some extent, model their resort to systemic integration on the practice of international tribunals, contributions to this volume show that international tribunals are far from having developed a consistent approach to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (see section I.A above). Moreover, as is also pointed out by d'Aspremont, the risk of diverging systemic integrations of international law is higher at the domestic level than at the international level.<sup>109</sup>

There is clearly a need for more knowledge about the extent to which domestic courts in fact merely reflect fragmentation in international law. Research is needed regarding the explicit or implicit application of the principle of systemic integration within domestic legal systems: by courts, by the legislature, and by administrative authorities. While nothing would formally prevent actors within domestic legal systems from making use of the principle of systemic integration, there are, as we have hinted at above, significant barriers that must be overcome before international tribunals will make effective and systematic use of the practice of national legal systems. Research as called for above could improve the ability and willingness of international tribunals to take into account such practice.

### III. SOME CONCLUDING OBSERVATIONS

The discussion of rather specific techniques applied by international and national courts to counteract fragmentation, has to be placed against a series of fundamental normative questions that are raised by the phenomenon of fragmentation. In most of this book these normative aspects have been left aside. For a fuller understanding of the role of international and national courts in regard to the process of fragmentation this question obviously needs to be considered, not only because the perceived positive and negative aspects of fragmentation are likely to influence judicial practices, but also for our external evaluation of such practices.

<sup>104</sup> Currie and Kindred, this volume at 218.

<sup>105</sup> *ibid* 219.

<sup>106</sup> *ibid*.

<sup>107</sup> D'Aspremont, this volume at 160f.

<sup>108</sup> *ibid* 142.

<sup>109</sup> *ibid* 161.

The universalist aspirations of much of international law<sup>110</sup> and a perceived need for consistency and coherence may drive the application of techniques that counteract fragmentation, as described in the various chapters in this volume, and indeed may lead one to positively assess such application. However, that perspectives needs to be balanced with the value of grounding interpretation and application of the law in a localised expression (as far as the practices of national courts are concerned)<sup>111</sup> and the need to protect the specific nature and aims of specialised regimes (as far as courts that operate within treaty regimes are concerned). International law may lose some of its uniform meaning in this process, yet may gain national and regional relevance.<sup>112</sup> Indeed, the possibility and permissibility of variations is generally a condition underlying the acceptance of these obligations in the first place. In this respect, the very indeterminacy that fosters processes of auto-interpretation and differences between states is 'not a scandal or a structural deficiency', but 'an absolutely central aspect of International Law's acceptability'.<sup>113</sup> The same holds to some extent for differences in interpretations between particular treaty regimes. Indeed, 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'.<sup>114</sup>

Further research on the role of international tribunals and national courts in connection with the fragmentation of international law can build on the case studies provided in this volume, and should take as its starting point the normative complexities of the above perspectives.

It follows from the above that despite an abundance of literature on fragmentation, both normative and empirical factors remain underdeveloped. As to the latter, we acknowledge that the precise mapping of inter-judicial dialogues around the world is a challenging exercise. We observe that ideology and political preferences are likely to remain essential to the future debate on fragmentation of international law, and consider that such factors should be taken into account in future empirical research of the topic.

Despite these challenges, the usefulness of further empirical research to the main stakeholders in international and national legal systems is in our view unquestionable. This book has contributed to the empirical basis for debates concerning fragmentation and pluralism in international law, and it is our hope that it will inspire further empirical and normative exploration of fragmentation and pluralism in the interface between different regimes, and between international and national law.

<sup>110</sup> On the importance of uniform interpretation: P Pescatore, 'Conclusion' in FG Jacobs and S Roberts (eds), *The Effects of Treaties in Domestic Law* (London, Sweet & Maxwell, 1987) 282.

<sup>111</sup> ME Adjami, 'African Courts, International Law, and Comparative Case-Law: Chimera or Emerging Human Rights Jurisprudence' (2002) 24 *Mich J Int'l L* 164.

<sup>112</sup> K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *NYU J Int'l L & Pol* 501, 504.

<sup>113</sup> M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn (Cambridge, Cambridge University Press, 2006) 591.

<sup>114</sup> 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.