# A FAREWELL TO FRAGMENTATION

## Reassertion and Convergence in International Law

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CAMBRIDGE
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University Printing House, Cambridge CB2 8BS, United Kingdom

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www.cambridge.org
Information on this title: www.cambridge.org/9781107082090



First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*
A farewell to fragmentation : reassertion and convergence in international law / edited by Mads Andenas, Eirik Bjorge.
pages cm. – (Studies on international courts and tribunals)
Includes bibliographical references and index.
ISBN 978-1-107-08209-0 (hardback)
1. International law. 2. International courts. I. Andenas, Mads Tonnesson, 1957– editor. II. Bjorge, Eirik, 1983– editor.
KZ3410.F37 2015
341 – dc23 2015002842

ISBN 978-1-107-08209-0 Hardback

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# Unity and diversity in international law

SIR CHRISTOPHER GREENWOOD[1]

At the dawn of the new millennium, fear of the fragmentation of international law was widespread among international lawyers.[2] International law, we were told, was in danger of breaking up into a series of isolated and largely self-contained sub-disciplines, courts and tribunals were multiplying, creating divergent bodies of jurisprudence which it would be impossible to reconcile, while new treaties were emerging at an ever-increasing rate but drafted with no consideration for developments elsewhere. The result – or so it appeared – was that international law was in danger of losing all coherence. Yet, when the matter is properly analysed, the fear of fragmentation at the start of the present millennium appears eerily reminiscent of the panic with which the dawn of the previous millennium was greeted by those who believed that the end of the world was nigh.

Of course, the fear of fragmentation rests on a rational foundation that the earlier panic lacked. International law has expanded into many new (or relatively new) areas, such as environmental protection, the regulation of world trade and the protection of human rights, which are often seen as specialisms. There is much more international law than there was only a generation ago and treaties are frequently negotiated in isolation from other developments in international law. The number of international courts and tribunals has multiplied. Yet none of that points to a fragmentation of international law any more than the omens seen by our more credulous ancestors just over a thousand years ago presaged the end of the world.

[1] Judge, International Court of Justice.

[2] M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi (UN Doc. A/CN.4/L.682).

This chapter will briefly examine some aspects of the diversity of international law today and consider what it actually means for the international legal system. The term 'fragmentation' will be avoided as far as possible, partly because it has been overused in the literature but, more importantly, because implicit in that term are three assumptions, none of which is justified.

The first such assumption is that what we are witnessing is a decline from a past golden age in which international law was a single, entirely coherent system. Yet the international law of the 'pre-fragmentation era', with its attachment to regional custom[3] and the persistent objector principle,[4] not to mention its treatment of reservations to multilateral treaties[5] – all of which were well-established features of international law long before people began to tremble at the prospect of fragmentation – shows that the golden age was not so gilded after all.

The second assumption is that the increased diversity of international law must be seen as a problem – but why? That international law now regulates many areas of activity which it would once have left alone is – for the most part – a development to be welcomed. No-one who has read the Judgment of the Nuremberg Tribunal could have any doubts about the need for international protection of fundamental human rights. The emergence of a body of law on environmental protection is a response (perhaps an inadequate one) to serious problems which can only be addressed at the international level. The law on world trade has helped to prevent the latest financial crisis from tipping the world into the kind of protectionist, 'beggar-my-neighbour' policies which characterised the response to the 1929 crash.

Nor is the multiplication of international courts and tribunals a matter for concern, especially if we compare it with what went before. In 1977, the International Court of Justice had only one case on its General List,[6] although there was a small flurry of inter-State arbitrations after a dearth

[3] See *Asylum case (Colombia/Peru)*, *I.C.J. Reports 1950*, p. 266 and *Rights of Passage (Portugal* v. *India) I.C.J. Reports 1960*, p. 6.

[4] See *Fisheries case (United Kingdom* v. *Norway) I.C.J. Reports 1951*, p. 116 and J. Charney 'The Persistent Objector Rule and the Development of Customary International Law', (1985) 56 BYIL 1.

[5] *Reservations to the Convention on Genocide*, *Advisory Opinion*, *I.C.J. Reports 1951*, p. 15; Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; (1969) 8 ILM 679, Articles 19–22.

[6] *Aegean Sea Continental Shelf (Greece* v. *Turkey)*; the Court decided it lacked jurisdiction the following year, see *I.C.J. Reports 1978*, p. 3.

of such cases in the previous decade;[7] human rights jurisprudence was still in its infancy and applied in only one continent; there was no international criminal court in spite of the endorsement of the Nuremberg principles by the UN General Assembly thirty years earlier,[8] and the law on investment protection was enforced only by occasional instances of diplomatic protection and sporadic arbitrations derived from clauses in a particular set of oil concessions.[9] At the time of writing, the International Court had thirteen cases on the General List and there were ten further inter-State disputes pending before arbitration tribunals. The International Tribunal for the Law of the Sea (ITLOS), the criminal tribunals for Rwanda and the former Yugoslavia, the International Criminal Court and a variety of regional and global human rights courts and tribunals have all been busy in the last few years. In the field of investment arbitration, there has been an explosion in the number of cases, which now runs at something like one hundred arbitrations a year. In short, there is more scope today for the enforcement of international law than at any time in the past. It is difficult to see that development as evidence of decline.

The third assumption, encouraged by the use of the term 'fragmentation,' is that unity and diversity must be in conflict. But there is nothing inevitable about such a conflict. Diversity is inevitable in an international community characterised by decentralisation and the absence of a global legislature. It has the advantage of enabling international law to develop faster and more effectively through regional and functional groupings of States, or simply through 'coalitions of the willing' prepared to adopt and participate in a particular treaty regime. That can pose a problem for the unity and ultimate coherence of international law but it does not have to do so. What matters is that the diverse elements are bound together within a common body of principles which determine the source of legal authority and which give each diverse element its binding force, that rules and principles exist and are applied which can resolve apparent conflicts between

[7] *Channel Continental Shelf (France/United Kingdom)*, 54 ILR 6; *Beagle Channel (Argentina/Chile)* 52 ILR 93; and *Air Services (France/United States of America)* 54 ILR 303. The only major arbitration in the previous decade had been *Rann of Kutch (India/Pakistan)*, 50 ILR 2. The *Beagle Channel* case made history in another respect in that, following the failure to implement the award, the case became the subject of the first Papal mediation in over a century.

[8] General Assembly Resolution 95(I).

[9] C. Greenwood, 'State Contracts in International law – The Libyan Oil Arbitrations', (1982) 53 BYIL 27, discussing *BP* v. *Libya*, 53 ILR 297, *Texaco/Calasiatic* v. *Libya*, 53 ILR 389 and *Libyan American Oil Co.* v. *Libya*, 62 ILR 140.

different bodies of law and institutions and that the different courts and tribunals take proper account of each other's jurisprudence and practices.

This chapter will therefore explore whether such rules and principles exist; whether there is a sufficient core of unity binding together the diverse elements within international law. To that end, it is proposed to conduct what must, of necessity, be a brief and highly selective examination of diversity in the making of international law, and its application by different international courts and tribunals.

## Diversity in the making of international law

It is a truism that there is no central legislature occupying in international society a position comparable to that which the national parliament occupies in most States. The result is that new law and changes to the existing body of law must emerge either from the process of States negotiating a treaty or from State practice refining the body of customary international law. Both processes are clearly decentralised and thus capable of producing diversity in the sense of different bodies of law applicable to different States and in the sense of bodies of law which emerge without any conscious design regarding their place in the overall framework of international law.

In practice, customary international law[10] creates few problems in this regard. The process by which customary international law is developed[11] is such that the emergence of a new rule or principle is usually located within the body of existing law and conflicts (real or apparent) between different customary international law norms are rare. Regional custom is very much the exception and there have been few occasions on which a State has made a serious bid to be treated as a persistent objector. For the most part, therefore, customary international law is a coherent body of rules and principles applicable to all States.

The treaty-making process is a different matter; it almost invariably leads to diversity in both senses. No State is obliged to become party to a treaty[12] and very few treaties have achieved universal, or even

[10] As to which, see the comprehensive study in the two reports prepared by Sir Michael Wood for the International Law Commission in 2013 (UN Doc. A/CN.4/663) and 2014 (UN Doc. A/CN.4/672).

[11] See M. Mendelson, 'The Process of Formation of Customary International Law' 272 Recueil des cours (1998), p. 156.

[12] Moreover, most multilateral treaties permit a State to make reservations by which that State 'when signing, ratifying, accepting, approving or acceding to a treaty . . . purports to

near-universal, participation.[13] This aspect of diversity can certainly create problems. For example, forty years after the International Committee of the Red Cross attempted to update international humanitarian law, the decision of several of the most militarily powerful States not to become party to the Additional Protocols to the Geneva Conventions means that an issue as fundamental as who is entitled to be treated as a prisoner of war is subject to two very different legal standards.[14] This problem can be even more acute in the case of those treaties which aim at the creation of an objective regime, such as that for the deep seabed, or the full effectiveness of which requires universal participation, such as some of the environmental treaties.

Yet the problem is scarcely a new one. The decision of the United States not to join the League of Nations in 1919 was arguably far more significant than its decision, decades later, not to become party to the UN Convention on the Law of the Sea[15] or the Rio Treaty.[16] Nor is the lack of universal participation in such a treaty always as damaging as might be expected. The United Nations did not achieve universal membership until the 1990s yet played a major role in international life long before then; its effectiveness at different stages of its history cannot be attributed solely, or even primarily, to how close it was to universality. Moreover, in many cases the fact that key provisions of a treaty have come to be accepted as declaratory of customary international law mitigates the failure to achieve universal participation. That has been the case, for example, with many of the provisions of the Law of the Sea Convention regarding

exclude or to modify the legal effects of certain provisions of the treaty in their application to that State' (Vienna Convention on the Law of Treaties, 1969, Article 2(d)).

[13] The Charter of the United Nations, 26 June 1945, 892 UNTS 119 and the four Geneva Conventions of 1949 regarding international humanitarian law (though not the two 1977 Additional Protocols to those Conventions) are rare exceptions.

[14] Contrast the test in Article 4 of the 1949 Geneva Convention on Prisoners of War, 12 August 1949, 75 UNTS 135, with that in Articles 43 and 44 of the 1977 Additional Protocol I, 8 June 1977, 1125 UNTS 3. The problem is exacerbated by the fact that even those States which are parties to Additional Protocol I on international armed conflicts are obliged to apply its provisions in a conflict in which they are engaged only if the State with which they are in conflict is also a party. Thus, in the 2003 Iraq conflict, the United Kingdom was only required to apply the provisions of the 1949 Geneva Conventions and the relevant customary international law, because although the United Kingdom was party to Additional Protocol I, Iraq was not. By contrast, in the 1999 Kosovo conflict, the Protocol was applicable between the United Kingdom and the Federal Republic of Yugoslavia, both of which were parties, but not between the Federal Republic and the United States as the latter was not party to Protocol I.

[15] UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

[16] Inter-American Treaty on Reciprocal Assistance (Rio Treaty), 2 September 1947, 21 UNTS 77.

the continental shelf and the exclusive economic zone,[17] as well as most of the provisions regarding methods and means of warfare and precautions in attack (though not those on entitlement to prisoner of war status) contained in Additional Protocol I to the Geneva Conventions.[18] While it would be a mistake to imagine that these developments in customary international law solve all problems created by diversity in the applicable treaty regimes, they certainly go some way towards ameliorating the situation and mean that there is a greater unity in the law than might at first appear.

The process by which treaties are made also encourages diversity in the other sense. Since most treaties are negotiated as isolated texts, a treaty can all too easily create a self-contained legal code and, even if it does not go that far, the very fact that each treaty is negotiated separately can lead to conflicts between different legal instruments and thus undermine the coherence and unity of international law. Again, this problem exists but it is not as extensive or as serious as the 'fragmenteers' suggest.

First, there is a greater degree of coherence in the treaty-making process than is often supposed. The work of the International Law Commission, the Treaty Section of the Office of Legal Affairs of the UN Secretariat and, in their specialised fields, bodies such as the International Committee of the Red Cross, the Hague Conference on Private International Law and the World Trade Organization means that many multilateral treaties are today negotiated within an overall framework that fosters greater awareness of the relationship between the draft under consideration and other international law instruments. For example, the numerous counter-terrorism treaties adopted since 1970 have clearly been negotiated in a relatively systematic way, employing what has become a standard provision on dispute settlement and with an attempt to achieve a high degree of coherence.[19]

Secondly, the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties, 1969, include the important principle that, in the interpretation of a treaty, 'there shall be taken into account,

[17] See, e.g., the treatment of this issue by the International Court of Justice in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *I.C.J. Reports 2012 (II)*, p. 624. Nicaragua was party to the Law of the Sea Convention but Colombia was not.

[18] See C. Greenwood, 'The Customary Law Status of the 1977 Additional Protocols' in C. Greenwood, *Essays on War in International Law* (London: Cameron May, 2006), p. 179. See also 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', *ibid.*, p. 555.

[19] See B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2012).

together with the context . . . any relevant rules of international law applicable between the parties'.[20] That principle has been applied by a wide variety of bodies in the interpretation and application of treaties. For example, the European Court of Human Rights has consistently emphasised that the European Convention on Human Rights,[21] far from existing in a vacuum, is an integral part of international law and must be interpreted and applied accordingly.[22] Similarly, although the three arbitration tribunals constituted under the North American Free Trade Agreement (NAFTA)[23] that considered a Mexican argument that the imposition of a tax which allegedly violated the rights of US investors could be justified under the doctrine of counter-measures rejected that argument, none of them concluded that NAFTA created a self-contained legal regime in which doctrines of general international law such as that on counter-measures had no part.[24]

Thirdly, the fact that those negotiating a treaty sometimes do so without considering how the provisions adopted in that treaty relate to other rules of international law is neither surprising – the supposedly more coherent system for enactment of national legislation produces no shortage of examples in which one statute is in conflict with other parts of a parliament's output – nor necessarily damaging. What matters is whether international law contains the principles necessary for addressing that relationship and for avoiding conflict. That it does can be seen in the way in which different courts and tribunals have grappled with the relationship between the UN Convention against Torture, 1984,[25] together with other treaties on international criminal law, and the various rules and principles of international law regarding State and individual immunities. The records of the meetings in which the Convention was negotiated

[20] Article 31(3)(c). On the importance of this provision as a unifying force in international law, see C. MacLachlan, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 7 ICLQ 279.

[21] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

[22] For an early example, see the Judgment in *Golder* v. *United Kingdom*, 57 ILR 200. Even more striking in this regard is the unanimous decision of the Grand Chamber in *Banković* v. *Belgium and Others*, 123 ILR 94, see also the judgment in *Hassan* v. *United Kingdom* (App. No. 29750/09), 16 September 2014; to be published in volume 161 of the *International Law Reports*. See also the chapter by President Spielmann in the present volume.

[23] North American Free Trade Agreement, 17 December 1992, (1993) 32 ILM 289.

[24] *ADM and Tate and Lyle Inc.* v. *Mexico*, 146 ILR 439; *Corn Products Inc* v. *Mexico*, 146 ILR 581; *Cargill Inc.* v. *Mexico*, 146 ILR 642.

[25] Convention Against Torture, 10 December 1984, 1485 UNTS 85.

over a period of four years[26] show that the question of immunity was not considered, at least in any detail, and neither the text of the Convention, nor its *travaux préparatoires* gives any express guidance as to the relationship between the provisions of the Convention and the law on immunities.

That matter came before the House of Lords in the *Pinochet* case in 1998–99. The majority of the Appellate Committee considered that the Convention was not intended to dispense altogether with the immunity which the Appellate Committee found customary international law required one State to accord to the officials and former officials of another State in respect of their official acts. At the same time, the fact that the Convention defined torture in such a way that it was limited to acts committed by persons acting in an official capacity (or under colour of official authority), and that the Convention required each State Party to take action against any person accused of torture as thus defined, meant that some inroad into the normal principle of immunity must have been intended; otherwise anyone who was capable of committing torture within the meaning of the Convention would be entitled to immunity if prosecuted in a foreign State unless the State in which he or she held office chose to waive that immunity. The House of Lords thus concluded that the immunity *ratione materiae* enjoyed by all officials and former officials was incompatible with the Convention. Although most of the acts in respect of which General Pinochet's extradition was sought had been committed when he was President of Chile, by the time he was arrested he no longer held office. The conclusion, therefore, was that he was not entitled to immunity in respect of alleged violations of the Convention.[27]

Since General Pinochet had left office some years before his arrest, the House of Lords had no need to consider the immunity *ratione personae* enjoyed by a serving Head of State (as well as by certain other officials of very high rank). That matter was, however, addressed by the International Court of Justice in the *Arrest Warrant* case three years later.[28] In that case, a Belgian court had issued a warrant for the arrest of

[26] On which, see J. Burgers and H. Danelius, *The United Nations Convention against Torture* (Boston: Martinus Nijhoff, 1988).

[27] *Regina* v. *Bow Street Magistrate*, ex parte *Pinochet (No. 3)*, [2000] 1 AC 147; 119 ILR 135. The majority, however, upheld his immunity in respect of acts committed before the entry into force of the Convention between Spain (the State seeking his extradition), the United Kingdom and Chile.

[28] *Arrest Warrant (Democratic Republic of the Congo* v. *Belgium)*, *I.C.J. Reports 2002*, p. 3.

Mr Yerodia who, at the time the case was brought before the International Court, was the serving Foreign Minister of the Democratic Republic of the Congo. The International Court held that the grant of immunity to a serving foreign minister (and, one presumes, a serving Head of State or Government) served an important purpose in making possible the conduct of relations between States and was not, therefore, overridden by the provisions requiring prosecution in a treaty unless the treaty made clear that such was its intention.[29] While the arrest warrant was for violations of the Geneva Conventions and Protocols on the laws of war, rather than for violations of the Torture Convention, it is generally considered that the reasoning of the International Court would be applicable to the latter Convention, as well as to a number of similar treaty regimes.

The House of Lords returned to the subject in 2006 in *Jones* v. *Saudi Arabia*. In contrast to both *Pinochet* and *Arrest Warrant*, which both involved criminal proceedings, *Jones* concerned a civil action against both the Kingdom of Saudi Arabia and certain of its officials[30] for acts of torture allegedly committed in violation of the 1984 Convention. The House of Lords held that there was no incompatibility between the provisions of the Convention and the immunity of the State itself, since the Convention did not require one State to provide a civil remedy against another State for violation of the Convention. It also concluded that the decision in *Pinochet* was applicable to the immunity of the official in criminal but not civil proceedings, a conclusion which has attracted some controversy but which is explicable on the ground that criminal proceedings against an official are entirely distinct from the responsibility of the State itself,[31] whereas civil proceedings for damages against an official for acts attributable to the State are in practice inseparable from the responsibility of the State.[32]

I have dwelt upon the judgments in these three cases, because they demonstrate that, in spite of the fact that the process by which the treaties

[29] As Article 27 of the Statute of the International Criminal Court does. In that respect, see the decision of the International Criminal Court in *Prosecutor* v. *Bashir*, 150 ILR 228. See also the decision of the Special Court for Sierra Leone in *Prosecutor* v. *Taylor (Immunity from Jurisdiction)*, 128 ILR 239.

[30] *Jones* v. *Saudi Arabia* [2007] 1 AC 270; 129 ILR 629. One of the officials was the Minister of the Interior.

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *I.C.J. Reports 2007*, p. 43 at para. 172.

[32] Not only is the State vicariously liable for the acts of the official but also damages awarded against the official (and paid to the claimant) would necessarily affect the reparation which the State itself might be required to make if its responsibility was upheld.

under consideration were adopted (a process which avoided any consideration of the law on immunities), an application of the principles of treaty interpretation, together with an analysis of the nature and purpose of the various rules on immunity removed any apparent conflict between these different bodies of law. While it would be wrong to imagine that this was an easy task,[33] the fact is that it was accomplished. Diversity in the making of the different laws did not preclude their application in a way which upheld the unity of the international legal system.

## Diversity in the application of international law

It was the growth in the number of courts and tribunals that did most to spark the fear that international law was fragmenting. The scale and speed of that growth is remarkable. In the space of barely thirty years, the International Court of Justice has been joined by ITLOS, the International Criminal Court, ad hoc criminal courts or tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Lebanon and Cambodia, and the dispute settlement mechanism of the World Trade Organization. The regional human rights tribunals and the global UN Human Rights Committee have become far busier and the number of arbitrations (both between States and, even more noticeably, between investors and States) has undergone a dramatic increase. With no formal hierarchy or general appeals mechanism, the risk that each court or tribunal would interpret and apply the rules of international law in its own way, disregarding or challenging the jurisprudence of other courts and tribunals became a matter of serious concern.

It was the complex machinery for dispute settlement in the 1982 Law of the Sea Convention which was the initial focus of that concern. One of the compromises which proved necessary at the Third UN Conference on the Law of the Sea in order to secure some form of compulsory settlement of disputes was the choice, embodied in Part XV of the Convention, of recourse to the International Court of Justice, the newly created ITLOS, or arbitration under Annex VII of the Convention. It was feared that, particularly in the realm of maritime delimitation, these three options would lead to very different approaches to delimitation.[34]

[33] Having been counsel in both *Pinochet* and *Jones*, I can say (most emphatically) that it was not.

[34] S. Oda, 'The ICJ Viewed from the Bench (1976–1993)' 244 Recueil des cours (1993), p. 9, 127–55; S. Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ICLQ 863; G. Guillaume, 'The Future of International Judicial Institutions' (1995) 44 ICLQ 848.

Those fears now seem unfounded. In the years since 1982 eighteen maritime boundary disputes have been the subject of a judgment or award.[35] Far from the fragmented jurisprudence that was predicted, there has been a remarkable consistency of approach between the International Court of Justice, ITLOS and the various arbitration tribunals. Moreover, the judgments and awards given in all three fora have referred extensively to the jurisprudence of other courts and tribunals. Thus, in its 2012 judgment in the *Bay of Bengal* case, ITLOS drew heavily upon the jurisprudence of the International Court of Justice and the arbitral tribunals, both on delimitation and on more general questions of international law. Later in the same year, the International Court of Justice, in its judgment in *Nicaragua* v. *Colombia*, placed a similar reliance on the reasoning in *Bay of Bengal*, as well as that in the arbitration awards. The result has been the emergence of a coherent body of law and practice which is the stronger for having emanated from more than one institution.

A similar willingness to draw on the experience and jurisprudence of a variety of courts and tribunals is evident in the 2012 judgment of the International Court of Justice in the *Diallo* case.[36] In that judgment the Court had to determine the amount of compensation to be paid by the Democratic Republic of the Congo to Guinea in respect of the former's ill-treatment of a Guinean national. The case was only the second

[35] Eleven (many of them involving disputes over land as well as maritime territory) have gone to the International Court of Justice: *Continental Shelf (Tunisia/Libya)*, *I.C.J. Reports 1982*, p. 18; *Gulf of Maine (Canada/United States of America) I.C.J. Reports 1984*, p. 246; *Continental Shelf (Libya/Malta)*, *I.C.J. Reports 1985*, p.13; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, *I.C.J. Reports 1992*, p. 350; *Jan Mayen (Denmark* v. *Norway)*, *I.C.J. Reports 1993*, p. 38; *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, *I.C.J. Reports 2001*, p. 40; *Land and Maritime Boundary (Cameroon* v. *Nigeria, Equatorial Guinea intervening)*, *I.C.J. Reports 2002*, p. 303; *Territorial and Maritime Dispute (Nicaragua* v. *Honduras)*, *I.C.J. Reports 2007*, p. 659; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, *I.C.J. Reports 2009*, p. 61; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *I.C.J. Reports 2012*, p. 624; and *Maritime Dispute (Peru* v. *Chile)*, Judgment of 27 January 2014. ITLOS has so far decided one maritime delimitation case, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012. There have also been six arbitration awards: *Guinea-Guinea Bissau Maritime Delimitation* (1985) 77 ILR 635; *Guinea-Bissau* v. *Senegal* (1989) 83 ILR 1; *Delimitation of Maritime Areas between Canada and the French Republic (San Pierre and Miquelon)* (1992) 95 ILR 645; *Eritrea and Yemen, Phase Two (Maritime Delimitation)* (1999) 119 ILR 418; *Barbados* v. *Trinidad and Tobago* (2006) 139 ILR 449 and *Guyana* v. *Suriname* (2007)139 ILR 566. At the time of writing several further cases were pending before the International Court of Justice and various arbitration tribunals.

[36] *Ahmadou Sadio Diallo (Guinea* v. *the Democratic Republic of Congo)*, *Compensation Judgment*, *I.C.J. Reports 2012*, p. 324.

occasion on which the Court had been called upon to determine the quantum of compensation.[37] By contrast, other bodies, noticeably the human rights tribunals and the Iran–United States Claims Tribunal, had extensive experience in such matters. The Court's judgment draws heavily on that experience. Although the judgment is relatively short, it referred to the practice of the European Court of Human Rights, the Inter-American Court of Human Rights, the UN Human Rights Committee, the African Commission on Human and People's Rights, the UN Compensation Commission, the Iran–United States Claims Tribunal, the Eritrea–Ethiopia Claims Commission and ITLOS, as well as the award of the umpire in the *Lusitania* claims.[38] It is difficult to see in this judgment much evidence of a fragmentation of international law; quite the contrary.

A third example of the essential unity which exists in international law, notwithstanding the diversity of the courts and tribunals which apply it, concerns an issue which has come before both international and national courts. That issue is whether international law requires a State to accord another State immunity before the courts of that State even if the wrong of which the second State is accused contravenes a fundamental rule of international law. The fact that this issue is one which comes before national courts more frequently than it does before international courts makes achieving unity markedly more difficult. That is because the courts of many, perhaps most, States are not always at liberty to apply international law in its full extent. In most national legal systems, the constitution, or other rules of law, place limitations on the extent to which the national courts may apply international law. Those limitations vary from one State to another but, at a minimum, most States require obedience to at least the fundamental rules of the national constitution irrespective of whether that entails a conflict with international law. Moreover, in some States the supremacy of parliament, concepts of binding precedent, deference to the executive on certain legal issues or the straitjacket which can sometimes be imposed by procedure constrain the courts in their ability to apply international law.

Nevertheless, the courts of several States have dealt with this question and it has also come before the International Court of Justice and the European Court of Human Rights. The precise way in which the question has presented itself has not, however, been the same. The jurisdiction of

[37] The previous occasion was the *Corfu Channel case (United Kingdom* v. *Albania)*, *I.C.J. Reports 1949*, p. 244.
[38] VII RIAA 40.

the European Court of Human Rights is confined to the interpretation and application of the European Convention on Human Rights, although, as has already been seen, the Court has repeatedly held that the Convention forms part of international law and has to be interpreted and applied in the context of the international legal system as a whole. In 2001, the Court held that for one State to recognise the sovereign immunity of another and therefore bar an action in its courts against that State was, in principle, a denial of access to justice which could engage the responsibility of the forum State under Article 6 of the Convention. It went on to hold, however, that if international law required a State to accord immunity from the jurisdiction of its courts to another State, compliance with that obligation was a justifiable limitation on the exercise of Article 6 rights.[39] The Court has, therefore, considered whether international law requires the grant of immunity in cases where the defendant State is accused of violating fundamental rules of international law (including norms of *jus cogens*) as a prior step to determining whether a limitation on access to justice was justifiable or a violation of Article 6 of the European Convention. In *Al-Adsani* v. *United Kingdom*, the Grand Chamber of the Court decided that the status of the rule of international law a defendant State was alleged to have violated, however fundamental, did not remove the requirement for other States to accord immunity. It reached that conclusion, however, by the narrowest of margins (nine votes to eight) and with the qualification that its decision reflected the current state of international law, which might of course undergo change in the future.

It was against that background that the English courts had to consider the same question in *Jones* v. *Saudi Arabia* in 2006.[40] The facts of *Jones* were essentially the same as those of *Al-Adsani*. The claimants alleged that they had been tortured while in the defendant State. They maintained that the prohibition of torture, because of its status as a rule of *jus cogens*, prevailed over the duty under general international law to accord immunity. Since the immunity of foreign States from the jurisdiction of the English courts is governed by statute (the State Immunity Act 1978), which lays down a general rule of immunity subject to a list of defined exceptions, none of which was applicable to the facts of the *Jones* case, the position under general international law arose only in an indirect fashion. Under the Human Rights Act 1998, an English court must grant a declaration of incompatibility if a statute is inconsistent with rights under the European

[39] *Al-Adsani* v. *United Kingdom*, 123 ILR 24. See also *McElhinney* v. *Ireland*, 123 ILR 73.
[40] *Jones* v. *Saudi Arabia* [2007] 1 AC 270; 129 ILR 629.

Convention on Human Rights. The question before the English courts was, therefore, whether the State Immunity Act was inconsistent with Article 6 of the European Convention; because of the judgment of the Grand Chamber in *Al-Adsani*, that question could be answered only by first determining the present state of international law on sovereign immunity and *jus cogens*. After considering a number of international instruments and the jurisprudence of international courts, as well as the practice of several other States, the House of Lords unanimously concluded that international law still required that immunity be granted on the facts of the case and denied that there was an exception to the duty to accord immunity when a State was accused of violating a rule of *jus cogens*.

The Italian courts, however, had taken a different view in a series of cases against Germany concerning war crimes committed in the last two years of the Second World War.[41] The Supreme Court of Greece initially took the same position,[42] although this position was later reversed.[43] Those cases led Germany to institute proceedings against Italy before the International Court of Justice in 2008. Germany claimed that, by refusing to accord it immunity and entering judgment against it, Italy had violated its international law obligations to Germany.[44] This case thus raised directly the issue on which the European Court of Human Rights and the House of Lords had already had to pronounce. The judgment of the International Court of Justice, given in 2012, held that Germany had been entitled to immunity, notwithstanding the status of the rules of international law which the Italian courts had found it had violated. In reaching that conclusion, the Court considered the judgments of the European Court of Human Rights and the Court of Justice of the European Union,[45] as well as the jurisprudence of sixteen States.

Although the Court did not expressly make this point, it is clear that it examined the decisions of national courts for two distinct reasons. Those decisions were, of course, part of the State practice on which the

[41] *Ferrini* v. *Federal Republic of Germany*, 128 ILR 658. The judgment of the Italian Court of Cassation in that case was followed in several later cases.

[42] *Prefecture of Voiotia* v. *Federal Republic of Germany*, 129 ILR 513.

[43] *Margellos* v. *Federal Republic of Germany*, 129 ILR 525.

[44] *Jurisdictional Immunities (Federal Republic of Germany* v. *Italy, Greece intervening), I.C.J. Reports 2012*, p. 99.

[45] That Court had ruled on a reference from a national court regarding enforcement of judgments given against Germany in the Greek courts before the latter had changed their position following the *Margellos* judgment.

customary international law of State immunity was based. As such, they were important for the Court's analysis of that practice irrespective of the quality of the reasoning on which they were based. Yet the Court also considered that reasoning in order to see what guidance it gave, in the same way as it examined the reasoning of the European Court of Human Rights in the judgments which that Court had given regarding State immunity. While the reasoning in some of those judgments was very brief, in others (particularly, *Jones*, a judgment of the Supreme Court of Poland[46] and a judgment of the Court of Appeal for the Canadian Province of Ontario[47]) there was a detailed examination of the issues on which the Court placed a degree of reliance.

The picture is thus one of a high degree of unity of approach, notwithstanding the different contexts in which the issue had been raised before the various courts. That unity has also characterised the approach of two courts in cases subsequent to the judgment in *Jurisdictional Immunities*. In 2014, the European Court of Human Rights gave judgment in *Jones* v. *United Kingdom*.[48] That case was brought by the claimants whose action against Saudi Arabia had failed because of the judgment of the House of Lords that Saudi Arabia was entitled to immunity. The claimants maintained that, by denying them access to the courts, the United Kingdom had violated their rights under Article 6 of the Convention. The Court rejected their claim and declined to reconsider its earlier judgment in *Al-Adsani*. In reaching that conclusion, the Court stated that 'the recent judgment of the International Court of Justice in *Germany* v. *Italy* . . . must be considered as authoritative as regards the content of customary international law'.[49] The Quebec Court of Appeal has come to a similar conclusion.[50] That judgment has now been upheld by the Supreme Court of Canada.

These three examples demonstrate that, notwithstanding the diversity of the courts and tribunals which have considered the same issues of international law and the absence of any hierarchy or provision for a final appeal to a single court, there can be, and frequently is, a high degree of consistency in their approach to those issues. Moreover, the picture which emerges is one of judges, at both the national and international level, very

[46] *Natoniewski* (2010); English translation in 30 Polish Year Book of International Law, p. 299.
[47] *Bouzari* v. *Iran*, DLR (4th), vol. 243, p. 406; 128 ILR 586.
[48] Judgment of 14 January 2014.
[49] *Ibid.*, para. 198. [50] *Hashemi* v. *Iran* (2012) QCCA 1449, 154 ILR 351 and 159 ILR 299.

much aware of one another's judgments and concerned to ensure that there is no unnecessary conflict between them.

It must, of course, be admitted that the diversity of courts and tribunals hearing questions of international law can sometimes produce conflicting views on points of law. The most notorious example is the difference between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia regarding the responsibility of a State for the acts of a group which is not an organ of that State but with which it is in some sense allied. In its 1986 *Nicaragua* judgment, the International Court of Justice held that for an act of the '*contra*' rebels in Nicaragua to be attributed to the United States, it had to be established either that the *contras* were completely dependent upon the United States or that the specific act in question had been carried out under US direction and control.[51] However, in 1999 the Appeals Chamber of the International Criminal Tribunal, in the *Tadić* case, rejected this high standard and determined that the appropriate test was one of 'overall control'.[52] The matter came before the International Court for a second time in 2007. In its judgment in the *Bosnia* case, the Court reviewed the two conflicting authorities and reaffirmed the test laid down in *Nicaragua*, declining to alter its position on the strength of the *Tadić* decision.[53]

There is no escaping the fact that on this issue the Appeals Chamber deliberately chose to depart from the view of the law taken by the Court and that the Court then, again deliberately, rejected the view taken by the Appeals Chamber. Yet that difference between the Court and the Tribunal has to be seen in perspective. First, it is the only such difference. On a wide range of other issues, the Tribunal has been content to adopt the reasoning and rulings of the Court. Secondly, in its 2007 judgment, the Court, while declining to follow the Chamber's reasoning on attribution,[54] made clear throughout the judgment that it drew heavily on the findings of fact in the *Tadić* judgment and other judgments of the Tribunal. Indeed, this

[51] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, *I.C.J. Reports 1986*, p. 14, paras. 110 and 115.

[52] *Prosecutor* v. *Tadić* (IT-94–1–A), 124 ILR 61, paras. 88–145.

[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), *I.C.J. Reports 2007*, p. 43, para. 403.

[54] The Court rightly pointed out that the question of State responsibility does not fall within the jurisdiction of the Tribunal, which is confined to the criminal responsibility of individuals. The Tribunal had discussed the question of responsibility in order to decide whether or not the conflict in Bosnia was an international armed conflict. It must be questioned, however, whether that issue really turned on the question of responsibility.

one difference between the Court and the Tribunal is the exception to a general pattern of broad consistency between the judicial institutions of international law.

More numerous differences are to be found in the jurisprudence of investment arbitration tribunals. To some extent the differences between the awards given by different tribunals is no more than a proper recognition of the differences between the bilateral investment treaties ('BITs') under which each tribunal operates. Although many BITs contain provisions on subjects like fair and equitable treatment and expropriation which are drafted in very similar language, it should always be remembered that each treaty is an agreement in its own right and that the words used have to be interpreted in the light of the context, object and purpose and, where appropriate, drafting history of *that* treaty.[55] To approach each BIT in that light is to respect a diversity that is the product of the specific wills of the parties to each BIT; it is quite wrong to treat the language of BITs simply as 'boilerplate' texts which must necessarily be given a single, unified meaning.

Nevertheless, there have been differences between arbitral tribunals which cannot be explained on this ground. The vexed question of whether a most favoured nation ('MFN') provision in a BIT is capable of expanding the scope of a provision on investor-State dispute settlement is one such example. Ever since the award in *Maffezini* v. *Spain*,[56] this question has divided the arbitration world with approximately the same number of awards accepting the theory that a MFN clause can expand the jurisdiction of the tribunal as there have been awards rejecting the same theory. This lack of a *jurisprudence constante* cannot be explained only by reference to differences between the terms of the BITs involved (although such differences can be significant). Of the four tribunals which have ruled on the effect of the MFN clause in the Argentina–Germany BIT, two have held that this clause means that an investor can circumvent the requirement in the arbitration clause of that BIT that disputes may be submitted to arbitration only after a period of eighteen months has elapsed from

[55] Vienna Convention on the Law of Treaties, 1969, Articles 31 and 32. In *Polydor* v. *Harlequin* [1982] ECR 329 the Court of Justice of the European Communities (as it then was) held that a provision in the EEC–Portugal Association Agreement had to be given a different interpretation from the identically worded provision in the EEC Treaty because the context, and object and purpose of the two agreements was different.

[56] *Maffezini* v. *Spain*, 124 ILR 1.

their submission to the local courts,[57] while two have held that the MFN clause cannot release the investor from this requirement.[58] Moreover, even where tribunals have reached the same conclusion on this issue, they have frequently done so for radically different reasons.[59]

The marked difference of views on this issue is, to say the least, unfortunate. It makes it difficult for either party to plan its approach to litigating an investment claim and places a premium on the selection of the arbitrators who will hear a case which involves (or, which may involve) this issue. But it does not indicate a hopelessly fragmented system. In spite of the fact that consistency is generally easier to achieve within, and between, institutions such as the International Court of Justice and the European Court of Human Rights, the more diverse world of international investment arbitration has achieved a far higher level of consistency than the MFN debate might suggest. The difference of views over MFN clauses and jurisdiction is best seen as one of those issues which arises from time to time in any legal system, one on which scholars as well as arbitrators or judges differ. Eventually such differences tend to be resolved and a more settled approach takes hold. That is obviously easier to achieve where there is a final court of appeal whose decision on the matter provides the last word. Yet even in the absence of such a tribunal, a settled view is generally arrived at in the end. Until that happens, the differences are regrettable but they need not be calamitous. It is worthwhile recalling that for over a decade, the French Conseil d'État and the Cour de Cassation took radically different views on the issue of the supremacy of European Community law over French legislation.[60] Neither the European legal system nor the French legal system collapsed as a result.

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The international community is a decentralised society and the international legal system is a reflection of that society. One consequence of that fact is that the processes by which international law is made and applied are inevitably more diverse than those found in a national legal system.

[57] *Hochtief* v. *Argentina*, ICSID Case No. ARB/07/31; *Siemens AG* v. *Argentina*, ICSID Case No. ARB/02/8.

[58] *Wintershall Aktiengesellschaft* v. *Argentina*, ICSID Case No. ARB/04/14; *Daimler Financial Services* v. *Argentina*, ICSID Case No. ARB/05/01.

[59] Compare the awards in *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24 and *Renta 4 SVSA and others* v. *Russian Federation*, SCC Case No. 24/2007.

[60] See *Société des Cafés Jacques Vabre* Cour de cassation, 24 May 1975; 93 ILR 240 and *Nicolo* Conseil d'État, 20 October 1989; 93 ILR 286.

Of late they have become more, rather than less, diverse. Yet that does not mean that international law is fragmenting. Diversity exists without, on the whole, compromising the essential unity of the legal system. That unity cannot, however, be taken for granted. It requires those involved in making and applying international law to be conscious of the place which the immediate task before them occupies in the legal system as a whole, to be aware of the work of others and to respect their efforts. Fear of fragmentation has been greatly exaggerated but a certain wariness is necessary.