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978-1-107-08209-0 - A Farewell to Fragmentation: Reassertion and Convergence in International Law

Edited by Mads Andenas And Eirik Bjorge

Excerpt

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Introduction: from fragmentation to convergence in international law

MADS ANDENAS AND EIRIK BJORGE

I. The project

The title of this book, *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, could be thought to indicate that in our view there is no fragmentation in international law. Fragmentation of international law has not, however, come to a complete end; the end of all fragmentation is not a realistic prospect. We regard fragmentation more as a part of a dynamic legal system, and fragmentation may be a fruitful perspective by which to study almost any legal system or sub-system.

The fragmentation of international law has in the last twenty years been discussed as a threat to international law as a legal system, and the extent and degree of fragmentation may have posed such a threat. There is, not surprisingly, a rich literature on the fragmentation of international law.¹

There is less attention given to the move towards convergence. That is the focus of this volume. Convergence can be regarded as just as much a part of any legal system, together with fragmentation, in a Hegelian dialectic process.² Fear of fragmentation as a threat to the unity and

¹ See, e.g., 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, finalized by Martti Koskenniemi, A/CN.4/L.682; J. Crawford, 'Chance, Order, Change: The Course of International Law' in 365 *Collected Courses of The Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers, 2013), 9, 205–29; M. Andenas, 'The Centre Reasserting Itself: From Fragmentation to Transformation of International Law' in *Volume in Honor of Pär Hallström*, edited by M. Derlén and J. Lindholm (Uppsala: Iustus, 2012); P. Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013); and E. Benvenisti and G. W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595, E. Benvenisti, *The Law of Global Governance* (The Hague Academy of International Law, 2014).

² G. W. F. Hegel, *Phenomenology of Spirit* (trans. A. V. Miller, Clarendon Press, 1977) 29–30 at [50]–[51]. See Castellarin, Chapter 12 in the present book.

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coherence of international law or its future as a legal system may explain why convergence and unity are becoming more of a dominating feature of international law discourse than the claims to autonomy and specificity of different regimes and disciplines, which previously dominated more than they currently do.

Convergence is less studied in international law. Nonetheless, it plays a most important role in the current phase of what we call the reassertion of the International Court of Justice as, over and above simply being an organ that delivers ‘transactional justice’, being an institution worthy of the name ‘the principal judicial organ of the United Nations’.³ This is happening in a wider context; the general method and principles of international law are changing as a function of this reassertion, supported not only by the International Court but generally also by most other international courts and tribunals, treaty bodies and United Nations (UN) institutions, such as the International Law Commission (ILC) and special procedures of various kinds.

There is also convergence in the approach taken in many forms of State practice, such as government statements in international and domestic fora, and not the least in the jurisprudence of domestic supreme and constitutional courts, increasingly concerned with international law and openly taking account of and giving effect to international law in their judgments as they do. Scholarship follows in tow, slowly opening up to the extended comparative perspectives within public international law disciplines, in relation to domestic law, and the role of such scholarship in developing international law and its general method and principles.

We subscribe to the view of international law as a legal system, with the challenges that follow for the analysis of institutions, method, general principles and substantive law. A part of this challenge is the imperative of openness for general international law to place itself, and remain, at the centre as a generalist discipline with continuing relevance for the emerging specialist treaty regimes and disciplines.

For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of one another, address possible conflicts, including those which cannot

³ Charter of the United Nations, 26 June 1945, 892 UNTS 119, Art 92. See, on the beginnings of the development, G. Guillaume, ‘Transformations du droit international et jurisprudence de la Cour Internationale de Justice’ in R. Ben Achour and S. Laghmani (eds.), *Les nouveaux aspects du droit international* (Pedone, 1994) 175–92.

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be resolved, and in the course of doing so, contribute to the development of general principles and forms of hierarchies of norms and institutions. Such convergence may contribute to a stabilization of the (still) rapidly expanding international legal system. Even if fragmentation, and the fear of fragmentation, is the subject of a rich literature, there is still need for empirical study to understand the impact of fragmentation on the legal system of international law. Empirical study is also required to understand the emphasis on coherence and unity in developing international law and its general method and principles, and increasingly also in finding answers to legal questions as seen in the practice of the courts.

We believe that the contributors to this book, on the whole, share this view but that the book may also have interest to scholars who do not. Much of what we see as convergence may also be seen as ways of dealing with fragmentation, and does not have to be based on, for instance, general principles or hierarchies of norms and institutions.

Since the law of human rights has become such a vector in the debates concerning fragmentation and convergence in international law,⁴ and also about the role of the International Court in what we regard as a reassertion and convergence phase,⁵ we have felt that this particular area merited a particular focus within the context of this book.

Against this background, this book explores convergence as a response to fragmentation. The book is organized into two parts. After this introduction follows 'Part 1: Reassertion and Convergence: 'Proliferation' of Courts and the Centre of International Law', which has two sub-parts: 'A: At the centre: The International Court' and 'B: "Regimes" of International Law'. 'Part 2: A Farewell to Fragmentation and the Sources of

⁴ See, e.g., R. Jennings, 'The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers' in *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, *ASIL Bulletin: Educational Resources on International Law* (1995) 2, 6; R. Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *ICLQ* 1, 5–6.

⁵ See, for instance, Andrew Lang, 'The Role of the International Court of Justice in a Context of Fragmentation' (2013) 62 *International and Comparative Law Quarterly*, 777–812, and Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights', Chapter 35 in Nigel Rodley and Scott Sheeran (eds.), *Routledge Handbook on Human Rights* (Routledge, 2013) 635–61, and 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' *Chinese Journal of International Law* (2013) 12(4) 639–77.

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Law' also has two sub-parts: 'A: Custom and *jus cogens*' and 'B: Treaty interpretation'.

We would like in this introductory chapter briefly to foreshadow three themes which, in various ways, make an appearance in the chapters of this book: substantive fragmentation, institutional proliferation, and methodological fragmentation. Finally, we provide an overview of the chapters of this book and how they contribute to develop the book's theme of reassertion and convergence in international law.

II. Three forms of fragmentation

A. Substantive fragmentation

The first of the three themes of this book, or the first of the three forms of fragmentation, is substantive fragmentation, that is, different regimes or disciplines laying claim to autonomy and being self-contained fragmented regimes. International law, in the words of the International Court in *WHO Regional Headquarters*, 'does not operate in a vacuum'; it operates, rather, with 'relation to facts and in the context of a wider framework of legal rules of which it forms only a part'.⁶ One expression of this is how international customary law, over time, may be called on to mould and even modify the content of otherwise static treaties.⁷ That, as Crawford has observed,⁸ was the case in *Nuclear Weapons*,⁹ the International Court there took the concepts of 'proportionality' and 'necessity' from the developing customary international law concept of self-defence and read them into the concept of self-defence under Article 51 of the UN Charter.¹⁰ Another, but related, aspect is that, as the International Court noted in the *Fisheries Jurisdiction* case, 'an international instrument must be interpreted by reference to international law'.¹¹ Similarly, to our mind, the International

⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* ICJ Rep 1980 73, 76 [10].

⁷ J. Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012) 33.

⁸ J. Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 Hague Recueil 1, 110.

⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion ICJ Rep 1995, 226, 244–5 [37]–[43].

¹⁰ Charter of the United Nations, 26 June 1945, 892 UNTS 119.

¹¹ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment ICJ Rep 1998, 460 [68].

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Court in *Bosnian Genocide* observed, in connection with the Genocide Convention,¹² that:

[t]he jurisdiction of the Court is founded on Article IX of the [Genocide] Convention, and the disputes subject to that jurisdiction are those ‘relating to the interpretation, application or fulfillment’ of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention . . . and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.¹³

The same approach has been taken by the European Court of Human Rights.¹⁴ Interpreting and applying instruments which on their face provide that the tribunal having jurisdiction to interpret and apply them shall, as is the case with the UN Convention on the Law of the Sea (UNCLOS), ‘apply this Convention and other rules of international law not incompatible with this Convention’, international courts and tribunals have recognized that this duty is all the stronger. It is not surprising, and entirely fitting, that the International Tribunal for the Law of the Sea (ITLOS), in *Arctic Sunrise* (Provisional Measures),¹⁵ should take into account international human rights law in connection with the detention of the *Arctic Sunrise* crew, who would, absent an order for release, ‘continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The settlement of such disputes between two States should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned’.¹⁶

In this way, through reliance on the insight that the sources of international law do not operate in a vacuum but rather in relation to a broader context of rules, fragmentation gives way to convergence.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Rep 2007, 43, 105 at [149].

¹⁴ See, e.g., *Fogarty v. United Kingdom* [GC], no. 37112/97, § 35, ECHR 2001-XI; *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI; *Al-Adsani v. United Kingdom* [GC], no. 35763/97, ECHR 2001-XI.

¹⁵ *Arctic Sunrise (Netherlands v. Russia)* (Provisional Measures) ITLOS Case No. 22.

¹⁶ *Arctic Sunrise (Netherlands v. Russia)* (Provisional Measures) ITLOS Case No. 22 at [87]. See, however, the criticism in D. Guilfoye and C. Miles, ‘Provisional Measures and the MV *Arctic Sunrise*’ (2014) 108 *AJIL* 271, 284–6.

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[More information](#)*B. Institutional fragmentation*

The second of the three themes of this book on the three forms of fragmentation is institutional proliferation. Despite the lack of formal hierarchy between international courts and tribunals, the pronouncements of the International Court, the only permanent tribunal of general jurisdiction, carry particular weight. The International Court provides international law with a centre of gravity.¹⁷

It has in later years been possible to observe a tendency according to which the International Court itself has started referring, even more than it used to do before,¹⁸ to other types of international court and tribunal, not least the human rights courts and bodies. It was eloquent of this development when Judge Greenwood in *Diallo* (Compensation) stated that:

International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.¹⁹

This seems now to have become the new orthodoxy. Special Rapporteur Sir Michael Wood has, in the context of an ILC study on the formation of customary international law,²⁰ observed that given the unity of international law and the fact that ‘international law is a legal system’, it is in principle neither helpful nor in accordance with principle to break the law up into separate specialist fields. The same basic approach to the formation and identification of customary international law, he said, applies regardless of the field of law under consideration. The Commission’s work on this topic would be equally relevant to all fields of international law, including, for example, customary human rights law, customary

¹⁷ J. Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 Hague *Recueil* 1, 216.

¹⁸ It is important to remember that the Permanent and the International Court have on occasion referred to the decisions of other tribunals, both international and domestic: A. D. McNair, *The Development of International Justice* (New York University Press, 1954) 12–13.

¹⁹ Declaration of Judge Greenwood, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Rep 2012, 324, 294 [8].

²⁰ ‘Formation and Evidence of Customary International Law’: see http://legal.un.org/ilc/guide/1_13.shtml.

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international humanitarian law, and customary international criminal law.²¹

The tendency – in the literature, in the jurisprudence of international tribunals, and in the work of the ILC – seems to have gone from focusing on what is different among the different fields of international law ‘to move freely over the boundaries, which seem to divide these fields of law and to bring out the underlying unities’.²²

C. Methodological fragmentation and a fragmented method?

The last of the three themes of this book on the three forms of fragmentation is methodological fragmentation. The possibility of methodological fragmentation has been put forward by some commentators in connection with two aspects of the sources of law: treaty and custom. First it is true that some international courts and tribunals, perhaps especially treaty bodies, have at times insisted on regarding the treaty which they are interpreting as being in some way special. One example often referred to in this connection is that of *Mamatkulov & Askarov*.²³ There the Grand Chamber of the European Court held that, whilst on the one hand ‘the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties’, the Court must do so ‘taking into account the *special nature* of the Convention as an instrument of human rights protection (see *Golder v. United Kingdom*, judgment of 21 February 1975, Series A no 18, p. 14, §29).’²⁴ It bears mention, however, that as is evident from the reference in *Mamatkulov & Askarov* to *Golder* above, the European Court based this statement on its finding in *Golder*, where the Court said that it would follow Articles 31–3 of the Vienna Convention, but, and even more importantly in the present connection, that for the purposes of the interpretation of the

²¹ M. Wood, ‘Formation and Evidence of Customary International Law. Note by Michael Wood, Special Rapporteur’ ILC Sixty-fourth Session Geneva, 7 May–1 June and 2 July–3 August 2012, 5 at [22] (internal references omitted).

²² A. F. Denning, ‘Foreword’ (1952) 1 *ICLQ* 1, 1.

²³ *Mamatkulov & Askarov v. Turkey* (2005) 134 ILR 230. See ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013, ILC Report 2013, UN Doc A/68/10, 19.

²⁴ *Mamatkulov & Askarov v. Turkey* (2005) 134 ILR 230, 267 [111] (emphasis added). Also: *Effect of Reservations Opinion* (1982) 67 ILR 559, 567–68; *Restrictions to the Death Penalty (Advisory Opinion OC–3/83)* (1983) 70 ILR 449, 466.

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European Convention²⁵ account should be taken of Articles 31–3 of the Vienna Convention, but that it was also bound by Article 5 of the Vienna Convention:

for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate to ‘any relevant rules of the organization’ – the Council of Europe – within which it has been adopted (Article 5 of the Vienna Convention).²⁶

In other words, at any rate in the view of the European Court itself, when the Court says that the European Convention must be interpreted in accordance with Articles 31–3 but also that the Court must do so ‘taking into account the *special nature* of the Convention’,²⁷ that is nothing else than applying the scheme of the Vienna Convention, as set out in Article 5. In a sense, then, the ‘special nature’ approach of the European Court follows from the Vienna rules themselves. This rhymes well with the approach taken in the Vienna Convention where, apart from Article 5, no mention is made of this type of distinction in the principles of treaty interpretation. It also introduces an interesting circularity into the debate: how can a ‘specialized’ approach be deemed to be ‘specialized’ if it is mandated by the ‘generalist’ approach. Interstitial points such as this open up the debate; we suggest that they have, putting the point at its lowest, played a minor role in the debates as yet.

The same is the case in relation to international environmental law. It is, to take one example, possible in principle to see the evolutionary interpretations made by the International Court in environmental law cases such as *Gabcikovo–Nagymaros*,²⁸ *Pulp Mills*,²⁹ and, to some extent, also in *Whaling in the Antarctic*,³⁰ as evidence of a particular type of approach to treaty interpretation taken in a particular type of international law.³¹ Yet,

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 22.

²⁶ *Golder v. United Kingdom* (1975) 57 ILR 200, 213–14 [29].

²⁷ *Mamatkulov & Askarov v. Turkey* (2005) 134 ILR 230, 267 [111] (emphasis added).

²⁸ *Gabcikovo–Nagymaros Project (Hungary/Slovakia)*, Judgment ICJ Rep 1997, 7, 67–8 [112] and 78–9 [142].

²⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment ICJ Rep 2010, 14, 83 [204].

³⁰ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* ICJ Rep 2014 at [45] (describing the International Convention for the Regulation of Whaling, Washington, 2 December 1946, 161 UNTS 72 as ‘an evolving instrument’).

³¹ Generally, M. Fitzmaurice, ‘International Environmental Law as a Special Field’ (1994) 25 *Netherlands Yearbook of International Law* 181.

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the disagreement between Australia and Japan in *Whaling in the Antarctic* as to, *inter alia*, whether the terms ‘conservation and development’ of whale resources in the preamble as well as Articles III and V of the Whaling Convention ought to be interpreted evolutionarily or not, was plainly capable of being solved by relying upon the traditional tools of treaty interpretation. Redgwell must be right, therefore, to observe that it cannot be the case that environmental treaty-making has engendered new rules of treaty interpretation applicable only in that sphere; the dynamic development of international environmental treaties should, instead, be seen as contributing to the dynamic development of the general law of treaties.³² In any case, as Bjorge has observed,³³ it is often the case, with what we have come to term the evolutionary interpretation of treaties, that recourse to evolution is really wholly unnecessary. There often is no need for it, as the result to which it would have led already follows from the plain meaning of the text read in good faith. This point was already made by the Permanent Court in *Employment of Women during the Night* when, in a statement of principle regarding ‘provisions which are general in scope’, it stated that the fact that, at the time when the treaty was concluded, certain facts or situations were not thought of, which the terms of the treaty in their ordinary meaning were wide enough to cover, ‘does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms’.³⁴

Secondly, arguments as to methodological fragmentation have been put forward in connection with customary international law. With a possible academic exception in relation to the importance of *opinio juris*,³⁵ the rules as to the formation of customary international law are mostly settled.³⁶

³² C. Redgwell, ‘Multilateral Environmental Treaty-Making’ in V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (Martinus Nijhoff 2000) 107. Further, P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press, 2009) 20–2.

³³ E. Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 191–3.

³⁴ *Convention concerning Employment of Women during the Night* PCIJ (1932) Series A/B No. 50, 377.

³⁵ M. Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Hague Recueil* 155; Final Report by the Committee on Formation of Customary Law of the International Law Association (ILA) 712, 744.

³⁶ See Article 38 of the Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119. Special Rapporteur Sir Michael Wood, First Report on Formation and Evidence of Customary International Law ILC A/CN.4/663; Second Report on Formation and Evidence of Customary International Law ILC A/CN.4/672; P. Tomka, ‘Custom and the

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Judge Read in the *Fisheries* case described customary international law as ‘the generalization of the practice of States’.³⁷ The reasons for making the generalizations involve an evaluation of whether the practice is fit to be accepted, and is in truth generally accepted as law.³⁸ It is in this connection that it has been argued that special problems arise in connection with human rights law.

According to Thirlway, ascertaining developments in customary international law presents particular difficulties in connection with human rights; in his view, ‘there is a problem with basing human rights law on custom’.³⁹ This, he observes, is because in the past ‘the relationship of a State with its own subjects . . . has been generally immune from the impact of developing customary law’, the reason being that ‘custom derives from the *de facto* adjustment of conflicting claims and interests of the subjects of international law, and it has always been – and probably still is – one of the most fundamental tenets of international law that individuals and private corporations are not subjects of international law’.⁴⁰ The traditional position, set out by Oppenheim,⁴¹ according to which only States were considered the subject of international law, has been left behind. It is now abundantly clear, as Sir Christopher Greenwood has recently stated, that ‘states can no longer be regarded as the only subjects of international law’.⁴²

While admitting that the traditional position does not represent the current stage of development of international law, Thirlway observes that ‘teasing intellectual problems remain’.⁴³ In the traditional view, he continues, the essence of custom is that its provisions have been hammered out in the resolution of conflicts of interests, or disputes, between States

International Court of Justice’ (2013) 12 *The Law & Practice of International Courts and Tribunals* 195; J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012) 23–4.

³⁷ *Fisheries (United Kingdom v. Norway)* ICJ Rep 1951, 116, 191 (Judge Read).

³⁸ J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press, 2012) 23.

³⁹ H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014) Ch 2.

⁴⁰ H. Thirlway, *International Customary Law and Codification* (Leiden: Brill, 1972) 7.

⁴¹ L. Oppenheim, *International Law: A Treatise* (1st edn., London: Longmans, Green & Co, 1905) 8–9.

⁴² C. Greenwood, ‘Sovereignty: A View from the International Bench’ in R. Rawlings, P. Leyland and A. Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013) 255. Also J. Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 *Hague Recueil* 1, 139.

⁴³ H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014) Ch 2.