An Australian International Law: The Impact of Australian Courts on the Fragmentation of International Law

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There is as much an ‘Australian’ international law as there is an Australian law of torts.1

I. Introduction

In 2007, a new report series entitled ‘International Law in Domestic Courts’ was launched to explore, amongst other things, ‘the impact of domestic reception of international law on the unity or fragmentation of international law’.2 The advent of this series marks the crossroads of two previously unrelated developments; the fragmentation of international law due to the proliferation of international courts and tribunals and the rise of national courts as international courts.

Like the report series, this paper proposes to bridge these two developments to examine whether the application of international law by national courts impacts on its fragmentation. Closer to home, the issue is whether an ‘Australian International Law’ can exist without threatening the ‘unity’ of international law.

In doing so, this paper seeks to answer certain questions that have so far been overlooked in contemporary legal scholarship. First of these is the way in which Australian courts address international law. At this point, some may refer disenchantedly to the longstanding debate in Australia concerning the place of international law in the domestic legal system. True, this debate is relatively well-settled, but it is only the beginning of the discourse. Acknowledging that international law can be directly applied by the courts (albeit in limited circumstances), this paper examines how it is applied.

A second question that this paper addresses is the role of Australian courts in the international legal order. Whether giving international law a distinctly Australian interpretation undermines its ‘unity’ depends on whether Australian courts influence the development of international law. This paper therefore attempts to clarify the effect of Australian jurisprudence within the international legal community.

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2 See Amsterdam Center for International Law <http://www.jur.uva.nl/aciluk/object.cfm/BBBC7545-1321-B0BE-688203374CCFCB17>.
At first, this proposal may seem too abstract, lacking the practicality of past international law debates. But consider remarks by eminent international jurist Ivan Shearer:

Another important question, and one that is likely to grow in importance, is how to approach those statutes that directly incorporate the texts of international conventions and make those texts operative as the law of Australia [emphasis added].\(^3\)

Recently, Gillian Triggs observed that the influence of national courts on the development of international law ‘poses the risk of fragmentation of jurisprudence where courts adopt differing principles’.\(^4\) And in the *Al-Kateb Case*, Kirby J of the High Court remarked that when dealing with matters governed by international law, Australian Courts become part of an ‘international judiciary’.\(^5\) Piecing these comments together against the backdrop of an increase in international law matters appearing before Australian courts, it becomes clear that the impact of domestic interpretations on fragmentation is an area of burgeoning academic interest that warrants further investigation.

This contribution begins with an overview of the fragmentation debate. Part II discusses the recent work of the International Law Commission (ILC) as well as contributions of the wider academic community to develop a preliminary understanding of the issues surrounding the proliferation of international courts and tribunals. Part III enquires whether national courts, in light of their global rise as recipient of international law, should be considered as part of this debate. It will contend that national courts belong to the international legal community together with their international counterparts and that their activities should therefore be examined for impact on fragmentation. Consequently, part IV will assess the practice of Australian courts across three case studies to determine whether domestic constructs pose a similar threat (if any) to the ‘unity’ of international law to that posed by the divergent jurisprudence of international courts and tribunals.

This paper does not attempt to define the substance of those domestic constructs that give rise to an ‘Australian international law’ or what social, legal or other concepts might shape it. Rather, part V proposes with reference to the current state of the fragmentation debate that an ‘Australian international law’ can exist without upsetting the fabric of international law, provided that Australian courts engage in a process of transjudicial dialogue with other national and international tribunals when applying (or ‘translating’) international norms in the domestic context.

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\(^3\) I A Shearer, ‘The Relationship between International Law and Domestic Law’ in B R Opeskin and D R Rothwell (eds), *International Law and Australian Federalism* (1997) 34, 54.


II. The Fragmentation of International Law

(a) The work of the International Law Commission

In July 2006, the ILC Study Group charged with examining the fragmentation of international law presented its final report. The report marked the end of a four-year engagement during which the Study Group assessed the difficulties rising from the diversification and expansion of international law.

‘Fragmentation’ had been of interest to the ILC following a feasibility study conducted by Gerhard Hafner in 2000. This study equated the fragmentation of international law with a lack of homogeneity that was accompanying a shift towards independent ‘self-contained regimes’: defined as specialist areas of international law such as human rights, trade and environmental law. The problem stemmed from the lack of any centralised body in the international legal order that ensured unity across these specialised regimes. In Hafner’s view, this meant that there was nothing to prevent the emergence of conflicting rules and institutional practices, leading to the hypothesis that if international law was creating more disputes than it was avoiding, its credibility, reliability and, above all, authority would be impaired.

In analysing the effects of fragmentation, Hafner distinguished between ‘substantive’ and ‘procedural’ issues. Substantive fragmentation dealt with potentially conflicting primary rules that applied simultaneously to a dispute where the jurisdictions of the various specialised regimes overlapped. In these circumstances, international actors faced a dilemma where compliance with one obligation would contravene the other.

Procedural fragmentation, on the other hand, concerned the proliferation of judicial and quasi-judicial tribunals established under the various self-contained regimes and the different procedures they adopted in resolving disputes. Not only did a ‘dispersed nature of judicial activity’ promote forum shopping, but more fundamentally, it prompted inconsistent decisions on common questions of law. Hafner concluded that the overall fragmentary effect on international law was the same from both a substantive and procedural perspective.

This distinction, however, proved instrumental when the ILC subsequently established the Study Group to assess the issue of fragmentation. In its first report, the Study Group agreed to limit its terms of reference to the issue of

8 Ibid 147.
9 Ibid 148.
10 Ibid.
inconsistent primary rules, leaving untouched the issue of proliferation. Instead it referred this to the tribunals themselves in the hope that its work would ‘assist international judges and practitioners in coping with the consequences of proliferation’.\(^{12}\)

It is unclear exactly why the Study Group avoided the issue of proliferation. After all, up until that point, procedural fragmentation in the sense of inconsistent judgments had been more the focus of international attention than the effect of inconsistent primary rules, prompting the then President of the International Court of Justice (ICJ), Judge Guillaume, to warn that ‘the proliferation of international courts engender[ed] serious risks of inconsistency’ in the international legal order.\(^{13}\)

The importance of proliferation to the issue of fragmentation is evident in the final report of the Study Group prepared by Martti Koskenniemi. Whilst recognising that ‘differing legal interpretations’ fell beyond the scope of the study, the report devoted much of its introductory section to ‘fragmentation through conflicting interpretations of general law’.\(^{14}\) The report drew heavily on an earlier work on fragmentation by Koskenniemi that focused almost entirely on proliferation,\(^{15}\) and this work itself was yet another contribution to a growing body of literature examining whether inconsistent decisions of international tribunals were jeopardising the unity of international law.

What is clear is that the ILC was reluctant to act as a referee between international tribunals.\(^{16}\) Perhaps given the uncertainty surrounding the admissibility of the topic, the ILC was concerned that delving critically into international tribunals and their jurisprudence risked overstepping the mark.\(^{17}\) Whatever the reasons, the work of the Study Group remains relevant to the present discussion. At the very least, it serves to promote an understanding of the legal environment in which divergent decisions may be made. But in the absence of any specific findings on proliferation, it is necessary to turn to the discussion on the issue amongst the wider academic community.


\(^{14}\) Above n 6, 25-27.


\(^{16}\) Above n 12, 42.

\(^{17}\) Statute of the International Court of Justice, art 1.1; the ILC acknowledged that the topic was ‘different from other topics which the Commission had so far considered’, UN Doc A/55/10, [731].
(b) Beyond the International Law Commission

Until the late 1950s, the only international judicial body was the World Court. Since then, the world has witnessed a proliferation of international courts and tribunals. From the latest survey, there are 125 judicial or quasi-judicial bodies operating at both international and regional level forming what is considered to be an ‘international judiciary’. This proliferation has accompanied the material expansion of international law and, in the views of Pierre-Marie Dupuy, improvements to the efficiency of international obligations. Yet its advent has been greeted with mixed responses: many welcome the move towards greater justiciability, others caution that the patchwork of independent tribunals threatens the unity of international law.

The effects of proliferation have been the focus of much scholarly attention in recent years. Even before the cautionary words of Judge Guillaume, the issue had been the subject of a number of symposia, the results of which have been remarkably similar. Each recognised the risk of inconsistent jurisprudence as well as the need for urgent attention. Where they differed is the way in which they considered proliferation to impact on the international legal order.

Recalling Hafner’s preliminary observations, the principal concern is that in an international legal order lacking a hierarchy amongst the ever-increasing number of judicial and quasi-judicial bodies, there is a real risk of inconsistent interpretations of the same legal norm where jurisdictions overlap. The archetypal example is the conflicting judgments on state responsibility adopted by the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY). In Tadic, the ICTY rejected the ‘effective control’ test applied by the ICJ in the Nicaragua case.
Case in favour of a lower threshold to determine whether activities of paramilitary groups could be attributable to a state. Other conflicts can be observed not only between specialised tribunals and the ICJ, but also the specialised tribunals themselves. One prominent example is the conflict generated by the World Trade Organisation (WTO) Dispute Settlement Body in its trade-centric interpretations of human rights and international environmental norms.

Instances of inconsistent interpretations have been attributed to ‘legal centricity’ among the various independent tribunals. As Dupuy observes, decision-makers tend to be experts in the relevant specialised field rather than in international law. As a result, their institutional bias may engender a disregard for the implications, connections, and legal relationships between the specialised regime and general international law. As Koskenniemi and Leino remark:

Each institution speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody.

Without respect for the legal environment in which they operate, there is nothing holding international tribunals to give international law a consistent meaning.

The outcome of the debate so far will be discussed later in part V. For now, it is necessary to outline its parameters. So far almost all commentary has focused on the jurisprudence of tribunals established at the international or regional level. But this limitation is not an essential one. Consider the words of Mohamed Shahabuddeen:

[International tribunals] make decisions which influence the development of international law. If that influence can amount to law-making in the case of all of them, the absence of a hierarchical order is a prescription for conflicting precepts.

There is nothing novel about this statement. If the decisions of international tribunals cannot influence the development of international law, then ipso facto they have no impact on its fragmentation. But their influence is undeniable. Whilst the doctrine of stare decisis is viewed with reservation by international jurists, it

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26 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14, 53.
27 Ibid [122].
28 See Koskenniemi and Leino, above n 15. See also Stephens, above n 21, 270, who observes that whilst to date there is no indication that international tribunals have preferred ‘skewed’ interpretations of environmental rules and principles in order to uphold the policy objectives of the issue-specific regimes within which they operate, ‘[t]here are distinct possibilities of normative conflict if complaints are made concerning state environmental policies that, amongst other things, interfere with social, economic or cultural rights’.
29 Dupuy, above n 21, 797.
30 Above n 15, 578.
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is clear that the decisions of international tribunals are influential at least as subsidiary sources of international law.33

If ‘influence’ is the criterion, then the debate has so far overlooked one key development: the rise of national courts as international courts. Admittedly, the issue has not been totally ignored. The issue was raised by Pemmaraju Rao in his contribution to the 2004 University of Michigan symposium on proliferation.34 Rao observed in passing that the work of national courts, in contrast to that of their international counterparts, ‘poses less of a problem for the unity and integrity of international law’.35 The reasons for this observation were two-fold. First, national courts do not operate at the same universal level as international tribunals and second, national courts are ‘quite conscious of the need to align their jurisprudence with the well established norms of international law’.36 Rao concluded that national courts ‘for the most part act more as agents and instruments for the unity and integrity of international law than as sources of its fragmentation’.37

Rao’s contribution is to be welcomed for its acknowledgment of national courts in the fragmentation debate. However, if national courts are capable of influencing the development of international law, then it is necessary for their potential impact on its fragmentation to be considered in more detail.

III. The Role of National Courts in International Law

For students of international law, it is easy to be blasé about the widespread use of national court decisions. Such decisions often appear in textbooks alongside judgments of the ICJ and other international tribunals without question as to their authoritative value. The study of international criminal law will invariably encounter the decision of the Jerusalem District Court in the *Eichmann Case*.38 Similarly, the study of Head of State immunity cannot ignore the House of Lords decision in *Pinochet (No 3)*.39 Indeed, almost every aspect of international law is the subject of some national court decision somewhere in the world.

(a) National courts as decision-makers on questions of international law

The role of national courts in addressing questions of international law is not a recent phenomenon. Before the advent of the World Court, national courts were the

34 Above n 24.
36 Ibid.
37 Ibid 959.
38 *Attorney-General of Israel v Eichmann* (1962) 36 ILR 18.
39 *R v Bow Street Metropolitan Stipendiary Magistrates Court, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.
only judicial bodies competent to pronounce on issues of international law. Even after the establishment of the Permanent Court of International Justice (PCIJ) in 1920, the application of international law remained commonplace in national courts: so much so that soon after, the first volume of the Annual Digest of Public International Law Cases was published, a report series devoted to international law decisions in national courts. As co-editor Hersch Lauterpacht observed at the time, there is ‘hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals’. Amongst these branches were the definition of the state as well as the law relating to nationality, extradition and treaties. In particular, the development of the doctrines of foreign state and diplomatic immunity depended almost entirely on the work of national courts.

These days, international law regulates to varying degrees areas such as trade, human rights and the environment that have traditionally fallen within the domestic jurisdiction of states. In the absence of international tribunals with jurisdiction to deal with this normative expansion, national courts have become by default the most appropriate forum in which to litigate these new areas. In a 1971 decision of the United States Supreme Court, Justice Powell observed that ‘[u]ntil international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law’.

Whilst recent proliferation has meant that it is more likely for common questions of international law to be addressed at both a national and international level, there are still issues that mainly arise in national courts. This may happen either by necessity (eg, state immunity) or due to the lack of international tribunals with appropriate jurisdiction (eg, refugee law).

Additionally, international law now directly regulates the rights and duties of non-state actors such as international organisations and individuals. This represents a shift in international law from a system of rules governing the interstate relations to one of universal norms regulating activities involving private individuals. As Thomas Buergenthal observes, ‘the traditional dividing line between public and private international law is gradually becoming less pronounced and relevant’.

As yet, not all international courts provide standing for non-state actors, notably the

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41 Ibid 67-71.
43 First National City Bank v Banco Nacional de Cuba 406 US 759, 775.
44 R Higgins, Problems and Process: International Law and How We Use It (1994); A-M Slaughter and W Burke-White, ‘The Future of International Law is Domestic’ (2006) Harvard International Law Journal 327. See also G Triggs, ‘The Public International Lawyer and the Practice of International Law’ (2005) 24 Aust YBIL 201, 208, who attributes the growth of the domestic practice of international law in part to an ‘explosion in the substantive development of international law’ responding to transnational problems such as climate change, the transport of hazardous goods, drug trafficking, slave trading and terrorism, many of which regulate the activities of non-state actors.
45 Buergenthal, above n 18, 270.
ICJ. The changing shape of international law would therefore tend – for the moment at least – towards a greater role for national courts in addressing questions of international law.

It might even be suggested that the rise of national courts parallels – if not surpasses – the proliferation of international tribunals.\(^{46}\) In terms of caseload alone, national courts address questions of international law more frequently than their international counterparts, leading some commentators to suggest that the decision-making process should rest entirely with national courts.\(^{47}\) If anything, their decisions are enforceable, a quality famously lacking at the international level.

But whilst some welcome the rise of national courts, others remain hesitant. Eyal Benvenisti, for instance, doubts whether national courts can live up to the challenge. He highlights a number of constitutional and judge-made restraints that inhibit the full application of international law by national courts.\(^{48}\) These include the ‘political question’ doctrine, act of state doctrine and general judicial deference towards the government, which act to limit the justiciability of certain international issues.

Indeed, there are other barriers preventing the full application of international law. For one, national courts are not suitably positioned to decide disputes between states. This contravenes the principle of sovereign equality, and its corollary that states are free to resolve disputes by any peaceful means they choose.\(^{49}\) As long as state sovereignty remains a fundamental part of international law, international tribunals remain the more appropriate forum for deciding such disputes.

Elsewhere, there is no uniform approach to applying international law in national courts and no consensus as to its interaction with inconsistent domestic law. Some national courts adhere to a monist approach such that they apply international and domestic law as part of one and the same legal system. A significant proportion, however, are dualistic and require international law to be incorporated into domestic law to be applicable.\(^{50}\) As a result, without the will of the legislature, opportunities for national courts to address questions of international law may be further limited.

Whilst these barriers render unlikely the vision of a unitary international legal order embedded in national courts,\(^{51}\) the reality is that national courts do have

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\(^{49}\) Charter of the United Nations (1945) art 33(1).

\(^{50}\) Higgins, above n 44, 205.

\(^{51}\) See eg Slaughter and Burke-White, above n 44.
jurisdiction to decide questions of international law. It is this fact together with the normative expansion of international law that has sparked renewed interest in how international law is received by national courts. In 1989, the International Law Association (ILA) established a Committee on International Law in National Courts, which was tasked with collating reports on the practices of courts participating states. The Committee found that in most instances, national courts considered themselves competent to pronounce on questions of international law.52 In some jurisdictions, they even initiated enquiries into the existence of customary norms through discussions of state practice and opinio juris.53

Once it is recognised that national courts readily interpret and apply international law, the question arises whether what they are applying is indeed international law. Whilst this might not be so problematic for monists, from a dualist perspective, the strict separation of the international and domestic legal systems means that incorporated international law is considered domestic law.54 However true this may be in theory, practice reveals that domestic application does not strip international law of its internationality.55 Instead, it appears that national courts do acknowledge the relevant international principles such as those pertaining to the interpretation of treaties.56 To this end, the ILA Committee concluded that national courts ‘do have regard … to the jurisprudence of international courts and tribunals, of national courts in other states and to the writings of scholars’.57

It may therefore be argued that not only do national courts address questions of international law at a substantial rate, they do so in an increasingly internationalist manner.

(b) National courts as a part of the international legal community

For present purposes, it is not enough simply to observe that national courts interpret and apply international law. Recalling the comments of Judge Shahabuddeen, if the rise of national courts is to have any impact on the fragmentation of international law, their decisions must somehow influence its development.58 In other words, they must be regarded as part of an international legal community.

In theory, national court decisions are influential in much the same way as decisions of their international counterparts. Referring to the ‘subsidiary means for the determination of rules of law’ under Article 38(4) of the Statute of the International Court of Justice, Rosalyn Higgins states:

53 Ibid 580-81.
55 ILA, above n 52, 581-82.
57 Above n 52, 584.
58 Above n 31, 67.
Although it is natural that the judicial decisions of the International Court of Justice will have a great authority, it is also natural in a decentralized, horizontal legal order that the courts of nation states should also have a role to play in contributing to the norms of international law.60

If the ICJ is prepared to reference its own decisions, what is the practical value of national court decisions? In his early treatise on this issue, Lauterpacht considered national courts as ‘organs of the international legal community’,61 but was hesitant to recognise their decisions as a subsidiary source of international law. In his view, Article 38(4) was directed towards decisions of the PCIJ, although he did not completely rule out its application to national courts. Instead, Lauterpacht found that ‘the true sedes materiae’ of national court decisions lay in establishing a customary practice amongst states.

A similar approach was adopted by the PCIJ in the Upper Selisia Case:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.62

In the Lotus Case, the Court considered at length the decisions of national courts but was reluctant to give them any greater weight.63

If national court decisions are in practice no more than mere facts, then their legal impact is severely limited. Their decisions influence the development of international law not through strength of ratio decidendi but rather as evidence of common practice. The same may be said of their value as sources of ‘general principles of international law’.64 Even now, notwithstanding the increased role of national courts in dealing with questions of international law, the ICJ remains reluctant to refer to national court decisions in the same manner as it does its own.65

From a brief overview of the practice of the World Court, it might appear that national courts and international courts remain on two distinct planes, rather than as part of the same international legal community. But this conclusion is premature. The lack of reference to decisions of national courts may be explained by the fact that the contentious jurisdiction of the ICJ is limited to interstate disputes. Together with the suggestion that the ICJ is becoming increasingly isolated from the expanded normativity of international law,66 a jurisdicational gap is emerging between the ICJ and its national counterparts, suggesting that decisions of the latter may be of little applicability.67 Alternatively, as Philip Jessup explains, ‘the Court,
qua Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection. For a court whose power rests on the consent of states, it may be politically undesirable to give national court decisions any greater weight.

Whatever the reasons, if evidence of cross-referencing supports inclusion within the international legal community, the ICJ is not the best place to look. In a 2002 study of international tribunals, only three instances were found where the ICJ referred to the decisions of other tribunals. Yet beyond the ICJ, it observed a ‘robust interaction’ amongst the remaining international tribunals.

As for national courts, their decisions are increasingly referenced by other international tribunals. This is most evident in human rights law, where cross-referencing has been a feature of its development. But the most significant impact of national courts is on the decisions of other national courts in what has been termed a ‘global community of courts’. According to Anne-Marie Slaughter, not only is the role of national courts in addressing international law issues increasing, but so is their awareness of the task before them. This, together with greater access to the judges and decisions of other national courts, is leading to increased cross-referencing and cross-fertilisation of ideas from one court to the next.

As Justice La Forest of the Canadian Supreme Court explains:

In the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international law experience. Thus our court – and many other national courts – are truly becoming international courts in many areas involving the rule of law.

This sentiment is echoed in national courts around the world. Whilst conceding that reference to the decisions of other national courts was ‘not yet firmly established as a principle’, the ILA Committee observed that as a general conclusion, courts have regard to the jurisprudence of other national courts.

In an address shortly after his election to the ICJ, Buergenthal emphasised that inclusion within the international legal system imposed certain obligations upon international tribunals. Above all is the obligation ‘to promote and be open to

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68 Quoted in Nollkaemper, above n 42, 310.
70 Ibid 498.
72 G V La Forest, ‘The Expanding Role of the Supreme Court of Canada in International Law Issues’ (1996) 34 Canadian Yearbook of International Law 89, 100.
73 See Slaughter, above n 71, 194-95.
jurisprudential interaction or cross-fertilization’. The converse is also true; as Slaughter maintains, the community of courts ‘is constituted above all by the self-awareness of the national and international judges who play a part’. If the decisions of national courts on international law can influence the decisions of other national and international courts, then it is hard to deny that they are now part of the international legal community.

It follows that in examining the effects of proliferation, the role of national courts cannot be ignored. It is therefore necessary to address how divergent interpretations by national courts arise and assess whether they contribute to fragmentation in the same way as their international counterparts.

IV. The Role of Australian Courts in International Law

(a) International law in Australian courts

There has been much debate in recent years as to whether international law can apply within the Australian legal system. This paper does not seek to add to that debate. Instead, it takes the outcome as a starting point for analysing the next step: how international law is applied by Australian courts, an issue that has yet to receive any sustained scholarly attention.

It is a well-settled principle that treaties have no direct legal effect unless incorporated into Australian law by legislation. Customary international law, whilst not automatically incorporated, is considered a source for the development of the common law. International law may also be applied as an aid to the interpretation of statutes. Of these three cases, incorporation represents the only method by which international law may directly operate at a domestic level.

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75 Buergenthal, above n 18, 274.
76 Slaughter, above n 71, 192.
Despite a notable absence of incorporated major human rights treaties to which it is a party, Australia has drawn numerous treaties into domestic law that cover areas such as international environmental, criminal, trade and refugee law, as well as state and diplomatic immunities.83

On the question of interpretation, the High Court has accepted the view that the relevant rules in the Vienna Convention on the Law of Treaties apply to the interpretation of treaties that have been incorporated into domestic law rather than ordinary rules of statutory interpretation.84 In principle, therefore, international law applied by Australian courts does not lose its internationality. As Kirby P stated in *SS Pharmaceutical Co Ltd v Qantas Airways*:

> It is essential to approach the construction of the international instruments attached to the Australian statute keeping in mind their international character and the desirability (so far as possible) that they should be given a consistent construction by the courts of the several contracting parties.85

To this end, courts should ‘avoid parochial constructions which are uninformed (or ill informed) about the jurisprudence which has gathered around such instruments’.86 Further to this, the Federal Court has held:

> In deciding questions as to the meaning of provisions of treaties which arise in a matter before this court, it is permissible to have regard, *inter alia*, to the commentaries of learned authors and the decisions of foreign courts as aids to interpretation.87

It is therefore open to Australian courts to refer to decisions of other national courts as an aid to interpreting international law.

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83 See the Department of Foreign Affairs and Trade’s online treaty database (http://www.dfat.gov.au/treaties/index.html).
84 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 94 (Gibbs CJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 252 (McHugh J). This interpretive approach applies not only to treaties that are annexed to legislation that gives them ‘force of law’, but also to legislative provisions that are enacted or amended to give effect to treaty obligations: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 264-65 (Brennan J). See also D Pearce and H Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 38-39; Allsop, above n 78, 8. For information on how different treaties have been incorporated, see the Department of Foreign Affairs and Trade’s treaty database, above n 83.
86 Ibid. See also *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406, 421, in which the Full Federal Court expressed the desirability of uniformity and consistency ‘to avoid a multitude of divergent approaches in the territories of the contracting parties on the same subject matter’.
87 *Somaghi v Minister for Immigration* (1991) 31 FCR 100, 117 (Gummow J). The Federal Court has applied this approach to domestic law enacted to give effect to Australia’s international obligations. In *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406, the Full Court stated that ‘an important consideration in examining legislation intended to implement international agreements is to give weight to the construction which the international community would attribute to the relevant instrument or concept’. See also Allsop, above n 78, 13.
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Certain barriers, however, still apply to restrain the full application of international law. Apart from the requirement for statutory incorporation, it is beyond the competence of the courts to comment on the international legality of treaties.88 Furthermore, whilst it is not the practice of the courts to defer to the executive on matters of treaty interpretation, the government may nevertheless make submissions that are accorded special weight.89

In the light of the foregoing, it is not surprising that in the recent Al-Kateb Case, Kirby J said that when deciding cases to which international law is relevant, Australian courts are ‘exercising a form of international jurisdiction’.90 Writing extrajudicially, he explained:

Today we are seeing a broader and deeper movement for the reconciliation of the systems of national and international law, including national constitutional laws. Thus, a municipal tribunal, applying international law, is no longer simply an organ of its own national legal system. Instead … the national court exercises a kind of ‘international jurisdiction’. It becomes, in a sense, an organ of the international judiciary.91

Similar remarks have been made by past and present Chief Justices of the High Court, who point out that Australian courts are not unacquainted with the notion of an international legal community.92 As common law courts, they habitually engage in a process of cross-referencing and cross-fertilisation with decisions of other common law courts, in particular those in the United Kingdom and to a lesser extent in New Zealand and Canada.

In asking whether there exists an ‘Australian common law’, Sir Anthony Mason observed that ‘ease of communication and growing familiarity with other countries and their culture, as well as the internationalisation of commerce and politics, are encouraging a greater unity and harmony of legal rules throughout the world’.93 He later qualified these remarks by saying that the common law needs to be shaped by courts ‘with a view to achieving, amongst other things, social justice for the community which they serve’.94

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94 Mason, above n 92.
If one accepts that Australian courts can exist as part of an ‘international judiciary’ and together with the courts of other states and their international counterparts interpret and apply international law, how do they fare? Although judicial statements have so far endorsed an internationalist approach, if it is accepted that an ‘Australian international law’ might exist that accords with our local domestic legal culture in a similar way as might an ‘Australian common law’, what are the implications for the ‘unity’ of the legal order to which they now belong? This paper will attempt to elucidate the situation by undertaking a brief case study of three key areas of domestic law governed by international law.

(b) Refugee law: the Ibrahim Case

Section 36 of the Commonwealth Migration Act 1958 provides for protection visas to be granted to persons to whom the Immigration Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees. Article 1A(2) of the Convention defines ‘refugee’ as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Whilst the Migration Act does not incorporate the Convention in its entirety, it does give effect to this most fundamental and controversial article. In the absence of an international tribunal that routinely applies the Convention, the task rests entirely upon national courts. As it happens, since the 1989 decision in Chan Yee Kin, the High Court has developed a substantial body of case law in relation to the Convention.

In Minister for Immigration and Multicultural Affairs v Ibrahim, the High Court considered whether the Convention applied to situations of clan warfare. In that case, the applicant had fled Somalia and upon arrival in Australia, applied for a protection visa. This was denied. On appeal, the Refugee Review Tribunal found that the harm feared was not persecution for reasons of his membership of a particular subclan but rather ‘unsystematic warfare’. It therefore concluded that Article 1A(2) did not apply.

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98 Despite art 4 of the Protocol, no question relating to the interpretation of art 1A(2) has ever been referred to the ICJ.
100 (2000) 204 CLR 1.
In coming to its conclusion, the Tribunal referred to *Adan v Secretary of State for the Home Department*,\(^{101}\) a recent United Kingdom case in which the House of Lords held that persecution due to clan warfare was not contemplated by the Convention as a basis for refugee status. In order for the Convention to apply, a ‘differential impact’ had to be demonstrated\(^{102}\) in the sense that the harm feared was over and above the ordinary risks of clan warfare.\(^{103}\)

Before the High Court, the applicant argued that the tribunal erred by applying *Adan*. The majority dismissed the appeal. In the leading judgment, Gummow J nevertheless rejected *Adan*, claiming that tests such as the ‘differential impact’ served only as ‘distractions from applying the text of the Convention definition’.\(^{104}\) However, since the Tribunal’s reference to *Adan* did not affect its decision, there was no error of law.

The decision in *Ibrahim* is significant in three respects. First, the critical assessment and eventual rejection of *Adan* demonstrates transjudicial dialogue in practice. Second, the decision has since been upheld by the United Nations High Commission for Refugees as international authority for the application of the Convention to civil conflict.\(^{105}\) It is thus likely to have an impact on the decisions in other national courts as they turn to international sources for interpretive assistance.

Third, the decision reveals the extent to which domestic constructs may influence the interpretation of international law. This is best observed in the different approaches of Gaudron and McHugh JJ in relation to the meaning of the term ‘persecution’. Whilst the High Court was not called upon to define the term persecution, both judges discussed its meaning to justify their rejection of *Adan*.

Persecution is not a term commonly used in Australian law. Its origins lie primarily in international law. But nowhere in the Convention – let alone international law – is persecution defined. In addition to foreign decisions, the *Handbook* published by the United Nations High Commissioner for Refugees\(^ {106}\) may assist. However in Australia, the High Court has stated that although at times ‘especially useful’, the *Handbook* is to be regarded ‘more as a practical guide … than as a document purporting to interpret the meaning of the relevant parts of the Convention’.\(^ {107}\)

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\(^{101}\) [1999] 1 AC 293.

\(^{102}\) Ibid 311 (Lord Lloyd of Berwick).

\(^{103}\) Ibid 302 (Lord Slynn of Hadley).

\(^{104}\) *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 51.


In Gaudron J’s view, discrimination forms an ‘essential feature of persecution’ such that if ‘sufficiently serious’, it may satisfy the Conventional definition.\textsuperscript{108} Discrimination in this sense had been developed in relation to the prohibition on interstate discrimination under the Australian Constitution.\textsuperscript{109} In Her Honour’s view, there was no issue in adopting constitutional constructs, rather than international considerations, as a basis for interpreting Article 1A(2).

Conversely, in McHugh J’s judgment:

Given the objects of the Convention, the harm or threat of harm will ordinarily be persecution only when done for a Convention reason and when it is so oppressive or recurrent that a person cannot be expected to tolerate it.\textsuperscript{110}

In arriving at this conclusion, His Honour consulted the \textit{Handbook} and referred to Canadian authority as well as scholarly writings.

The difference in the two approaches is striking. For Gaudron J, since persecution always involves discrimination, its determination will depend on the differential impact of the actual or feared treatment. Not only is this reasoning close to that adopted in \textit{Adan}, it also contradicts international authority.\textsuperscript{111} Although the listed grounds for persecution will necessarily reveal a differential impact, such an impact does not by itself constitute persecution. Instead, persecution is determined by the actual treatment, such as a threat to life or a serious violation of human rights.\textsuperscript{112} This represents the approach adopted by McHugh J.

Furthermore, Gaudron J focused on the comparative military might of the various warring clans to see whether the conflict affected them in such a differential way as to amount to persecution. This sets the Court on a chain of enquiry significantly different to that required by McHugh J, according to which the actual or feared treatment is examined to determine whether it is or would be ‘so oppressive or recurrent that a person cannot be expected to tolerate it’.

To use Kirby P’s pejorative in \textit{SS Pharmaceutical}, Gaudron J’s approach hints at parochialism. It is based on domestic legal concepts without reference to the international foundation of the Convention. In comparison with the judgment of McHugh J, it is a striking example of how domestic and international constructs can fundamentally change the meaning of international law.\textsuperscript{113}

\textsuperscript{108} \textit{Minister for Immigration and Multicultural Affairs v Ibrahim} (2000) 204 CLR 1, 10-12.


\textsuperscript{110} \textit{Minister for Immigration and Multicultural Affairs v Ibrahim} (2000) 204 CLR 1, 20.

\textsuperscript{111} Above n 105, [6]-[7]. It is nevertheless important to note that Gaudron J’s conception of ‘discrimination’ in the context of the Constitution has been shaped by considerations of international human rights jurisprudence. See Simpson, above n 109.

\textsuperscript{112} Above n 106 [51].

\textsuperscript{113} For further examples of divergence in the interpretation of art 1A(2) and other provisions of the Convention, see North and Chia, above n 78.
(c) International commercial law: the Convention on Contracts for the International Sale of Goods

The issue of ‘parochial constructions’ has marred the inception of international commercial law in Australia. One of the most important international instruments \(^{114}\) is the 1980 Convention on Contracts for the International Sale of Goods (CISG), \(^{115}\) which contains a set of rules governing international transactions, drafted as a compromise between different social, economic and legal systems for the purpose of promoting unrestricted international trade.\(^{116}\) The CISG was ratified by Australia in 1989 and has since been implemented through uniform state and territory legislation.\(^{117}\)

Because it regulates transactions between non-state entities, the CISG finds its application and interpretation largely in national courts. Since its inception, it has been the subject of an increasing body of case law from around the world, in particular Europe.\(^{118}\) In Australia, however, the CISG has only been referred to in a handful of cases and in these few instances, the courts have already displayed difficulties in breaking free of domestic constructs.

The first case of note is the 1995 Federal Court decision in Roder.\(^{119}\) The main issue before the court was whether the plaintiff company was entitled to avoid the contract and recover the sale goods. In his judgment, von Doussa J recognised that the contract was governed by the CISG and that as ‘part of the municipal law of Australia, the meaning of that law, and its application to the facts, [was] to be determined by [the] Court’.\(^{120}\) In response to claims of ‘repudiation’, he recognised that:

\[
\text{[c]ommon law concepts and the common law remedies which could follow upon the acceptance of a repudiation of the contract by [the respondent] are replaced by the provisions of the Convention.}\]

Despite recognising that the CISG applied under a different regime to domestic law, His Honour did not further clarify how Australian courts should approach its construction. In fact, nowhere in the judgment is interpretive assistance sought from foreign judgments or scholarly writings, resources that are regarded as


\(^{116}\) Ibid preamble.


\(^{120}\) Ibid 222.

\(^{121}\) Ibid 233.
essential for promoting uniformity in the application of the Convention.\textsuperscript{122} Whilst
the judgment is important for laying the groundwork for applying the CISG in
Australia, it has been criticised for misunderstanding how this is to be achieved.\textsuperscript{123}

In the more recent Queensland Court of Appeal decision in \textit{Downs Investment Pty Ltd v Perwaja Steel SDN BHD},\textsuperscript{124} contract avoidance in response to a
fundamental breach was again considered. At first instance, the trial judge stated
that any difference between the relevant CISG and common law concepts was ‘not
material’. On appeal, Williams JA said:

\begin{quote}
In my view it is clear from reading his reasons as a whole that [the trial judge] was
equating repudiation with fundamental breach of contract, the term used in the
Convention … When one has regard to Article 64(1) and Article 72 it is clear that
the Convention adopts, at least to some extent, the common law concept of
repudiation.\textsuperscript{125}
\end{quote}

Similarly, the Court found that the CISG provision relating to the calculation of
damages\textsuperscript{126} ‘reflects the common law’.\textsuperscript{127}

The decision of the Queensland Court of Appeal has been criticised for its
\textit{a priori} equation of the CISG with common law concepts at odds with the earlier
comments of von Doussa J in \textit{Roder}. Not only is this association erroneous, it
undermines the object of the CISG. To begin with, the foreseeability test for
damages in Article 74 of the CISG differs from that developed by the common
law.\textsuperscript{128} To assume otherwise disregards the compromise that underlies the
Convention. As Jacobs observes:

\begin{quote}
Not only is such an approach threatening the uniformity of interpretation of the
Convention as stipulated by Article 7, but such legal ethnocentricity could seriously
hinder an evolutionary process which was to achieve international conformity in the
interpretation of the Convention.\textsuperscript{129}
\end{quote}

From the modest amount of case law so far, it cannot be said that Australian
courts have approached the CISG in total legal isolation without regard to foreign
decisions. What can be said, however, is that when assistance is sought from these
decisions, it is customarily limited to those of other common law jurisdictions with
whom the court has an established dialogue. This poses the risk of generating
decisions that are at odds with international jurisprudence and the resulting
compartmentalisation of international commercial law into blocks defined by a
common legal culture.

\begin{footnotesize}
\begin{enumerate}
\item[122] See Zeller, above n 118.
\item[123] See Jacobs, Cutbush-Sabine and Bambagiotti, above n 114.
\item[124] \[2001\] QCA 433.
\item[125] Ibid [35] (Davies JA and Byrne J agreeing).
\item[126] Art 74.
\item[127] \textit{Downs Investment Pty Ltd v Perwaja Steel SDN BHD} [2001] QCA 433 [48].
\item[128] See S Cook, ‘The UN Convention on Contracts for the International Sale of Goods: A
Mandate to Abandon Legal Ethnocentrism’ (1997) 16 \textit{Journal of Law and Commerce}
257.
\item[129] Above n 114.
\end{enumerate}
\end{footnotesize}
(d) International human rights law: the ACT Human Rights Act

International human rights law has been the test case in Australia for the debate surrounding the interaction between international and domestic law. For the most part, courts and commentators have discussed the application of unincorporated human rights norms. As a result, the discussion has predominantly focused on the extent to which courts may use human rights as an aid to interpreting domestic law rather than focusing on interpreting the rights themselves.\footnote{Cf. Nudd v The Queen [2006] HCA 9 concerning the right to a fair trial (Kirby J).} Whilst the High Court has at times been asked to discuss the application of human rights as a matter of customary international law, the absence of statutorily incorporated human rights has limited the opportunities for detailed curial analysis of their domestic interpretation.\footnote{See M Kirby ‘Domestic implementation of International Human Rights Norms’ (1999) 5(2) Australian Journal of Human Rights 109.}

In this context, a significant development has been the passing of the Human Rights Act 2004 (HR Act) in the Australian Capital Territory. The HR Act incorporates those rights appearing in the 1966 International Covenant on Civil and Political Rights\footnote{International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, reprinted in (1967) 6 ILM 368.} that fall within ACT jurisdiction. Contrary to many of its overseas counterparts, the HR Act as currently in force does not give these rights any substantive force.\footnote{In March 2008, the ACT Legislative Assembly passed the Human Rights Amendment Act 2008. Commencing on 1 January 2009, the Act proposes \textit{inter alia} to insert Part 5A into the HR Act, which requires public authorities to act in a way that is compatible with a human right and to give proper consideration to a relevant human right when making a decision (cl 40B). Clause 40C permits a person to commence proceedings in the ACT Supreme Court against a public authority claiming a contravention of this obligation. See Explanatory Statement, Human Rights Amendment Bill 2007.} Instead, its main function is to promote statutory interpretation that is consistent with the human rights contained in the HR Act.\footnote{S 30(1), as amended by the Human Rights Amendments Act 2008, provides: ‘So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights’.}

As for their own interpretation, section 31(1) states that the rights may be interpreted in light of international law and the judgments of foreign and international courts. In an explanatory statement, the ACT Attorney-General confirmed that this provision shows a clear intention for the interpretation of human rights to be as coherent with internationally accepted standards as possible.\footnote{Explanatory Statement, Human Rights Bill 2003, 6.}

At the time of publication, the rights contained in the HR Act had been the subject of proceedings before ACT courts and tribunals in over 60 cases. Of these, only a few had utilised section 31(1) to determine the meaning of those rights.

The first case in which the judgments of foreign and international courts were considered was \textit{R v Upton}.\footnote{[2005] ACTSC 52.} In his decision, Connolly J of the ACT Supreme
Court consulted New Zealand and Canadian authority to determine the scope of the right to be tried without unreasonable delay. In the subsequent case of Stevens v McCallum, the ACT Court of Appeal considered whether the incompetency of defence counsel amounted to a denial of the right to a fair trial. In that case, the Court referred to the High Court decision in Nudd v The Queen in which Kirby J had referred to determinations of the Human Rights Committee of the United Nations to support the view that the right to a fair trial implied ‘a guarantee of adequate, proper or effective legal representation’. Kirby J also garnered support from decisions in Canada, New Zealand and the Privy Council. In Stevens, the Court held that foreign decisions have a ‘special resonance’ insofar as they derive support from the ICCPR.

Given its small jurisdiction and the relatively recent passage of the HR Act, it is difficult to assess the contribution of ACT courts to the development of international human rights jurisprudence. What can be discerned is that despite the manifest internationality of the rights contained in the Act, the courts have so far not fully appreciated their place within the international legal community. As Charlesworth and McKinnon observe:

The use of the Human Rights Act … has overall been cautious and sporadic, perhaps a result of the judiciary’s and the profession’s unfamiliarity with international human rights law and standards.

More specifically, the courts have said little on the scope of section 31(1) and the wider issue of the domestic interpretation of human rights. Indeed, it appears that case law, as well as commentary, is still more concerned with the impact of rights on statutory interpretation rather than how the rights themselves are interpreted. Admittedly, as human rights are not directly enforceable before the courts but rather raised in an ancillary manner, few opportunities exist for a detailed analysis of their local interpretation. But as the above cases demonstrate, when such an analysis occurs, little assistance is sought from sources beyond familiar or common law authority.

As yet, there are no clear examples of inconsistencies between decisions of the ACT courts and other domestic and international jurisdictions on the interpretation

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137 S 22(2)(c) of the Human Rights Act 2004 (ACT).
139 S 21(1) of the Human Rights Act 2004 (ACT).
140 [2006] HCA 9 [93].
141 Ibid [140]. See also Perovic v CW, Case No 05/1046, unreported.
143 For a useful list of case law and commentary on the HR Act, see <http://acthra.law.anu.edu>.
144 Cf Stevens v McCallum [2006] ACTCA 13 [138].
of human rights. Nonetheless, given the judiciary’s reticence towards international authority thus far, there remains a distinct possibility for this to occur.145

(e) Overview

International law is increasingly being applied by Australian courts. Globally, this phenomenon may be attributed to the normative expansion of international law. In an Australian context, where a relatively strict dichotomy is maintained between the international and domestic legal orders, the increase is also due to greater legislative will to incorporate norm-creating treaties.146

It is now well-established that when interpreting international law, Australian courts must have regard for its international character and to that end, foreign authority may be considered. But whilst there are notable instances of this judicial cross-referencing, it is yet to represent common practice. As Christopher Ward observes, even following clear legislative adoption, there remains ‘an underlying reluctance on the part of the judiciary to rely fully on international law, and in particular the decisions of international tribunals, as a source of law’.147 In most cases, courts are more willing to apply home-grown constructions and seek support from familiar authority. ‘When the chips are down,’ writes Peter Nygh, ‘national policy will prevail’.148

When the enquiry does extend further, it rarely looks beyond the common law world, with United Kingdom, Canadian and New Zealand decisions hailed as international even by progressivists such as Kirby J. This practice is all the more intriguing in cases involving the CISG, where the bulk of case law has been developed by civil law courts. If such ‘legal ethnocentricity’ should be defended by a common language, it fails to explain an almost total disregard for other English-speaking jurisdictions such as South Africa, which is currently developing a substantial body of human rights case law. Even still, the judgments of other foreign courts are readily available in English through international law report series and online databases.

But perhaps this reticence is not so surprising given the so-called ‘deep anxieties’ of the Australian judiciary towards international law,149 which is at times depicted as a source of chaotic and capricious norms at odds with Australian law.150 This attitude may be attributed to unfamiliarity with international law due to a lack of formal legal training. As former ICJ Judge Weeramantry once said, ‘international law is not accorded in many Australian universities the position of importance which it warrants’.151 Although developments are taking place,152 it is

145 With the introduction on 1 January 2009 of an independent cause of action against public authorities for breaches of human rights, see above n 133, it is likely that ACT courts will be called upon more frequently to interpret those rights and make use of s 31(1).
146 Above n 131.
147 Ward, above n 33, 98.
148 Above n 97, 102.
149 Above n 77.
150 Ibid; see Western Australia v Ward (2002) 213 CLR 1, 389 (Callinan J).
151 C Weeramantry, ‘Foreword’ in H Reicher (ed), Australian International Law: Cases
understandable that judges might be wary of deriving interpretive assistance from international authority.

Whatever the reasons for this ‘legal ethnocentricity’, it is clear that Australian courts are not alone; to varying degrees, national courts around the world are exhibiting a similar national bias in dealings with international law. Closer to home, there is real potential for incorporated international law to become ‘Australianised’ or otherwise develop along common law lines. In this way, decisions on international law unconcerned with its transnational context risk conflicting with jurisprudence developed elsewhere. Whilst this is not so problematic from a purely dualist perspective, given the ever-increasing presence of national courts within the international legal community and the breakdown in barriers between the international and domestic legal systems, this may be cause for concern. At the very least, the contention that national courts are ‘quite conscious of the need to align their jurisprudence with the well established norms of international law’ is tenuous, especially from an Australian perspective.

V. The Impact of Australian Courts on the Fragmentation of International Law

(a) Parallels with international tribunals

Until now, the fragmentation debate has focused exclusively on international tribunals. This paper contends that national courts should be considered within its terms of reference. If the inconsistent positions of the ICJ and ICTY on state responsibility are relevant, why should this not be the case for the divergences in the many areas of international law addressed primarily by national courts?

It is hard to ignore the parallels between national courts and their international counterparts. To begin with, both belong to a ‘global community of courts’ and work together in applying and developing international law. More fundamentally, if the implications of ‘self-contained regimes’ underlie the fragmentation question, then the implications of national legal systems – whose ‘self-containedness’ is the quintessence of sovereignty – are a relevant consideration. So much is recognised by Koskenniemi:

[T]he move from a world fragmented into sovereign States to a world fragmented into specialized ‘regimes’ may in fact not at all require a fundamental transformation of public international law – though it may call for imaginative uses of its traditional techniques.

It follows that constructions based on domestic legal culture prevailing in ‘self-contained’ national legal systems share much in common with constructions based on the specialised interests of ‘self-contained regimes’.

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152 Gleeson, above n 92.
153 ILA, above n 52, 582; See also Benvenisti, above n 48, 159.
154 Above n 35, 959.
155 See H Charlesworth, M Chiam, D Hovell and G Williams, No Country is an Island (2006) 5.
156 Above n 6, 208.
Admittedly, the parallels should not be overstated. International tribunals, unlike national courts are creatures of international law. As Ian Brownlie points out, "the international character of the tribunal is a question of both its organization and its jurisdiction". When national courts apply international law, they do not act entirely independent of their national legal systems. But as this paper has shown, difference in organisation does not preclude inclusion within the international legal community. Whilst the decisions of international courts (especially the ICJ) will normally have greater influence, this cannot negate the impact of national courts. Once this is realised, it becomes clear that in the absence of judicial hierarchy, the ‘parochial constructions’ of national courts may have a similar impact on the fragmentation of international law.

(b) The fragmentary impact of national courts

Concerns over proliferation have predominantly been voiced by members of the ICJ. In 1999, the then President noted the potential for conflicting interpretations. A more candid assessment was given a year later by his successor, Gilbert Guillaume, who prophesied a ‘loss of the overall perspective’. Whilst fears of a loss of overall perspective have been echoed by some commentators, for others they represent concerns of the World Court for loss of overall control. As Koskenniemi and Leino suggest, the debate is less about hierarchy than about a particular hierarchical arrangement headed by the ICJ. But as Jonathan Charney illustrates, such a hierarchy has never existed and is unlikely ever to do so.

The debate has re-ignited questions regarding the fundamental nature of international law. Whilst it would be impossible within the parameters of this paper to attempt a wholesale analysis of the various theoretical aspects, it is nevertheless important to make two observations.

First, the disunity associated with ‘fragmentation’ assumes the existence of a structured body of rules applied uniformly across the international community. But as the ILC Study Group confirmed, the international legal order has never enjoyed unity and as such, ‘pluralism should be understood as a constructive value of the system’. The rise of self-contained regimes each applying their own version of international law should therefore not in itself be viewed with trepidation.

This does not mean, however, that international law cannot ignore the centrifugal forces of self-contained regimes. The Study Group notes that

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158 See Ward, above n 33, 420-21.
159 Above n 22.
160 Above n 13.
162 Above n 15, 575-76.
163 Above n 46, 698. Cf Schwebel, above n 22, who suggests enabling tribunals to request advisory opinions of the ICJ in areas where conflicting interpretations exist.
164 Above n 6, 209.
Fragmentation has so far taken place against the background of general international law. In fact, it rejects the notion of ‘self-containedness’, highlighting that specialised regimes owe their establishment and maintenance to the general international law that also acts as a gap-filler as well as a fall-back in the event of regime failure. Not surprisingly, its principal conclusion is that ‘the emergence of special treaty regimes … has not seriously undermined legal security, predictability or the equality of legal subjects’. But whilst existing conflict rules may solve inconsistencies for now, greater specialisation without the development of parallel conflict rules may indeed undermine the desired legal security and predictability. Fragmentation is tolerable so long as it occurs within the rubric of international law.

This leads to a second observation: acceptance of the fact that the international legal system may be characterised by both its universality and particularity lends support to the view that fragmentation is not concerned with rules but rather process. At issue is not the existence of conflicting rules, but rather the processes involved in their creation and resolution. As Higgins maintains, an analysis of international law in terms of process permits an appreciation of the variety of participants that shape international law as well as the divergent policies and interests they pursue. Applying this to the present debate, Dirk Pulkowski states:

A rules-based perspective focusing on techniques of treaty interpretation cannot capture what is at stake when competing processes of policies, identities or rationalities clash. Only a comprehensive analysis of the communicative processes related to the judicial decision will bring to light the parameters for resorting to [conflict rules].

On account of a process approach, whether fragmentation undermines the legitimacy of international law depends on whether participants engage in the same legal discourse. These observations are particularly enlightening in the context of proliferation where judgments of the various tribunals act as mouthpieces for their constituting regimes. The system is already ‘characterised by fragmentation’, writes Karin Oellers-Frahm. What is at stake is not the unity of international law, but rather its cohesiveness in the sense that its interpretation should respect the underlying concepts by which it is governed.

This proposition is portrayed by Joost Pauwelyn as a ‘universe of inter-connected islands’ whose cohesion is maintained through judicial

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166 Higgins, above n 44, 2-3.
167 See Ward, above n 33, 381-85.
169 Ibid 10; Ward, above n 33, 385.
170 Above n 161, 67-68.
Inconsistent decisions, he concludes, are not necessarily undesirable as long as judges recognise they are all applying the same law. Similarly, Charney concludes that divergent case law strengthens rather than weakens international law. In a comparative study of the jurisprudence of selected tribunals, he notes a relative coherence of views, concluding that ‘although differences exist, these tribunals are clearly engaged in the same dialectic’.172 As a result, fragmentation is perceived not in the decision itself but rather in the process adopted in coming to that decision.173

Whether consciously or not, the majority of commentators ascribe to this view, tolerating divergent interpretations as long as they respect the international context of the law they apply. Just as this involves international tribunals looking beyond the specialised interests of their respective regime, it also involves national courts looking beyond their ‘parochial constructions’ to engage in a transjudicial dialogue with other national and international courts. As Franck and Fox observe:

> At best this sharing of monitoring and implementing functions between international and national judiciaries generates a functional synergy ... At worst, national and international tribunals view one another as interlopers, or even as irrelevant. Then the result is a fractured and weakened normativity.174

But promoting transjudicial dialogue cannot alone remedy the fragmentary impact of inconsistent interpretations. As Christopher Ward observes, ‘without an underlying normative framework, legal process as a sole determinant of compliance and law making is incomplete and conceptually unsatisfying’.175 There must be something more to prevent reference to foreign decisions becoming a superficial activity to buttress local constructions176 or, at the other extreme, reducing national courts to mere compliance mechanisms.

Georges Abi-Saab has proposed a compromise, suggesting that cohesion can be maintained by a ‘common understanding of the overarching principles’ as well as a:

> division of labor between the different judicial organs that can develop progressively through appropriate unilateral adjustments of deference and assertion, within the permissible margin of judicial discretion.177

Although this proposal may be regarded as nothing more than a vain search for hierarchy, it is significant inasmuch as it recognises the importance of respecting

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172 Above n 46, 699. See also Triggs, above n 44, who adds from a legal practice perspective that ‘[t]he emerging college of public international lawyers appearing before and sitting as judges on these new tribunals may prove to be a unifying elements’, 212.
173 See Pulkowski, above n 168, 12.
174 T M Franck and G M Fox, ‘Introduction: Transnational Judicial Synergy’ in Franck and Fox (eds), above n 54, 1, 4-5.
175 Above n 33, 385.
176 Nygh, above n 97.
the transnational context in which norms are created whilst allowing a margin of discretion to respect the particular context in which they are applied.

(c) The margin of appreciation doctrine revisited

The idea that courts have a margin of appreciation when interpreting international law has previously been acknowledged.\textsuperscript{178} Indeed, so much was conceded by Judge Guillaume who, in the same breath as championing the unity of international law, urged it to adapt itself to ‘local and regional requirements’.\textsuperscript{179}

Developed within the European human rights regime, the margin of appreciation doctrine operates as a mechanism for deference to the policy decisions of national authorities in pursuit of particular values and needs.\textsuperscript{180} Whilst the doctrine does extend in its present form to decisions of national courts, it does so by regarding them as part of the state apparatus rather than as judicial bodies operating within the international legal community. It therefore governs the factual application of international law more so than its legal construction.\textsuperscript{181} In this final section, it is proposed that a similar doctrine should serve as a foundation for a framework in which to assess the fragmentary impact of national courts.

Karen Knop has approached the issue as a process of translation in the sense that the interpretation of international law by national courts ‘requires us to be faithful to the other language as well as to assert our own’.\textsuperscript{182} This accepts the involvement of legal culture in interpretation that accordingly gives international law a more acceptable meaning within that culture. In Australia, this view has been embraced by Hilary Charlesworth in her rejection of a universal interpretation of international standards.\textsuperscript{183}

\begin{thebibliography}{99}
\item Guillaume, above n 13.
\item K Knop, ‘Here and There: International Law in Domestic Courts’ (1999-2000) 32 New York University Journal of International Law and Politics 501, 506, 520. The role of domestic courts as translators has recently been reiterated by Andreas Paulus, ‘The Emergence of the International Community and the Divide between International and Domestic Law’ in J Nijman and A Nollkaemper (eds), New Perspectives on the Divide between National and International Law (2007). Paulus states, at 249, that ‘[i]n the age of globalization, domestic decisions affect a broader community and are themselves part of a larger context than the nation State. In this vein, domestic courts are playing an indispensable role as interpreter and “translators” of international standards and principles into action’.
\end{thebibliography}
Since the job of the translator is to reproduce a message from one language to another, an understanding in both linguistic traditions is essential.\textsuperscript{184} Therefore national courts need to understand the meaning of the international norm they are interpreting and to reproduce in such a way that is meaningful at the domestic level. But the ‘meaning’ of international law is diverse and ever-changing.\textsuperscript{185} What was once a limited bundle of norms intended to regulate inter-state relations has become a complex system of universal norms.\textsuperscript{186}

In his work on the ‘domestication’ of international law, Phillip Trimble commented:

Instead of being seen as a single, unitary system applicable across the “world community”, public international law should be imagined as a series of parallel systems, more or less convergent depending on the subject, separately applicable within the various nations of the world.\textsuperscript{187}

Despite the geometric oversight, this statement portrays the varying degrees of universality in international law. Whereas some norms seek uniform interpretation, others allow a degree of latitude to respect different social, political and legal cultures.\textsuperscript{188} If translation requires fidelity to the original message, then national courts must recognise this polyvalence of international law. In practice, this means that the margin of appreciation enjoyed by national courts will vary depending on the rule sought to be translated.

In refugee law, the refugee definition adopts vague, undefined language. As Gummow J explained in \textit{Ibrahim}, since the Convention was originally premised on the sovereign right of all states to admit non-citizens at their own pleasure,\textsuperscript{189} the term ‘persecution’ was sufficiently open-ended to allow contracting parties to admit such dissidents as would satisfy their political ends.\textsuperscript{190} This association with sovereignty therefore suggests that states (and their courts) should be permitted considerable latitude in admitting refugees.

It is therefore foreseeable that refugee status might be denied in one state yet granted in the next, thereby exacerbating the transnational movement of displaced people. This issue was recently addressed by the House of Lords, which held that returning a person to a third state whose courts adopted a more restrictive definition of ‘refugee’ was tantamount to \textit{refoulement}.\textsuperscript{191} Although unanimity is unachievable, national courts have ‘no choice but to apply what they consider to be

\begin{thebibliography}
\item \textsuperscript{184} E Nida and C Taber, \textit{The Theory and Practice of Translation} (1969) 12.
\item \textsuperscript{185} See esp VCLT, above n 56, art 31 (3).
\item \textsuperscript{186} Higgins, above n 44, 11.
\item \textsuperscript{188} Ibid 836-38. The ILC Study Group agrees: ‘international law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions’, above n 6, 210; See also H Koh, ‘Bringing International Law Home’ (1998-1999) 35 \textit{Houston Law Review} 623.
\item \textsuperscript{189} \textit{Minister for Immigration and Multicultural Affairs v Ibrahim} (2000) 204 CLR 1, 45-7.
\item \textsuperscript{190} Ibid 48. Cf 67-68 (Kirby J). See also North and Chia, above n 113, 108.
\item \textsuperscript{191} \textit{Secretary of State for the Home Department, Ex Parte Adan} [2001] 2 AC 477.
\end{thebibliography}
the *autonomous* meaning’ independent of their own national legal systems.\(^{192}\) This approach accords with the objectives of the UNHCR *Handbook* and has recently been adopted by the European Union in an effort to harmonise the application of the Convention across member states.\(^{193}\) These developments suggest a possible shift, at least within Europe, towards greater uniformity, which in turn limits the permissible margin.\(^{194}\)

As for international commercial law, the clear object of the CISG regime is the facilitation of international trade. It is argued that national courts must therefore completely overcome legal ethnocentricity and adopt an internationalist perspective when dealing with uniform rules such as the CISG.\(^{195}\) If national courts were given too much latitude, the potential inconsistencies would generate unpredictability and inequality in international trade, which might promote forum shopping. This in turn would undermine the objects and legitimacy of the regime.\(^{196}\) It is therefore suggested that national courts enjoy little, if any, margin.

The situation in international human rights law is more complex in view of the debate between universality and cultural relativism.\(^{197}\) Given the existing margin of appreciation in applying human rights standards (especially those relating to personal liberty),\(^{198}\) it might be expected that the same underlying rationale would allow national courts a commensurate degree of latitude in their interpretation. However, recall the words of Justice La Forest that in the field of human rights, ‘our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe’.\(^{199}\) Although this signals a potential shift towards greater harmonisation, contemporary practice and commentary still indicate that national courts should retain a relatively wide margin in interpreting human rights standards.\(^{200}\)

It is clear from the foregoing that the margin of appreciation varies according to the particular norm being interpreted. Whilst some seek unity, others acknowledge diversity. All depends on the meaning of the norm – its object and purpose – the changing nature of which can only be determined with reference to its international context.\(^{201}\)

\(^{192}\) Ibid 518 (Lord Steyn).


\(^{194}\) North and Chia take the view that the Convention is designed to be a universal humanitarian instrument, offering a regime of international protection to the most vulnerable. In this respect ‘the aims and context of the treaty are fundamentally undermined if there are substantial differences between the views taken by states parties of their obligations’. Above n 113, 108.

\(^{195}\) Above n 114.

\(^{196}\) See *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyds Rep 288, 294.


\(^{198}\) Donoho, above n 181; even within human rights the margin varies – it is suggested that there is little margin for non-derogable rights: cf Shany, above n 178, 925.

\(^{199}\) Above n 72.

\(^{200}\) Donoho, above n 181, 406.

\(^{201}\) This accords to the interpretive rules in the VCLT, above n 52, art 31 (1).
The age-old maxim ‘traduttore, traditore’\textsuperscript{202} is a misnomer, at least insofar as the domestic translation of international law is concerned. Although it is essential for national courts to ‘engage in the same dialectic’, inconsistent interpretations cannot be seen to threaten its cohesion as long as they fall within the permissible margin of appreciation.\textsuperscript{203} After all, if the real danger of fragmentation lies in undermining the legitimacy of international law, it is posited that the process of ‘internalising’ (or ‘domesticating’) international law makes it more relevant and therefore legitimate in the eyes of those it governs.\textsuperscript{204} No more is this true than in the Australian context, where jurists fear that taking international law too seriously will open the floodgates to foreign and undemocratic norms.\textsuperscript{205} It is further posited that tolerating diversity will not only remedy the risks ensuing from fragmentation, but provide a benefit to international law by diversifying its sources.\textsuperscript{206} Whilst an analysis of these ideas should be left for further discussion, for the time being they serve to support the fact that an Australian international law shaped by local domestic concepts can exist without upsetting the fabric of international law.

\textbf{VI. Concluding Remarks}

When the ILC Study Group began assessing the difficulties rising from the diversification and expansion of international law, it declined to examine the proliferation of international tribunals and the impact of inconsistent decisions. It focused its attention instead on the conflicting primary rules across the various specialised regimes, intimating that its work might somehow assist international tribunals in coping with the consequences of proliferation.

In view of the fact that international tribunals form the judicial arm of specialised regimes, an appreciation of the divergent policies that bring about conflicting primary rules is essential when examining the processes underlying inconsistent interpretations and vice versa. As Hafner suggested – and the Final Report of the Study Group confirms – both are indispensable and interdependent aspects of the wider fragmentation question.

A similar all-encompassing approach is warranted at the national level. As Charlesworth et al warn, ‘[c]oncentration on court decisions can give a false impression of the nature of Australia’s relationship with international law’.\textsuperscript{207} The fragmentary impact of national courts cannot be examined divorced from the other ‘domestic legal operators’ that are involved in the domestic implementation and interpretation of international law.\textsuperscript{208} When the Australian government ratified the ICC Statute in 2002, it declared that the relevant international crimes would be

\begin{footnotesize}
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\item \textsuperscript{202} ‘The translator is a traitor’.
\item \textsuperscript{203} Cf Shany’s formulation, above n 178, 913.
\item \textsuperscript{204} Koh, above n 188, 680. See also J Nijman and A Nollkaemper, ‘Beyond in the Divide’ in Nijman and Nollkaemper (eds), above n 182, 341, 360.
\item \textsuperscript{205} See Charlesworth, Chiam, Hovell and Williams, above n 77, 464.
\item \textsuperscript{207} Charlesworth, Chiam, Hovell and Williams, above n 155, 52.
\item \textsuperscript{208} See Conforti, above n 47, 8; see also Ward, above n 33, 21.
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‘interpreted and applied in a way that accords with the way they are implemented in Australian domestic law’.209 Indeed, it is not uncommon for the legislature to translate international law into ‘traditional legislative language’ to give it a more acceptable meaning within the national legal system.210 When this occurs, the ability of the courts to remain faithful to the language of the original international law is significantly constrained.211

But in situations where international law has been directly implemented and the courts are armed with seemingly unlimited ‘international jurisdiction’, it is their task to ascertain its proper meaning. This paper has found that despite honourable statements championing an internationalist approach, the courts have yet to fully grasp what is required of them as ‘organs of the international legal community’. In view of the fact that their decisions on international law can influence its development, national courts must be seriously considered as part of the fragmentation debate.

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209  See J Howard, ‘International Criminal Court’ (Press release, 20 June 2002): The declaration was intended to reaffirm ‘the primacy of Australian law and the Australian legal system’.


211  M. Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 (Mason CJ and Deane J); See also Pearce and Geddes, above n 84, 39. Cf discussion above at n 84.