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**LUKASZ GRUSZCZYNSKI & WOUTER WERNER, *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS*, OXFORD, OXFORD UNIVERSITY PRESS, 2014**

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**LUKASZ GRUSZCZYNSKI & WOUTER WERNER,  
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*Adrien Faeli\**

International law is in constant expansion and seeks to regulate matters in a variety of fields, such as human rights, investment, trade, international criminality and regional economic integration. The multiplicity of these regimes and their elaboration in isolation from one another has led to a state of “fragmentation” of international law.<sup>1</sup> In that regard, examples of self-contained regimes are numerous.<sup>2</sup> Nonetheless, certain similarities in the ways in which international law is designed and construed by international courts allow judges and academics to look for common features, since they are often confronted with the same problems and use similar methods to deal with them.

It is in the context of the COST action IS1003 *International Law between Constitutionalization and Fragmentation: The Role of Law in the Post-National Constellation* that Lukasz Gruszczynski<sup>3</sup> and Wouter Werner<sup>4</sup> decided to realize a collective work on these similarities with regard to judicial deference. In 2014, they edited «Deference in international courts and tribunals»,<sup>5</sup> a collection of twenty articles about standards of review in international law. The authors begin their investigation with an overview of common questions susceptible to arise in any international court, including general comparative analysis and inquiries for ideological frameworks (Part II). Then they proceed to analyse in-depth the way in which assessment of conformity of national policies are performed by WTO courts and investment tribunals (Part III), the European Court of Justice (Part IV), The

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\* LLM, McGill University.

<sup>1</sup> See Ole Kristian Fauchald & André Nollkaemper, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart, 2012) [Fauchald, Nollkaemper]; Margaret A Young, *Regime interaction in international law: facing fragmentation* (Cambridge: Cambridge University Press, 2012).

<sup>2</sup> See Gabrielle Marceau, “WTO dispute settlement and Human Rights” (2002) 13:4 EJIL 753; Ragnar Nordeide, “The ECHR and its normative environment: difficulties arising from a regional human rights court’s approach to systemic integration” in Fauchald, Nollkaemper, *supra* note 1.

<sup>3</sup> Lukasz Gruszczynski is an assistant professor of international law at the Institute of Law Studies, Polish Academy of Sciences in Warsaw. He is also a guest lecturer of international trade law and European law at the Kozminski Academy and Warsaw University. He graduated from Jagiellonian University in Cracow (MA) and the Central European University in Budapest (LLM). In 2008 he earned his PhD from the European University Institute in Florence. He also published *Regulating Health and Environmental Risks under WTO Law* with Oxford University Press.

<sup>4</sup> Wouter Werner is professor of Public International Law at the Free University of Amsterdam. He is a member of the Dutch Advisory Council on Public International Law, and is an editor of the *Leiden Journal of International Law* and the *Netherlands Yearbook of International Law*. His academic interests lie in international legal theory, the interplay between international law and international politics.

<sup>5</sup> Lukasz Gruszczynski & Wouter Werner, *Deference in international courts and tribunals* (Oxford: Oxford University Press, 2014) [Gruszczynski & Werner].

European Court of Human Right (Part V), the ICC, the ICJ, and the ITLOS (Part VI). As stated by the editors themselves, the methodological choices are left to each individual author and the book does not privilege any particular approach.<sup>6</sup>

The purpose of the book is to define commonalities in the way international courts choose to defer to national decision makers or to review – “second guess” – the challenged decision when assessing a potential infringement to treaty law. It discusses two issues of international adjudication: (i) the relevance of the concept of standard of review/margin of appreciation and their mode of application, and (ii) the extent to which courts scrutinise states decisions and the reasons for which they decide to grant deference.<sup>7</sup> More specifically, it claims that it is possible to raise a common profile of all the uses of standards of review by international adjudicatory bodies.<sup>8</sup> This statement contradicts the apparent disarray in the variety of criteria used for granting deference, and handles the general absence in the courts sentences of any mention of rationale for granting such deference.

The first part, “General Issues/ Comparative perspectives”, establishes the general framework of the judicial standards of review in international economic law. It starts with a claim, in chapter 2 “Judicial Standards of Review and Administration of Justice”,<sup>9</sup> that the main goal of international courts is to protect the rule of law. The author calls for a more coherent application of the standards of review that would contribute to the creation of a “Cosmopolitan Constitutionalism”, mainly grounded in WTO law<sup>10</sup> and investment law.<sup>11</sup> Chapter 3 “Deference and the Use of the Public Policy Exception”<sup>12</sup> elucidates the profile of a common exception to international tribunals’ jurisdictional scrutiny, namely the public policy exception. The author looks for the grounding of this exception in the textual wording of European law, WTO law, and investment treaty, and concludes that the peculiar nature of the exception depends broadly on the allocation of power between member states and the

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<sup>6</sup> *Ibid* at 5.

<sup>7</sup> *Ibid* at 6.

<sup>8</sup> *Ibid* at 5.

<sup>9</sup> Ernst-Ulrich Petersmann is an emeritus professor of international and European law at the European University Institute (Florence). His research interests focus on international economic law and human rights, as well as constitutional law. He wrote several papers on issues of constitutionalism in international organisations.

<sup>10</sup> In consideration of WTO objective to “provide security and predictability to the multilateral trading system” (WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc L/UR/A-2/DS/U/1, online: WTO <<http://docsonline.wto.org>>, art 3.2), and since WTO treaties include specific provision suggesting the use of standards of review (WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc L/UR/A-2/DS/U/1, online: WTO <<http://docsonline.wto.org>>, art 11; WTO, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, WTO Doc LT/UR/A-1A/3, online: WTO <<http://docsonline.wto.org>>, art 17.6; See Ernst-Ulrich Petersmann, “Judicial Standards of Review and Administration of Justice” in Gruszczynski & Werner, *supra* note 5 at 26 [Petersmann]).

<sup>11</sup> *Ibid* at 31.

<sup>12</sup> Ilona Cheyne, is a professor at the School of Law of Oxford Brookes University since 2010. Her academic interests lie in public international law, law of armed conflict and the law of international institutions. She previously taught at the Universities of Aberystwyth and Newcastle. She published widely on international trade and environment, particularly on the implications of the precautionary and proportionality principles.

courts.<sup>13</sup> In a comprehensive essay about a common foundation to all doctrines of deference, Benedikt Pirker (*Democracy and Distrust in international law*)<sup>14</sup> discusses the merits of the procedural democracy doctrine.<sup>15</sup> According to this doctrine, the consideration granted by national decision-makers in the decision-making process to the interest of a particular affected group becomes an additional criterion in deciding to grant deference.<sup>16</sup> Although this theory requires adjudicators to define the central values of system of democratic process, it advocates the tribunal's strict role of procedure reviewer and enhances good governance at the state level. Chapter 5 "Good Faith"<sup>17</sup> looks further into the psychological element of a breach of international law. Good faith review is performed through open-textured standards, such as "unreasonableness", which may help to consider a state's intent.<sup>18</sup> However, the author claims that states must keep a certain margin of appreciation, notably regarding the type of subjective evidence admissible for review. Propensity evidences, and adverse inference are found to be inconsistent with the presumption of good faith from which the states benefit.<sup>19</sup>

Part II of the book emphasises the specificities of international investment law and trade law. First, in chapter 6 "Beyond the Standard of Review",<sup>20</sup> Michael Ioannidis presents the overall profile of the standard of review used in trade law: he explores its textual foundations in WTO law,<sup>21</sup> demonstrates the limitations of such grounding, enlightens the judicial criteria used for awarding deference,<sup>22</sup> and pleads for the introduction of the procedural standard of review.<sup>23</sup> Chapter 7 "The role of the

<sup>13</sup> Ilona Cheyne, "Deference and the Use of the Public Policy Exception" in Gruszczynski & Werner, *supra* note 5 at 55.

<sup>14</sup> Benedikt Pirker is currently a senior lecturer (maître d'enseignement et de recherche) at the University of Fribourg. He is also one of the editors and a regular contributor to the European Law Blog. His main research interests lie in the fields of EU and international law, focusing on topics such as constitutionalism and constitutional principles (proportionality), environmental law and EU external relations (EU-Swiss bilateral agreements, European Economic Area).

<sup>15</sup> Mainly based on the work of John H Ely, *Democracy and Distrust – a Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). The theory originates from US *Bill of Rights* and its construction by the US Supreme Court.

<sup>16</sup> Adjudicators may act as guardians of representation reinforcement, when such interest has been neglected, and will therefore grant less deference to national policy, Benedict Pirker, "Democracy and Distrust in International Law" in Gruszczynski & Werner, *supra* note 5 at 73 [Pirker].

<sup>17</sup> Andrei Mamolea is a PhD Candidate at the Graduate Institute of International and Development Studies (Geneva). His academic interests lie in history of international, humanitarian law and human rights.

<sup>18</sup> Andrei Mamolea, "Good Faith Review" in Gruszczynski & Werner, *supra* note 4 at 76.

<sup>19</sup> *Ibid* at 84.

<sup>20</sup> Michael Ioannidis is a PhD and Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg). He wrote several publications on issues of legitimacy of international adjudications in regard of WTO law. More recently, his post-doctoral research focuses on the legal aspects of the Eurozone crisis and the new European economic governance, with a special focus on financial assistance conditionality.

<sup>21</sup> See *supra* note 10.

<sup>22</sup> Mainly sovereignty, democratic accountability and expertise; Michael Ioannidis, "Beyond the Standard of Review" in Gruszczynski & Werner, *supra* note 5 at 100.

<sup>23</sup> With several references to John H Ely, Gruszczynski & Werner, *supra* note 5 at 6. See also, Michael Ioannidis, "A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law" (2011) 12 GLJ 1175 at 1177.

Standards of Review and the Importance of Deference in Investor-State Arbitration”<sup>24</sup> is devoted to a comparative inquiry of the European Court of Human Rights [ECtHR], Court of Justice of the European Union [CJEU] and World Trade Organization [WTO] case law in order to identify the underlying rationale for deference: regulatory autonomy and proximity, and relative institutional competence.<sup>25</sup> The author then assesses the importance of these concepts in international investment case law, despite their under-theorization.<sup>26</sup> In chapter 8 “Treaty Change, Arbitral Practice and the Search for a Balance”,<sup>27</sup> Erlend Leonhardsen explores the origins<sup>28</sup> and policy aspects of deference as an adjudicative response to the state’s need to keep large regulatory flexibility in its domestic sphere and an attempt to protect its legitimacy.<sup>29</sup> Lastly, Chapter 9 “Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration”<sup>30</sup> considers the use of standards of review in the specific context of scientific assessment of risks, in both WTO and investment law,<sup>31</sup> with public health and environmental protection laying at the heart of state sovereignty. The chapter’s conclusion emphasizes a recent and marked shift in the case law towards more deference.<sup>32</sup>

<sup>24</sup> Caroline Henckels holds a PhD from the University of Cambridge and is a Vice-Chancellor’s Post-Doctoral Research Fellow at the Faculty of Law, UNSW. Her PhD research concerned proportionality and deference in investor-state arbitration. She is also an Associate Editor of the *Journal of World Investment and Trade*. Her areas of research interest include international economic law, international dispute settlement, human rights law, administrative law and legal theory.

<sup>25</sup> Caroline Henckels, “Deference in Investor-State Arbitration” in Gruszczynski & Werner, *supra* note 5 at 120.

<sup>26</sup> “Tribunals could be more explicit in their determination of the applicable standard of review, including setting out why they have (or have not) been deferential in the circumstances”; See also Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge: Cambridge University Press, 2011) at 248.

<sup>27</sup> Erlend M Leonhardsen is a Research Fellow at the Scandinavian Institute of Maritime Law, Department of Petroleum and Energy Law, Faculty of Law, University of Oslo. He has published and given presentations on such topics as international arbitration and international sanctions, and has taught for several years at the University of Oslo’s faculty of Law in matter such as EU/EEA Law, international law and human rights.

<sup>28</sup> Deference in the ECtHR jurisprudence takes the form of “margin of appreciation”. See *Handyside v United Kingdom* (1976), A24 ECHR (Ser A) 1, no° 5493/72.

<sup>29</sup> See Aileen Kavanagh, “Deference or Defiance? The limits of the Judicial Role in Constitutional Adjudication” in Grant Huscroft, ed, *Expounding the Constitution: Essay in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 184 at 203-207

<sup>30</sup> Valentina Vadi is a Reader at the Faculty of Law of Lancaster University. She holds a doctorate in international law from the European University Institute, and degrees in international law and political science from the University of Siena. Her main areas of research are in international economic law, including international investment law and world trade law, as well as international cultural law.

<sup>31</sup> WTO law on scientific assessment is codified in SPS and TBT agreements, Lukasz Gruszczynski, Valentina Vadi, “Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration” in Gruszczynski & Werner, *supra* note 5 at 155.

<sup>32</sup> As in *Methanex Corporation v United States of America*, UNCITRAL (NAFTA) 1, Final Award of the Tribunal on Jurisdiction and Merits (2005), online: <<http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>>; *Chemtura Corporation v Canada*, UNCITRAL (NAFTA) 1, Award (2010), online: <[http://www.italaw.com/sites/default/files/case-documents/ita0149\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf)>; and, for WTO, *United States - Continued suspension of Obligations in the EC-Hormones Dispute* (2008), WTO Doc WT/DS320/R (Panel Report), as modified by Appellate Body Report WT/DS320/AB/R.

The book's third part addresses European Union [EU] law, whose specificities and integrated structure indeed justify a separate review. It begins with chapter 10 "National Procedural Choices before the Court of Justice",<sup>33</sup> and its author's illustration of how CJEU's reviews of national procedural autonomy<sup>34</sup> vary according to four standards, whose concurrent application reflects a form of European "Crypto-federalism"<sup>35</sup> and is pre-determined by the court's perception of the state attitude toward European integration.<sup>36</sup> In chapter 11 "Risk, Precaution and Scientific Complexity",<sup>37</sup> Patrycja Dabrowska-Klosinska focuses on the CJEU reviewing power over scientific assessments of risk, which got progressively extended despite the TFEU initial intent to grant deference to member states as to scientific determination.<sup>38</sup> The article explores how the CJEU managed, through proceduralization,<sup>39</sup> to develop a less deferential standard of review, which still leaves states with little predictability as to the outcome of a proceeding. Lastly, chapter 12 "Standard of Review for Necessity and Proportionality Analysis in EU and WTO law"<sup>40</sup> elaborates further the theoretical framework justifying the use of deference. First, Alexia Herwing and Asja Serdarevic extensively review the CJEU and WTO laws and the jurisprudence of their respective adjudicatory bodies, and establish that both systems entail necessity and proportionality tests, both of which leave

<sup>33</sup> Pieter Van Cleynenbreugel is an Assistant Professor at the Europa Institute of the Leiden Law School. His publications focus on the interplay between EU institutional law and EU substantive law. His research particularly seeks to shed light on the extent to which foundational principles of European legal integration (including national procedural autonomy) influence and shape the playing field between supranational and national legal entitlements manifested throughout EU substantive law.

<sup>34</sup> The liberty for member states to designate courts and procedural rules for enforcing EU law. See among other Constantinios Kakouris, "Do the Members States Possess Judicial Procedural Autonomy?" (1997) 34 CMLR 1389.

<sup>35</sup> Pieter Van Cleynenbreugel, "National Procedural Choices before the Court of Justice" in Gruszczynski & Werner, *supra* note 5 at 187.

<sup>36</sup> If the country acts in favour of this integration, deference is likely to be granted (*Ibid* at 190).

<sup>37</sup> Patrycja Dabrowska is a PhD from the European Institute of Florence and a Lecturer in EU Law at the Centre for Europe, University of Warsaw. Her research interests include EU governance and risk regulation (biotechnology and GMOs, food safety and the environment) as well as EU constitutional and administrative law. She has published widely on GMO regulation and governance in the EU.

<sup>38</sup> With the performance of a review only in case of "manifest error of appraisal [...] misuse of power or when the institutions have manifestly exceed the limits of their discretion": General Court, Third Chamber, 9 september 2011, *French Republic v Commission of the European Communities*, (2011) JCP II, Case T-257/07 at para 85 [*France v Commission*].

<sup>39</sup> See for instance Court, Third Chamber, 28 January 2010, *European Commission v French Republic*, (2010) JCP II, Case C-333/08; Court, Second Chamber, 6 November 2008, *Kingdom of the Netherlands v Commission of the European Communities*, (2008), JCP II, Case C-405/07; *France v Commission*, *supra* note 38.

<sup>40</sup> Alexia Herwing is a post-doctoral researcher at the Centre for Law and Cosmopolitan Values and lecturer of WTO law at the University of Antwerp. Her current research focuses on the constitutionalization of the WTO, global distributive justice and labour law aspects raised by the liberalisation of trade in services. Other research interests of hers include food safety regulation under WTO law and EU law.

Asja Serdarevic is a PhD and Researcher at the Centre for European Law of the Vrije Universiteit Brussel. Her academic interests lie in issues of constitutionality and legitimacy of international organisations such as the WTO and European Union. Her PhD research concerned the internal institutional mechanisms on the basis of which the European Community acts within the World Trade Organisation.

considerable room for margin of appreciation.<sup>41</sup> The author then appraises the normative merits of key justifications – such as democratic legitimacy, due process, proximity of the decision maker, or pluralism – used by courts for calibrating their standards of review.

Part IV turns to International Human Rights Law. In chapter 13 “The European Court of Human Rights and Standards of Proof”,<sup>42</sup> the author, through the study of different rights enshrined in the ECHR,<sup>43</sup> finds an inverse relationship between margin of appreciation and the burden of proof borne by states: provisions requiring mere factual assessments lead to more scrutiny, contrary to those relating to moral issues. The latter leaves wider margin of appreciation and thus implies less evidential requirements.<sup>44</sup> Chapter 14 “Experts in Hate Speech Cases”<sup>45</sup> examines the procedural role of experts in national courts and how ECtHR reviews national judgements based on them in the context of the justification of prosecution in hate speech cases. It illustrates the linguistic and epistemic particularities of hate speech and discusses the inconsistent approaches of various streams of ECHR case law in that regard.<sup>46</sup> Chapter 15 “The Standard of Equivalent Protection as a Standard of Review”<sup>47</sup> further explores a specificity of the ECHR system, namely the “standard of equivalent protection”<sup>48</sup> used by the ECtHR in the context of its relationship with

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<sup>41</sup> The author singles out the criterions according to which the margin varies, Alexia Herwing & Asja Serdarevic, “Standard of Review for Necessity and Proportionality Analysis” in Gruszczynski & Werner, *supra* note 5 at 216.

<sup>42</sup> Monika Ambrus is a PhD and lecturer in Public International Law at the Faculty of Law, University of Groningen. Her research on judicial decision-making and its effects on the legitimacy of international judicial entities in various fields of law, such as international criminal law, international environmental law, and international human rights law. She was also involved in a research project on international water law focusing on the nature of water rights and water governance.

<sup>43</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force: 3 September 1953), art. 2(3), 8-11, 14; Monika Ambrus “The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation” in Gruszczynski & Werner, *supra* note 5 at 237.

<sup>44</sup> This distinction is related to the determinacy/vagueness of the norm, see Shany, “Toward a General Margin of Appreciation Doctrine in International Law?” (2005) 16:5 EJIL 907.

<sup>45</sup> Uladzislau Belavusau is a PhD and Assistant Professor at the Faculty of Law of VU University Amsterdam. He has been a visiting scholar at the University of California at Berkeley, the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht and the York University. His research interests focus on EU law, human rights, comparative constitutional law, and critical legal studies.

<sup>46</sup> Due to the non-adoption of a single coherent standard of review, Uladzislau Belavusau, “Experts in Hate Speech Case” in Gruszczynski & Werner, *supra* note 5 at 258; The author also discusses the pertinence of these streams in regard of the “elusive nature of truth”, See Alvin Goldman, “Epistemic Paternalism: Communication Control in Law and Society” (1991) 88:3 *Journal of Philosophy* 113 at 115.

<sup>47</sup> Veronika Bilkova is a PhD and Assistant Professor at the Faculty of Law of the Charles University in Prague. Since 2010 she is a Member of the European Commission for Democracy Through Law (Venice Commission of the Council of Europe). Her academic interests lie in issues of international humanitarian law and the protection of human rights in the context of armed conflict.

<sup>48</sup> The standard of equivalent protection states that the court will not review in details measures taken by a system that ensures a level of protection equivalent to that of the ECHR, Veronika Bilkova, “The Standard of Equivalent Protection as a Standard of Review” in Gruszczynski & Werner, *supra* note 5 at 272.

member states to strike a balance between the role of the Court as final guardian of human rights and the states' discretion. The last section (Chapter 16: Subsidiarity in the Americas)<sup>49</sup> explores the concept of subsidiarity and the usage of standards of review in the particular context of the Inter-American Human Rights System.

The final part of the book "Other International Courts" is dedicated to various international courts. In both chapter 17 "Standard of Review and the Margin of Appreciation before the International Court of Justice"<sup>50</sup> and chapter 18 "Standard of Review in the International Tribunal for the Law of the Sea",<sup>51</sup> the authors look at the debate over deference respectively through the lens of the ICJ and ITLOS case law. The issue is more complex, since none of these laws contain exception clauses or provide their courts with any clear power of judicial review.<sup>52</sup> Chiara Ragni discusses the ICJ limited competence to pronounce on the matter despite the lack of sharp standard of deference emerging from jurisprudence.<sup>53</sup> Meanwhile, Rosemary Rayfuse explores the notions of reasonableness and standard of review in the circumscribed context of prompt release proceedings.<sup>54</sup> Likewise, Chapter 19 "Deference in the ICC Practice Concerning Admissibility Challenges Lodged by States"<sup>55</sup> and Chapter 20 "Beyond Hierarchy: Standard of Review and the Complementary of the International Criminal Court"<sup>56</sup> investigate application of standards of review in ICC case law.<sup>57</sup>

<sup>49</sup> Bernard Duhaime is Professor at the Faculty of Law and Political Science of the University of Québec (Montréal). He teaches mainly international human rights law and specializes on the Inter-American System of Protection of Human Rights. He has been involved with the defense and promotion of human rights since 1996, having worked or collaborated with several international and national human rights agencies. He has produced several publications in his area of expertise, contributing for instance to *Human Rights Regimes in the Americas* (United Nations University Press, 2010).

<sup>50</sup> Chiara Ragni is a PhD and Assistant Professor of International Law at the University of Milan. Her interests lie in issues of international economic law and international criminal law and jurisdictions. She authored a book about the International criminal tribunal. Since 2013 she is a lecturer of the Jean Monnet Module on European Family Law at the University of Milan.

<sup>51</sup> Rosemary Rayfuse is a Professor at the Faculty of Law of UNSW Australia (The University of New South Wales) and Con-Joint Professor at the Faculty of law of Lund University. She researches and teaches in the area of Public International Law in general and more specifically in the Law of the Sea and International Environmental Law. In particular, her research focuses on oceans governance, high seas fisheries, protection of the marine environment in areas beyond national jurisdiction, and the normative effects of climate change on international law.

<sup>52</sup> For the ICJ, See *Certain expenses of the United Nations* (Article 17(2) of the *Charter*) Advisory Opinion, [1962] ICJ Rep 151.

<sup>53</sup> Chiara Ragni, "Standard of review and the margin of appreciation before the International Court of Justice" in Lukasz Gruszczynski & Wouter Werner, eds, *Deference in international courts and tribunals* (Oxford: Oxford University Press, 2014) 319 at 335.

<sup>54</sup> Article 73, 220, and 226 of the Law of the Sea Convention, Rosemary Rayfuse, "International Tribunal for the Law of the Sea" in Gruszczynski & Werner, *supra* note 5 at 353.

<sup>55</sup> Karolina Wierczynska is a PhD and Assistant Professor at the Institute of Law Studies of the Polish Academy of Science (Warsaw). She is the Managing editor of the Polish Yearbook of International Law and an Editor of International law blog. Her main academic interests are public international law and international criminal law.

<sup>56</sup> Diane Bernard is a PhD and Senior Researcher at the Belgian National Fund for Research and professeur invitée at the Saint-Louis University, Brussels. Her doctoral research focused on issues of international criminal law. She teaches as an assistant in criminal and constitutional law.

<sup>57</sup> In the context of article 17 of the Rome Statute of the International Criminal Courts, which regulate admissibility of cases, Karolina Wierczynska, "Deference in ICC Practice Concerning Admissibility



Both are, in particular, concerned about the complementarity principle that determines the admissibility of a case before the ICC, and attempt to draw normative conclusions as to the adequate standard of review, in light of the statute of Rome's objective to end impunity.

The book is not a manual as to the use of standards of review,<sup>58</sup> but rather a comprehensive essay whose purpose is to capture the essence of such standards at the international scale and to propose legal and ideological foundations as well as to highlight common criteria and practice. It is destined to academics, practitioners and adjudicators. However, the authors' recurrent insistence on the procedural democracy doctrine appears like a call to adjudicators to change their perception on the "deference" issue in order to achieve more uniformity and foreseeability in international law.<sup>59</sup> Overall, the book is accessible to any reader with a minimum background in the fields at stake, and most articles contain descriptive sections that enlighten the more complex parts of their thesis.

The very wide comparative analysis that the work provides constitutes its undeniable strength. The same concepts are carefully reviewed in each part for each different legal context and the recurrent nature of their conclusions about deference provides the editors' claims with a strong academic foundation. Moreover, even though the topic of each chapter is roughly the same, most authors manage to exemplify the specificities of the case law with far greater precision than that of a mere statement about different degrees of deference being induced by the particularities of each case at stake. The book covers a great variety of distinctive themes and issues, such as review of scientific assessment, due process and procedural democracy, good faith as a defence, and political balance between international law courts and states.

Given the great variety of approaches developed, the book fulfilled its objective to provide the reader with a comprehensive survey of all issues at stake. Still, the book's eclectic nature and the separate development of the articles constitute, to some extent, its weakness. Although the opinions developed are always pertinent, they may sound redundant as the same themes and reasoning are treated more than once. Also, despite collecting each article under separate chapters for each topic at stake, there is no connection between them, and as a result no particular coherence for each theme. Finally, the book does not provide a clear definition of the concepts it uses and the latter are left to each individual author: the meaning of central notions such as "margin of appreciation", "proportionality" and "deference" is consequently ambiguous.

This criticism does not, however, concuss the overall great contribution to provide the whole concept of deference with sound justificatory frameworks as well as coherent criteria as to their usage. To that extent, the work successfully engages with the constitutionalism debate.

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Challenges Lodged by States" in Gruszczynski & Werner, *supra* note 5 at 359; Diane Bernard, "Beyond Hierarchy" in Gruszczynski & Werner, *supra* note 5 at 377.

<sup>58</sup> See Martha S Davis, "A Basic Guide to Standards of Judicial Review" (1988) 33 *SDL Rev* 369.

<sup>59</sup> In particular, see Pirker, *supra* note 16 at 72.