In Chapter 1 it was indicated that this book would advance two broad propositions:

1. In relation to human rights related trade measures that are not subject to the rules contained in the Marrakesh Agreement Establishing the World Trade Organization (“the WTO Agreement”) or similar rules in other treaties, international law is generally permissive; and

2. In relation to human rights related trade measures that are subject to the rules contained in the WTO Agreement or similar rules in other treaties, there is less scope to lawfully impose human rights related trade measures. The scope to lawfully impose such measures, however, remains significant. In addition, the jurisprudence of panels and the Appellate Body of the World Trade Organization (“WTO”) provides a basis for concluding that concerns expressed about negative consequences of allowing such measures (such as the risk of unsubstantiated claims of human rights violations being used as a cover for essentially protectionist measures) are often overstated.

In relation to the first proposition, the analysis in Chapters 5 and 6 demonstrated that principles of non-intervention in the internal affairs of another State have no significant application to human rights related trade measures. Rules of international law governing permissible exercises of jurisdiction are also not generally violated by such trade measures. Rather, the relevant international legal principles are those that protect the autonomy and independence of States to control the movement of persons and goods into and out of their territory. The starting point under general international law is therefore essentially permissive – States enjoy a wide discretion to restrict trade for a range of purposes including concerns over the violation of human rights in other States.

States have, however, through the exercise of their autonomy and independence, regulated their discretion to restrict international trade through treaties such as the WTO Agreement. Obligations to ensure respect for human rights under human rights treaties and general international have also restricted this discretion.
Chapter 8

In relation to the second proposition, the analysis in Chapters 6 and 7 demonstrated that the WTO Agreement’s regulation of State discretion to restrict international trade does not preclude the imposition of all human rights related trade measures. The continuing entitlement to take human rights related trade measures under the WTO Agreement is based, in part, on the peremptory character of human rights norms analysed in Chapter 4, and on the relevance of those peremptory norms to the interpretation of the WTO Agreement. This interpretation is also required by other, albeit related, factors.

As a part of the international legal system, it is inconceivable (and in all likelihood legally impossible) for the rules and procedures enshrined in, and operating under, the WTO Agreement to be applied in isolation from international obligations such as those enshrined in Article 41 of the Articles of State Responsibility (regarding serious breaches peremptory norms), due diligence obligations to prevent the violation of particular peremptory norms and obligations not to aid or assist another State that is violating its obligations under the Charter of United Nations. Obligations owed by non-State entities directly under international law, such as those that exist in respect of crimes against humanity, must also remain relevant. The relationship between international responsibility for crimes against humanity and responsibility for systematic and widespread violations international human rights obligations is of particular importance in this context.

The complexity of rules and principles of international law and the interactions between them seems to increase by the day. This creates many tensions not least those of an institutional character when institutions responsible for administering different areas of international law find that their responsibilities overlap. Such tensions have led to anxiety regarding fragmentation of international law. But as the International Law Commission’s work on fragmentation has emphasised, such complexity and tension has not undermined the coherence and systemic integrity of the international legal system. There are, if you like, both centrifugal and centripetal forces at work. The virtue of coherence, which conceptions of the rule of law seek to express and secure, is amongst the latter.

In Chapter 4 there was consideration of the rules and principles of international law that have been developed to maintain the coherence of the international legal system. The Study Group on fragmentation of international law emphasised, in particular, the “principle of harmonization”, which was described as “a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of obligations”.¹ The Study Group also emphasised the importance, in cases of apparent or actual conflict between different “special regimes” of international law, of independent