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Introduction

I. Judicial Development of International Law and the Growth of International Courts

Two phenomena—one longstanding but largely hidden, and one contemporary and highly visible—have inspired the topic of this book. First, there is the development of international law through judicial decisions, which runs against the classic view of international law being made by states alone.[1] Second, there is the dramatic increase in the number of international courts, tribunals, and quasi-judicial bodies, with fifty such bodies now in existence, most of which have been established in recent decades.[2] When viewed together, these two phenomena raise the question whether the coherent development of international law is threatened by this multiplicity of international courts.[3]

Jonathan Charney examined this question in his impressive study for the *Recueil des Cours* in 1998.[4] This book alters the scope of Charney's study by considering different substantive areas of law and focusing on four major international

[1] Allison Marston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 Vand LR 101, 104 (hereinafter Danner, 'When Courts Make Law'); Anne-Marie Slaughter, 'International Law and International Relations' (2000) 285 Recueil des Cours 9, 33–34; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 YLJ 2599, 2607–2608. See also the ICJ's observation that courts 'state the existing law and [do] not legislate': *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 237 (hereinafter *Nuclear Weapons* Advisory Opinion).

[2] Roger P Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (2000) 94 ASIL Proc 160, 160 ('Depending on one's count, more than fifty international courts and tribunals are now in existence, with more than thirty of these established in the past twenty years'). Karen J Alter, writing in 2003, estimated that 63 per cent of international judicial activity had occurred in the last twelve years: 'Do International Courts Enhance Compliance with International Law?' (2003) 25 Rev Asian & Pac Stud 51, 52.

[3] See, for example, the symposia: Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systematic Problem?' (1999) 31 NYUJILP 679; various authors (2002) 13 RQDI 115; various authors, 'Diversity or Cacophony?: New Sources of Norms in International Law' (2004) 25 Mich JIL. Although the ICTY, ICTR, and arbitral bodies are technically called 'tribunals', this terminology has no special significance in this context, and, for the sake of brevity, I will refer to them as 'courts'.

[4] Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 Recueil des Cours 101, 117 (hereinafter Charney, *Recueil*).

courts.[5] It takes into account the significant developments that have occurred since 1998, including the increased judicial activity of the International Court of Justice (ICJ),[6] the establishment of the International Criminal Court (ICC), and the extensive jurisprudence generated by the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). This book also goes beyond the question of whether courts are developing international law in a coherent manner by seeking to identify the factors that influence the degree of integration or fragmentation among them, and reflecting upon what this may illuminate about how international courts develop international law.

The first phenomenon—the important role of judges in developing international law—was observed many years ago.[7] Yet it is a role that is regularly refuted by the courts themselves, and the view that judges merely declare the law is affirmed in the constitutive instruments of international courts. Article 38 of the Statute of the ICJ, often taken as the definitive statement of the sources of international law, treats 'judicial decisions' as a 'subsidiary means for the determination of rules of law', apparently placing them at a lower level than the 'primary sources' of treaties, international custom, and general principles of law. This limited view of judicial decisions is reinforced in Article 59 of the Statute, which provides that the ICJ's decisions are binding only between the parties and in respect of the specific dispute. Article 21 Statute of the ICC allows the Court to 'apply principles and rules of law as *interpreted* in its previous decisions',[8] but stresses that the Statute, Elements of Crimes and Rules of Procedure and Evidence must be applied in the 'first place'. The ICTY was instructed 'to apply rules of international humanitarian law which are *beyond any doubt* part of customary law' and the ICTR was expected to follow a similar approach.[9]

[5] While Charney also studied the practice of the ICJ, he made only passing reference to the ICTY (Charney, *Recueil* (n 4) 185 (treaties), 261 (state responsibility)), barely addressed the ICTR (367 (on extradition)), and at the time he was writing the Statute of the ICC was still being negotiated.

[6] From August 2007 to July 2008, the ICJ had its most productive year until that date, delivering four substantive judgments and one order on a request for the indication of provisional measures: Judge Rosalyn Higgins, President of the ICJ, 'Speech to the General Assembly of the United Nations' (30 October 2008). The Court receives a steady stream of new cases from all around the world and as of October 2012, had eleven cases on its docket. Since 1946, the Court has handed down over one hundred Judgments and forty Orders on provisional measures. Approximately one-third of those Judgments and half of those Orders were rendered in the past decade.

[7] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons 1958). See also Georges Abi-Saab, 'De la jurisprudence: quelques réflexions sur son rôle dans le développement du droit international' in M Perez Gonzalez and others (eds), *Hacia un Nuevo Orden Internacional y Europeo. Estudios en homenaje al Profesor Don Manuel Díez de Velasco Vallejo* 19 (Tecnos 1993).

[8] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute) Art 21 (emphasis added).

[9] UNSC 'Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 (emphasis added). The ICTR Statute criminalizes acts committed in an internal armed conflict even though Additional Protocol II has not yet been recognized as customary international law. This was because Rwanda had ratified the two Additional Protocols in 1984 so the Security Council was reflecting substantive rules already in force in the ter-

This circumscribed role for judicial decisions belies the reality. Higgins, speaking of the Security Council, observed that while the Council 'is likely to state that it is basing itself on the law as it conceives it to be, the line between applying law and legislating it becomes thin; certainly a question of developing law becomes involved'.[10] The same may be said of the line between interpreting and developing law in the judicial context. This book will seek to show that international courts have made significant contributions to the development of the law in specific areas and even though international courts settle only a small percentage of disputes, their Judgments have a powerful influence on how the international community understands international law.[11]

The second phenomenon—the growth in the number of international courts—is not hard to prove, but the implications of this growth are still being unravelled. Since the 1950s, and with increasing intensity since the 1990s, the rapidly growing complexity of international relations and the expansion and deepening of international law have been accompanied by the creation of specialized judicial bodies on international and regional levels.[12] This growth is a sign of the vitality of international law and of the welcome preparedness of states to submit their disputes to judicial settlement.[13] At the same time, a multitude of different bodies without rules of procedure governing the relationships between them nor an ultimate court of appeal to provide definitive interpretations can potentially lead to such a diversity of opinion that the coherence of international law may be at risk.[14]

These concerns have triggered a lively debate about the 'proliferation' of international courts, including a multi-year study by the International Law Commission (ILC).[15]

ritory: UNSC 'Report of the Secretary-General on International Tribunal (Rwanda)' (15 February 1995) UN Doc S/1995/134.

[10] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 5. In the same book, Higgins observed that the capacity of the ICJ to develop the law had been hampered by the absence of a compulsory jurisdiction (at 3). This has provided less of a hindrance in recent years, with over 300 treaties providing for recourse to the ICJ and a steady flow of cases, including cases concerning the major political and legal controversies of the day, coming to the Court for resolution.

[11] Myres McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1952) 82 Recueil des Cours 137, 173; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 50 (hereinafter Higgins, *Problems and Process*) (explaining that international law is a dynamic decision-making process with a variety of participants including individuals, states, international organizations, multinational corporations, and private non-governmental groups).

[12] See Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 NYUJILP 919, 923 (hereinafter Abi-Saab, 'Fragmentation or Unification'). For a historical overview, see Charney, *Recueil* (n 4) 117–131.

[13] Campbell McLachlan, *Lis Pendens in International Litigation* (Brill 2009) 299.

[14] Charney, *Recueil* (n 4) 117.

[15] See, for example, the symposia cited in (n 3). See also ILC, 'Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 (hereinafter ILC Study Group Report).

This book seeks to contribute to, and hopefully to broaden, the debate by addressing three questions:

1. Are international courts engaged in the same dialectic and do they render decisions that are largely coherent?
2. What factors influence the degree of integration or fragmentation among international courts?
3. What do the results of the first two questions tell us about the development of international law by international courts?

II. Integration and Fragmentation in the International Legal System

The approach of this book is grounded on two assumptions. First, there is an international legal *system*, albeit one that is diffuse and decentralized. Second, within this system, coherence or judicial integration of the law is a desirable policy goal while incoherence or judicial fragmentation is generally undesirable, especially over the long-term. Both of these assumptions require further explanation.

In the same way that international law does not resemble national law, the international legal system does not replicate the institutions seen on the national level. International law is best understood as a process for realizing shared values, and there are still the tools for authoritative decision-making that render it *law*.[16] That process of decision-making takes place in a flexible, horizontal, decentralized environment, involving numerous actors, but that is still nonetheless a *system*. It may lack the classical executive and legislative institutions and a judiciary with compulsory jurisdiction,[17] but it still creates, interprets and applies law through its own processes and institutions. This arrangement has been characterized as 'erratic blocks and elements as well as different partial systems', 'a universe of inter-connected islands', and 'an international legal community'.[18] It is true that there is no orderly arrangement according to a vertical hierarchy governed by avenues of appeal, rules of precedent, and methods of enforcement. Nonetheless, numerous practical links and common bonds exist among the international courts and they are interacting with each other—and with national courts—on

[16] Higgins, *Problems and Process* (n 11) 8–10; W Michael Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 ASIL Proc 101, 113.

[17] Charney, *Recueil* (n 4) 115.

[18] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Mich JIL 849; Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Mich JIL 903; Pemmaraju Sreenivasa Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2004) 25 Mich JIL 929. See also on the notion of 'international community', Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994-VI) 250 Recueil des cours 217; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 EJIL 387.

an ever more regular basis. A definition borrowed from complex systems theory might be more appropriate for describing what we are seeing: a self-organizing system 'shaped by dynamics of cooperation and competition over time'.[19]

Within this international legal system, judicial integration or coherence is a desirable policy goal because it protects and promotes that 'core predictability that is essential if law is to perform its functions in society'.[20] This is desirable from the perspective of the users of the international legal system (states, individuals, organizations) who wish to make informed choices about courses of action as well as to have their disputes dealt with according to the rule of law. It is also desirable from the perspective of those who work within the international legal system (judges, legal officers, support staff) who seek to enhance the effectiveness of their particular judicial institution and the overall legitimacy of the third party dispute settlement process. As Judge Greenwood observed in a Separate Opinion in the *Diallo* case:

> International law … is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.[21]

Judicial integration does not equate to total uniformity, which is an unrealistic end-state given the complexity and variety of both international courts and the legal issues that come before them. Rather, judicial integration requires that similar factual scenarios and similar legal issues are treated in a consistent manner, and that any disparity in treatment is explained and justified. The desired outcome is harmony and compatibility, which allow for the co-existence of minor variations and for tailoring of solutions for particular cases. An integrated approach is essential to the stability of the fragile international legal system and the justice that it is expected to dispense. Judicial integration across international courts facilitates a comprehensive approach to dispute settlement that better reflects the interconnectedness of issues in the world at large, as compared to the alternative approach of splitting disputes into mini-conflicts arising under specific regimes.[22]

Judicial fragmentation may be understood in two ways. First, the term 'fragmentation' is often associated with conflicts between substantive bodies of law, such as trade law and environmental law.[23] This type of fragmentation

[19] Jenny Martinez, 'Towards an International Judicial System' (2003) 56 Stanford LR 429, 443, referring to Sunny Y Auyang, *Foundations of Complex System Theories: in Economics, Evolutionary Biology, and Statistical Physics* (CUP 1998).

[20] Higgins, *Problems and Process* (n 11) 8.

[21] *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* (Compensation phase) [2012] ICJ Rep, Separate Opinion of Judge Greenwood, para 8. On the belief that normative coherence is a goal to be attained, see Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 232.

[22] Yuval Shany, 'One Law to Rule Them All: Should International Courts be viewed as Guardians of Procedural Order and Legal Uniformity?' Conference on Unity or Fragmentation of International Law (Oslo, 14–15 May 2009) (hereinafter Shany, 'One Law to Rule Them All').

[23] ILC Study Group Report (n 15) 19.

was the focus of the ILC's study. Second, fragmentation can refer to 'decisional fragmentation',[24] which is when two courts seised of the same issue (legal or factual) render contradictory decisions, or a single court contradicts a finding in an earlier case, without explaining the reasons for the divergence. This second type of fragmentation or incoherence is the concern of this book. Such fragmentation goes beyond mere variations in reasoning. It is not the same as observing a degree of experimentation among international courts, which can be a positive factor. The exploring and testing of multiple solutions in various international courts may allow for legal innovation and the eventual adoption of the most appropriate solution.[25] The international legal system is indeed designed to permit a certain degree of flexibility and variation.[26]

Rather, judicial fragmentation is a significant divergence in the reasoning on the same/similar legal issue or in relation to the same/similar factual scenario. Such a phenomenon is damaging to the international legal system. As in national legal systems, the like treatment of like cases through the consistent application of the law enhances the legitimacy of the system and of the body applying and developing the law.[27] While there may be periods of transition during which courts explore different solutions to a contemporary legal problem, such solutions should be reconciled or the most appropriate solution should prevail over the long term. If there has been ample opportunity for courts to address the legal problem and a sufficient body of case law on the topic, the existence of divergent interpretations of the same law or different conclusions in similar factual situations creates uncertainty and unpredictability. It has the potential to put legal subjects in an unequal position vis-à-vis each other.[28] If it is perceived that the case law of a particular court happens to be more favourable to certain interests than that of another, 'forum shopping' may result. This could encourage courts to tailor their decisions to attract clients, to the detriment of an objective approach to justice.[29]

Divergent decisions raise the question whether the law and its institutions are serving interests other than justice.[30] Since the international legal system has no final court of appeal nor any sovereign governing or enforcement mechanism, its

[24] McLachlan, *Lis Pendens in International Litigation* (n 13) 408.
[25] Charney, *Recueil* (n 4) 347.
[26] Charney, *Recueil* (n 4) 356, citing the ability of states parties to a treaty to adopt rules applicable in their relations *inter se* that vary from general international law (Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, Arts 53 and 64); the ability of states parties to modify treaty rights and duties among sub-groups, within limits (Vienna Convention on the Law of Treaties, Art 41); and the ICJ's acknowledgment of the development of regional custom: *Asylum* case (*Colombia v Peru*) (Judgment) [1950] ICJ Rep 266.
[27] Charney, *Recueil* (n 4) 360.
[28] ILC Study Group Report (n 15).
[29] Judge Gilbert Guillaume, President of the ICJ, 'The proliferation of international judicial bodies: The outlook for the international legal order', Speech to the Sixth Committee of the General Assembly of the United Nations (27 October 2000).
[30] Charney, *Recueil* (n 4) 360.

legitimacy rests to a large extent on the international community's confidence in the way international law is applied and developed. Coherent and compatible pronouncements on the law by international courts are vital to this confidence. As Charney observes, if states and other subjects of international law were to consider that the law applied and developed by international courts was unfair because like cases were not treated alike, they may not respect those decisions.[31] Such disrespect would undermine the viability of the international legal system and of international law itself.

The prospect of fragmentation is not hypothetical. In 1998, Charney found that the different international courts of the late-twentieth century shared a coherent understanding of the law, but he also recognized that we would be entering deeper into a period of multiplicity of courts and that risks of fragmentation did exist.[32] In the early years of the twenty-first century, the 'intermingling' of legal regimes is in fact going on all around us.[33]

International courts are addressing the same or similar factual scenarios.[34] In 2007, the ICJ delivered its Judgment in a case in which Bosnia and Herzegovina claimed that Serbia and Montenegro had committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, within its territory during the 1990s.[35] Since 1993, the ICTY has concluded proceedings against 125 persons accused of serious violations of international humanitarian law committed in the territory of the former Yugoslavia. These include the trial of Slobodan Milošević, the former president of the Federal Republic of Yugoslavia, for crimes including genocide in Bosnia and Herzegovina. That trial was cut short by his death in custody, but there is an ongoing case against Radovan Karadžić', President of Republika Srpska from 1992 to 1995, for genocide in Bosnia and Herzegovina.[36] Since its establishment in 1994, the ICTR has completed cases against 52 persons for serious violations of humanitarian law, including genocide committed in Rwanda. Inter-state cases concerning

[31] ibid 361.

[32] ibid 347, 373.

[33] Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791, 792 (hereinafter Higgins, 'A Babel of Judicial Voices').

[34] This book focuses on human rights violations and the use of force, but there are also significant overlaps between courts in the law of the sea. The ICJ and the International Tribunal for the Law of the Sea (ITLOS) have both engaged in deciding related maritime disputes between Malaysia and Singapore. The MOX plant case between Ireland and the United Kingdom was submitted by the parties to arbitration under the OSPAR Convention and arbitration under the UN Convention on the Law of the Sea (UNCLOS) (preceded by provisional measures proceedings before ITLOS). A third set of proceedings on the lawfulness of the Irish decision to bring its claims before the UNCLOS mechanisms rather than the European Community bodies, came before the European Court of Justice: Yuval Shany, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 LJIL 815.

[35] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (hereinafter *Bosnia Genocide* Judgment).

[36] *Prosecutor v Karadžić* IT-95-5/18 (pending).

the Rwandan genocide have also been brought to the ICJ, but have not fulfilled the Court's jurisdictional requirements.[37] In 2005, the ICJ delivered its judgment in the case brought by the Democratic Republic of the Congo against Uganda for, inter alia, massive human rights violations.[38] The ICC, whose Statute entered into force in 2002, has been investigating human rights abuses allegedly committed in the same two countries. Georgia submitted a case against Russia to the ICJ concerning the events of August 2008 (later held to be without jurisdiction),[39] while the ICC Office of the Prosecutor is conducting a preliminary examination in Georgia covering the same period.[40]

Beyond common factual patterns, international courts are also interpreting, applying, and developing the same legal principles. For example, the crime of genocide is one of a number of acts that can result in both state responsibility and individual responsibility. The ICJ has jurisdiction over state responsibility for genocide pursuant to Article IX of the Genocide Convention. The provisions of the Genocide Convention have also been incorporated almost verbatim into the statutes of the international criminal courts mandated to prosecute individuals.[41] As a result, the Genocide Convention is being interpreted and applied—through the lenses of state responsibility and individual criminal responsibility—by the ICJ, ICC, ICTY, and ICTR. Other acts that share this dual quality include crimes against humanity, grave breaches of the Geneva Conventions, terrorism, torture, and aggression.[42] The legal contours of aggression have been briefly analysed by the ICJ in inter-state cases in the context of both the Charter and the customary law prohibition on the use of force, and the notion of aggression as a crime committed by individuals has recently been included, but not activated, in the ICC Statute.[43]

[37] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Preliminary Objections: Judgment) [2006] ICJ Rep 6 (hereinafter *Congo v Rwanda*). On 18 April 2007, Rwanda applied to the ICJ in a dispute with France concerning international arrest warrants issued by the latter's judicial authorities against three Rwandan officials on 20 November 2006 and a request sent to the UN Secretary-General that President Paul Kagame of Rwanda should stand trial at the ICTR. Since the Application was brought under Art 38(5) of the Rules of Court, the ICJ cannot take action in the proceedings unless and until France consents to the Court's jurisdiction in the case, which it has not yet done: ICJ Press Release (18 April 2007).

[38] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits: Judgment) [2005] ICJ Rep 168 (hereinafter *Congo v Uganda*).

[39] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections: Judgment) [2011] ICJ Rep 1.

[40] UNGA 'Sixth Report of the International Criminal Court to the United Nations for 2009/2010' (19 August 2010) UN Doc A/65/313, paras 75–76.

[41] Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/827/1993, Statute contained in UN Doc S/25704 Annex (1993), attached to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) 32 ILM 1192 (ICTY Statute) Art 5; Statute of the International Criminal Tribunal for Rwanda UNSC Res 955 (8 November 1994) UN Doc S/INF/50 Annex, reproduced in (1994) 33 ILM 1598 (ICTR Statute) Art 2; ICC Statute (n 8) Art 6.

[42] Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 618 (hereinafter Nollkaemper, 'Concurrence').

[43] Kampala Review Conference 'Resolution on the Crime of Aggression, Annex III' (11 June 2010) ICC Doc RC/Res.6.

Where does this book's analysis of integration and fragmentation in the international legal system fit into the existing literature? Despite the numerous books and articles discussing various developments in international courts, the 'international judicial process and organization has not been considered as a field of study in itself' until rather recently; the field is still in its infancy.[44] Subject to a few exceptions,[45] much of the existing scholarship has examined the growth in the number of international courts in the abstract, or has had a narrow focus on the case law of only one court or only one legal topic.[46] Moreover, the relationship between the ICJ and the recently created international criminal courts has not been explored in a sustained manner.[47] By studying the impact of four major international courts on three substantive areas of international law, this book seeks to provide a more comprehensive explanation of the international judicial process, and to assess whether fragmentation is a genuine problem.

Some scholars have looked at a single court or one aspect of international law, without taking into account the broader implications of having multiple courts interpreting and developing the same substantive law. Others have taken a more general approach, such as the ILC Study Group on the topic 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' that operated from 2002 to 2006. The ILC Study Group covered all types of treaties and every type of international court. Nonetheless, the focus of the Study Group was not on the relations between international courts (although they did touch on aspects of this),[48] but rather on the relationship between different rules and rule-systems. Moreover, the ILC Study Group decided not to examine the institutional questions of 'practical coordination, institutional hierarchy, and the need for various actors—especially international courts and tribunals—to pay attention to each other's jurisprudence'.[49] In contrast, I believe these institutional issues are fundamental to answering the central question of this book and will pay significant attention to them.

[44] NYU Project on International Courts and Tribunals, <http://www.pict-pcti.org/matrix/matrix-home.html> ('Scholars and practitioners of one forum are rarely familiar with the law and procedure of another'). See also Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (n 2) 160 ('While there has been a significant focus on a few international tribunals, there have been insufficient efforts to compare and contrast the various courts and tribunals'); Martinez (n 19) 432–433.

[45] Charney, *Recueil* (n 4); Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003); Brown (n 21).

[46] See, for example, *International law, the International Court of Justice and Nuclear Weapons* (Laurence Boisson de Chazournes and Philippe Sands eds, CUP 1999); William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2004) (hereinafter Schabas, *Genocide in International Law*).

[47] For an excellent overview of some of the criminal justice issues that arise before the ICJ, see Kenneth J Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 ICLQ 895.

[48] See, for example, the analysis of the apparent conflict between the ICTY *Tadic* Judgment and the ICJ's *Nicaragua* Judgment, discussed in Chapter 4(V).

[49] ILC, 'Report of the International Law Commission on the Work of its 55th session' (5 May–6 June and 7 July–8 August 2003) UN Doc A/58/10, Annex, para 416.

III. Methodology

In order to answer the three key questions set out above in Section I, a detailed study of specific areas of law that engage the attention of a variety of international courts is required. I have selected three areas of international law: the law on genocide, the law on immunities, and the law on the use of force.[50] Not only has each of these areas been addressed by several international courts, but there have also been significant overlaps in terms of similar factual situations coming before more than one court[51] and the same legal question being examined by different courts.[52] The selected legal areas encompass the responsibility of both states and individuals under international law. These three areas of law have arisen in numerous cases in the past two decades, which has generated a body of contemporary judicial practice. This helps ensure that the conclusions this book draws reflect the current situation and provide a solid foundation for future projections. In addition, the three legal areas chosen have some distinctive features that should enrich the analysis of courts' behaviour. Whereas the law on genocide is largely governed by a comprehensive treaty, the law on immunities draws heavily on customary international law and a patchwork of topic-specific conventions. The law on the use of force has its roots in the UN Charter, but it has been developed on the basis of customary international law. These areas of law also differ in terms of the depth of judicial practice that exists, the amount of controversy the legal issues elicit, and the impact of societal changes on the applicability of the law. The selected legal areas allow for a comparative analysis to be undertaken, but they also reflect the diversity that exists in international law.

Similar considerations have driven the selection of the international courts to be studied. This book focuses on four main courts. First, there is the ICJ, the principal judicial organ of the UN established more than six decades ago to adjudicate disputes submitted to it by states and issue advisory opinions on legal questions referred by authorized UN entities. Second, there is the ICC, a relatively new permanent entity created by treaty outside of the UN system to prosecute individuals for the most serious crimes of international concern. Third, we have the ICTY, an ad hoc institution created by the Security Council to hold individuals accountable for crimes committed in the territory of the former Yugoslavia since 1991. The fourth court is the ICTR, another ad hoc institution created by the Security Council, and which is dedicated to prosecuting persons

[50] These differ from the seven areas in Charney, *Recueil* (n 4): treaty law, other sources of international law, state responsibility, compensation standards, exhaustion of domestic remedies, the international law on the nationality of persons, and international maritime boundary law.

[51] See Section II above.

[52] For example, the extent to which a state official can benefit from immunity *ratione personae* when faced with allegations of serious human rights violations has been considered by the ICJ, ICTY, ICTR, and ICC.

responsible for genocide and other serious crimes committed in Rwanda during 1994.

Each of these courts has interpreted, applied, and developed aspects of the law on genocide, the law on immunities, and the law on the use of force. At the same time, these courts capture some of the variety of the international legal system. Two are permanent (ICJ and ICC) and two are ad hoc (ICTY and ICTR), one is concerned with state responsibility (ICJ) while the others are focused on the responsibility of the individual (ICC, ICTY, ICTR). Three (ICJ, ICTY, ICTR) are embedded, to different degrees, within the UN system while the ICC exists separately, albeit with a close relationship to the Security Council. The courts also differ in terms of their procedure, including as regards the influence of their statutory instruments on proceedings, their fact-finding ability, and the judicial drafting and reasoning process. Finally, since these courts are among the most important in the fields of law chosen, the level of coherence in their decisions should provide a useful impression of the overall amount of integration or fragmentation in an area of law.

The scope of this book requires a focus on these four main international courts, but these courts are of course not the only judicial players in the law on genocide, immunities, and use of force. Important judicial decisions have also been issued by national courts, hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL), regional human rights courts, and arbitral tribunals. I refer to these bodies where their decisions have had an important impact on the interpretation and development of a legal issue that has also come before the ICJ, ICC, ICTY, or ICTR. For example, in the law on immunities the judicial practice of national courts is of growing importance because, by definition, it is before domestic courts that issues of immunity from local jurisdiction are raised.[53]

Given that the judicial development of the law is at the heart of this book, the analysis relies first and foremost on judicial decisions and, to this end, I undertake a close examination of the relevant case law of the international courts. While it is necessary to proceed by way of case law analysis, it should be acknowledged that the cases that have arisen so far may represent 'only a fraction of the possible fact patterns which may arise in the future'[54] and the responses of courts to these cases may not be the most accurate guide to future decisions. To address this limitation, I look not only at the substance of the decisions, but also the methods of interpretation employed, types of evidence relied upon, and responses to the decisions of other courts. Constitutive documents such as statutes and rules of procedure are also examined for their impact on the procedural and substantive framework of the courts. These sources are illuminated by commentary found

[53] Higgins, *Problems and Process* (n 11) 81. See also Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 EJIL 815.

[54] McLachlan, *Lis Pendens in International Litigation* (n 13) 301.

in scholarly writing (including speeches and writings by judges of these courts) and relevant studies by the International Law Commission and *Institut de droit international*. I also draw on the insights I gained during my employment at the ICJ and ICC from 2004 to 2009 and my participation in the 2010 ICC Review Conference, while always respecting my obligations regarding confidentiality.

In order effectively to analyse the jurisprudence and impact of four international courts, the central part of this book adopts a comparative law approach. Instead of simply describing the decisions of each court and leaving comparison until the end, I adopt Reitz's approach of breaking the subject into natural units and making *every* part comparative and analytical.[55] This comparative analysis is both detailed and systemic. I closely examine specific cases in order to capture the variations in wording and technique that are integral to understanding the diverse approaches to developing international law. However, I will also ask whether, viewed as a whole, the differences between the international courts are slight or significant, benign or disturbing. As Charney notes: 'Any qualified lawyer can distinguish cases … it would not be hard to establish that the specific applications of the law by each of the tribunals considered differ to some extent.'[56] To mitigate the risks of adopting an approach that is either over-broad or too absorbed in the minutiae, I use the following analytical framework:

	Integration	**Fragmentation**
Genuine	GENUINE INTEGRATION Judicial decisions are coherent and compatible (though not necessarily uniform). This result may be due to judicial dialogue and an effort to be consistent or a default setting due to coalescing around external standards, such as treaties.	GENUINE FRAGMENTATION Judicial decisions give rise to conflicting developments in the law that are either unconscious due to lack of awareness of other courts' decisions or a conscious departure from existing case law.
Apparent	APPARENT INTEGRATION Judges attempt to integrate their decisions with those of other courts, but due to differing facts or the misapplication of legal concepts, cracks appear beneath the surface.	APPARENT FRAGMENTATION Judicial decisions appear to be conflicting, but the variations are due to contextual factors and the underlying legal reasoning can be resolved and rendered compatible through clarification and interpretation.

[55] John C Reitz, 'How To Do Comparative Law' (1998) 46 AJCL 617, 634.
[56] Charney, *Recueil* (n 4) 137.

IV. Structure

The analytical core of the book is formed by Chapters 2, 3, and 4, which examine the judicial practice regarding the law on genocide, the law on immunities, and the law on the use of force. These three chapters address the first two questions of this book: (1) Are courts engaged in the same dialectic and do they render decisions that are largely coherent? (2) What factors influence the degree of integration or fragmentation among courts? Chapter 5 develops and deepens the answer to the second question by adopting a thematic approach that cuts across the legal areas analysed in the preceding chapters. It seeks to explain why international courts tend towards the integration or fragmentation of international law, and considers the applicability of these explanatory factors beyond the substantive areas of genocide, immunities, and use of force. Chapter 6 extends this analysis by considering the implications for the development of international law by international courts. It addresses theoretical insights and evaluates practical models for encouraging judicial integration in the international legal system.