

Often international criminal law is discussed as one monolithic topic that is linear in nature. It is common to portray international criminal law as starting with the Nuremberg Tribunal, continuing through the ad hoc and other specialist tribunals and reaching its pinnacle with the International Criminal Court (ICC). However, international criminal law is not so linear and the court system cannot be so easily traced. This picture of international criminal law neglects its development within other legal traditions, such as its use by domestic jurisdictions or its application within transnational law. This portrayal also fails to account for the ‘borrowing’ of legal concepts from one international jurisdiction to another, such as when the ICC relies on a decision from the European Court of Human Rights.

At the international court and tribunal level, international criminal law has developed through a number of different agreements, which have established different courts and tribunals for different purposes. The ad hoc tribunals, for example, were purposefully designed to deal with specific issues that occurred during a specific time period, while the ICC was created to prosecute future issues of international criminal law. Creating an international tribunal involves the blending and re-blending of different, and often disparate, traditions of criminal law and procedure, and international law from a variety of sources including international humanitarian law and human rights law. The result is that international criminal law is a legal system based on, but different from, that of national jurisdictions and other international law traditions. Furthermore, because of the different underlying purposes of each international court or tribunal, it is insufficient to merely copy the statute of a previous court when introducing a new one. Even the Statute of the International Criminal Tribunal for Rwanda, which is largely based on the statute of the earlier International Criminal Tribunal for the former Yugoslavia, does not exactly replicate its predecessor.

The international criminal law statute arising out of a particular negotiating process does not end the formation of new law within that legal system. Once a court becomes active, the judges must interpret and apply the statute that forms the basis of the court, and at times, this application and interpretation further develops the law of a particular international court. The court’s interpretation could be relatively minor, such as the clarification of a definition of a particular word used within the statute or rules or the reconciliation of seemingly contradictory articles in the same statute. Alternatively, courts are also free to develop far more sweeping applications of the statute, such as the creation ‘no case to answer’ motions by ICC Trial Chamber V(A) during the *Ruto and Sang* case. Because the statutes and rules are the result of negotiations, which cannot,

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1 See Art. 1 ICTYSt, Art. 1 ICTRSt, Preamble, Art. 11 ICCSt.
2 For further discussion, see A. Cassese, *International Criminal Law* (2nd edn., Oxford University Press 2008), at 6-7
3 Decision No. 5 on the Conduct of Trial Proceedings, Principles and Procedure on ‘No Case to Answer’ Motions, *Ruto et al.* (ICC-01/09-01/11), Trial Chamber V(A), 3 June 2014.
and do not, anticipate every situation that could arise before these courts, the courts themselves must interpret their foundational documents, make decisions, and at times, fill gaps that may exist within their own jurisdiction in order to keep the tribunal functioning and fair. This however, causes differences to exist between international criminal law traditions. The result is a dynamic area of law, which is in constant development, and advances differently between domestic, regional, transnational and international jurisdictions and even, at times, between different chambers of the same tribunal. This however, raises the following question. Is the existence of differences within and between different international criminal law jurisdictions a problem that needs solving?

This question is thoroughly discussed in two collections. *The Diversification and Fragmentation of International Criminal Law* and *Pluralism in International Criminal Law*. These volumes are excellent contributions to the discussion and thought surrounding the development of variations and contradictions within international criminal law. Each book contains a collection of articles from an esteemed and diverse group of scholars who problematize the issues of fragmentation and pluralism by drawing on examples from different courts, jurisdictions and cases.

In *The Diversification and Fragmentation of International Criminal Law*, Carsten Stahn and Larissa van den Herik argue that fragmentation is an inherent part of international criminal law in part because it reconciles ‘the “universalist” aspirations of public international law, the “humanist” dimensions of human rights law and the legality and fairness-oriented foundations of criminal law’. The blending of these three fields of law is complicated by the addition of jurisdiction, which can cause fragmentation and diversification depending on which jurisdictions are examined and compared. Therefore, there is fragmentation not only in the development of international criminal law, but also between jurisdictions or when jurisdictions interact. Fragmentation, however, need not be a ‘problem’, instead it provides the opportunity to view international criminal law developments from multiple angles in order to determine where greater unity might be necessary and where diversification could, in fact, be beneficial.

After an introduction by Flavia Lattanzi and an introductory chapter by Carsten Stahn and Larissa van den Herik, which set the stage, the book is divided into three parts. Part One, ‘Institutional Aspects of Fragmentation’, discusses fragmentation between and amongst the various international tribunals and the regional human rights courts. Chapters discuss the interaction or lack of interaction between different international institutions such as the International Court of Justice, the ICC and the ad hoc tribunals. Issues addressed include: how fragmentation may be dealt with or utilized on a regional level; and what role alternative justice mechanisms, truth commissions and amnesties

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7 H. Duffy, ‘Human Rights Cases in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation?’, in van den Herik and Stahn (eds), *ibid.*, 163; C.C. Naddeo, ‘Praising the Region:
might play in the fragmentation or harmonization of international criminal law.\(^8\) Part Two looks at how fragmentation has affected substantive law largely by examining either particular crimes or a particular jurisdiction.\(^9\) An examination of fragmentation in procedural law is developed in Part Three. Rather than focusing on discrete procedural issues, this part takes a broader approach to procedure including a discussion of the structure, the issue of prosecutorial discretion, victims’ rights, and the appeals process.\(^10\) This book, by examining how fragmentation affects institutions, procedural law, and substantive law, provides a comprehensive discussion.

**Pluralism in International Criminal Law** takes a different perspective on the issues involved with blending and developing international criminal law.\(^11\) The overarching argument, thoughtfully presented by Elies van Sliedregt and Sergey Vasiliev in the first chapter, and followed throughout the collection, is that the traditional discussion of fragmentation, by solely focusing on the differences between tribunals, does not consider the issues involving the incorporation of domestic laws into an international criminal court nor does it consider the issues of having multiple philosophies or approaches between chambers of the same court. Conversely, pluralism allows for a dialogue about the variety of legal sources between and within tribunals, and thus accommodates the conversations not captured due to fragmentation.\(^12\) The

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differences, and the incorporation of a variety of rules from different legal traditions, can be beneficial to international criminal law as they allow for positive diversity and the incorporation of different legal philosophies, cultures, and values. Thus, this book calls for a paradigm shift from fragmentation to pluralism within the conversation about varying legal rules in international criminal law.

The book’s organization highlights pluralism’s ability to help fully discuss the issues surrounding the incorporation of varied legal rules, laws, and philosophies into international criminal law. Part One discusses pluralism generally: introducing the paradigm shift; discussing how comparative study can benefit international criminal law; and highlighting the various types of pluralism. Part Two addresses horizontal pluralism. This sort of pluralism exists between the various international criminal law tribunals. Much of this dialogue analyses the ways that criminality is established and used in international criminal law. Logically, Part Three focuses on vertical pluralism, which results from the incorporation of domestic laws and rules into international criminal law. This Part further attempts to address concerns that a person being tried in domestic court may be subject to a different standard of justice than those tried in the international court. Finally, Part Four considers the controversies and challenges surrounding harmonization and uniformity. The focus is on the global concept of international criminal law, suggesting that if these are truly international crimes a common international framework and terms should be adopted, while allowing for diversity and pluralism in other areas of international criminal law.

Each of these books contains a complete picture of the issues surrounding fragmentation and pluralism. Both books are convincing and thorough in the treatment of their topics. Both argue that concerns over the ‘problem’ of fragmentation are exaggerated, but both approach the debate from a different angle. Pluralism in

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13 Ibid.
International Criminal Law contends that the differences can serve as a beneficial framework to the development and use of international criminal law. The Diversification and Fragmentation of International Criminal Law maintains that the debate on fragmentation should allow for a holistic approach to problems within international criminal law, where solutions are drawn from criminal justice, human rights, and international law. When read together, however, these books truly provide the full picture of how fragmentation may affect the various levels of international criminal law and raise interesting questions about whether the differences in the law should be unified. Further, both books assert that the differences within international criminal law could be beneficial to the development of the field. Ultimately, while the diversity within and between international criminal law systems may cause some difficulties in practice, these difficulties are rare, and ultimately, these inconsistencies provide plenty of food for thought with regard to what international criminal law is and where it is headed.

The variety present within international criminal law results from the blending of different legal sources, domestic and international laws, and the diplomacy required to create international agreements. While the differences between courts, jurisdictions and even chambers of the same court could be problematic, it is unlikely that complete unity could exist. Instead of calling for unification as a solution, these books contribute to the overarching debate by arguing that rather than seeing the differences as ‘problems’ they can be part of a rich tapestry of the ever-developing field of international criminal law.

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