Larissa van den Herik and Carsten Stahn (eds), ***The Diversification and Fragmentation of International Criminal Law*** (Martinus Nijhoff, 2012) 710 pp. €208.00 (Hardback) ISBN 978-90-04-23691-2

Elies van Sliedregt and Sergey Vasiliev (eds), ***Pluralism in International Criminal Law*** (Oxford University Press, 2014) 480 pp. £70 (Hardback) ISBN 978-0-19-870319-8

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.[1] 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.[2] 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.[3] Because the statutes and rules are the result of negotiations, which cannot,

[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'.[4] 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.[5] 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.[6] Issues addressed include: how fragmentation may be dealt with or utilized on a regional level;[7] and what role alternative justice mechanisms, truth commissions and amnesties

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[4] C. Stahn and L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in L. van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012) 21, at 23-24.

[5] *Ibid*., at 24.

[6] R. van Alebeek, 'The Judicial Dialogue between the ICJ and International Criminal Courts on the Question of Immunity', in van den Herik and Stahn (eds), *ibid*., 93; P. Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide', in van den Herik and Stahn (eds), *ibid*.,_117; Y. Kirakosyan 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared', in van den Herik and Stahn (eds), *ibid*., 149.

[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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What Might a Complementary Criminal Justice System Learn from the Inter-American Court of Human Rights?' in van den Herik and Stahn (eds), *ibid*., 187; R. Pereira 'The Regionalization of Criminal Law — The Example of European Criminal Law', in van den Herik and Stahn (eds), *ibid*., 217.

[8] S. Kemp, 'Alternative Justice Mechanisms, Compliance and Fragmentation of International Law', in van den Herik and Stahn (eds), *ibid*., 247; E. Kirs, 'Limits of Information-sharing between the International Criminal Court and Truth Commissions', in van den Herik and Stahn (eds), *ibid*., 287; D. Jacobs 'Puzzling over Amnesties: Defragmenting the Debate for International Criminal Tribunals', in van den Herik and Stahn (eds), *ibid*., 305.

[9] L. Daqun, 'Chinese Humanitarian Law and International Humanitarian Law', in van den Herik and Stahn (eds), *ibid*., 349; D. Donat Cattin 'Approximation or Harmonisation as a result of Implementation of the Rome Statute', van den Herik and Stahn (eds), *ibid*., 361; D. Ruiz Verduzco, 'Fragmentation of the Rome Statute through an Incoherent Jurisdictional Regime for the Crime of Aggression: A Silent Operation', in van den Herik and Stahn (eds), *ibid*., 389; C. Fernández-Pacheco Estrada, 'Domestic Prosecution of Genocide: Fragmentation or Natural Diversity?', in van den Herik and Stahn (eds), *ibid*., 429; B. Pisani, 'The Rome Statute and Domestic Proceedings for Ordinary Crimes: The (In)Admissiblity of Cases before the International Criminal Court', in van den Herik and Stahn (eds), *ibid.,* 461; C. Meloni, 'Fragmentation of the Notion of Co-Perpetration in International Criminal Law?' in van den Herik and Stahn (eds), *ibid.,* 481; M.E. Badar, 'The *Mens Rea* Enigma in the Jurisprudence of the International Criminal Court', in van den Herik and Stahn (eds), *ibid.,* 503; J.L. Bischoff, 'Reception of Common Law in Substantive International Criminal Law', in van den Herik and Stahn (eds), *ibid.,* 535; E. Kok, 'The Principle of Complicity under International Law — Its Application to States and Individuals in Cases involving Genocide, Crimes against Humanity and War Crimes', L. van den Herik and Stahn (eds), *ibid.,* 557.

[10] M. Klamberg, 'Unification or Fragmentation? Structural Tendencies in International Criminal Procedure', in van den Herik and Stahn (eds), *ibid.,* 591; H. Takemura, 'Prosecutorial Discretion in International Criminal Justice Between Fragmentation and Unification', in van den Herik and Stahn (eds), *ibid.,* 633; M. Burnham, 'Fragmentation in International Criminal Law and the Rights of Victims', in van den Herik and Stahn (eds), *ibid.,* 657; X. Tracol, 'The Influences of French Law on Appeal Proceedings before the International Criminal Court and the Tribunals', in van den Herik and Stahn (eds), *ibid.,* 681.

[11] E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014); previously reviewed in this Journal at T. Hamilton, 'Book Reviews', 13 *Journal of International Criminal Justice* (2015) 891.

[12] E. van Sliedregt and S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in *ibid*., 3, at 6-7.

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;[13] discussing how comparative study can benefit international criminal law;[14] and highlighting the various types of pluralism.[15] 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.[16] Logically, Part Three focuses on vertical pluralism, which results from the incorporation of domestic laws and rules into international criminal law.[17] 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.[18] 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*.

[14] C. Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law', in van Sliedregt and Vasiliev (eds), *ibid*., 39.

[15] M.A. Drumbl, 'The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths and Plural Responses', in van Sliedregt and Vasiliev (eds), *ibid.,* 68.

[16] J.D. Ohlin, 'Organizational Criminality', in van Sliedregt and Vasiliev (eds), *ibid.,* 107; M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Participation', in van Sliedregt and Vasiliev (eds), *ibid.,* 128; J.D. Jackson and Y.M. Brunger, 'Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals', in van Sliedregt and Vasiliev (eds), *ibid.,* 159; B. Hold, 'Consistency and Pluralism of International Sentencing: An Empirical Assessment of the ICTY and ICTR Practice', in van Sliedregt and Vasiliev (eds), *ibid.,* 187.

[17] R.A. Kok, 'National Adjudication of International Crimes: A Dutch Approach', in van Sliedregt and Vasiliev (eds), *ibid.,* 211; A. Zahar, 'Pluralism and the Rights of the Accused in International Criminal Proceedings', in van Sliedregt and Vasiliev (eds), *ibid.,* 225; E. Fry, 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity', in van Sliedregt and Vasiliev (eds), *ibid.,* 251; W. Jordash QC and M.R. Crowe, 'Evidentiary Challenges for the Defence: Domestic and International Prosecutions of International Crimes', in van Sliedregt and Vasiliev (eds), *ibid.,* 373.

[18] G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in van Sliedregt and Vasiliev (eds), *ibid.,* 301; J.G. Stewart, 'Ten Reasons for Adopting a Universal Concept of Participation in Atrocity', in van Sliedregt and Vasiliev (eds), *ibid.,* 320; J. Gadirov, 'Collective Intentions and Individual Criminal Responsibility in International Criminal Law', in van Sliedregt and Vasiliev (eds), *ibid.,* 342; J.P. Murphy and L. Baddour, 'Evidence and Selection of Judges in International Criminal Tribunals: The Need for a Harmonized Approach', in van Sliedregt and Vasiliev (eds), *ibid.,* 368.

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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