Fragmentation and Coherence of International Law: A Study into the International Legal Order and Role of Hermeneutics

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بسم الله الرحمن الرحيم

DECLARATION

I, Munazza Akram, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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DEDICATION

To my husband, Dr. Nisar Ahmed

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LIST OF ABBREVIATIONS

CITES	Convention on International Trade in Endangered Species
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICL	International Criminal Law
ICJ	International court of justice
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
MEA	multilateral environmental agreements
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
UNTAET	United Nations Transitional Administration in East Timor
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization
WCED	World Commission on Environment and Development

ABSTRACT

The fragmentation of international law can be seen both as a challenge and an opportunity. The existing literature suggests that viewing fragmentation as a threat implies that international law was once unified or in a unitary form. The unity of international law is assumed and hardly explored in the context of the fragmentation debate. Furthermore, the creation and growth of specialized regimes of international law triggered the concern that they may eventually become self-contained regimes distinct from the body of international law. The present research highlights the forms of unity, fragmentation, and kinds of norm conflict, thus establishing that these multi-faceted concepts must be analyzed carefully.

This research study encompasses the fragmentation debate in general and focuses on the role of international adjudicative bodies in achieving coherence in international law through hermeneutical dynamics as suggested by Ronald Dworkin. The researcher aims to employ qualitative, doctrinal, and theoretical analysis for the topic under consideration. The theoretical nature of this research necessitates an interpretive analysis grounded in doctrinal research.

The research concludes that no specialized regimes are self-contained and fragmentation is not necessarily a negative phenomenon; however, it has implications for the development of the international legal system. The judges of international adjudicative bodies can minimize the effects of fragmentation. There is a strong probability that hermeneutical dynamics, as suggested by Ronald Dworkin, can contribute to maintaining the coherence of international law.

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Traditionally, public international law dealt with the relations between states only.[1] The primary subject of international law was the state alone, and if individuals were involved, they were considered objects of public international law. Nevertheless, with the various developments at the international level, this view is obsolete now. International organizations are both important actors and subjects of international law.[2] Individuals are now subject to international law, following the advent of International Human Rights Law (hereinafter referred to as IHRL) and International Criminal Law (hereinafter referred to as ICL). International law is continually evolving, and various concepts are developing through specialized institutions and fields of international law. The areas now covered by public international law range from war and human rights to trade and the seas and space.[3]

However, the development and emergence of these specialized areas and international regimes have both positive and negative influences on international law. Among the negative impacts is the alleged claim that the international legal system is currently fragmenting.[4]

The evolution of specialized areas, such as ICL and IHRL, may have led to the fragmentation of international law; however, this fragmentation requires analysis by exploring the concept of international legal order and understanding how law-appliers can achieve convergence within this legal order through interpretation.

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[1] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York: Routledge, 1997), 1

[2] Ibid., 91.

[3] Malcolm N. Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017), 2.

[4] Ibid.,48.

The debate over fragmentation has arisen for several reasons. Some are technical, while others are cultural or political in nature. Two technical reasons have contributed to the perception that international law is fragmented. The first, normative reason, stems from the tendency towards greater autonomy of special regimes; the second, organic and institutional, is based on the growth of methods and procedures of control that ensure the application of law.[5]

1.2 STATEMENT OF THE PROBLEM

This fragmentation reflects the hegemonic struggles of different regimes and institutions to occupy the space of the whole.[6] There is a probability that the increase in specialized regimes will result in conflicts and multiple interpretations adopted by various international institutions and courts.[7] For instance, the allegedly different interpretations of the circumstances under which a State may be held responsible for the acts of non-state actors with which it is associated, as employed by the International Court of Justice (ICJ)[8] and the Appeals Chamber of the ad hoc International Criminal Tribunal for the Former

[5] Pierre-Marie Dupuy, "A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law," *European Journal of Legal Studies* 1, no. 1 (2007): 26.

[6] Martti Koskenniemi, "What Is International Law For?" in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2014), 47.

[7] Shaw, *International Law* ,48.

[8] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, Merits, ICJ Rep. 1986, 14, [109]–[116].

Yugoslavia (ICTY).[9] In the 2007 Genocide case[10], Bosnia and Herzegovina, invoking the Tadić case, questioned the validity of the Nicaragua test before the ICJ. The ICJ considered the Appeals Chamber's reasoning, but it could not subscribe to the Chamber's view. A few days after the ICJ delivered its judgment in the Genocide case, the International Criminal Court (ICC) appeared to have endorsed the Tadić approach in the Lubanga case[11]without explicitly referring to Nicaragua or the Genocide cases.

All aspects of fragmentation, namely substantive, institutional, and procedural, need to be addressed. Along with this, there is a dire need to revisit the basics of international law's legal character. How do international lawyers and academics view the concept of law on the global plane? From this concept arises the second point of consideration: how lawyers and scholars of international law perceive the notion of unity. The issue of fragmentation has been discussed from various perspectives. It is essential to note the conclusion of the International Law Commission in 2006: first, the special regimes are not self-contained, and their emergence does not significantly affect the predictability and reliability of international law. Second, to combat fragmentation and divergence, the conflict between norms, regimes, and procedures requires special attention.[12]

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[9] *Prosecutor v. Tadić* (Judgment of Appeals Chamber) IT-94-1-A, July 15, 1999.

[10] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, Merits, February 26, 2007, ICJ Rep. 2007, 43.

[11] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, January 29, 2007, [210]–[211].

[12] Shaw, *International Law* ,49.

This proposed research study aims to explore the problem of fragmentation in the context of two main regimes that have brought individuals within the picture of international law, namely, ICL and IHRL. Both fields have transformed the legal personality of an individual at the global level.[13] IHRL is directed toward protecting individuals' rights and freedoms, whereas ICL prohibits individual acts or omissions and provides punishments for violations.[14] This research examines the interpretations of their respective judicial bodies to avoid conflicting norms. This exploration will explain the interpretation of laws by various international judicial bodies of the same regime and others.

1.3 RESEARCH CONTEXT/ THEORETICAL FRAMEWORK

The fragmentation of international law can be approached from alternative perspectives, as explored in the literature review. The scholars hold different views due to the fundamental difference in their conception of international law and its unity. Those who once considered international law to be fragmented now consider it unified. On the other hand, a group of scholars considers the evolution and diversity of international law positively. The fragmentation issue is not real for them. For these scholars, the evolution of international law and specialized regimes helps to get a more refined version of international law.

[13] Robert Cryer, "ICL," in *International Human Rights Law*, eds. Daniel Moechli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 521.

[14] Thomas Margueritte, "ICL and Human Rights," in *Routledge Handbook of International Criminal Law*, eds. William Schabas and Nadia Bernaz (New York: Routledge, 2013), 435.

In the modern Western legal context, it is a fact that law exists in a systematic form. The disputed fact is what transforms a law into a legal system. The approaches and conceptions towards law vary almost infinitely. These approaches examine the form of a legal order and the relationship between its constituent parts. The institutionalist theories focus on the relation of authority between norms and social institutions. There can be a hermeneutic interaction among norms and law-appliers (post-normative theories), an authority connection between norms and social institutions (institutionalist theories), or a validity relationship between multiple types of rules (normativist theories). In the fragmentation/unity debate, H.L.A. Hart is the initial point for reviewing the formal unity of international law. For instance, Pierre-Marie Dupuy contended that public international law is formally unified, as it comprises both primary and secondary norms.[15] However, while claiming the formal unity of international law, one can criticize the scholar for overlooking other theories of the unity of international law.[16] By overlooking the relevant theories, they risk overlooking many issues related to the interaction of normative, institutional, and hermeneutical dynamics.[17]

In addition, it is necessary to reevaluate the formal unity implied by citing Hart's theory. Despite the significance of the determinacy of secondary rules and their acceptance by the system officials in Hart's legal system theory, these two crucial subjects have

[15] Pierre-Marie Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the 'International Court of Justice,'"*International Law and Politics* 31, no. 79 (1999): 793.

[16] Mario Prost, *The Concept of Unity in Public International Law* (Portland: Hart Publishing, 2012), 84.

[17] Ibid., 82.

received little to no attention in the fragmentation literature.[18] Formal unity does not follow a single cause. When law is viewed as a complex system of norms, it always comprises several socially constructed rules and principles, the interpretation and application of which rely, at least in part, on the views and interpretations of interpretive groups. Because of the intricacy of law, it is impossible to reduce the identity of legal orders to just one of these three dimensions. Law is not institutions, regulations, or adjudication procedures. It is all of them at once. The research aims to explore the concept of formal unity theoretically. After analyzing the concept of unity, the research revisits the debate on fragmentation and explores a plausible direction for the evolution of international law. This study investigates the role of judges and hermeneutics in mitigating and resolving the fragmentation of international law. Ronald Dworkin's hermeneutical approach treats law as a moral and interpretive practice rather than a set of isolated rules. The research seeks to draw inspiration from the concept of 'Law as integrity,'[19] which advocates for legal decisions to be made in a manner that promotes coherence and justice throughout the legal system. Applied to international law, this approach offers a way to address fragmentation by encouraging interpreters to find unity and moral consistency across specialized regimes like ICL, IHRL, and International Humanitarian Law. The study aims to discuss the effect of this fragmentation on the integrity of international law as a system of law, highlighting the role of legal hermeneutics in providing a plausible solution that helps retain the unity of international law to some extent or at least identifies points of convergence. The debate

[18] Ibid., 89.

[19] Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986), 167–168.

on fragmentation encompasses the institutional, substantive, and procedural aspects; however, the role of judges and courts in the fragmentation of international law remains largely unexplored.

Precisely, the research begins with an analysis of the fragmentation debate by investigating the concept of unity theoretically and exploring the grounds of various views. The study analyzes ICL and IHRL jurisprudence to investigate the regimes' interactions and the conflict of norms. The research aims to propose the positive and constructive role of law-appliers (judges) as architects of the unified international legal system. The law-appliers can help produce coherence and convergence of norms in international law in cases of conflict through legal hermeneutics.

1.4 LITERATURE REVIEW

The available literature on fragmentation addresses questions and research points, ranging from the definition of fragmentation to its sources and effects. Fragmentation, according to Anne Peters, is simultaneously a process and a result.[20] On the one hand, scholars view fragmentation as a process that breaks international law into distinct, unrelated legal sections. On the other hand, scholars consider fragmentation a challenge for international law due to the overlapping jurisdictions of various international organizations and international regimes.[21] The overlap between these jurisdictions leads to

[20] Anne Peters, "Fragmentation and Constitutionalism," in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford, Florian Hoffmann, and Martin Clark (Oxford: Oxford University Press, 2016), 1011–1012.

[21] Tamar Megiddo, "Beyond Fragmentation: On International Law Integrationist's Forces," *Yale Journal of International Law* 44, no. 1 (2019): 119.

hegemonic struggles among different branches of international law to protect their norms as universal.[22]

The problem of fragmentation does not end with its definition. Scholars hold conflicting views on the causes, effects, and potential responses to fragmentation. Firstly, it is argued that the decentralized international system leads to fragmentation.[23] The absence of a supreme court, international legislative body, and global executive is considered a factor behind the fragmentation of international law.[24] Can this decentralization be changed? Few writers have argued that unifying or hierarchizing international law is not possible.[25] Another opinion suggests that fragmentation is a result of globalization. Lastly, the causes of fragmentation originate from the domestic legal sphere, where different governmental departments govern various issues.[26]

The International Law Commission (ILC) report, published in 2006, contended that fragmentation is a natural result of an increase in the specialized areas or regimes of

[22] Martti Koskenniemi, "What is International Law for?" in *International Law*, Edited by Malcom D Evans (Oxford: Oxford University Press, 2014), 47.

[23] Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, *International Journal of Constitutional Law* 15, no. 3 (2017): 674.

[24] Barbara Stark, "International Law from the Bottom Up: Fragmentation and Transformation," *University of Pennsylvania Journal of International Law* 34, no. 4 (2013): 701.

[25] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25, no. 4 (2004): 999–1046.

[26] Anne Peters, The refinement of international law: From fragmentation to regime interaction and politicization, 674.

international law. However, the report focused on the substantive fragmentation issues and held that the fragmentation does not cause practical problems.[27]

The ILC report has been criticized for addressing only the conflict of norms issue while discussing the fragmentation of international law. It is argued that this fragmentation has affected international law through substantive, procedural, and institutional means. The fragmentation caused by the increase in regionalism has consequences for the United Nations' universalist approach. However, this can be addressed by creating a hierarchy of norms and institutions in international law.[28]

The literature on the fragmentation debate identifies two generations. The first generation focuses on two issues: the autonomy of specialized fields and the multiplicity of international adjudicative bodies. Regarding the independence of the self-contained regimes, the ILC report concluded that no regime is self-contained. The ILC report adopted a balanced approach to the diversity of international tribunals, stating that the overlap of normative rules has both positive and negative effects. The second generation of the fragmentation debate focuses on the principles, methods, and means through which the diverse areas of international law can be brought together in a coherent order. [29]

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[27] Study Group of the International Law Commission, *Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (April 13, 2006).

[28] Musa Njabulo Shongwe, *The Fragmentation of International Law Through Regionalism: Towards a New World Order* (PhD diss., University of Johannesburg, 2015).

[29] Mario Prost, *The Concept of Unity in Public International Law*, 9-10.

The analysis of Koskenniemi's writings suggests that fragmentation is not severe, and there is no cause for concern. The underlying issues, which are considered to be caused by the fragmentation of international law, were always there to be addressed by international law lawyers in any case.[30] Fischer-Lescano and Teubner consider this fragmentation to be an unavoidable consequence of the evolution of international law. It is argued that it is not possible to achieve a unified legal system at the global level. However, it can be tried to have some normative compatibility between various regimes of international law.[31]

It is argued that the debate on fragmentation must include an analysis of the concept of unity. While debating fragmentation in international law, one must also theorize the concept of unity.[32] Dupuy argues that the unity of international law is twofold: formal unity and substantive unity. The formal unity consists of what H.L.A. Hart terms 'secondary rules,' and the substantive unity is achieved through substantive rules.[33] Unity may be considered in terms of movement, cross-flows, overlaps, and arrangements between a plurality of principles and unity dynamics.[34] Sir Christopher Greenwood examines the diversity in the creation and application of international law, arguing that the decentralized international law system renders this diversity unavoidable and compromises the unity of

[30] Tomer Broude, "Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law," *Temple International & Comparative Law Journal* 27, no. 2 (2013): 291.

[31] Fischer-Lescano and Teubner, "Regime-Collisions" , 1004-1045.

[32] Mario Prost, *The Concept of Unity in Public International Law*, 210.

[33] Dupuy, The Danger of Fragmentation or Unification of The International Legal System and The "International court of justice", 793.

[34] Mario Prost, *The Concept of Unity in Public International Law*, 210.

international law.[35] If we focus on the unity of international law, perhaps we have to address another question: Why do we need unity in international law? The answer to this question can be technical, legal, and political as well. Technically, the various terms of international law must have the same meaning when applied in the specialized regime. For instance, if the terms' state responsibility, ' 'legal title,' 'territorial sovereignty,' 'nationality,' and 'diplomatic protection' acquire different meanings according to their geographical application, this will affect international law's efficiency.[36] Why has fragmentation caused concern among scholars? It is perhaps because fragmentation puts international law in a position where its stability, reliability, and consistency are all at stake.

There is also research on the relationship between the United Nations (UN) and the regional institutions. The status of a regional agency under Chapter VIII of the UN charter is not clearly defined. However, various regional arrangements exhibit diverse forms of cooperation. It is argued that there is no inherent superiority in universalism or regionalism. The complex task is to apply the best principles in a situation while considering internal coherence.[37]

The effects of fragmentation are both harmful and positive. The conflict between the norms creates uncertainty and incredibility, which, in turn, undermines the authority of international law. The increase in specialized areas against the general field of international

[35] Sir Christopher Greenwood, "Unity and Diversity in International Law," in *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, eds. Mads Andenas and Eirik Bjorge (Cambridge: Cambridge University Press, 2015), 54–55.

[36] Dupuy, "A Doctrinal Debate," 32.

[37] Christoph Schreuer, "Regionalism v. Universalism," *European Journal of International Law* 6, no. 1 (1995): 477–499.

law produces friction and fragmentation. The availability of various specialized fields results in a conflict of norms and a difference in procedure as well. This conflict between norm and process can result in providing a state with various forums for addressing a single problem. States resort to the forum that serves their interests best.[38] For instance, an Arbitral Tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS), another Tribunal established under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and the European Court of Justice (ECJ) under the European Community and Euratom Treaties, have all addressed the issue of potential environmental effects resulting from the operation of the MOX Plant nuclear facility at Sellafield, United Kingdom. The identical facts are covered by three different rule complexes: EC law, the OSPAR Convention, and UNCLOS.

Which ought to be the deciding factor? Is the law of the sea, potential North Sea pollution, or inter-EC relations the primary source of the issue? The fact that such questions are already being asked indicates how tough it will be to respond. Yes, all of these issues are at stake in this case. Indeed, the case is about all these matters.[39]

Conversely, specialization can address various needs and concerns. The states believe that their issues are better addressed in a specialized regime, and this confidence leads to compliance with the specialized rules.[40] Fragmentation can also contribute to the

[38] Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law* 25, no. 4 (2004): 856–857.

[39] Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *The Modern Law Review* 70, no. 1 (2007): 7.

[40] Ibid., 858.

unity of international law. European lawyers and Friedmann share this functional thinking as they argued for unity through diversity.[41]

Fragmentation is a problem in the evolution of international law for which no established rules exist to address it.[42] The ILC report suggests the principle of systematic integration as a possible solution.[43] Article 31 of the "Vienna Convention on Law of Treaties"[44] , which is a part of customary international law according to the "International Court of Justice", is often cited as a means to achieve systematic integration. However, Rachovista has criticized the principle of systematic integration and advised caution while

[41] Anne-Charlotte Martineau, "The Rhetoric of Fragmentation: Fear and Faith in International Law," *Leiden Journal of International Law* 22, no. 1 (2009): 28.

[42] Joel P. Trachtman, "Fragmentation, Coherence and Synergy in International Law," *Transnational Legal Theory* 4, no. 2 (2011): 507.

[43] Study Group of the International Law Commission, *Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (April 13, 2006), 25–28.

[44] It provides as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted

by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

applying it.[45] Scholars also discuss constitutionalism,[46] legal pluralism,[47] normative hierarchy, and regime interaction[48] as possible ways of addressing fragmentation.

1.5 RESEARCH GAP

The literature reviewed above reveals a gap in the existing research, as there is no comprehensive study on the notion of unity in international law from the perspectives of international tribunals and courts. The research aims to examine the potential contribution of judges and international tribunals and courts to the fragmentation of international law. The idea is to explore whether international courts and judges, despite the absence of a judicial system hierarchy, are still bound by a chain of interpretation. Furthermore, whether judges and courts at the international level adhere to common standards and principles remains unexplored and insufficiently addressed. Hence, the study aims to provide a constructive analysis in this regard and develop a narrative on how this role can help address the challenge of fragmentation in international law.

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[45] Adamantia Rachovitsa, "The Principle of Systemic Integration in Human Rights Law," *International and Comparative Law Quarterly* 66 (2017): 560

[46] Anne Peters, "Fragmentation and Constitutionalization," in *The Oxford Handbook of the History of International Law*, eds. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 1011.

[47] Miguel Poiares Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism," in *Ruling the World? Constitutionalism, International Law, and Global Governance*, eds. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 356.

[48] Margaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

1.6 ISSUES FRAMED/RESEARCH QUESTION

1. How did the phenomena of fragmentation evolve and affect the development of international law?

2. How do we view the notion of 'unity' of law at the international level with reference to this fragmentation debate?

3. How are the specialized areas of International law becoming a reason for fragmentation? How do specialized regimes, such as ICL, IHRL, and IHL, view international law in general? Is it appropriate to call them 'self-contained' regimes?

4. What is the role of international adjudicative bodies in coping with this fragmentation issue? Can international courts and judges play their role in resolving this fragmentation through legal hermeneutics?

1.7 RESEARCH METHODOLOGY

The researcher aims to employ qualitative, doctrinal, and theoretical analysis for the topic under consideration. The normative nature of the research aims to analyze the character of international law and understand the concept of the legal system. The theoretical nature of this thesis necessitates an interpretive analysis grounded in doctrinal research. The study does not intend to provide empirical findings but rather to construct a conceptual framework for coherent legal interpretation. The theoretical exploration facilitates the understanding of the notion of the unity of international law. The fragmentation debate has been a topic of historical discussion, and various aspects of this discussion are covered. The research then examines the role of ICL and IHRL in exploring

possible ways out of the fragmentation debate. The primary and secondary sources are explored, such as conventions, UN resolutions, case laws, legislation, books, and articles. The critical and comparative analysis of primary and secondary sources helps to comprehensively encompass the fragmentation debate. It offers a fresh perspective on how the courts play a crucial role in the development of international law through the application of hermeneutical techniques.

1.8 SCOPE OF STUDY

- The adaptation of Dworkin's theory to the international legal system does not intend an empirical validation. This study involves normative extrapolation.
- The study focuses on selected fragmented areas of international law, which may limit the generalizability of conclusions to all international legal regimes.
- The normative and conceptual focus means that empirical testing or quantification of legal coherence falls beyond the scope of this study.

1.9 SIGNIFICANCE OF THE STUDY

This research study encompasses the fragmentation debate in general and focuses on the role of international adjudicative bodies in achieving coherence in international law through interpretation. The fragmentation of international law is studied through the framework of regionalism, universalism, and international organization. However, the role of international courts is not studied comprehensively. There is a strong probability that hermeneutical dynamics, as suggested by Ronald Dworkin, can contribute to maintaining the coherence of international law. Along with exploring the role of law-appliers, the

research theoretically examines the concept of law and unity in the context of international law. The research contributes to the fragmentation debate and helps understand the plausible role of judges and hermeneutics in resolving this fragmentation. Theoretically, the present study explores the fragmentation debate by conceptualizing 'notions' of the legal system and unity in international law. Legally, this study provides insights into the jurisprudence of specialized regimes and their relationship with general international law. Practically, this present research points out a direction through which international law development can be better understood. The present study aims to produce positive results in international legal studies through the fragmentation debate.

1.10 OBJECTIVES OF THE STUDY

- To study the causes and effects of fragmentation in international law.
- To explore the legal characteristics of international law by revisiting the concept of law and unity.
- To describe the relationship of specialized regimes with general international law.
- To explore the role of legal hermeneutics in the development of international law.

1.11 OUTLINE OF THESIS

The first chapter starts with a statement of the problem and provides a literature review on the topic. After addressing the preliminary points, such as research methodology,

framing of issues, study objectives, and the significance of the research, the researcher outlines the research in the second chapter by discussing the historical development of international law. The second chapter provides detailed insights into the concepts necessary for understanding the fragmentation debate. The chapter also explains the concept of unity and other relevant notions.

The third chapter presents a discussion on the concept of fragmentation, its various forms, and its impact on international law. The chapter provides an overview of the fragmentation literature, highlighting both the negative and positive implications of the concept. Furthermore, the various schools of thought on the issue of fragmentation are discussed. Then, different types of norm conflicts are explained, and the research proceeds to discuss case laws that reflect these conflicts of norms. Before the ending, the techniques to resolve the conflict of norms are mentioned and analyzed. The questions addressed in this chapter include: What is meant by the fragmentation of international law? What are the different types of fragmentation? What does the literature on the issue of fragmentation of international law indicate?

The fourth chapter proceeds to explain the specialized regimes of international law and provides a brief introduction to the development of different specialized regimes, such as the law of the sea, international trade law, international environmental law, IHL, IHRL, and ICL. Then, the chapter addresses crucial questions, such as whether specialized regimes are self-contained. Do international regimes interact with each other? Does this interaction necessarily result in a conflict of norms? And other relevant questions.

The fifth and sixth chapters examine two distinct regimes of international law to validate the findings and research presented in previous chapters. Chapter Five deals with ICL, beginning with an overview of ICL, criminal tribunals and courts, and their applicable law. The chapter then proceeds to discuss the interaction of the ICJ and international criminal tribunals, the interaction between criminal tribunals and courts, and lastly, the interaction of international criminal courts and human rights.

Chapter six deals with IHRL, and the chapter begins by providing the details of the human rights system at the universal and regional levels. The chapter then addresses multiple questions to address the issue of fragmentation. The chapter endeavors to analyze the practice of the European Court of Human Rights and the American Court of Human Rights regarding their mutual references to each other's case law. The chapter also analyzed the judicial dialogue between the regional human rights courts. The chapter examines the role of the ICJ in the evolution and development of IHRL, thereby providing insight into the interaction between specialized regimes, such as IHRL, and general international law.

The dissertation then provides the conclusion and findings of this work.

All the questions addressed in this thesis are crucial for understanding the fragmentation debate of international law and its possible solution. The thesis is divided into six chapters, each addressing a distinct question. However, it is not essential to read them in sequence. Chapter Two can be divided into two parts: History and Legal Concepts. Both parts can be read independently of each other. Chapters three and four can also be read separately, but they must be read before chapters five and six to gain a better

understanding of the fragmentation issue. Since Chapters Five and Six discuss two different regimes, they can be read separately and independently of each other.

CHAPTER TWO

BACK TO THE BASICS: AN EVOLUTION OF THE INTERNATIONAL LEGAL SYSTEM

2 INTRODUCTION

The reference to international law refers to a body of rules and principles that regulate the relationships between states, international organizations, and matters of international concern related to individuals. Traditionally, only states have been the primary subjects of international law. However, with changing circumstances, one can observe an increase in the subjects and issues falling within the domain of international law. These developments can have multiple effects and consequences, including the fragmentation of international law. It is pertinent to mention that the fragmentation and coherence of international law can be understood well if the historical evolution of International law is studied and explored across various ages, thus providing a background that informs plausible solutions.

This chapter examines the fundamentals of international law and its historical context. Then, questions relating to the legal character of international law are discussed. The chapter offers insights into various notions and concepts, including unity, unification, and universality, to aid in understanding the issue of fragmentation. The chapter concludes by examining multiple approaches regarding the formal unity of international law.

2.1 HISTORY AND DEVELOPMENT OF INTERNATIONAL LAW

In its modern form, international law has its origins in the European continent. However, various international law concepts and ideas existed in ancient times. The political alliances of ancient times can be linked to the historical evolution of international law.[49]

2.1.1 EARLY ORIGINS OF INTERNATIONAL LAW

Few ideas and concepts of international law existed in ancient periods. Old treaties concluded between political entities of that time served different purposes. For instance, in 3100 BC, a treaty was concluded to define the boundary between the rulers of Lagash and Umma.[50] Then, allegedly, a treaty was signed between the monarch of the Hittites and Rameses II of Egypt after a millennium.[51] The earliest treaties concluded in the ancient period came from the Far East. These treaties covered various subjects, including alliance, subjugation, military support, refugees, and asylum.[52]

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[49] For a detailed study of the historical development of international law, see Arthur Nussbaum, *A Concise History of Laws of Nations*, revised ed. (New York: The Macmillan Company, 1954); Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London and New York: Routledge, 1997), 9–32; Malcolm N. Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017), 10–30; and Stephen C. Neff, "A Short History of International Law," in *International Law*, 4th ed., edited by Malcolm D. Evans (Oxford: Oxford University Press, 2014), 3–24.

[50] Nussbaum, *A Concise History of Laws of Nations*, 1–2; Shaw, *International Law*, 10.

[51] Nussbaum, *A Concise History of Laws of Nations*, 2; Shaw, *International Law*, 11.

[52] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 8th ed. (London and New York: Routledge, 2019), 17.

2.1.2 TRACES OF INTERNATIONAL LAW DURING THE GREEK PERIOD

The Greeks did not have the concept of a state in the modern sense. However, using the term 'polis' to describe the political organization of the city-states was close to understanding the concept of the state in the modern sense.[53] The city-states were linked together through trade, commerce, and political associations, with specific rules governing their interactions. These rules included that war should be avoided, a declaration of war should only commence it, heralds were not to be harmed, soldiers killed in battle were entitled to burial, and a few others. The techniques of treaties, international arbitration, diplomacy, and the concept of diplomatic immunity were prevalent in the Greek city-states.[54] However, this civilization did not consider international relations, as there was no sense of a global community.[55]

2.1.3 TRACES OF INTERNATIONAL LAW DURING THE ROMAN PERIOD

During the Roman period, there were two types of laws: the *jus civile* and the *jus gentium*. The former was applied only to Roman citizens. However, with the Roman nation's expansion and development, this law failed to provide adequate solutions. *Jus gentium*, which established guidelines governing interactions between foreigners and Roman residents, was the result of this expansion. The *jus gentium* eventually overrode the

[53] Alina Kaczorowska, *Public International Law*, 4th ed. (New York: Routledge, 2010), 8. Also see J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992).

[54] Kaczorowska, *Public International law*, 8.

[55] Shaw, *International Law*, 12.

jus civile due to its progressive rules, and the Roman Empire treated it as its common law with universal application.[56] From ancient Rome, international law has also inherited the doctrine of the universal law of nature, known as 'natural law,' which was initially developed by Stoic philosophers of ancient Greece and later adopted by the Romans.[57]

2.1.4 TRACES OF INTERNATIONAL LAW DURING THE MIDDLE AGES

A significant development during the Middle Ages was the establishment of various commercial and maritime rules. A code of regulations related to foreign traders, which was universally applicable, was envisaged. Maritime customs and courts were also developed during this period. Trade, commercial, and maritime laws were of an international scope.[58]

However, despite the development of treaty-making practices,[59] the establishment of maritime customs, and the creation of mercantile courts, the continent of Europe was not yet ready to develop international law in the true sense. Europe was not divided into modern states. The distinction between municipal and international law was ambiguous. Medieval kings did not have undisputed control over their territories. Domestic law was a combination of state law, feudal laws, customs, and principles of justice.[60] St Augustine of Hippo developed the concept of 'just' and 'unjust' war, which St Thomas Aquinas later

[56] Ibid., 12-13.

[57] Kaczorowska, *Public International law*, 9.

[58] Nussbaum, *A Concise History of Laws of Nations*, 27–31; Shaw, *International Law*, 14; Kaczorowska, *Public International Law*, 9–11.

[59] Theodor Meron, "The Authority to Make Treaty in the Late Middle Ages," *The American Journal of International Law* 89, no. 1 (January 1995): 1.

[60] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 18.

refined. In the Middle Ages, the first attempts were made to restrain the methods and means of warfare and maintain peace through the institution of the Peace of God.[61] The Middle Ages saw the rise of nation-states, which made the development of the International legal system possible. When strong centralized States, such as England, Spain, France, the Netherlands, and Sweden, began to emerge, they began displacing or restricting the relevance of non-state sources of law internally, claiming unrestricted sovereignty and no longer submitting to a superior external authority. The fully-fledged operation of the international legal system in Europe has thus become possible.[62]

2.1.5 TREATY OF WESTPHALIA (1648)

The period from the 1648 Peace Treaty of Westphalia to the 1815 Congress of Vienna is considered the period of 'classical' international law. Indeed, international law in its modern form begins with the breakdown of the feudal state system and the emergence of society as a free nation-state. The 1648 Peace Treaty of Westphalia ended the Thirty Years' War in Europe. The 1648 Treaty of Westphalia, often referred to as the constitutional treaty of Europe, recognized the principles of sovereignty, territorial integrity, and the equality of States.[63] Under the Treaty of Westphalia, European rulers established a system of balance of power to prevent wars. This system lasted until the

[61] Kaczorowska, *Public International law*, 11.

[62] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 18.

[63] Treaty of Westphalia (Peace of Westphalia), 1648, in *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, https://avalon.law.yale.edu/17th_century/westphal.asp. Also see, Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55, no. 2 (Spring 2001): 251–87.

French Revolution and the Napoleonic Wars. It was then adopted by the 1815 Congress of Vienna to establish a new balance of power in Europe after the Napoleonic Wars. [64] The French Revolution (1789) recognized the freedom and self-determination of people and proposed denying the rights of monarchs. To uphold law, security, and continuity, Europe sought a more institutionalized mechanism.

The Vienna Congress of 1815 established a collective security system, thereby restoring the old European order. The Treaty of Paris established the Holy Alliance of Christian nations to counter liberal and nationalist uprisings that threatened the established order. The Paris Peace Treaty of 1856 ended the Crimean War, and as a result, Turkey gained admission to the Concert of Europe. World War II brought the Concert of Europe to an end.[65]

2.1.6 COLONIZATION AND RELATIONS BETWEEN EUROPEAN AND NON-EUROPEAN POWERS

European sea powers expanded beyond their previous limits during the fifteenth and sixteenth centuries. The discovery of sea routes to the Far East and the subsequent rediscovery of America significantly enhanced these powers. European interests in trade and commerce were expanded and secured through profit-making companies such as the East India Company in foreign non-European lands. Europe recognized and dealt with the Mughals, the Ottomans, Persia, Burma, Ethiopia, China, and the Japanese Empire.

[64] Kaczorowska, *Public International law,* 11-12.

[65] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 19.

China did not accept foreign contacts and preferred to stay isolated from foreigners. However, after the Opium War (1842), China ceded the Island of Hong Kong to Britain. There were multiple unequal treaties afterward. As a result of European intervention, China's growing anti-foreign sentiment culminated in the Boxer Rebellion.[66] The rebellion was crushed in June 1900 by European forces. Europeans forced the ruling dynasties of China and Japan to establish contacts with the outside world under the pretext of 'freedom of trade.' Europe subdued most of the non-Euro world by 1880 through various techniques.[67]

Here, two significant developments at the international level may be discussed. First, the consensus of states on various rules for the conduct of war and the protection of a victim of warfare led to the evolution of international humanitarian law.[68] Second, the states, especially the UK, made an effort to abolish the slave trade.[69] The slave trade started in the 16th century. The transfer of goods from Europe to Africa, the transfer of enslaved people from Africa to America, and the transportation of raw materials from America to Europe completed the trade cycle. The slave trade was gradually prohibited in the 19th century.[70]

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[66] Boxer Rebellion was based on slogan 'China for Chinese'. Joseph W. Esherick, *The Origins of the Boxer Uprising* (Berkeley: University of California Press, 1987), 149–50.

[67] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 21.

[68] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 3–7.

[69] Ed Bates, "History," in *International Human Rights Law*, edited by Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 13–16.

[70] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 22.

2.1.7 DEVELOPMENTS AFTER WORLD WAR I

Germany was defeated and declared solely responsible for World War I under Article 231 of the Treaty of Versailles. The end of World War I significantly altered the fundamental structure of the international legal system. Following the Russian Revolution (1917), the Russian government declared that the existing international law system was unacceptable to them; however, it gradually accommodated it due to economic and political interests. They initially objected to the equal treatment of capitalist and socialist states under the international legal system; however, this attitude was later changed.[71]

From 1919 onwards, there were attempts to organize the international community and ban the use of force. The establishment of the International Labour Organization[72], the protection of minorities by the League[73] , and the creation of the Permanent Court of International Justice in 1921 are significant developments. However, certain factors contributed to the League crisis; ultimately, these crises led to the League's closure, as it failed to prevent World War II.

2.1.8 DEVELOPMENT AFTER WORLD WAR II

After World War II, the Nuremberg and Tokyo trials affirmed the individual responsibility of German and Japanese superiors. These trials were significant developments in international law as individuals were prosecuted and punished for their

[71] Ibid.,23-24.

[72] International Labour Organization, "Publications," accessed August 2, 2023, https://www.ilo.org/global/publications/lang--en/index.htm.

[73] Bates, "History," 13–16.

crimes.[74] The corporate veil of the state was pierced. Another remarkable development after World War II was the creation of the United Nations Organization (UNO) to ban the use of force[75] and maintain international peace and security. In 1946, the UN Commission on Human Rights was established to prepare the International Bill of Human Rights. However, the commission recognized the difficulty of preparing the International Bill of Rights and, thus, decided to divide it into three parts: a declaration, a convention, and a system of supervision.

Consequently, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948.[76] A crucial step toward the global protection of human rights was the adoption of the UDHR. The declaration was not legally binding but marked the origin of modern IHRL.[77]

Another significant development following World War II was a shift in the composition of the international community, resulting from the decolonization process based on the principle of self-determination. The principle of self-determination can be

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[74] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), 3.

[75] Oscar Schachter, *International Law and Theory in Practice* (Dordrecht; London: Martinus Nijhoff, 1991), 106–7.

[76] For a detailed analysis on the impact and significance of the UDHR, see Asbjørn Eide, "The Historical Significance of the Universal Declaration," *International Social Science Journal* 50, no. 158 (1998): 475–97; Antoon De Baets, "The Impact of the Universal Declaration of Human Rights on the Study of History," *History & Theory: Studies in the Philosophy of History* 48, no. 1 (2009): 20–43; Francesca Klug, "The Universal Declaration of Human Rights at Seventy: Rejuvenate or Retire?" *The Political Quarterly* 90, no. 3 (2019): 356–67.

[77]Wiktor Osiatynski, "The Historical Development of Human Rights," in *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley (London and New York: Routledge, 2013), 9–13.

found in various international instruments such as the United Nations Charter, Article 1 of the 1966 Covenants,[78] and United Nations General Assembly Resolution 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples.

The historical evolution of international law has proven that it is the language of states.[79] International law is necessary for maintaining international peace and security, as well as for protecting human rights and the environment.[80] New issues at the global level created a sense of the interdependence of states, thus compelling them to negotiate in the language of international law. Consequently, states agreed on a few fundamental principles, including the principle of sovereign equality of states, the prohibition on the threat or use of force by states, and the peaceful settlement of disputes between states.[81]

2.2 ASSESSING THE LEGAL CHARACTER OF INTERNATIONAL LAW

Following this overview of the historical development of international law, the reader is left to question the nature of international law. What are the characteristics of international law? Does international law contain legal characteristics? Is International law a law or not? Often, these questions are addressed at the beginning of any text on public international law. However, this question remains unsettled, and it remains relevant to ask whether international law constitutes a legitimate form of law. As a famous philosopher of

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[79] Kaczorowska, *Public International law*, 16.

[80] Schachter, *International Law and Theory in Practice*, 1–3.

[81] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/2625(XXV), 24 October 1970.

modern times, Ronald Dworkin stated, 'The old grounds for challenge remain; they are only ignored.' [82] The preceding sections address the legal characteristics and nature of international law.

There are frequent claims that international law lacks legal characteristics. Why is it so? Because there is no centralized authority, a lack of enforcement mechanism, a lack of sanctions in case of violations, and an absence of a legislative body.[83] The controversy about the legal character of international law dates back to the times of Hobbes and Pufendorf. This controversy was revived in the nineteenth century with the theory of John Austin.[84]

According to Hobbes, society was in a state of nature, characterized by chaos and lawlessness, from which it transformed into a civil state, marked by law and order. This transition occurred at some stage of history that cannot be identified. This transition also established a sovereign authority to which people surrendered their absolute freedom. Afterward, this sovereign provided rights to people under his laws. In Hobbes' legal writings, the sovereign was theoretically free from all kinds of restrictions.[85] Considering this argument, Hobbes suggests that this transitional phase never occurred on the

[82] Ronald Dworkin, "A New Philosophy of International Law," *Philosophy & Public Affairs* 41, no. 1 (2013): 2.

[83] Malanczuk, *Akehurst's Modern Introduction to International Law*, 6

[84] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 4.

[85]Suri Ratnapala, *Jurisprudence*, 2nd ed. (New Delhi: Cambridge University Press, 2013), 32–33.

international plane; thus, there is no one on the global level to make or implement international law.[86]

Austin also viewed the international level as a positive morality. For him, the absence of a sovereign on a global level is the point that renders international law as positive morality. The central idea of Austin's definition of law is a command of the sovereign, which is backed by a sanction.[87] According to Austin, positive law is 'set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its author.'[88]

The legal characteristics of international law were questioned by H.L.A. Hart in the twentieth century when he pointed out that there are no secondary rules on the global plane. Secondary rules are rules that govern how rules are made and interpreted, or what the consequences are if they are breached.[89] The presence of only primary rules, also known as rules of conduct, at the international level, without the presence of secondary rules and a unifying rule of recognition, makes it resemble a primitive legal system.[90]

Hans Morgenthau developed the realist thesis, advocating that it is not international law that plays a decisive role in states' policies, but instead that states are motivated by

[86] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 5.

[87] Ratnapala, *Jurisprudence*, 44-51.

[88] John Austin, in R. Campbell (ed.), *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 2 vols. (Bristol: Thoemmes Press, 2002 [reprint of 1861 ed.]), 35. Also see John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832).

[89] H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Clarendon Press, 2012), 80–81.

[90] Orakhelashvili, *Akehurst's Modern Introduction to International Law,* 5.

their domestic interests. States give due consideration to power and their interests and benefits.[91]

In between all these claims and arguments, how can we understand the content of international law? The better approach is to understand the international plane's legal system and reference its requirements. Any attempt to explain the normative framework of international law from any social or political lens is not an appropriate way.

International law differs from domestic law in that the state's three centralized functions —legislation, judicature, and executive —are arranged horizontally rather than vertically.[92] International law is organized and derived from the consent of states, and furthermore, the element of reciprocity drives states to adhere to international law.[93] The principles of reciprocity and consent are the driving elements at the global level, rather than command and sanction.

2.3 IDENTIFYING THE CONCEPT OF UNITY IN INTERNATIONAL LAW

Apart from the incidents and events that influenced the evolution of international law, it is pertinent to conceptualize the international legal system. In this regard, it is also necessary to explore a few fundamental concepts. Before examining international law as a

[91] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1948), 209–11.

[92] Sir Christopher Greenwood, "Unity and Diversity in International Law," in *A Farewell to Fragmentation: Reassertion and Convergence of International Law*, ed. Mads Andenæs and Eirik Bjorge (Cambridge: Cambridge University Press, 2015), 40.

[93] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 10.

legal order, the question that needs to be addressed is: what factors make international law a legal system? Here, the concept of unity comes into the picture. However, this unity is a complicated, or at least multifaceted, concept. The remaining sections of this chapter address the concept of unity and then examine international law as a legal order.

2.4 WHAT IS MEANT BY UNITY?

Whenever ‘unity’ is used, it is often mistakenly presumed to be a simple word. However, the term has multiple meanings and various usages. In the discourse of international law fragmentation, the term 'unity' is often used simplistically. The unity of international law is usually presumed, but the concept of unity is not as simple as it appears to be. The debate and discussion on the fragmentation of global constitutionalism, legal pluralism, and conflict of norms cannot be completed without explaining unity. However, before turning to the unity of international law, it would be appropriate to discuss the term 'unity' in itself.

Unity is not a fact but a multi-layered and multifaceted concept or construct. The unity of an object is subjective and depends on the approach used to analyze it.

An object has *elementary unity* if its constituent parts do not have an identity of their own. For instance, the fragments of a wooden slab do not form another object; they are still wooden slabs, thus retaining the essence of the original object.[94]

Then, there are complex objects. In other words, the constituent parts of an object are placed together in some particular way, and consequently, the object is considered one.

[94] Prost, *The Concept of Unity in Public International Law*, 24.

The placement of constituent parts of the object can either be natural or rest on some external element that composes the object. In the natural placement of constituent parts, consider the example of a tree consisting of a trunk, leaves, branches, fruits, and roots. The tree is regarded as one object due to the natural connection between its constituent parts.[95] This type of unity is referred to as *natural unity*.[96] However, suppose the components of an object are not connected for any natural reason, but the connection is due to some external element that composed that object. In that case, the unity is considered accidental.[97] For instance, a car or a building is viewed as an object because its constituent parts are placed together in a peculiar order.

Sometimes, objects are not even connected due to the continuity of their constituent parts. It is the position or placement of an object that gives it *unity by proximity*. For instance, a wolf pack is considered to have unity due to its proximity. Any observer will consider several wolves coming together as a pack, and the observer will not perceive them as individual wolves.[98]

The types mentioned above are more related to material objects or the material continuity between the constituent parts of a complex object. Unity also exists when some idea, function, cause, or interpretation provides unity to otherwise unrelated objects. For instance, the digestive system consists of multiple organs that form a whole system with a

[95] Edmund Husserl, *The Shorter Logical Investigations* (London: Routledge, 2001), 164.

[96] Mario Prost, *The Concept of Unity in Public International Law*, 24.

[97] The parts of the object are bounded or fastened together to achieve unity. For discussion on fastening as a method of composition, see Peter van Inwagen, *Material Beings* (Ithaca: Cornell University Press, 1990), 56–58.

[98] Prost, *The Concept of Unity in Public International Law*, 25.

single function: digesting food. These organs are together due to the *teleological unity* they have.[99] Another reason for unity can be a shared idea, value, or belief that fosters a sense of unity within a group. Here, consider a group of people standing on a road, holding banners with slogans against government policies. This group has *axiological unity,* as they share a common ground for their demonstration.[100]

The concept of unity is multi-layered and complex. An object can have any form of unity, whether elementary, natural, teleological, or accidental. The unity of an object is not dependent on itself; instead, it is dependent on the perspective from which the unity is discussed.

2.5 UNITY VERSUS UNIFICATION

The concept of unity is often discussed along with other terms, such as unification and universality. The meanings of these terms require clarification to understand the concept of unity and the issue of fragmentation of international law. These terms may be used interchangeably, but they have distinct meanings.

First, examine the term unification. What precisely does one mean by saying the unification of law? If there are efforts to unify the law, what is the ultimate target? Does unification mean there are efforts to eliminate all the conflicts of laws? The first answer to these questions is that unification differs from the unity of law. 'Unification signifies the process of uniting that which is not unitary.'[101] Unification is a process through which one

[99] Ibid., 28

[100] Ibid.

[101] Mario Prost, *The Concept of Unity in Public International Law*, 32.

tries to achieve unity. Thus, an object can be unifying and fragmented at the same time. However, unity and fragmentation cannot coexist with reference to the same object or thing. In the legal sense, the unity of a legal system has a different meaning than the unification of law. There are efforts to unify private international law, aiming to establish common standards that are compatible with most national legal systems.[102] These efforts do not seek to bring unity within different legal systems and eliminate diversity.

There are two crucial differences between unification and unity. Firstly, unity expresses the state of an object, while unification is a process. Unity can be achieved through unification, but both are distinct concepts. The other significant difference lies in the aim of unification and unity. The unity of law aims to eliminate contradictory rules and laws, thereby excluding diversity. Unification, on the other hand, maintains the multiplicity of legal systems and harmonizes them. Unification is not aimed at achieving integration; instead, it aims to ensure compatibility between systems or laws. Simply put, unification maintains and manages diversity, while unity denies it. [103]

2.6 UNITY VERSUS UNIVERSALITY

The other term used or confused with unity is 'universality'. Neither in letter nor in spirit does universality amount to unity. In this regard, there is a need to consider how the law is considered universal. First, universality, on a fundamental level, reflects the

[102] René David, "The Methods of Unification," *American Journal of Comparative Law* 16, no. 1/2 (1968): 13.

[103] Prost, *The Concept of Unity in Public International Law*, 34

omnipresence of law. [104] Every society and group of human beings has its laws, and law is a social institution. In the second sense, universality means generality. The law must apply to all subjects equally to be considered valid and binding.[105] The historical development of international law has highlighted its division into spheres, such as American versus European international law; however, it has gradually been extended to encompass all states. Theoretically, international law applies equally to all states.[106]

With clarification of the term universality, there is another aspect related to the universality of international law that needs to be addressed here. If universality is to be considered inclusiveness, then universality is essential to the unity of international law.[107] However, there is a need to understand how treaty practices have contributed to the substantive evolution of international law.[108] Most of the time, the treaties are bilateral. Even if a treaty is multilateral, it is concluded at a regional level due to cultural, environmental, or geographical similarities.[109] However, it does not mean that regionalism threatens universality. Regionalism, at times, supports universalism. The point here is that legal universalism exists along with legal particularism.[110]

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[104] Ibid., 35

[105]Bruno Simma, "Universality of International Law from the Perspective of a Practitioner," *The European Journal of International Law* 20, no. 2 (2009): 265–67.

[106] Stephen C. Neff, 'A Short History of International Law', 15.

[107] Simma, "Universality of International Law," 267-268.

[108] Statute of the International Court of Justice, art. 38.

[109] Robert Kolb, *The Law of Treaties: An Introduction* (Cheltenham, UK: Edward Elgar Publishing Limited, 2016), 3–4.

[110] The co-existence of universalism and regionalism is reflected in Chapter 7 of the UN Charter, which allows for regional arrangements concerning international peace and security. For further discussion

Another interesting point is understanding how universality can sometimes be achieved through fragmentation. A relevant example is the concept of 'reservation' in the law of treaties. States sometimes accept most of the provisions of the treaty, but due to various reasons, they object to specific provisions. In such a situation, the states can make reservations, thus limiting the effects of specific treaty provisions.[111] Therefore, universality is achieved through a compromise of unity. However, it is crucial to understand that universality rests upon this fragmentation.

2.7 KINDS/TYPES OF UNITY

As already discussed, the concept of unity is multifaceted and multi-dimensional. In this regard, to explore the unity of international law, it is necessary to understand various types of unity. Unity can be substantive, cultural, and logical.

2.7.1 SUBSTANTIVE UNITY

The substantive unity of international law can be assessed through both primary and secondary norms. When there is coherence between the primary norms and no conflict between them, then this substantive unity is termed material unity. However, another way to consider unity is to assess how these individual norms are arranged in relation to one another. The arrangement of individual norms refers to the formal unity of law. The formal

on regional and general international law, see Haro van Panhuys, "Regional or General International Law? A Misleading Dilemma," *Netherlands Journal of International Law* 8, no. 2 (1961): 146–64.

[111] Vienna Convention on the Law of Treaties, art. 2(1)(d), 1155 U.N.T.S. 331 (1969). see, Malanczuk, *Akehurst's Modern Introduction to International Law*, 135-136. However, a reservation can be made only if it is compatible with the purpose of the treaty.

unity does not focus on particular parts, but rather on the relationship between parts (norms), which result in a cohesive whole structure, thus forming a legal order or system.[112]

2.7.2 CULTURAL UNITY

Cultural unity is yet another lens through which the oneness of international law can be analyzed. Corporate unity refers to the internal structures of international law as a professional field, while Grammatical unity refers to the identity and recursive closure of international law as a discursive field.[113]

2.7.3 LOGICAL UNITY

Logical unity can be discussed in two forms: ontological unity, which refers to the unity of the legal system as a logico-transcendental epistemological imperative, and Axiological unity, which means the super-determination of positive norms by overarching values.[114]

2.8 FORMAL UNITY: CONCEPTUALIZING THE INTERNATIONAL LEGAL SYSTEM

However, directive consistency (the lack of normative conflicts) is not the same as the substantial unity of law in general and international law in particular. [115] Another way to think about unity is to examine how these standards are combined and structured, rather than emphasizing consistency and compatibility among individual rules. There are various

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[112] Prost, *The Concept of Unity in Public International Law*, 69

[113] Mario Prost, "All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation," *Finnish Yearbook of International Law* 17 (2006): 136.

[114] Prost, *The Concept of Unity in Public International Law*, 161.

[115] Prost, All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation, 135.

approaches to assessing the formal unity of law, as well as different standards and criteria used to analyze unity. Among multiple approaches, the institutionalist, the normative, and the post-normative are the primary three approaches to examine the unity of law.

In institutionalist approaches, unity is analyzed through the coherence of the social order (institution) behind the law. In normative approaches, formal unity depends on the dynamic relationships that unite different types of norms, and the functioning of one type of norm rests upon the functioning of another. According to post-normative approaches, the point of focus is the mutually constitutive relationships that exist between specific kinds of norms, principles, and the organs of the system that enforce laws.

The institutionalist approach can be linked to Santi Romano, the first jurist to advocate that the nature of law has to be understood through its legal order.[116] For him, the law is not merely a collection of norms; the law's existence is not dependent only on norms. The structure and nature of the system as a whole have great importance in understanding the law. According to Romano, objectivity and sanction are two formal elements that distinguish between legal and non-legal norms.[117] Due to these two formal elements, Romano advocates that legal norms cannot be self-sufficient. The existence of legal norms is dependent on an institution. This institution is a structuring power that can control the development, production, and functioning of legal norms.[118]

[116] For detailed analysis on Santi Romano's institutional theory of legal order, see Lars Vinx, "Santi Romano against the State?" *Ethics & Global Politics* 11 (2018): 25–36.

[117] Santi Romano, *The Legal Order*, ed. and trans. Mariano Croce (New York: Routledge, 2017), 8.

[118] Ibid., 12-19.

Hans Kelsen's theory, a normative approach, visualized law as a system of norms. Legal norms do not operate in isolation, and they are integral to the system.[119] Kelsen disagrees with Romano that law is not self-sufficient and requires a social order to understand it. According to Kelsen, norms are the only components of a legal order. In Kelsen's theory, a legal order is concerned with norms and their mutual relationships. Without denying the importance of institutions, he believes that the law regulates its creation and implementation.[120] The law's capacity for self-organization reflects the systematicity of the law. For Kelsen, the formal unity of a legal order rests upon two fundamental ideas: first, all the norms of a legal order are interlinked and connected through the chains of validity. Second, these chains of validity lead to a single Grundnorm.[121]

Hart's theory, another normative approach, has been discussed frequently in the fragmentation literature. Hart, like Kelsen, visualizes the legal order as a system in which certain norms depend on other types of norms for their functioning.[122] The union of primary and secondary rules reflects the principle of unity in Hart's theory. Primary rules are the duty-imposing rules of conduct, such as the rule that one must not steal. Primary rules provide guidelines regarding the conduct of an individual.

[119]Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), 47.

[120] Ibid., 71.

[121] Prost, *The Concept of Unity in Public International Law*, 74.

[122] H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Clarendon Press, 2012), 80–81.

On the other hand, the secondary rules can be called 'rules about rules' because they set standards for the change, recognition, and adjudication of the primary rules.[123] For Hart, having a legal order without secondary rules, such as international law, is possible. However, legal systems consisting of primary rules exclusively are not properly so-called legal systems.[124]

In Hart's theory, the existence of law as a unified system depends on multiple conditions; namely: i) general obedience to the valid rules of conduct; ii) secondary rules govern the existence and operation of rules of conduct; ii) This combination of primary and secondary rules is ultimately based on a single, ultimate rule of recognition, which the system's authorities acknowledge as the highest standard of validity for the system as a whole.

It is pertinent to note that when debating the unity of international law, international lawyers often focus on secondary norms. Those who consider international law a unified system base their view on the mere existence of secondary norms.[125] However, the mere presence of secondary norms is not enough to establish the unity of a system. The acceptance and determinacy of secondary rules are often overlooked.

The normative approaches of Kelson and Hart are based on the idea that legal systems are constituted of norms exclusively. Post-normative approaches reject this notion

[123] Ibid., 91-97.

[124] Ibid., 213-237.

[125] For detailed study of this criticism see, Prost, *The Concept of Unity in Public International Law*, 80–91..

either partially or entirely. Among these post-normative approaches, Joseph Raz and Ronald Dworkin are discussed here.

In his Concept of Legal System, Raz put forward the idea that the nature of law cannot be understood exclusively in terms of norms. One must examine the various types of norms and their mutual relationship to understand the complexity of the law's nature.[126] Raz's post-normative theory of the legal system and its unity is based on two notions. First, the legal system is not composed exclusively of norms. For him, there are two types of laws in every legal system: duty-imposing and power-conferring laws.[127] However, there are other types of laws in a legal system that are not norms. The laws that are not norms do not guide human conduct. According to Raz, laws instituting rights[128] are prime examples of such laws. Regardless of their nature, these laws are essential components of a legal system. Secondly, Raz rejects the idea of unity based on the ultimate rule of recognition.[129] The unity and identity of a legal system lie in the fact that the law-applying organs of the system have accepted the laws as binding. These law-applying organs, such as courts and tribunals, highlight the limits of the legal system by determining the laws that are part of the system based on a commonly accepted standard of interpretation.[130]

Ronald Dworkin's post-normativism is based on the idea that the identity of a legal system depends on the principles and their application by the law appliers. Dworkin, like

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[126] Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970), 121–22.

[127] Ibid., 147-166.

[128] For instance, wife has a right of maintenance or a person has a right in an immovable property do not prescribe any conduct. They merely state the existence of a legal relationship.

[129] Raz, *The Concept of a Legal System,* 100-105.

[130] Ibid., 189-197.

Raz, disapproves of the concept of an ultimate rule of recognition.[131] He stipulates that there are principles and policies behind rules. For him, a policy is a norm that lays forth an objective to be met and typically signifies some advancement for the community.[132] However, the principle is a benchmark that must be followed because it is required by justice, morality, or fairness.[133] The formal unity of the legal system lies in the interpretation done by the judge in light of legal principles.[134] Therefore, the practice of adjudication forms the foundation of Dworkin's idea of unity. It is found in the hermeneutic process of relating explicit regulations to fundamental ideas to find the "right answer" to ethical or legal dilemmas.[135]

While discussing the formal unity of international law, the literature on fragmentation discusses these different approaches in isolation. It is incorrect to believe that the unity of law stems from any of these dynamics exclusively (institutions, ascending chains of validity, and collective chains of interpretation). Formal unity of law is not mono-causational.

2.9 CONCLUSION

This chapter provides an overview of the historical evolution of international law. It is contended that the legal character of international law cannot be denied on a few

[131] Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35, no. 1 (1967): 14–46.

[132] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 22.

[133] Ibid.

[134] Ibid., 83-84.

[135] Prost, *The Concept of Unity in Public International Law, 80.*

grounds, and it must not be evaluated with reference to the national legal systems. When referring to the international legal system, we must answer various questions. In this regard, the chapter offered a descriptive analysis of unity and an in-depth exploration of formal unity. The concept of unity is complex and multifaceted, and an understanding of the fragmentation of international law cannot be complete without considering the notion of unity. Formal unity, out of various kinds of unity, talks about the assemblage of norms in a legal framework. The formal unity of international law is assessed through institutionalist, normative, and post-normative approaches. It can be concluded that formal unity cannot be discussed with reference to any one of the mentioned approaches, excluding the others. Thus, the right way is to consider all of them and then assess the unity and coherence of international law as a legal system.

CHAPTER THREE

REVISITING THE FRAGMENTATION DEBATE OF INTERNATIONAL LAW

3 INTRODUCTION

The fragmentation of international law needs to be addressed by understanding the concept of fragmentation, its implications, types, and consequences. A clear understanding of the fragmentation can help to provide a plausible solution for it.

This chapter explores the concept of fragmentation, comprising eight sections. The first section examines the fundamental concept of fragmentation and its various types. The following section addresses the available literature on the fragmentation of international law. The third and fourth sections highlight the effects of fragmentation and the views of scholars on this issue. The fifth section examines various types of norm conflicts, while the sixth section addresses cases that reflect fragmentation. The seventh section describes multiple techniques for resolving the conflict of norms. The final section examines the application of precedent across international courts and tribunals.

3.1 FRAGMENTATION AS A CONCEPT

International lawyers address the fragmentation of international law through various approaches. The literature on fragmentation is dense, complex, and complicated. Since this concept/notion is subjective, it is crucial to explore and describe it for the sake of the present work. Fragmentation of international law has existed for a long time, albeit

in various forms. For instance, Jenks discussed the unavoidable treaty conflicts in 1953 and explored the means through which these conflicts could be resolved.[136]

The fragmentation of international law received scholarly attention almost two decades ago, after the two presidents of the International Court of Justice, Judge S. M. Schwebel and G. Guillaume, considered it an issue and highlighted it in their address to the United Nations General Assembly.[137] Later on, the International Law Commission conducted a group study on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[138]

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[136] A conflict "arises only where a party to two treaties cannot simultaneously comply with its obligations under both treaties," according to Wilfried Jenks, who made this assertion in a seminal essay on the conflict between law-making treaties. Even when they undermine the goal of one of the treaties, he believes that other kinds of treaty divergence do not necessarily amount to conflicts in the technical sense. While acknowledging that these differences could have significant practical ramifications, Jenks insisted that an actual conflict arises only when two documents cannot be harmonized and their duties cannot be fulfilled simultaneously.

C. Wilfred Jenks, "The Conflict of Law-Making Treaties," *British Year Book of International Law* 30 (1953): 401–53.

[137] G. Guillaume, "Address to the Plenary Session of the General Assembly of the United Nations," President of the International Court of Justice, October 26, 2000, https://www.icj-cij.org/sites/default/files/press-releases/9/2999.pdf.

[138] International Law Commission (ILC), *Report of the International Law Commission on the Work of its 54th Session* (29 April–7 June and 22 July–16 August 2002), UN Doc. A/57/10 (2002 ILC Rep.) available at https://legal.un.org/ilc/reports/2002/ ; *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 (2003 ILC Rep.) available at https://legal.un.org/ilc/reports/2003/ ; *Report of the International Law Commission on the Work of its 56th Session* (3 May–4 June and 5 July–6 August 2004), UN Doc. A/59/10 (2004 ILC Rep.) available at https://legal.un.org/ilc/reports/2004/ ; *Report of the International Law Commission on the Work of its 57th Session* (2 May–3 June and 11 July–5 August 2005), UN Doc. A/60/10 (2005 ILC Rep.) available at https://legal.un.org/ilc/reports/2005/ ; *Report of the International Law Commission on the Work of its 58th*

It would be interesting to initiate an analysis of dense fragmentation literature. So, what exactly is meant by the term 'fragmentation'? Fragmentation refers to the process of splitting an object into multiple pieces. However, when the reference is towards the fragmentation of international law, then what is meant by that? The answer is not straightforward.[139] Conflict in substantive provisions of treaties, conflicting jurisdictions, the proliferation of international courts and tribunals, the development of specialized regimes[140], the increase in subjects of international law, and an ambiguous hierarchy of sources are, in one way or another, reflective of the fragmentation of international law.[141]

3.1.1 SUBSTANTIVE FRAGMENTATION

The material expansion of International law is dependent on various sources, primarily treaties and customs.[142] Substantive fragmentation refers to the presence of any conflict in the law. If there are deviating norms, inconsistent decisions, or any heterogeneity in applicable norms, it would indicate substantive fragmentation. [143] The

Session (1 May–9 June and 3 July–11 August 2006), UN Doc. A/61/10 (2006 ILC Rep.) available at https://legal.un.org/ilc/reports/2006/ .

[139] Cheng Tai-Heng, "Making International Law without Knowing What It Is," *Washington University Global Studies Law Review* 10, no. 1 (2011): 3.

[140] Detailed rules of international law can be found regarding sea, environment, human rights, war, air and space. These laws are so comprehensive that one can find a whole specialized field of law on each area mentioned. "International court of justice" has discussed these segments of international law in its advisory opinion on the legality of nuclear weapons.

[141] Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *The Modern Law Review* 70, no. 1 (2007): 1–30.

[142] Statute of the International Court of Justice, art. 38(1).

[143] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Rules Relate to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003), 17-23.

conflict in norms can be resolved through various techniques.[144] Courts and tribunals are expected to adopt techniques or opt for interpretation to avoid conflicts. ILC concluded to choose rules of treaty interpretations that can provide plausible solutions for the integration of international law.[145]

3.1.2 PROCEDURAL OR INSTITUTIONAL FRAGMENTATION

Another type of fragmentation exists due to the multiplicity of international courts and tribunals, which is referred to as procedural or institutional fragmentation.[146] It is argued that sometimes, the multitude of international adjudicative bodies results in conflicting or overlapping jurisdictions. The proliferation of tribunals and courts risks undermining the coherence of the international legal system due to the lack of hierarchy within the international justice system.[147] However, it is pertinent to note that there is a bifurcation in the literature regarding the impact of the proliferation of international tribunals. There is literature arguing that the overlapping jurisdictions of international

[144] International Law Commission. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." In *Report of the International Law Commission on the Work of its 58th Session* (1 May–9 June and 3 July–11 August 2006). UN Doc. A/61/10.

[145] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

[146] Mads Andenas and Eirik Bjorge, "Introduction: From Fragmentation to Convergence in International Law," in *A Farewell to Fragmentation: Reassertion and Convergence of International Law*, ed. Mads Andenas and Eirik Bjorge (Cambridge: Cambridge University Press, 2015), 6; Ruti Teitel, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order Symposium — The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems," *International Law and Politics* 41 (2009): 959–90.

[147] Suzannah Linton and Firew Kebede Tiba, "The International Judge in an Age of Multiple International Courts and Tribunals," *Chicago Journal of International Law* 9, no. 2 (2009): 408–10.

tribunals can compromise the efficiency and effectiveness of the international legal system.[148] Christian Leathley contended that there is a need for institutional hierarchy and that the International Court of Justice should be the apex court at the international level.[149] On the other hand, some scholars believe that this issue of proliferation is a theoretical one, and judges of international tribunals maintain the integrity of international law by engaging in judicial dialogue.[150]

3.2 FRAMING THE FRAGMENTATION DEBATE

As mentioned earlier, the literature on fragmentation is dense and complex. To understand the impact of fragmentation, it is essential to map the debate surrounding it. What are the fundamental questions addressed in this debate? What is the point of concern? How many varying views are there in this debate? Whether the ultimate goal is to eliminate fragments? Or what is expected by the scholars engaged in this debate? These and many other questions are significant to understanding the phenomenon and literature on fragmentation.

The literature on fragmentation can be divided into two generations. The first generation was focused on two fundamental issues: the development of specialized regimes and the proliferation of adjudicative bodies. In comparison, the second generation in the

[148] Dupuy, "The Danger of Fragmentation," 797.

[149] Christian Leathley, "An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?" *New York University Journal of International Law and Politics* 40 (2007): 259–306.

[150] William Burke-White, "International Legal Pluralism," *Michigan Journal of International Law* 25, no. 4 (2004): 971–973; Rosalyn Higgins, "The ICJ, the ECJ, and the Integrity of International Law," *International and Comparative Law Quarterly* 52, no. 1 (2003): 1–19.

literature sought means and methods to achieve the ultimate goal of unity in the international legal order.

3.2.1 FIRST GENERATION OF FRAGMENTATION LITERATURE

Scholars on the question of specialized regimes are divided on two different sides of the spectrum. Some scholars believe that specialized regimes have their own primary and secondary rules, which are self-sufficient for operating within their sphere, requiring no reliance on the rules and principles of general international law. Thus, these specialized regimes are self-contained and a closed sub-system of international law. These self-contained regimes are capable of implementing and interpreting their substantive provisions.[151] The scholars at the other end of the spectrum believe that no regime can be self-sufficient, and at some point, they must apply or opt for the rules of general international law due to the absence of sufficient secondary rules. So, for these scholars, there is no closed sub-system of international law in existence.[152]

[151] In international law, every tribunal is a self-contained regime. Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1, Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, 2 October 1995, para. 11.

[152] See Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," *European Journal of International Law* 17, no. 3 (2006): 483–529; Anja Lindroos and Michael Mehling, "Dispelling the Chimera of Self-Contained Regimes: International Law and the WTO," *European Journal of International Law* 16, no. 5 (2005): 857–877.

The other question addressed in the first generation was regarding the proliferation of international courts and tribunals.[153] This proliferation gives rise to the institutional aspect of fragmentation. This institutional fragmentation can cause multiple interpretations of similar norms in international law.[154] Additionally, the overlapping jurisdiction of various courts or tribunals can lead to forum shopping.[155]

3.2.2 SECOND GENERATION OF FRAGMENTATION LITERATURE

The second generation of fragmentation literature focused more on exploring the methods by which the various fragments of international law can be unified. This pragmatic turn in the fragmentation literature begins by discussing the rules and principles of treaty interpretation. The principle of systematic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[156] and the principles of *lex specialis* were often under scrutiny as possible methods to resolve the conflict of norms and obligations.[157]

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[153] There is significant increase in the number of international courts and tribunals after 1980s. see, Roger Alford, "The Proliferation of International Courts and Tribunals: International Tribunals in Ascendance," *American Society of International Law Proceedings* 94 (2000): 160.

[154] Gregory Fox, "International Organizations: Conflicts of International Law," *American Society of International Law Proceedings* 95 (2001): 184.

[155] Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," *International and Comparative Law Quarterly* 55 (2006): 798.

[156] Jan Klabbers, "Reluctant 'Grundnormen': Article 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law," in *Time, History and International Law*, ed. Matthew Craven and Malgosia Fitzmaurice (Leiden: Martinus Nijhoff, 2007); Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention," *International and Comparative Law Quarterly* 54, no. 2 (2005): 279–320.

[157]William Schabas, "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum," *Israel Law Review* 40, no. 2

3.3 EFFECTS OF FRAGMENTATION: A THREAT OR AN OPPORTUNITY?

Fragmentation has positive and negative implications. The first risk arising out of fragmentation is the conflict of obligations.[158] Fragmentation also leads to uncertainty and loss of predictability. The uncertainty regarding the applicable substantive provision is a serious concern arising from fragmentation. Furthermore, the conflicting secondary norms led to forum shopping, resulting in the choice of a forum more suitable to the litigating state. The multiplicity of courts and tribunals results in overlapping and sometimes conflicting jurisdictions. Most significantly, fragmentation endangers the unity and coherence of international law as a legal system. The specialized regimes, along with their respective tribunals, create a distinct space and become an autonomous subsystem of international law, sometimes diverging from general international law.[159]

On the contrary, there are certain benefits of fragmentation. First, the multiplicity of courts and tribunals increases the confidence of litigating states in the dispute settlement system. Second, the multitude of tribunals, courts, and regimes fosters healthy competition among them. This proliferation also creates an environment of accountability and division of power at the international level. It is contended that judges at the global level cross-cite the case law of other regimes and attempt to avoid pronouncing contradictory judgments.

(2007): 592–613; Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis," *Nordic Journal of International Law* 74, no. 1 (2005): 27–66.

[158] Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law* 25, no. 4 (2004): 849–851.45

[159] Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *Modern Law Review* 70, no. 1 (2007): 1–30.

The judges are cautious regarding the integrity and coherence of the international legal system.[160] Few judges welcomed this multiplicity of courts and tribunals.[161]

3.4 FRAGMENTATION: REALIST AND POSITIVIST SCHOOL

As discussed earlier, the debate on fragmentation is complex and multifaceted. Apart from discussing fragmentation as an opportunity or a threat, some scholars refuse to acknowledge the anxiety associated with fragmentation. The proponents of this view, which may be called the positivist school of thought in fragmentation theory, believe that this anxiety of fragmentation is baseless. Craven states that institutional weakness demonstrates the maturity of the system, and it must not be linked with uncertainty, lack of uniformity, or coherence in international law.[162]

On a similar note, Koskenniemi stated that the problem of fragmentation cannot be resolved, and the proliferation of international tribunals and autonomous regimes reflects

[160] Anne Peters, "The Refinement of International Law," *International Journal of Constitutional Law* 15, no. 3 (2017): 671–704.

[161] Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," 791–804; Bruno Simma, "Fragmentation in a Positive Light," *Michigan Journal of International Law* 25, no. 4 (2004): 845–847.

[162] Matthew Craven, "Unity, Diversity and the Fragmentation of International Law," *Finnish Yearbook of International Law* 14 (2003): 3–34.

Craven, Matthew. "Unity, Diversity and the Fragmentation of International Law." *Finnish Yearbook of International Law* 14 (2003): 3–34.

a ‘postmodern’ era. The homogeneity and fragmentation express the varying political preferences at the global level.[163]

The fragmentation of international law is a natural (side) effect of the development of international law. The advocates of positive schools argue that the issue of fragmentation is theoretical. Being fragmented does not necessarily imply a negative connotation. It is very much possible that the multiplicity of international institutions provides an opportunity to develop new norms of public international law.[164] Positivists also believe that the multiplicity of international courts and tribunals reflects the maturity of international law.

Regarding conflicting judgments, positivists argue that a few instances of contradictory and overlapping jurisdictions do not necessarily indicate a general disorder in the law. This school believes that the judges of international courts and tribunals are aware of their roles, and they must be viewed as architects of the coherence of international law in general.[165]

On the other hand, the Realist school expresses its anxiety over fragmentation.[166] For instance, the realist school expresses its concern over the conflict of obligations when

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[163] Martti Koskenniemi, “What Is International Law For?” in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2014), 45-47.

[164] Karen Scott, “International Environmental Governance: Managing Fragmentation through Institutional Connection,” *Melbourne Journal of International Law* 12, no. 1 (2011): 181.

[165] Bruno Simma, “Universality of International Law from the Perspective of a Practitioner,” *European Journal of International Law* 20, no. 2 (2009): 289.

[166] This division of scholar into realist and positive school can be found in the writing of Musa Njabulo Shongwe, see Musa Njabulo Shongwe, “The Fragmentation of International Law: Contemporary

a state is party to multiple treaties. Such conflicts are more obvious when they occur between a general and a special law. The representation of the European position in the United Nations is one example discussed by Wouters, Honffmeister, and Tom Ruys.[167] In case of such conflicts, there is a need to regulate them. According to Fox, this situation is similar to one in which, in the case of conflict of laws (private international law), a party has links with more than one jurisdiction, thus making the laws of those jurisdictions relevant simultaneously.[168] In cases of conflict of laws, there are well-established rules governing which jurisdiction applies. However, there are no rules to resolve conflicts of obligations in treaty law.[169] Hafner[170] also believes that states that are parties to different

Debates and Responses," *The Palestine Yearbook of International Law Online* 19, no. 1 (2020): 210–240. Accessed May 30, 2023. https://www.researchgate.net/publication/360285526_The_Fragmentation_of_International_Law_Contemporary_Debates_and_Responses

[167] Institutional ambiguities created by the EC and EU Treaty on external representation of Europe are not conducive to achieving a generally satisfactory European status in the UN system. UN partners may well be ignorant of the European architecture, and they are not obliged to follow the legal details thereof. Therefore, the question whether the EU or the EC or both should represent a European position in the UN is mostly left to the European institutions themselves. See J an Wouters, Frank Hoffmeister, and Tom Ruys, *The United Nations and the European Union: An Ever Stronger Partnership* (The Hague, The Netherlands: T.M.C. Asser Press, 2006).

[168] Gregory Fox, "International Organizations: Conflicts of International Law," *American Society of International Law Proceedings* 95 (2001): 184–87.

[169] Ibid.

[170] Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law* 25, no. 4 (2004): 857–63.

treaties would forum shop the dispute settlement mechanism (established under different treaties)[171] that suits their interests.

3.5 CONFLICT OF NORMS: EXPLORING VARIOUS TYPES

The conflict of norms is typically understood as a lack of uniformity in the substantive rules and norms of a legal system. So, if there is no conflict between the primary rules of a legal system, then it is said that there is no conflict of norms. Material unity is often inferred through the existence of legislation, the treatment of the legal subjects in the same way, or the similar application and interpretation of legal norms.

International lawyers generally consider the material unity of international law in terms of the absence of deviating norms, inconsistent decisions, or any other element that may lead to uncertainty in a given decision. To sum up, the lack of conflict in the law is considered a material unity.[172]

In the second edition of the Pure Theory of Law, Kelsen reiterates that the unity of law 'is expressed by the fact that a legal order may be described in rules of law that do not

[171] Different enforcement mechanisms are established under various treaties. The dispute settlement bodies always apply the rules of the treaties under which they are established.

[172] It would be interesting to note that the International Law Commission (ILC) adopted a similar way of thinking and took up fragmentation in terms of 'conflicting and incompatible rules, principles, rule-systems and institutional practices'. It was further considered by ILC that when such deviations occur more frequently and generally they create 'problems of coherence in international law' and 'the unity of the law suffers'. See, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, report of the Study Group finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), paras. 14–15..

contradict each other,' adding that a conflict of norms exists 'if one norm prescribes a certain behavior, and another norm prescribes another behavior incompatible with the first. For example, if one norm prescribes that adultery ought to be punished, and another norm that it ought not to be punished, or if one norm prescribes that theft ought to be punished by death, and another by imprisonment.[173]

While discussing the conflicts of norms, authors sometimes disagree as to the definition and nature of the conflict. For instance, Joost Pauwelyn does not consider that there can be any issue between judicial decisions.[174] For him, the judicial decisions are not norms of international law. Furthermore, for conflicts of norms, the norms must apply to the same subject matter and parties simultaneously.[175] Since parties, facts, and issues are different in judicial decisions, there is no conflict of norms.

Another significant point is the lack of conflict despite the overlap of norms. Sometimes norms overlap, but they do not create a conflict; instead, they can confirm another, add rights or obligations to the existing norms, and even a norm can be an exception to another norm.[176]

So, what exactly is a conflict of norms? How is it defined? There are various approaches and differing definitions of norm conflict. In a rigorous sense, termed as *stricto*

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[173] Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 205.

[174] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003), 109.

[175] Ibid., 165.

[176] Article 51 of UN Charter is an exception to Article 2(4) of UN Charter.

sensu conflicts by Mario Prost, conflict of norms occurs when two norms are absolutely opposite to one another, and their simultaneous application is impossible.[177] Situations in which conflicts of norms occur vary, including one norm being directly opposed to another, one norm prescribing something incompatible with another norm, and one norm prescribing something that is forbidden by another norm.[178]

A strict or restrictive approach to norm conflicts prevails at the international level. Wilfred Jenks stated that a conflict of norms can only occur if the simultaneous application of obligations under two different treaties is not possible.[179] Wolfram Karl, Gabrielle Macreau, Czaplinski, and Danilenko adopted a similar restrictive/ strict approach with regard to conflict of norms and found that conflict of norms exists if the obligations under different treaties are mutually exclusive and it is not possible to perform both at the same time.[180]

By adopting a strict approach towards conflicts of norms, international law lawyers try to avoid judicial anomalies. For them, conflict with the norm is a problem, and thus, by adopting a strict definition, one can escape the issue, as most conflicts will not fall within

[177] Prost, *The Concept of Unity in Public International Law*, 52.

[178] Ibid.

[179] C. Wilfred Jenks, "The Conflict of Law-Making Treaties," *British Year Book of International Law* 30 (1953): 426.

[180] Wolfram Karl, "Conflicts Between Treaties," in *Encyclopaedia of Public International Law*, vol. 4, ed. Rudolf Bernhardt (Amsterdam: Elsevier, 1992), 936. Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdiction: The Relationship Between the WTO Agreement and MEAs and Other Treaties," *Journal of World Trade* 6 (2001): 1083–1086; W. Czaplinski and G. Danilenko, "Conflicts of Norms in International Law," *Netherlands Yearbook of International Law* 21 (1990): 12..

the purview of the definition.[181] This approach is also reflected in the practice of international courts and tribunals. For instance, the decision of the World Trade Organization (WTO) in the Indonesian Automobiles case was based on the narrow definition of conflict of norms. In this case, a complaint was brought against Indonesia by the European Community, Japan, and the United States. It was alleged that Indonesia violated its obligation under Article III of the GATT (Non-discrimination between imported and domestic goods) by exempting national vehicles from certain taxes and duties. Indonesia claimed that, as a developing country, this derogation was legal under the Agreement on Subsidies and Countervailing Measures (SCM). Indonesia contended that the SCM Agreement prevailed over the GATT provisions under the *lex specialis* doctrine. Rather than considering the application of *lex specialis*, the panel at the first stage examined whether there was any conflict between these two treaties. It was held that the obligations under both treaties were not mutually exclusive, and there was no conflict between them. Thus, Indonesia was supposed to comply with its obligation under Article III of GATT.[182]

Another type of conflict includes potential conflicts as well. Kelsen is a proponent of this broader definition of conflict of norms. Kelsen initially believed that two norms of a legal system could not be incompatible. The only possibility is that one of the incompatible norms is not valid.[183] However, later on, when Kelsen further developed his theory, he accepted that the incompatibility between norms is possible, though he

[181] Pauwelyn, *Conflict of Norms in Public International Law*, 171

[182] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted July 2, 1998.

[183] Kelsen, *Pure Theory of Law*, 205–206.

considered them to be anomalies.[184] After accepting the possibility of a conflict of norms, he expanded the definition of a conflict of norms. At first, he advocated a strict/ narrow approach, accepting the mutually exclusive obligations within the domain of conflict of norms. However, later, he considered the incompatibility between permission and command as conflicting norms. Similarly, Karl Engisch and Hart also included a different normative function, including command and permission, within the definition of conflict. Hence, if a person is permitted to do one thing under one rule and at the same time the same person is prohibited from doing the same thing, it constitutes a conflict.[185]

In international law, Joost Pauwelyn and Erich Vranes have taken the view that contradictions between command, permission, and prohibition are included within the definition of a conflict. Thus, conflict will occur if an action is permissive under one rule, but applying it would necessarily violate another norm.[186] The International Court of Justice implicitly adopted this widened definition in the Lockerbie case, where it inferred that a contradiction between an obligation and a right constitutes a conflict.[187] Similarly, this broader definition was adopted by the WTO in the Banana III dispute (though the

[184] Kelsen's theory was developed in almost six decades and he changed his mind on certain issues. For a more insight on this periodization see, Stanley Paulson, "Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization," *Oxford Journal of Legal Studies* 18, no. 1 (1998): 153–166.

[185] Prost, *The Concept of Unity in Public International Law*, 58

[186] Joost Pauwelyn, *Conflict of Norms in Public International Law*, 175-176; Erich Vranes, "The Definition of 'Norm Conflict' International Law and Legal Theory," *European Journal of International Law* 17, no. 2 (2006): 418.

[187] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Request for the Indication of Provisional Measures*, ICJ Reports (1992), April 14, 1992.

prevailing approach of WTO panels is to regard mutually exclusive obligations only as conflicts).[188]

Lastly, one can talk about the functional conflict of norms. Functional conflict of norms occurs when the norms appear to be compatible and can be applied simultaneously; however, the implementation of one norm would undermine the purpose of the other norm. Mario Prost termed these types of conflicts as *lato sensu* conflicts.[189] This definition includes a much wider range of norms, which are not mutually exclusive but hinder the operation of one another. It is worth noting that Kelsen initially proposed a narrow definition; however, he later discussed the possibility of this functional conflict. Kelsen mentioned that 'a conflict of norms can be compared – if at all – not with a logical contradiction, but with two forces acting in different directions on the same point'.[190]

This functional definition of conflict of norms can be found in various domestic jurisdictions as well as in international law. In international law, this functional approach is used implicitly. For instance, the scholars have discussed the functional conflict between international humanitarian law (henceforth referred to as IHL) and IHRL. These two regimes frequently overlap; however, their scope, history, and philosophy differ.[191] A similar kind of functional conflict is implicitly argued between the Stockholm Convention on Persistent Organic Pollutants and WTO law due to the contradiction between the

[188] *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Panel Report, WT/DS27/R, adopted May 22, 1997.

[189] Prost, *The Concept of Unity in Public International Law*, 61.

[190] Kelsen, *General Theory of Norms*, 125.

[191] Anthony E. Cassimatis, "International Humanitarian Law, IHRL, and Fragmentation of International Law," *International and Comparative Law Quarterly* 56, no. 3 (2007): 623–639.

requirements of international trade law and the objectives of international environmental law.[192]

Christopher Borgen suggested a more explicit widening of the definition of conflict. He argued that a narrow definition of conflict overlooks various causes of fragmentation. Hence, he defined conflict between treaties 'as when a state is a party to two or more treaty regimes, and either the mere existence of or the actual performance under one treaty will frustrate the purpose of another treaty.'[193] For him, functional conflicts arise when treaties of apparently different subject matter overlap in their regulatory scope. In this regard, he referred to the tensions between trade and environment treaties or between trade and human rights treaties.[194]

It is worth noting that Martti Koskenniemi favored a broad definition of conflict in his final report on fragmentation.[195] The International Law Commission suggested the following definition of conflict of norms:

> A treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aims at different ends. The law of State immunity and the law of human rights, for example, illustrate two sets of rules that have very different objectives. Trade law and environmental law, too, emerge from different types of policy, and that fact may have an effect on how the relevant

[192] See, Batchelder, Dean. "An Analysis of Potential Conflicts Between the Stockholm Convention and Its Parties' WTO Obligations." *Michigan Journal of International Law* 28, no. 1 (2006): 157–173.

[193] Christopher Borgen, "Resolving Treaty Conflicts," *George Washington International Law Review* 37 (2005): 575.

[194] Ibid., 580.

[195] International Law Commission, *Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006), para. 23.

> rules are interpreted or applied. While such 'policy conflicts' do not lead to logical incompatibilities between obligations upon a single party, they may nevertheless also be relevant for fragmentation. This Report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem.[196]

3.6 CASE LAW REFLECTING FRAGMENTATION

With the expansion of its scope and increased field specialization, the fragmentation of international law became inevitable. Field specialization necessitates the enumeration of specific, subject-oriented principles, which, in the long run, may contradict the general principles of international law or those of other subsystems. Such a conflict of norms became the focus of attention for international lawyers, as it eroded the status of international law. International law, being a decentralized and horizontal legal system, has no alternative but to harmonize legal conflicts; failing to do so may threaten its very foundations. The quest of jurists remained to classify the nature of contradiction as one that can be addressed through a plausible theoretical explanation or one that poses a substantial threat to the validity of general norms of international law. Thus, there is a divide among international scholars into two groups, positivists and realists, who hold contradictory opinions on whether the fragmentation of international law is a genuine problem or merely an academic concern. Despite the different views of scholars on the issue of fragmentation, it is an inevitable feature of international law, but its impacts are manageable.

There have been multiple occasions in the past that witnessed such a contradiction of norms, yielding the problem of fragmentation of international law. Conflicting interpretations of international law principles by various international bodies are

[196] Ibid., paras 24-25.

manifested on one such occasion. It arose for the first time when the ICTY in the Tadic Case" varied from the early ruling of the International Court of Justice (ICJ) in the Nicaragua Case[197] over the consequences of third-party involvement in an armed conflict and fixing state responsibility. In Tadic's case,[198] the ICTY held Serbia-Montenegro responsible for the actions of the Bosnian Serb militia during the Yugoslav conflict, relying on a lower threshold for fixing responsibility, i.e., overall control. Meanwhile, for similar actions by Nicaraguan contras, the ICJ failed to hold the United States accountable in the Nicaragua case, arguing for adequate control. The Nicaragua case was the first instance to raise concerns about fragmentation within the international legal structure.

Similarly, it is often the case that an international court encounters both general law and special legal rules concerning the same subject matter. In such cases, the court practice is to give preference to special laws over general laws, resulting in the fragmentation of international law—for example, the ruling of the European Court of Justice in the MOX Plant case.[199] The case pertains to Ireland's environmental concerns regarding the operation of a nuclear reprocessing plant located in Sellafield, UK. Ireland invoked the

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[197] *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27), 64–65 [hereinafter ICJ Nicaragua].

[198] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Tadić Judgment].

[199] *Case C-459/03, Commission v. Ireland*, 2006 E.C.R. I-04635. There had been a series of cases brought by Ireland against the United Kingdom concerning the operation of the nuclear processing plant in Sellafield; see *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* (Ir. v. U.K.), XXIII RIAA 59 (Perm. Ct. Arb. 2003), 42 I.L.M. 1118 [hereinafter *Ireland v. UK*]. The other cases are: *MOX Plant* (Ir. v. U.K.), Case No. 10, Order, Request for Provisional Measures of Dec. 3, 2001, ITLOS ICGJ 343, 41 I.L.M. 405 [hereinafter *MOX Plant Provisional Measures*]; *MOX Plant* (Ir. v. U.K.), 126 ILR 310 (Perm. Ct. Arb. 2003), 42 I.L.M. 1187.

United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) before the European Court of Justice (ECJ). The court held that EU law, being the special legal regime of the EU, has supremacy over other legal regimes, including general international law. Moreover, the court ruled Ireland's recourse to international law against the UK as a breach of EU sovereignty. In this regard, the Arbitral Tribunal established under UNCLOS emphasized the significance of mutual respect and comity between judicial bodies and the potential for conflicting decisions if various entities adjudicated on the same matter.

Furthermore, the Southern Bluefin Tuna (SBT) case highlighted the issue of applying multiple treaties to a single dispute.[200] In 1993, Australia, Japan, and New Zealand signed the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), which aimed to establish measures for managing SBT and setting a total allowable catch. However, in 1998, Japan initiated an Experimental Fishing Program (EFP), which Australia and New Zealand opposed. The dispute was brought to arbitration before the International Tribunal for the Law of the Sea (ITLOS). Japan, while challenging ITLOS's jurisdiction, contended that the CCSBT should take precedence, whereas Australia and New Zealand argued that obligations under the United Nations Convention on the Law of the Sea (UNCLOS) still applied. The case raised questions about ITLOS's jurisdiction under UNCLOS and whether both treaties should be applied simultaneously.

[200] Kerry Hancock, *Southern Bluefin Tuna Cases*, unpublished manuscript, 2009, http://courses.kvasaheim.com/ps376/briefs/kehancockbrief4.pdf (accessed July 28, 2023).

Likewise, the Belilos decision[201] marked a departure from conventional rules regarding the effect and severability of reservations. An interpretative declaration in its instrument of ratification was added by Switzerland, which the European Court of Human Rights (ECtHR) considered a reservation and declared invalid in vague and broad terms. Irrespective of the declaration's validity, the ECtHR emphasized that Switzerland remained bound by the European Convention on Human Rights, leading to further discussions on how human rights organs address reservations in a manner different from other areas of international law.

Additionally, fragmentation in international law is further evident from the divergent acts of various international bodies and tribunals. The difference in approaches is apparent in the rulings of the ICTY and the International Court of Justice (ICJ) regarding their authority to review acts of the United Nations Security Council. In the Lockerbie case, the ICJ,[202] relying on Article 103 of the UN Charter, concluded that UN Security Council decisions are to be accepted and executed by states such as Libya and the United States, overriding any other rights they might have. Meanwhile, while reviewing the legality of its establishment, the ICTY Appeals Chamber asserted its continued authority even in cases where there might be a contradiction with the UN Charter's Principles and Purposes.

Moreover, the disagreement between the ICJ and the ICTY is also evident in their contrasting opinions regarding armed reprisals during an armed conflict. Armed reprisals

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[201] *Belilos v. Switzerland*, App. No. 10328/83, 1988 Eur. Ct. H.R.

[202] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), Request for the Indication of Provisional Measures, Order of April 14, 1992, 1992 I.C.J. Rep. 114, para. 39.

are completely prohibited according to the assertion of the ICTY, whereas the ICJ suggests the principle of proportionality to be the governing law of such retaliation.

Moving forward, the ICTY has established its autonomy in several cases. In the Celebisi case,[203]it was argued that the ICJ, being a principal judicial organ of the UN, holds a superior position to that of the ICTY, and the decisions of the ICJ should therefore bind the ICTY. However, the ICTY rejected any hierarchical relationship between the two and emphasized its autonomy as a judicial body. Similarly, in the Delalić case, the ICTY Appeals Chamber noted that it may reach different conclusions even while considering other decisions of international courts.

Similarly, judicial experimentalism is another potential factor contributing to fragmentation. It envisages that adjudicative bodies of specialized regimes should focus on specific issues within their mandate. This approach may lead to further fragmentation of international law.[204]

In summary, the fragmentation of international law primarily stems from the divergent interpretations and approaches adopted by various international tribunals. The lack of hierarchy and lacunas in the structure of the international legal order have posed challenges and complexities that need to be harmonized and effectively addressed.

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[203] *Prosecutor v. Zejnil Delalić et al.* (Čelebići Camp), Case No. IT-96-21-A, Appeals Chamber, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) [hereinafter *ICTY Delalić et al. Appeals*].

[204] Musa Njabulo Shongwe, "The Fragmentation of International Law: Contemporary Debates and Responses," 191.

3.7 TECHNIQUES TO RESOLVE CONFLICT OF NORMS

The following section of the chapter examines various techniques and methods for resolving or avoiding conflicts of norms. The most significant technique is the application of *lex specialis* and *lex posterior*. However, both of these rules are more appropriate in a domestic legal system.

The maxim of *lex specialis* is deeply rooted in domestic law, and its origin is found in Roman law. The *lex specialis* maxim is also discussed by famous international lawyers such as *Hugo Grotius, Samuel Pufendorf, and Emmerich de Vattel.*[205] According to Grotius and Vattel, the *lex specialis* maxim highlights the fact that weight and preference should be given to the one that is more specific in nature. It seems irrational to apply a general rule to a situation that can be regulated in a particular manner. It is advisable to use the specific rules as outlined in the agreement between the parties or the relevant law, whichever applies.[206] In his report, Koskenniemi states that "*lex specialis* is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts".[207] He further added that: "there is no specific legislative intention of the *lex specialis* maxim, highlighting its role as an informal part of legal reasoning, that is, of the

[205] Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*," *Nordic Journal of International Law* 74, no. 1 (2005): 35.

[206] Ibid., 36

[207] Martti Koskenniemi, *The ILC Report: Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes'*, International Law Commission, 7 May 2004, ILC(LVI)/SG/FIL/CRD.1, para. 21.

pragmatic process through which lawyers go about interpreting and applying formal law."[208]

Another crucial technique is the prevalence of the norm higher in the hierarchy. However, hierarchy also has a limited scope in the domain of international law. There were various proposals to introduce a form of institutional hierarchy in international law, placing the ICJ at the top of the international adjudicative bodies.[209] Yet, this proposal was not well received, and to this day, there is no normative, procedural, or institutional hierarchy in international law.

Another vital method to resolve conflicts can be termed mutual tolerance. Similar to the traditional margin of appreciation approach, this tolerance would help create a space where the differences between cultures, politics, and rules can play their role. Similar to mutual tolerance is the approach of confidence and trust. It should be trusted that the states share some common values, and they do not intend to violate those values. However, for trust and confidence, the rules in question must not be exclusive.

It is worth noting that all the techniques or methods discussed above create a binary division, and one rule must be preferred or given priority. There are a few other interpretative methods as well that can resolve the conflict of norms, but by way of integration, that is to say, without applying one and leaving the other conflicting rule/norm.

The first interpretative method is the presumption of law-abiding intention of the state parties. The ICJ, in the Right of Passage over Indian Territory, held that it is a rule of

[208] Ibid., para. 24.

[209] Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," 798-800.

interpretation to interpret texts of the Government in accordance with the existing rules and to believe that the government does not intend to violate its obligation.[210] Similarly, the ECtHR held that there is a presumption that there is no conflict between the Security Council resolution and EU member states' obligations under the ECHR to fulfill their human rights obligations.[211] This law-abidance presumption was also deployed by ECtHR earlier in the Srebrenica case, where it was held that human rights had been restricted but not violated. It was held by interpreting human rights provisions in compliance with the existing rules of general international law.[212]

The second interpretative method is often discussed in the fragmentation literature and referred to as the 'systematic interpretation' of rules and norms. Article 31(3)(c) is the main text that refers to the systematic interpretation of treaties, and the ILC famously highlighted it in its final report on the fragmentation of international law. The mentioned article states that the interpretation of a treaty should be made by considering the relevant applicable rules of international law in the relations between the parties.[213]

Article 31(3)(c) of the 1969 Vienna Convention encapsulated the presumption that whenever states enter into new obligations, they do not intend to violate their pre-existing obligations under previous legal instruments. Article 31(3)(c) stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable

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[210] *Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections*, 1957 ICJ Rep. 125, 142 (Nov. 26, 1957).

[211] *Al-Jedda v. United Kingdom*, 2011 Eur. Ct. H.R. ¶ 102 (App. No. 27021/08).

[212] *Stichting Mothers of Srebrenica and Others v. The Netherlands*, 2013 Eur. Ct. H.R. ¶ 139 (App. No. 65542/12).

[213] *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, art. 31.

in the relations between the parties. However, the prerequisites for applying this Article are ambiguous. It is agreed that the term 'relevant rules' in the provision includes the norms derived from any of the recognized sources of international law. In comparison, it is debated whether the term 'parties' refers to all parties to, for instance, the treaty establishing the 'relevant rules', or whether it is sufficient that the rule in question binds the parties to a particular dispute.[214]

It is worth noting that the ICJ has employed the tool of systemic interpretation in various cases. For instance, in the Oil Platforms case, the ICJ situated a specific bilateral treaty within the broader context of general international law by applying Article 31(3)(c) of the VCLT.[215] In the case of Djibouti v. France, the Court used Article 31(3) (c) of the Vienna Convention to interpret two bilateral treaties and interpreted a Convention on Mutual Assistance in Criminal Matters of 1986. According to Djibouti's claim, France allegedly violated the Convention on Mutual Assistance in Criminal Matters of 1986. The ICJ interpreted the Convention on Mutual Assistance in Criminal Matters in light of a Treaty of Friendship and Cooperation concluded between the two parties in 1977.[216]

[214] Bruno Simma, "Universality of International Law from the Perspective of a Practitioner," *The European Journal of International Law* 20, no. 2 (2009): 276.

[215] *Islamic Republic of Iran v. United States of America (Oil Platforms case),* Judgment, I.C.J. Reports 2003, 161, para. 41.

[216] *Djibouti v. France (Case concerning Certain Questions of Mutual Assistance in Criminal Matters),* Judgment, I.C.J. Reports 2008, 177, para. 112.

3.8 OPERATION OF PRECEDENT ACROSS INTERNATIONAL COURTS AND TRIBUNALS

Article 38(1)(d) of the Statute of the ICJ states that judicial decisions are subsidiary means for determining rules of law. However, Article 59 of the Statute of the ICJ mentions that an international decision is only binding upon the parties to the case and in respect of that particular case. Thus, the doctrine of precedent is not binding at the international level. However, there are a few essential things that need to be considered here. When a system reaches a stage at which the decisions of the court are reported and the arguments of judges are published, it is then no longer possible for the judges to ignore the decisions of their fellow judges.[217] The doctrine of precedent was not considered relevant since the cases were not readily available. However, the situation has changed, and the decisions are now properly published and available. They are also relied upon and referred to in subsequent decisions. However, since the ICJ is not bound by its previous decisions, the judges often use interesting phrases when referring to them. Instead of using 'we held', which reflects authority, the court chose phrases such as 'we recall', 'it is stated', and 'we note', all of which indicate mere persuasion.[218]

It is pertinent to note that international courts and tribunals interact with one another, and patterns of their interaction are evident.[219] Prof. Jonathan I. Charney

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[217] J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, ed. Sir Humphrey Waldock (Oxford: Clarendon Press, 1963), 64.

[218] For a detailed analysis on this point and operation of precedent at the world court, please see, Muhammad Munir, *Precedent in Pakistani Legal System* (Karachi: University of Karachi, 2008), 65–72.

[219] Nathan Miller, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals," *Leiden Journal of International Law* 15, no. 3 (2002): 498.

concluded that different international adjudicative bodies interact with each other by referring to their decisions and they mostly agree in their understanding of various concepts of international law such as the law of treaty interpretation and reservations, the sources of international law, state responsibility, nationality, international maritime boundaries compensation for violations of international legal obligations, and exhaustion of domestic remedies. He came to this conclusion after surveying the case law of the ICJ, the ECHR, the Court of Justice of the European Communities (ECJ), the Inter-American Court of Human Rights (IACtHR), the WTO/General Agreement on Tariffs and Trade (GATT) and NAFTA Dispute Settlement Panels, the Iran-U.S. Claims Tribunal, ad hoc and arbitral bodies, and the administrative tribunals of intergovernmental agencies.[220]

3.9 CONCLUSION

The fragmentation of international law is a multi-faceted concept, and scholars address it in different ways. For some, it is a risk that affects the unity and coherence of the international legal system. Institutional fragmentation can result in forum shopping, overlapping of jurisdiction, and conflicting jurisprudence. On the contrary, few argue that the anxiety over fragmentation is an exaggeration. Fragmentation is a natural phenomenon in the development of international law, reflecting the maturity of the international legal system. Furthermore, the multiplicity of international tribunals and courts enhances the efficiency of the system. The international judges take care of their role as architects of coherence of the international legal system.

[220] Jonathan Charney, "Is International Law Threatened by Multiple International Law Tribunals?" *Collected Courses of the Hague Academy of International Law* 271 (1998): 101–382.

The conflict of norms in international law can affect the material unity of international law, and there are different ways in which the norms of international law can conflict with one another. There are means and methods through which the conflict of norms can be resolved, such as the application of *lex specialis* and *lex posterior*, mutual tolerance, and the interpretative principle of systematic integration. Thus, it is concluded that the fragmentation issue can be resolved through different techniques. The international legal system lacks a hierarchical structure and a set of conflict-resolving rules; however, the mindfulness of judges in their relevant cases about the integrity and coherence of the international legal system can help combat the issue of fragmentation.

CHAPTER FOUR

THE DEVELOPMENT OF INTERNATIONAL REGIMES: AN APPRAISAL

4 INTRODUCTION

With the increasing interdependence of states and the complexity of international relations, specialized legal regimes have emerged to address specific issues within the broader framework of international law. However, it is essential to examine whether these specialized regimes compromise the unity and coherence of international law as a legal system. The chapter describes the historical development of different regimes, establishing that they were created in response to the needs of the community of states. The following section addresses the question of the self-contained nature of these specialized regimes. After highlighting the potential interactions between different regimes, the chapter explains the conflict between norms within these regimes.

4.1 HISTORICAL ANALYSIS OF INTERNATIONAL SPECIALIZED REGIMES

The evolution of international law was discussed in detail in Chapter Two; however, exploring its evolution from a different viewpoint could yield further insights. The range of topics covered by international law has expanded in tandem with the surge in challenges faced and the increase in the number of participants within the system. It is no longer exclusively concerned with issues relating to the territory or jurisdiction of states narrowly understood, but is beginning to consider the specialized problems of

contemporary society. Many of these have already been referred to, such as the vital field of human rights, the growth of international economic law covering financial and development matters, concern with environmental degradation, the space exploration effort, and the exploitation of ocean resources and the deep seabed. One can also mention provisions relating to the bureaucracy of international institutions (international administrative law), international labor standards, health regulations, and controls on communications. For instance, the principles and rules relating to war are often discussed in the historical development of international law, but these principles and rules are now part of a dense branch of law known as international humanitarian law. Similarly, the law of the sea, which was initially a part of customary international law, is now a specialized area of international law. Environmental issues, human rights, serious crimes, trade, and various other subjects were matters of concern for the international community. Gradually, specialized treaties and instruments were concluded to address these concerns. Over time, these instruments, along with relevant customary law, developed into specialized regimes. Before discussing any other aspect, it would be helpful to highlight the historical development of a few essential regimes.

4.1.1 Law of the Sea

The international law of the sea is a sub-branch of public international law that deals with defining sea zones, the rights of coastal states, activities at the high seas, permitted and prohibited acts at sea, the relationship between coastal states and landlocked

states, and the relationship between states and the seas.[221] Earlier, the law of the sea was mainly inspired by the idea of freedom of the high seas, as advocated by Hugo Grotius.[222]

The First United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958, essentially codified the law of the seas. Four conventions were concluded at the mentioned conference: The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the Continental Shelf. However, several issues remained unsettled at the first and second Geneva Conferences in 1960. Among these issues, a crucial issue was the width of the territorial sea. A few states were also not satisfied with specific rules, and due to technological advancements, there was a need to create new rules. Thus, a third United Nations Conference on the Law of the Sea (UNCLOS III) was held in 1973. After nine years of deliberations and discussions, the conference finally concluded the United Nations Convention on the Law of the Sea in 1982. The reasons behind such a delay included the tenacity of states in pursuing a packaged deal, dissatisfaction among various states regarding specific provisions of UNCLOS 1982, and attempts to draft the law based on consensus rather than a majority.[223]

UNCLOS, often referred to as the Constitution of Oceans,[224] is a comprehensive system that elaborates on the zones of the seas. The 1982 Convention contains 320 articles and 9 Annexes. It was adopted by a vote of 130 to 4, with 17 abstentions. Under Article

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[221] Malanczuk, *Akehurst's Modern Introduction to International Law*, 173.

[222] Edward W. Allen, "Freedom of the Sea," *American Journal of International Law* 60, no. 4 (1966): 814.

[223] Malanczuk, *Akehurst's Modern Introduction to International Law*, 173- 174.

[224] Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 159.

308(1), the Convention entered into force on 16 November 1994, twelve months after the required 60 ratifications had been received. On July 29, 1994, an Agreement related to the Implementation of Part XI of the 1982 Convention was adopted, principally to address concerns raised by the West on the International Seabed Area (Part XI of the Convention).

One of the most significant outputs of the UNCLOS III was the establishment of various zones of the sea. UNCLOS III defines and describes internal waters, territorial waters, contiguous zones, exclusive economic zones, continental shelf, and high seas. Along with determining the limits of the various zones, the rights of coastal and other states therein are also elaborated in detail. The convention further discusses the maritime boundaries and the deep seabed.[225]

Another vital aspect of UNCLOS III is the establishment of the international tribunal for the settlement of disputes under Part XV of the convention. The statute of the tribunal can be found in Annex VI of the convention.[226] The jurisdiction of the Tribunal encompasses all disputes and applications submitted to it under the Convention, as well as all matters specifically provided for in any other agreement that confers jurisdiction on the Tribunal.[227]

Thus, laws related to the sea have been established in customary international law for ages; however, due to technological advancements, it has become crucial to create laws that could meet the needs of the time. That's the reason that detailed provisions are

[225] Malanczuk, *Akehurst's Modern Introduction to International Law*, 175.

[226] Shaw, *International Law*, 476-477

[227] United Nations, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, arts. 22–23.

provided in the relevant convention, which is also referred to as the constitution of the oceans due to its comprehensive nature. The early laws of the sea can be studied under the development of general international law; however, after the conclusion of UNCLOS III, a new specialized regime was formed.

4.1.2 International Environmental Law

It is a specialized area of international law that addresses significant environmental issues and seeks to regulate the interaction between humans and the environment. Environmental protection, conservation, sustainable development, and the global management of natural resources are all addressed under this regime[228] through multiple treaties and conventions.[229]

As awareness of transboundary environmental challenges, such as resource depletion, pollution, and environmental degradation, increased in the 20th century, contemporary International Environmental Law began to take proper shape.[230]

[228] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2012), 3.

[229] For Instance, Vienna Convention for the Protection of the Ozone Layer (1985) and the Montreal Protocol (1987) addressed the ozone layer's deterioration by phasing out ozone-depleting compounds, The United Nations Framework Convention on Climate Change (UNFCCC, 1992) laid the groundwork for the successive agreements such as Kyoto Protocol and the Paris Agreement to address climate change, The 1992 Convention on Biological Diversity (CBD) seeks to protect biodiversity and promote sustainable resource use, The Basel Convention (1989) and Rotterdam Convention (1998) address the management of hazardous waste and the trading of toxic chemicals internationally, Stockholm Convention on Persistent Organic Pollutants (2001) seeks to reduce or outlaw the manufacturing and use of persistent organic pollutants, which are harmful to both the environment and human health.

[230] Development of environmental law can be divided in different phases; from 1900-1972 (Early ideas of environmental law), from 1972-1992 (basic framework development); and from 1992-onwards

International environmental law evolved as a specialized field to establish norms, concepts, and processes for collectively addressing environmental concerns as the global community recognized the need for concerted action to protect the environment.[231] However, here it may be noted that international environmental law is not an isolated regime; instead, it works under the larger framework of international law, and it overlaps and interacts with other areas of international law, such as ICL and IHRL.[232]

It is worth observing that international treaties do not provide a consistent or uniform definition of 'environment'. The term changes its meaning and is subject to change according to the context in which it is used. For instance, the United Nations Conference on the Human Environment held in Stockholm in 1972 defined the environment as 'air, water, land, flora and fauna, and especially representative samples of natural ecosystems.'[233] Interestingly, the World Commission on Environment and Development (WCED) defined the environment in a very concise way as 'the environment is where we all live.'[234] Interestingly, the 1992 Rio Declaration on Environment and Development refers

(relationship with other branches of international law). see, Edith Brown Weiss, "The Evolution of International Environmental Law," *Japanese Yearbook of International Law* 54 (2011): 1–27.

[231] For the study of main developments that form the basic structure of modern international environmental law, see, Patricia Birnie and Allan Boyle, *International Law and the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009), 4–24.

[232] Birnie and Boyle, *International Law and the Environment*, 3.

[233] United Nations Conference on the Human Environment, *Declaration of the UN Conference on the Human Environment*, 16 June 1992, UN Doc. A/CONF/48/14/REV.1, Principle 2.

[234] Gro Harlem Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987), xi.

to environmental needs, environmental protection, and environmental degradation at numerous points, but it does not specify what these terms encompass.[235]

Due to resource competition, environmental degradation, and community displacement, environmental issues are becoming a growing factor in modern conflicts. By addressing these challenges through international environmental law, conflicts can be avoided, and peace and stability can be improved. There are various environmental courts and tribunals worldwide.[236] Furthermore, other international and regional courts, including the International Court of Justice (ICJ), arbitral tribunals, and the World Trade Organization (WTO) dispute settlement mechanism, take cognizance of environmental issues if they fall within their jurisdiction.[237]

International environmental law is crucial in the contemporary world for addressing urgent issues, including pollution, biodiversity loss, and climate change. It represents the growing recognition that maintaining the planet's health is a collective responsibility and that taking shared steps is necessary to protect the environment for both current and future generations. The overall progress of international environmental law in achieving its goals is impressive and positive; however, there remains considerable scope for improvement.[238]

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[235] Birnie and Boyle, *International Law and the Environment*, 5.

[236] G. Pring and C. Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (Kenya: UNEP, 2016), 1.

[237] Riccardo Pavoni, "Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights," in *Environmental Law: Dimensions of Human Rights*, ed. Ben Boer (London: Oxford University Press, 2015), 69–106.

[238] Joseph F. C. Di Mento, *The Global Environment and International Law* (Austin: University of Texas Press, 2003), 141.

4.1.3 International Trade Law

Trade is a human activity that has occurred in all times and places, with the only exception being the Dark Ages or periods of government prohibition.[239] However, merely trade agreements were not sufficient; trade rules were also required for the enforcement of these agreements. The challenges and complexities associated with international trade led to the specialization of the field of international trade law.[240] In the modern era, international trade law is essential for promoting stability, fostering economic growth, and resolving disputes in the global economy. It provides states with a well-organized framework for negotiating trade agreements, upholding fair competition, and resolving conflicts, which helps create a more feasible and open global trading system. The post-World War II era marked a significant turning point in the development of contemporary international trade law. Expertise in equating economic interests, market access, tariffs, non-tariff barriers, and regulatory alignment is necessary while negotiating trade agreements.

By lowering tariffs and other trade obstacles, the General Agreement on Tariffs and Trade (GATT, 1947) laid the groundwork for liberalizing trade.[241] World Trade Organization (WTO, 1995) replaced GATT and developed a thorough framework for

[239] International trade was restricted by the Japanese in the seventeenth century. see, Conrad Totman, *A History of Japan* (Oxford: Blackwell Publishing, 2000), 218–19.

[240] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros Mavroidis, and Michael Hahn, *The World Trade Organization: Law, Practice and Policy*, 3rd ed. (London: Oxford University Press, 2015), 8.

[241] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

international commerce, including procedures for resolving disputes.[242] Rules for non-discrimination (Most Favoured Nation and National Treatment Principles), tariff reduction, and dispute resolution are provided under the GATT and WTO accords.[243] The WTO exists to 'facilitate the implementation, administration, and operation as well as to further the objectives' of the WTO agreements.[244]

Due to trade disputes arising from protectionist policies, discriminatory practices, unfair subsidies, and infringements on intellectual property rights, international trade law is crucial in contemporary conflicts. The World Trade Organization (WTO) provides a specialized dispute resolution mechanism through the Dispute Settlement Understanding (DSU).[245] This dispute settlement mechanism is an essential tool for resolving trade disputes.[246] It includes the Dispute Settlement Body (DSB), the Appellate

[242] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (hereinafter 'the WTO Agreement'). For an overview on the history and future of WTO, See, Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: WTO Publications, 2013).

[243] For instance, the Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1995) establishes guidelines for the protection of intellectual property. The WTO's Agreement on Trade-Related Investment Measures (TRIMS, 1995) deals with investment policies that have an impact on trade. Similarly, Bilateral and regional free trade agreements (FTAs) set up special trade conditions between two or more nations or regions.

[244] WTO Agreement Article III:1

[245] Marrakesh Agreement Establishing the "World Trade Organization" (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (hereinafter 'the WTO Agreement') Annex 2. For understanding the dispute settlement mechanism of international trade law before 1995 and the contemporary mechanism, see, Michael J. Trebilcock and Joel Trachtman, *Advanced Introduction to International Trade Law* (Cheltenham: Edward Elgar Publishing, 2020), 25–35.

[246] For Detailed insights of the dispute settlement mechanism of WTO see, Matsushita et al., *The World Trade Organization*, 83–109.

Body, and the Panels to make sure that trade disputes are decided impartially and under predetermined guidelines.[247]

4.1.4 International Human Rights Law

The idea of human rights can be found in various religions in one form or another. However, certain developments and incidents led to the formation of modern IHRL. Western Ideologies seem to influence this branch of international law. For instance, the Magna Carta (1215), the French Revolution (1789), and the United Kingdom's abolition of the slave trade (1807) represent foundational moments in the development of modern human rights law.

It is worth noting that there was no significant development of this specialized area at the international level before the Second World War. Before the Second World War, there were attempts to abolish the slave trade and protect minorities. However, it was only after the Second World War that IHRL was developed at the international level in the true sense.[248]

The United Nations General Assembly adopted the UDHR on December 10, 1948.[249] UDHR is one of the significant documents in the history of IHRL. Most of the

[247] Ibid., 86-87.

[248] Riccardo Pisillo Mazzeschi, *IHRL: Theory and Practice* (Cham: Springer Nature Switzerland, 2021), 3–12.

[249] . Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

provisions of this declaration are now binding in the form of two covenants.[250] Apart from these covenants, many provisions of this declaration are part of various constitutions. The binding nature of specific provisions in the declaration is also evident from the fact that they have become part of customary international law.[251]

The various human rights treaties are concluded to address the relevant rights efficiently and effectively. Human rights are now protected at the universal and regional levels through different conventions and treaties. IHRL has also influenced other areas of international law.[252]

4.1.5 International Humanitarian Law

IHL is mainly grounded on the fact that conflicts cannot be eliminated. Thus, it is significant to establish rules that can protect the victims of warfare and regulate the means and methods of warfare.[253] This specialized regime regulates the laws related to belligerent and neutral nations, as well as persons involved in armed conflicts. It also discusses the rights of protected persons, such as civilians, and the obligations of belligerents towards

[250] International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).
International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976).

[251] Hurst Hannum, "The UDHR in National and International Law," *Health and Human Rights* 3, no. 2 (1998): 145.

[252] The influence of IHRL on other branches of international law and other relevant aspects are discussed in the Chapter 5.

[253] Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Leyden: Sijthoff; Geneva: Henry Dunant Institute, 1975), 30.

them and their property. The law of armed conflict is codified in the form of four Geneva Conventions and three additional protocols.[254] Currently, the conventions have a universal ratification with 196 state parties.[255] The Geneva Conventions, along with customary international law, provide the basic principles for conducting a war. These principles include the distinction between combatants and non-combatants, the prohibition of indiscriminate attacks, the requirement for proportionality in attacks, the respect and protection to be afforded to prisoners of war, and the prohibition of torture, medical experimentation, and neglect endangering health.

4.1.6 International Criminal Law

ICL deals with the trial and conviction of wrongdoers for heinous international offenses, including war crimes, genocide, aggression, and crimes against humanity.[256] The necessity to hold people accountable for the most serious international crimes, regardless

[254] The four Geneva Conventions of 12 August 1949, which entered into force on 21 October 1950 are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 ('Geneva Convention I'); (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 ('Geneva Convention II'); (3) Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 ('Geneva Convention III'); (4) Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 ('Geneva Convention IV'). Protocol Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol relating to the Protection of Victims of Non-International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609; Protocol relating to the Adoption of an Additional Distinctive Emblem, conclusion date 8 December 2005 (not yet in force).

[255] International Committee of the Red Cross, *Geneva Conventions of 12 August 1949* (2005), accessed [02 March 2023], http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps.

[256] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 3.

of their official status, led to the declaration of ICL as a specialized regime.[257] The constitution of special tribunals and courts, as well as the codification of legal concepts, eventually became mandatory as atrocities in conflicts attracted international attention. The foundational tracings for the development of ICL can be traced back to the post-World War II era and the Tokyo and Nuremberg trials, which tried and convicted various war criminals. These trials explicitly demonstrated that perpetrators of international crimes could be held accountable for serious breaches of international law. Later, to address the hostilities in the Balkans and the genocide in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) were both established.[258]

Due to its vital role in promoting justice, holding criminally liable individuals accountable, and preventing serious international crimes from going unpunished, ICL gained a significant position in contemporary conflicts. It provides a legal framework for addressing transgressions of humanitarian standards and serves as a deterrent and accountability mechanism in the modern world. It sends a message that impunity will not be tolerated and helps prevent and resolve conflicts when those responsible for serious infractions are held accountable. It highlights the international community's dedication to upholding the fundamental values of justice and human rights.[259]

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[257] Robert A. Friedlander, "The Enforcement of ICL: Fact or Fiction?" *Case Western Reserve Journal of International Law* 17, no. 1 (1985): 79.

[258] Orakhelashvili, *Akehurst's Modern Introduction to International Law,* 437-442.

[259] Detailed overview of this area of international law is provided and discussed in Chapter 4 below.

4.2 INTERNATIONAL REGIMES OR SELF-CONTAINED REGIMES

The expansion in various branches of international law, in turn, stimulates discussions concerning the relationships between free trade and environmental protection, human rights and trade restrictions, human rights and the environment, and many others. Through these discussions, the nature of different regimes and their interactions with one another needs to be highlighted. Are different regimes, such as those discussed in the previous section, self-contained regimes? Do the various international regimes interact with one another? Do the norms of different regimes overlap or contradict each other? If so, then how are different norms reconciled with each other in case of conflict? These are the questions that are discussed in this research, and a few of them are addressed in the present chapter.

The Appeals Chamber of the ICTY in the Tadić case stated that "in international law, every tribunal is a self-contained system (unless otherwise provided)."[260] To grasp the concept and idea of a self-contained regime, several rulings by the PCIJ and the ICJ are of importance. The framework of the concept is found in the S.S. Wimbledon Case, the Tehran Hostage Case, and the Nicaragua Case.

The term "self-contained" entered the domain of international law with a decision of the Permanent Court of International Justice (PCIJ), in the S.S. Wimbledon case.[261] The

[260] *Prosecutor v. Tadić***,** Appeals Chamber, IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, 8 September 1995, ¶ 11.

[261] Case of the S.S. "Wimbledon" (Brittany, France, Italy, and Japan (with Poland as intervener) v. Germany), 17 August 1923, PCIJ.

applicants questioned the German authorities' right to refuse access to the Kiel Canal and claimed a right to free access by referring to the Treaty of Versailles regarding international waterways.[262]

The PCIJ adopted a comparative approach for analyzing provisions related to the Kiel Canal and other provisions of the treaty that were general and more favorable to German sovereignty. The generally applicable articles limit access to inland waterways to allied and associated powers alone. PCIJ held that the provisions of the Treaty of Versailles regarding the KIEL Canal are self-contained, and their application cannot be limited by the general provisions of the treaty.[263]

For the first time, the term 'self-contained regime' appeared in the Tehran Hostages case decided by the International Court of Justice (ICJ).[264] The ICJ held that the rules of diplomatic law are a 'self-contained regime.'[265] Though the term 'self-contained' was used, the court did not provide any explicit or meaningful definition as to what exactly constitutes a self-contained regime. The court mentioned that

> diplomatic law itself provides the necessary means of defense against, and sanction for, illicit activities by members of diplomatic or consular missions [in particular, measures of declaration of persona non grata and the breaking-off of diplomatic relations] . . . The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand,

[262] Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 225 Consol. T.S. 188.

[263] *Case of the S.S. "Wimbledon" (Brittany, France, Italy, and Japan (with Poland as intervener) v. Germany),* 17 August 1923, PCIJ, 8–9.

[264] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* 24 May 1980, ICJ.

[265]Ibid., Para 86

> lays down the receiving State's obligations regarding the facilities, privileges, and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious.[266]

It is worth mentioning that the court referred to diplomatic law as self-contained only in terms of state responsibility. In the Nicaragua case, the ICJ made another reference to specific regimes of international law that provide for their enforcement mechanism. There, the ICJ noted that

> Where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves . . . The mechanisms provided for therein have functioned . . . In any event, while the United States might form its appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.[267]

However, the term 'self-contained regime' was not used by the ICJ in this case. ICJ also did not make a general statement to the effect that no remedy other than those provided for in human rights conventions could be resorted to. It was only found that the use of force was not an appropriate method.

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[266] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* 24 May 1980, ICJ, at para. 86.

[267] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment on the Merits, ICJ Rep. 1986, 14, paras. 267–68.

However, after the Tehran Hostages Case, the idea of a self-contained regime was often referred to, and it was believed that there could be regimes that have a complete set of secondary rules and can function on their own in isolation from general international law. This is a misleading and misconceived concept due to various reasons. The interpretation of the term 'self-contained regime' as a closed legal system is not accepted now. The principle of *pacta sunt servanda* requires states to fulfill their contractual obligations under different treaties and conventions. Thus, the states cannot create any other legal system outside the realm of current international law.

Furthermore, international regimes cannot regulate without observing the limitations imposed by the Jus Cogens.[268] Lastly, no regimes can be found that function in isolation and independently from the general international law. As soon as states contract with one another, they do so automatically and necessarily within the system of international law.[269] The jurisprudence of different international courts and tribunals can confirm the interaction of specialized regimes with international law.

4.3 INTERACTION OF INTERNATIONAL REGIMES OF INTERNATIONAL LAW?

The present chapter endeavors to explore the interaction of different specialized regimes. It would be crucial to analyze how and where these regimes overlap. Initially, it was perhaps possible to de-link different regimes from one another; however, with

[268] Andreas L. Paulus, "Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal," *Nordic Journal of International Law* 74, no. 3–4 (2005): 332.

[269] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003), 37.

advancements at multiple levels, it is hard to imagine this. One cannot ignore environmental or human rights concerns anymore while deciding on any trade-relevant case. For instance, free trade policy hinders national laws from restricting various goods or implementing different initiatives to protect the environment.[270] Similarly, international environmental law will be in the picture while adjudicating cases relevant to the law of the sea.

Furthermore, human rights matters are now related to all sub-branches of international law. There is a continuous need to review different concepts to accommodate human rights concerns. The initial separation between the specialized regimes was helpful, at least during the Cold War period. For instance, economic institutions such as the World Bank, IMF, and GATT (now WTO) focused on the world's economic problems, while the

[270] Although some commentators condemn free trade as generally bad for the environment, most focus their critique on specific issues, arguing (i) that the rules of the multilateral trading system may pose difficulties for the implementation of multilateral environmental agreements that use trade restrictions to protect the environment, such as the 1973 Convention on Trade in Endangered Species, the 1987 Protocol for the Protection of the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and the 2001 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention); (ii) that the rules of the multilateral trading system frustrate attempts to protect resources and the environment in areas beyond national jurisdiction (e.g. the oceans), as in the US–Mexico dispute concerning dolphin-friendly tuna-fishing regulations, or the similar attempt to protect sea turtles from shrimp fisheries; (iii) that the rules of the multilateral trading system prevent nations from adopting measures to protect their domestic environment, such as setting high environmental standards for products and services, labelling, packaging, recycling, and conservation of natural resources; and (iv) that the rules of the multilateral trading system obstruct eff orts to compel other countries to adopt high environmental standards, although these may be necessary to prevent or correct transboundary pollution, to remove competitive advantages in attracting investment and in selling products and services, or to conserve natural resources. See, Birnie and Boyle, *International Law and the Environment*, 754.

UN handled the political problems. However, the end of the Cold War era and the growing interdependence between states and between the issues made it difficult to maintain a strict line of separation. The appearance of non-state actors at the international level also played a significant role in blurring the separation between different regimes.[271]

The regime interaction can be observed in treaties through various clauses present in them. For instance, Notwithstanding-clauses can help in achieving integration effect and harmonization. Article 2(3) of the Cartagena Protocol is a perfect notwithstanding clause. Accumulative application is also achieved through cross-referrals, such as articles 6(2) and 22(3) of the ICCPR. These articles mention other human rights instruments. Another example of reconciliation can be found in Article 104 of the North American Free Trade Agreement (NAFTA) (by laying down a balancing approach), which attempts to avoid any potential conflict between free trade agreements and environmental agreements.

There are various principles as well that help reconcile different regimes. For instance, the sustainable development principle (which is a reconciliatory principle) aims to minimize friction between international environmental law and international law of development. Similarly, the concept of responsibility to protect is an attempt to reconcile the legal concept of non-intervention and human security. It would be essential to highlight that these principles do not help in resolving normative conflicts completely. They only help in avoiding a situation where one regime/principle overshadows the other one.

[271] Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands," *Michigan Journal of International Law* 25, no. 4 (2004): 903–904.

A perfect example of a reference to general international law and cross-referencing another international regime is Article 21 of the Rome Statute.[272] The mentioned article clearly states that the ICC shall apply the general rules and principles of international law and shall also consider the law of armed conflict and internationally recognized human rights standards. Similarly, the Havana Charter for an International Trade Organization of 1948 referred to the UN Charter's objectives of achieving economic progress and development.[273] In modern international law, the precautionary approach stated in Principle 15 of the Rio Declaration of 1992 was referred to in Article 1 of the Cartagena

[272] Article 21 of the Rome Statute of the International Criminal Court is related to the 'applicable law' of the court. It states:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

[273] Article 1 of the Havana Charter for an International Trade Organization, Mar. 24, 1948, United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4 [hereinafter Havana Charter]. Article 1 provided: "The parties to this Charter undertake in the fields of trade and employment to cooperate with one another and with the United Nations. For the Purpose of realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter."

Protocol. Last but not least, general international law was referred to in the "United Nations Convention on the Law of the Sea" (UNCLOS) preamble, stating "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[274]

An example of cross-referencing is that articles 211 and 217-220 UNCLOS deal with maritime pollution and accidents. The international standards referred to in these articles are basically the regulations of the International Convention for the Prevention of Pollution from Ships (MARPOL) and resolutions of the Maritime Safety Committee (MSC) under the International Convention for the Safety of Life at Sea (SOLAS).[275]

An interesting example of cross-referencing happens between international trade and international labor agreements. Not only that, bilateral trade law conventions refer to provisions of International Labour Organization (ILO) conventions, and direct incorporation of labor standards also occurred in a few bilateral trade agreements. [276]

There is significant interaction and references between special regimes of international law. Regime interaction can be seen in the case laws of international adjudicative bodies. Similarly, the reference to general international law in different treaties and cross-references to other regimes highlight the regime interaction. Few judges

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[274]United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982), preamble, ¶ 8 [hereinafter UNCLOS].]

[275] Anne Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization," *International Journal of Constitutional Law* 15, no. 3 (2017): 690.

[276] Jordi Agustí-Panareda, Franz Christian Ebert, and Desiree LeClercq, *Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System*, International Labour Office Background Paper, March 2014, SSRN, https://ssrn.com/abstract=3858496 (accessed November 22, 2022).

have even stressed the need for judicial dialogue between different courts and tribunals. For instance, Judge Greenwood stated

> International law is not a series of fragmented, specialist, and self-contained bodies of law, each of which functions in isolation from the others. It 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 necessarily bound to come to the same conclusions.[277]

However, due to the lack of a central court that can authoritatively interpret the provisions, clauses, and rules harmoniously, conflict of norms happens, and there is a need to consider the interpretative tools that can help minimize the fragmentation.

4.4 INTERNATIONAL REGIMES AND THE CONFLICT OF NORMS

International regimes address the subject matter of the respective field in a more specific manner. However, it is not surprising that sometimes the norms of different regimes can overlap and thus may cause a conflict. Conflict of norms can also happen within the same regimes. Conflict can occur between different treaty obligations, between a treaty obligation and a custom, and so on. International regimes often overlap in their content as well. For instance, IHRL and international refugee law overlap at various points in their content. Similarly, the newly emerged regime of statelessness law is also an offshoot of international refugee law. The overlap in content does not necessarily imply a

[277] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Judgment (Compensation Owed), 2012 ICJ Rep. 324 (June 19, 2012), Declaration of Judge Greenwood, ¶ 8.

conflict of norms, but it indicates that there is a strong possibility of it. Apart from the conflict of norms, there can be confusion with regard to the applicable regime in a particular situation.

The WTO Appellate Body analyzed the status of the precautionary principle under the WTO-covered treaties, particularly the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement). It was held that, regardless of the standing of the principle under international environmental law, it is not obligatory for the WTO.[278]

Conflict of norms can arise due to different approaches underlying the norms. The conflict due to various underlying approaches or concepts of norms can be found between the Convention on the Conservation of Antarctic Marine Living Resources and the UN Convention on the Law of the Sea. The conflict exists due to the fact that the first instrument approaches the marine environment in an eco-systemic manner, viewing it as an ecological whole, whereas the second approach is more utilitarian and economic, emphasizing the sustainable exploitation of natural resources. [279]

Another kind of conflict occurs between different treaty instruments due to their varying goals and policy objectives. For instance, the environmental treaties aim to re-regulate the economy, and on the other hand, the trade agreements primarily focus on eradicating trade barriers. There may not be any normative conflict in a strict sense;

[278] *Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, ¶¶ 123–125.

[279] Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer-Verlag, 2003), 7–8.

however, the divergent and opposing goals cause friction and tension.[280] It may be noted that there are various multilateral environmental agreements (MEAs) that endorse trade restrictions. The Montreal Protocol on Substances that Deplete the Ozone Layer,[281] the Convention on International Trade in Endangered Species (CITES),[282] and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes[283] are examples of MEAs to restrict trade.

Similarly, IHL and IHRL often overlap in their application. Both regimes have many similarities; for instance, both have a protective purpose. IHRL protects human dignity[284] , and IHL endorses the principles of humanity and public conscience. There are obligations under both regimes that are absolute, which means that the violation of such an obligation by one party does not allow for reciprocation.[285] Despite this closeness, inter-regime conflict does exist between them. ICL is yet another regime of international law that is considered an offshoot of IHL since it describes the penalties and punishments for the violations of International Humanitarian Law. However, ICL is scrutinized in its application of human rights law and norms.[286]

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[280] Ibid., 8-9.

[281] Adopts trade controls that are more restrictive as to non-parties than parties

[282] Regulates imports and exports in certain species of animals and plants and allows punitive trade restrictions to be imposed on non-complying parties

[283] Prohibits exports and imports of hazardous and other wastes by parties to the Convention to and from non-party states.

[284] See, for instance, the references to human dignity in the Universal Declaration of Human Rights.

[285] *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, ¶¶ 515–520.

[286] The interaction and conflict between IHRL, IHL and ICL are discussed in depth in Chapter 4 and 5.

4.5 CONCLUSION

The present chapter provides insights into the different regimes of international law. It can be concluded that different regimes were developed to provide adequate solutions to the relevant problems efficiently. However, in that process, the various regimes interacted with each other, and friction and conflict occurred. In the Fragmentation literature, international regimes face essential questions: are they self-contained regimes, or do they interact with general international law and other regimes of international law? The present chapter establishes that no international regime is self-sufficient, and they have to fall back on general international law at some point. However, the interaction of different international regimes between themselves and with the general international law raises the possibility of conflict. These conflicts can be of various kinds. Here comes the question for the coming chapters of this research: How do the courts and tribunals of the same and different regimes interact with each other, and what can be concluded from that judicial dialogue?

CHAPTER FIVE

EXPLORING THE FRAGMENTATION DEBATE IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW

5 INTRODUCTION

In the previous chapter, a basic introduction to ICL was provided. However, since this chapter aims to investigate the details of ICL from the perspective of the fragmentation debate, it is crucial to have a look at the basics of ICL, its history, and its overall structure now. ICL is a regime that brought individuals into the ambit of subjects of international law, and furthermore, the internal complexities of ICL make it an interesting area to explore to understand the fragmentation debate.

The chapter first explains the notion of ICL and begins exploring the applicable laws of criminal tribunals and courts. The chapter then proceeds to discuss the interaction of the ICJ and international criminal tribunals, the relationship between criminal tribunals and courts, and lastly, the interaction of international criminal courts and human rights.

5.1.1 Explaining the Term 'ICL'

The very first point to be highlighted is what exactly is meant by ICL and from where its origin can be found. Writings suggest the presence of the idea in early ages to punish those who have committed serious crimes, which concerned the community at

large.[287] For instance, Bassiouni claimed that individuals were held responsible for war crimes by a tribunal in 405 BC in Greece.[288] Schabas also held a similar view and stated that "War criminals have been prosecuted at least since the time of ancient Greece, and probably well before that."[289] It is generally accepted that the first known international criminal trial was conducted in 1474. It is contended that international criminal rules were first enforced and invoked when an ad hoc tribunal was established to try Peter von Hagenbach, who was accused and convicted of such crimes as "murder, rape, perjury, and other crimes in violation of 'the laws of God and man."[290] The establishment of the Nuremberg and Tokyo tribunals also played a vital role in the development of ICL. However, it is argued that it was only after the establishment of ad hoc Tribunals for the former Yugoslavia and Rwanda in the 1990s that it could be argued that ICL evolved as a specialized regime or branch of international law.[291] This regime/branch of law was further developed with the creation of the International Criminal Court.

Georg Schwarzenberger critically examines the ontological nature of International Criminal Law in his seminal article, where he interrogates the very foundations and

[287] Cenap Çakmak, *A Brief History of ICL and International Criminal Court* (New York: Palgrave Macmillan, 2017), 9.

[288] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. (Cambridge, MA: Kluwer Law International, 1999), 517.

[289] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK and New York: Cambridge University Press, 2001), 1.

[290] Çakmak, *A Brief History of ICL and International Criminal Court*, 10

[291] Robert Cryer et al., *International Criminal Law and Procedure*, 2nd ed. (New York: Cambridge University Press, 2010), 3.

definitional boundaries of the field.[292] Schwarzenberger critically examines the term "International Criminal Law" (ICL), identifying six distinct usages, including: Territorial extensions of domestic criminal law, internationally prescribed or authorized municipal law, Crimes common to civilized nations, International cooperation in criminal justice, and A broader material (substantive) sense of ICL. He concludes that none of these definitions constitutes a genuine, standalone legal system. In his view, what is often labeled "ICL" is domestic criminal law applied with international mechanisms rather than a truly independent legal order.

Another essential aspect of ICL is the concept of transnational criminal law. Before the 1990s, ICL was considered to consist of crimes that had transboundary effects. Transnational criminal law refers to the rules and principles of the national legal system that permit a state to enact and implement its criminal law over crimes with some transnational linkage.[293] Under transnational criminal law, states conclude treaties to enhance assistance with regard to crimes that have traces of foreign elements. Other treaties are also concluded, which require states to criminalize different actions, conduct trials of the offenders found in their territorial jurisdiction, or extradite them to other states that will prosecute them. It is pertinent to mention that domestic law is the primary source of these prohibitions on individuals and offenses.[294]

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[292] Georg Schwarzenberger, "The Problem of an ICL," *Current Legal Problems* 3, no. 1 (1950): 263–96, https://doi.org/10.1093/clp/3.1.263.

[293] Robert Cryer et al, *International Criminal Law and Procedure*, 6

[294] N. Boister, "'Transnational Criminal Law'?," *European Journal of International Law* 14, no. 5 (2003): 968–76, https://doi.org/10.1093/ejil/14.5.953.

The scope of ICL is often described in terms of values that international law seeks to protect through prohibitions. According to this approach, international crimes are those that are a matter of concern for the world community at large.[295] The abolition of the slave trade is a good example in this regard. Similarly, the ICC Statute almost defined the core crimes in terms of 'the most serious crimes of concern to the international community as a whole'[296] and accepted that such crimes 'threaten the peace, security, and well-being of the world.' [297]

5.2 EXPLORATION OF APPLICABLE LAWS OF CRIMINAL COURTS AND TRIBUNALS

International criminal ad hoc or hybrid tribunals and courts decide the cases falling under their jurisdiction according to their applicable law. Before looking into the complexities caused by the multiplicity of international criminal courts and tribunals, there is a need to understand the structure and the applicable laws of these adjudicative bodies.

5.3 AD HOC TRIBUNALS

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are ad hoc international criminal tribunals established by mandate from the Security Council of the United Nations. These tribunals were established in response to atrocities committed in the territories of

[295] Robert Cryer et al, *International Criminal Law and Procedure*, 6.

[296] Rome Statute of the International Criminal Court, arts. 1, 5(1).

[297] Rome Statute of the International Criminal Court, preamble, ¶ 3.

Yugoslavia and Rwanda. ICTY and ICTR deal with the prosecution of international crimes referred to in their statutes.

5.3.1 The International Criminal Tribunal of Yugoslavia (ICTY)

Article 1 of the ICTY Statute regarding the 'Competence of the International Tribunal' states that the ICTY 'shall have the power to prosecute persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute'.[298] Furthermore, Article 9 states that 'the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991. Thus, the jurisdiction of ICTY was restricted in territorial and temporal scope.

ICTY can only exercise jurisdiction over natural persons. According to the statute, the ICTY and national courts have concurrent jurisdiction over crimes committed in the former Yugoslavia. However, the ICTY can take over the trial if it is considered better in the interest of justice and fairness. The ICTY can prosecute individuals for grave breaches of international humanitarian law, war crimes, genocide, and crimes against humanity.[299]

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[298] Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), as amended by Resolution 1877 (2009), art. 1.

[299] Michael P. Scharf and Margaux Day, "The ad hoc international criminal tribunals: Launching a new era of accountability," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (New York: Routledge, 2011), 53.

5.3.2 The International Criminal Tribunal of Rwanda (ICTR)

On 8 November 1994, just 18 months after the creation of the Yugoslavia Tribunal, the Security Council established the International Criminal Tribunal for Rwanda (ICTR). Only months after the atrocities occurred, the Security Council established the ICTR, and the Tribunal's Statute was annexed to Security Council Resolution 955.[300]

The statute of ICTR resembles the ICTY's statute, though there are some significant differences. For example, the temporal jurisdiction of the Rwanda Tribunal was limited to the period of 1 January 1994 to 31 December 1994.[301] On the contrary, the ICTY's temporal jurisdiction has no end date. Furthermore, the ICTR Statute extended the jurisdiction of the tribunal over the crimes committed during an internal armed conflict. However, this jurisdiction was not extended to crimes committed in an international armed conflict.

The Prosecutor of the Yugoslavia Tribunal also served as Chief Prosecutor of ICTR, with a Deputy Prosecutor assisting. ICTY and ICTR have a single Appeals Chamber in The Hague. In contrast, the Trial Chambers of the Rwanda Tribunal were in Africa. The Judges formulated the Rules of Procedure and Evidence according to Article 14 of the ICTR Statute.

[300]Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994)..

[301] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), art. 1.

5.3.3 Applicable Law of ICTY AND ICTR

The absence of a provision on applicable law has led to inconsistent interpretations, which is regrettable.[302] However, both tribunals, ICTY and ICTR, generally agreed that international law sources are relevant, albeit in a subsidiary manner.[303] Cassese argues that the ad hoc tribunals, being international courts, must apply international law. They should prioritize their own statutes and internal legal instruments that explicitly refer to treaties like the Geneva Conventions and customary international law.[304] If these sources do not resolve a legal issue, the tribunals can consider general principles of international law or, if necessary, general principles of criminal law recognized in major legal systems worldwide. The ICTY has shown support for this approach in its case law. Nevertheless, it is worth noting that the tribunals have been inconsistent in identifying relevant sources and establishing their hierarchy.

5.4 INTERNATIONAL CRIMINAL COURT

It is claimed that the evolution of ICL will now primarily be influenced by the International Criminal Court.[305] The ICC statute entered into force on 1 July 2002, and the first judges were elected in February 2003. The Statute consists of a preamble and 13 parts,

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[302] Alexandre Skander Galand, "The Systemic Effect of IHRL on ICL," in *Human Rights Norms in 'Other' International Courts*, ed. Martin Scheinin (Cambridge: Cambridge University Press, 2019), 92.

[303] Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (Berlin: Springer-Verlag, 2016), 54.

[304] Ibid.

[305] David Scheffer, "The International Criminal Court," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (London and New York: Routledge, 2011), 67.

including 128 Articles.[306] The ICC is a permanent judicial institution, a product of an internationally binding instrument. Article 34 establishes the following organs of the Court: (a) a Presidency, (b) an Appeals Division, a Trial Division, and a Pre-Trial Division, (c) the Office of the Prosecutor, and (d) the Registry. The Court comprises 18 full-time judges who are to be elected for a fixed term of nine years by the Assembly of State Parties (ASP). Under the provisions of Article 38, the President and the First and Second Vice-Presidents are elected by an absolute majority of the judges. The Court consists of a number of chambers, namely the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber. The Court is usually located in the Hague but maintains the capacity to function elsewhere where this is more convenient. The ICC has a restrictive jurisdiction over 'the most serious crimes of concern to the international community as a whole.' These crimes are mentioned in Article 5(1), namely, Genocide, War Crimes, Crimes against Humanity, and Crime of Aggression. In establishing the 'trigger' mechanisms, Article 13 provides that the ICC exercises jurisdiction over crimes falling within the scope of the Statute only when a situation has been referred to the Prosecutor by a State party to the Statute or by the Security Council acting under Chapter VII of the UN Charter; or where the prosecutor him or herself initiates an investigation, under Article 15.[307]

[306] See, Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," *European Journal of International Law* 10 (1999): 144–71.

[307] William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge: Cambridge University Press, 2011), 157–86.

5.4.1 The Applicable Law of ICC

Article 21 of the Rome Statute refers to the applicable law of the ICC.[308] Article 21 was a unique provision in ICL. This article aims to limit the discretion of judges in defining the applicable law.[309] However, the text of Article 21 is not simple and certain. The possibility of multiple interpretations has made this article ambiguous and complicated. It is pertinent to mention that this article departs from the generally accepted text for the sources of international law referred to in Article 38(1) of the ICJ Statute. Along with describing the applicable law of ICC, this article postulates the hierarchy of sources as well.

5.5 HYBRID TRIBUNALS

The UN Security Council created the international criminal tribunals in the 1990s. However, the Security Council was later reluctant to create any other ad hoc tribunal for

[308] Article 21 of ICC states:

The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The Court may apply principles and rules of law as interpreted in its previous decisions.

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status..'

[309] Gudrun Hochmayr, "Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute," *Journal of International Criminal Justice* 12, no. 4 (2014): 656.

international law violations. Thus, hybrid tribunals were made, which are similar to models of ad hoc tribunals in form, substance, and legitimacy, but they are more in line with a nation's vision of justice.[310]

The features and models of each hybrid tribunal are distinct and different, but there are a few similarities. For instance, the applicable law of each of these tribunals is based on both national and international law, the judges and other staff are from both international and national backgrounds, and lastly, they are all situated in the countries where the crimes and violations of international law occurred.[311]

5.5.1 The Special Hybrid Panels Created as Part of the United Nations Administration of East Timor and Kosovo

5.5.1.1 East Timor

The United Nations Transitional Administration in East Timor (UNTAET) was established by the Security Council in 1999. UNTAET's mandate included the administration of East Timor, and it was empowered to legislate and exercise executive authority and administration of justice.[312] Under Regulations No. 1999/1 and No. 2000/11, the applicable law in East Timor was a mixture of international and domestic law. The

[310] Fidelma Donlon, "Hybrid Tribunals," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (London and New York: Routledge, 2011), 85–101.

[311] Etelle R. Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform," *Arizona Journal of International and Comparative Law* 23, no. 2 (2006): 348.

[312] In addition, by promulgating the first UNTAET Regulation No. 1999/1, the Special Representative of the Secretary-General vested all legislative and executive authority including the administration of the judiciary in East Timor in UNTAET. UN Security Council Resolution 1272, UN Doc. S/RES/1272 (1999), para. 1..

Special Panels in East Timor applied Indonesian law, the law and regulations promulgated by UNTAET, and, where appropriate, applicable treaties and customary international law.[313] Regulations No. 2000/11 and No. 2000/15 defined the subject-matter jurisdiction of the Special Panels. Genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture were defined as serious criminal offenses. Furthermore, Section 3.1 of Regulation No. 2000/15 provided that 'where appropriate, applicable treaties and recognized principles and norms of international law, including the established principles of the international law of armed conflict' were applicable. The transitional Criminal Procedure Code was introduced by UNTAET to manage the procedures and to ensure that international standards were observed during criminal proceedings.[314]

Timor-Leste was created as an independent state on May 20, 2022. The Timor-Leste Constitution regulated the transfer of authority of the UNTAET Special Panels and Serious Crimes Unit to the new Timor-Leste institutions. Established in May 2002, the United Nations Mission of Support in East Timor (UNMISET) was the follow-up mission

[313] See generally: Håkan Friman, "Procedural Law of Internationalized Criminal Courts," in *Internationalized Criminal Courts*, eds. Cesare P. R. Romano, André Nollkaemper, and Johan K. Kleffner (Oxford: Oxford University Press, 2004), 317–58.

[314] On detailed analysis of this point, see, Suzannah Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor," *Melbourne University Law Review* 25, no. 1 (2001): 145–75.

from UNTAET.[315] The Security Council ended its support of UNMISET, the Special Panels, and the Serious Crimes Unit operations in 2005.[316]

5.5.1.2 Kosovo

In 2000, a hybrid tribunal known as the "Regulation 64 panels" was established by the United Nations Interim Administration Mission in Kosovo.[317] UNMIK allowed international judges to serve alongside domestic judges to try crimes under domestic law.[318] After November 2008, the responsibility to try war crimes, organized crime, and other serious crimes under Kosovo law was formally transferred to the European Union Rule of Law Mission in Kosovo (EULEX).[319] EULEX war crimes trials in Kosovo are conducted through the ordinary court system by mixed panels of international EULEX judges and Kosovo judges. In 2016, the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC-SPO) was based in The Hague. The KSC administers justice under the

[315] It continued to operate until 2005 and worked with the Government of Timor-Leste to help the justice sector in the area of serious crimes. UNMISET provided lawyers to assist the new nation 'cross a critical threshold of self-sufficiency', including advisors in justice-related areas and acting judges and judge mentors to promote the functioning of the court system while training Timorese counterparts. see; Fidelma Donlon, "Hybrid Tribunals," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (London and New York: Routledge, 2011), 85.

[316] Ibid.

[317] UN Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), establishing the United Nations Interim Administration Mission in Kosovo (UNMIK).

[318] On the point that how the UNMIK rebuild the Kosovo justice system, see generally, David Marshall and Shelley Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo," *Harvard Human Rights Journal* 16 (2003): 95-146. see generally, David Marshall and Shelley Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo," *Harvard Human Rights Journal* 16 (2003): 123.

[319] UN Security Council, *Report on the United Nations Interim Administration Mission in Kosovo (UNMIK)*

Kosovo law, and it has jurisdiction over war crimes, crimes against humanity, as well as transnational crimes committed or commenced in Kosovo. However, it is crucial to mention that the KSC is superior to the Kosovo courts, and it works independently. KSC consists of staff and judges of international background only.[320]

5.5.2 The Tribunals Created by an Agreement Between the United Nations and a State

5.5.2.1 Cambodia

The government of Cambodia and the United Nations established the Extraordinary Chamber in Cambodia's courts with mutual agreement. The hybrid Pre-Trial Chamber consists of three Cambodian judges and two international judges. The hybrid Appellate Chamber is an integral part of the Supreme Court. The applicability of Cambodian Procedural Law reflects the hybrid nature of the Extraordinary Chambers. However, procedural rules at the international level were to be consulted if a particular matter could not be found in existing procedural rules.[321]

5.5.2.2 Sierra Leone

The special court in Sierra Leone was created through an agreement in Freetown in 2002. This agreement was incorporated into the national legal system of Sierra Leone

[320] Fidelma Donlon, "Hybrid Tribunals," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (London and New York: Routledge, 2011), 87–89.

[321] For detailed analysis of these chambers, see; Suzannah Linton, "Putting Cambodia's Extraordinary Chambers Into Context," *Singapore Year Book of International Law and Contributors* 11 (2007): 195–259.Also see, Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 185–87.

through the Special Court Agreement Act. The act provided a complete framework for the working of the court within the country. The court consists of a registry, the office of the prosecutor, and chambers of trial and appeal. The hybrid feature of the court is reflected through the staff members and applicable laws of the court. The court staff includes personnel from national and international backgrounds. The applicable law of the court is international and Sierra Leonean law. According to Article 1 of the Special Court Act, the jurisdiction of the court extends to 'prosecute persons who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'. The Special Courts Rules of Procedure and Evidence regulate the procedural law of the court. Under the statute, the rules can be amended by the judges.

5.5.2.3 Lebanon

The Agreement on the Special Tribunal for Lebanon and its Statute is annexed to Resolution 1757 since it was created by the Security Council by acting under Chapter VII.[322] The tribunal is located in the Netherlands. The Special Tribunal has limited personal and temporal jurisdiction. Under Article 1, the court is authorized to prosecute persons allegedly responsible for the Beirut terrorist attack. In addition, the tribunal shall have jurisdiction over other attacks between 1 October 2004 and 12 December 2005, or a later

[322] Resolution 1664 directed the Secretary-General to negotiate an agreement with the Government of Lebanon to create 'a tribunal of an international character based on the highest international standards of criminal justice . . .'. Following the negotiation process, the Agreement between the United Nations and the Lebanese Government on the establishment of the tribunal was signed by the parties in 2007. see, Fidelma Donlon, "Hybrid Tribunals," in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (London and New York: Routledge, 2011), 94–96.

date to be decided by Lebanon with the consent of the Security Council, if the tribunal decides they are connected 'in accordance with the principles of criminal justice' and are of a nature and gravity similar to the attack of 14 February 2005.

The subject-matter jurisdiction of the Special Tribunal is a unique feature. Although the tribunal is of international character, it derives its jurisdiction from national law exclusively. The jurisdiction of the court is defined on the basis of the Lebanese Criminal Code, and it does not incorporate international crimes as the subject matter of the jurisdiction of the court.

The Rules of Procedure and Evidence of the Special Tribunal were influenced by the Lebanese Code of Criminal Procedure, the Rules of Procedure of the International Criminal Court, and the Rules of the Tribunals for the former Yugoslavia and Rwanda. In order to fulfill the requirements of international proceedings, the rules of the tribunal attempt to blend the adversarial and inquisitorial systems. Although the Lebanese law embodies the inquisitorial system, the procedure mentioned in the Statute is mainly based on an adversarial system.[323]

5.6 ICL AND OTHER REGIMES OF INTERNATIONAL LAW

ICL has recently developed and emerged as a specialized regime. Earlier, it was hard to think about any criminal law at the international level. The present chapter has offered an in-depth overview of this area, and now it would be significant to explore this

[323] see, Marko Milanovic, "An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon," *Journal of International Criminal Justice* 5, no. 5 (2007): 1139–52.

regime with reference to other areas of international law. This section endeavors to analyze the nature of the relationship between ICL and other branches of international law.

ICL, IHRL, and IHL are regimes that can be discussed to highlight the existence of international regimes that function in connection with one another. It is essential to mention here that the main idea is to explore whether the relationship of ICL with the other regimes of international law reflects the self-contained nature of ICL or not.

Among ICL, international humanitarian law, and IHRL, the first regime to appear at the international level was international humanitarian law.[324] The modern attempts at codification of laws of war can be found in the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The efforts to humanize warfare gradually progressed, and the victims of warfare were protected through the Geneva Conventions. However, human rights did not have any effect on the development of humanitarian law, nor was the violation of the laws of war criminalized. Subsequently, there were efforts to limit the means and methods of warfare; the relevant laws are known as the Hague Laws.[325] Before the end of World War II, there was significant codification of the laws of war. During the period, international labor standards were codified; however, these developments were independent of international humanitarian law.

The end of World War II marked the beginning of the modern human rights era, with the conclusion of the Universal Declaration of Human Rights in 1948. The human

[324] Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Cheltenham: Edward Elgar Publishing, 2014), 1.

[325] Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Cheltenham: Edward Elgar Publishing, 2014), 3.

rights embedded in the declaration were later codified in the covenants of 1966. A significant number of human rights treaties on various issues were concluded. Human rights were also protected at the regional level through treaties such as the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981). On another track, the "International Military Tribunals at Nuremberg" (1946) and Tokyo trials are considered to be the starting point of ICL. This period also witnessed the conclusion of the four Geneva Conventions, thus further developing IHL. Up till now, the development of the three regimes has been separate and independent of each other.[326] Robert Kolb mentioned in his article that:

> Human rights, which were seen as being within the purview of the United Nations and bodies specifically set up to promote and develop those rights, were thus distanced from the concerns of the ICRC, which continued to work solely in the area of the law of war. These institutional factors affected the development of the rules: The United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression. The result was a clear separation of the two branches.[327]

The relationship between IHL and human rights law was the center of attention at the Tehran conference in 1968. The UN secretary-general was invited to study and explore the issues highlighted in the Tehran conference. Subsequently, the UN General Assembly,

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[326] Today there is a close relationship between IHLand IHRL. many believe that this was a situation from the very beginning but this is not true. see, Robert Kolb, "The Relationship between IHL and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions," *International Review of the Red Cross* 38, no. 324 (1998): 409.

[327] Ibid., 411.

in its Resolution 2444(XXIII) of 19 December 1968, entitled Respect for Human Rights in Armed Conflict.[328] Later on, the ICRC also took the initiative to consider the various human rights issues during the armed conflicts. Thus, the additional protocol I contains provisions related to human rights. In this regard, Article 75 is an important provision that, under the title of Fundamental Guarantees, codifies the essentials of the protection of human rights for persons affected by armed conflict. Moreover, Article 72 of Protocol I declares human rights law to be a subsidiary source of law to be respected in armed conflict. Similarly, Protocol II, which applies during non-international armed conflict, significantly attempts to include the human rights aspect in its provisions.[329]

The ICJ emphasized in the near past that IHRL and IHL can be applied simultaneously in armed conflict. In its "advisory opinion on the Legality of the Threat or Use of Nuclear Weapons", the Court stated that the protection of ICCPR does not cease in time of war.[330] Similarly, the ICJ confirms this view in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and adds further that human rights law can be *lex specialis* to IHL under certain circumstances.[331]

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[328] Hans-Peter Gasser, "The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law," in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, eds. José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (Leiden and Boston: Martinus Nijhoff Publishers, 2009), 1114.

[329] Ibid.

[330] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, 226, ¶ 25.

[331] Ibid., ¶ 106.

It may be noted here that after the Nuremberg and Tokyo trials, the development and progress of ICL were paused. There were penal provisions for the violation of laws of war in different instruments, such as the Geneva Conventions and Additional Protocol I, but it was up to the states to try the persons responsible under the national legal system. So, the armed conflict that tore apart the Federal Republic of Yugoslavia resulted in the establishment of the ICTY to prosecute persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia.

A few months later, the Security Council Resolution 955, 1994, established another ad hoc tribunal and adopted the statute of ICTR.[332] The Rwanda Tribunal was established to prosecute persons accused of genocide and other serious violations of international law during the tragic events in Rwanda.[333] This marked the development of ICL since the international community also witnessed the creation of hybrid tribunals and a permanent international criminal court.

Thus, it can be concluded here that international humanitarian law (IHRL) and ICL are international regimes that developed independently from each other and had different origins. However, now it is vital to acknowledge the inter-relationship of these regimes. Their principal documents are to be read with reference to the other instruments. These regimes are not self-contained; they rely on each other at some point.

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[332] UN Security Council, Resolution 955, UN Doc. S/RES/955 (1994).

[333] Hans-Peter Gasser, "The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law," in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, eds. José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (Leiden and Boston: Martinus Nijhoff Publishers, 2009), 1116.

5.7 ADJUDICATIVE BODIES OF INTERNATIONAL CRIMINAL LAW AND FRAGMENTATION

The last section of this chapter deals with the crucial question of the alleged fragmentation of international law caused by the multiplicity of courts and tribunals. Since this chapter deals with ICL, the focus here is primarily on criminal courts and tribunals. The issue of fragmentation requires an analysis from multiple angles. The way the international criminal tribunals take their own previous decisions, the application of the doctrine of precedent among different tribunals and international criminal courts, the relationship of human rights courts and criminal courts, and even the relationship between the ICJ and international criminal courts are various questions in the fragmentation debate.

5.7.1 ICJ and International Criminal Courts and Tribunals

The relationship between the ICJ and international courts and tribunals has been a focus of academic literature. Judge Guillaume and Judge Schwebel advocated a hierarchy between the institutions where the ICJ was the apex court. On the other hand, Higgins was against institutional hierarchy and saw the abundance of courts as a benefit rather than an issue.[334] The ad hoc tribunals have adopted an approach where they acknowledge the status of the ICJ. However, they give due regard to their autonomy as a judicial body. ICTY categorically stated that each tribunal is a self-contained system in international law.[335] Similarly, in the Delalic case, the appeals chamber advocated the autonomy of the tribunal

[334] R. Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," *International and Comparative Law Quarterly* 55, no. 4 (2006): 799.

[335] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ¶ 11.

and refused the existence of any hierarchical relationship between the ICJ and the tribunal.[336] However, it is pertinent to mention that the appeals chamber acknowledged that the international criminal tribunals are not isolated from the general international law. Furthermore, the chamber affirmed the need for stability, predictability, and coherence in the international legal system.[337]

The relationship between the ICTY and ICJ was under scrutiny in the Genocide case. Zoran Zigic, a defendant in the case, asked to suspend the proceedings of the ICTY until the case is pending before the ICJ.[338] The appeals chamber held that 'decisions of the "International Court of Justice" addressing general questions of international law are of the utmost significance, and the International Tribunal will consider such decisions, giving due weight to their authority.' However, ICTY is not legally required to defer its proceedings.[339] Similarly, in another case, it was claimed that the ICTY was needed to seek an advisory opinion from the ICJ, and the tribunal rejected the claim.[340] In the case of ICC, there were a few attempts to regulate the relationship between ICC and ICJ. In the matter of adjudication of the crime of aggression, it was discussed whether ICC should exercise its jurisdiction only after the determination of aggression by the General Assembly or the

[336] *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, ¶ 24.

[337] *Prosecutor v. Zejnil Delalić et al.*, ICTY, Appeal Judgment, Case No. IT-96-21-A, 20 February 2001, ¶ 24.

[338] *Prosecutor v. Miroslav Kvočka et al.*, ICTY**,** Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December 2000, Case No. IT-98-30/1, 25 May 2001, ¶ 9.

[339] Ibid., para 17.

[340] *Prosecutor v. Slobodan Milošević*, ICTY, Decision on Preliminary Motions, Case No. IT-02-54, 8 November 2001.

ICJ. However, this suggestion was rejected since it would have affected the independence of the ICC as an institution. Thus, it can be concluded that there is no hierarchical relationship between the international criminal tribunals, the ICC, and the ICJ.

5.7.2 Relationship Between Tribunals and ICC

The relationship between the ICJ and the International Criminal Court is complex, and this complexity is amplified when it comes to the relationship between the ICC and the criminal tribunals. Since the jurisdiction of each institution is different, it is difficult to mention a model that governs the relationship between them.

ICTY and ICTR have common appeal chambers[341] and a common Chief Prosecutor. The ICTY Appeals Chamber categorically mentioned that the Chamber must follow the legal principles enunciated in previous decisions in similar cases for the sake of certainty and predictability.[342] However, a departure from earlier decisions is possible in the interests of justice if there are convincing reasons for that. Thus, the doctrine of precedent is applicable in the practice of each tribunal.

Another important aspect is the application of the doctrine of precedent across the tribunals.[343] In Hadžihasanović, the ICTY Appeals Chamber rejected the automatic application of the doctrine of precedent across the tribunals, i.e., the judicial decisions of

[341]Article 13(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 12(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

[342] See *Prosecutor v. Aleksovski*, ICTY, Appeals Chamber, Judgment, Case No. IT-95-14/1-A, 24 March 2003, ¶ 110.

[343] whether the ICTR Trial Chambers are directly bound by a decision of the Appeals Chamber given in an ICTY case and vice versa.

ICTR are not binding on ICTY since their statutes were adopted in different contexts.[344] In the Kupreškić case,[345] the ICTY considered judicial decisions as a subsidiary source of law. Thus, ICTY rejected the application of the doctrine of binding precedent in relation to other criminal tribunals and courts. Since there is no hierarchical structure of courts in the international legal system, the ICTY did not acknowledge judicial decisions as a direct source of ICL. ICTR also held a similar stance with regard to the human rights treaties and held that the jurisprudence of the "European Court of Human Rights" and the "American Court of Human Rights" can be used as an interpretive tool while applying the applicable law of tribunals. However, they are not binding precedents. They can only be used as evidence of international custom.[346] Similarly, the Special Court of Sierra Leone (SCSL) applies the judicial decisions of ICTY and ICTR as a persuasive precedent after reviewing them for necessary changes required for the special court. The SCSL rejected the application of judicial precedents of ad hoc tribunals as binding.[347] However, the special court accepted the existence of a special relationship between the various institutions of criminal justice and, thus, applied their judicial precedent as a persuasive authority.[348]

There is no explicit provision in the Rome Statute that indicates that there was any intent to integrate the court into the existing adjudication system of criminal law. However,

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[344] *Prosecutor v. Hadžihasanović*, ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003, ¶ 26.

[345] Trial Chamber, *Prosecutor v. Kupreškic*, ICTY, Case No. IT-95-16-T, 14 January 2000.

[346] *Barayagwiza*, ICTR, Judgment, Case No. ICTR-97-19-AR72, 3 November 1999, ¶ 40.

[347] The Trial Chamber of the SCSL speaks of the 'sister tribunals ICTY and ICTR'. See *Prosecutor v. Brima*, SCSL, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, Case No. SCSL-04-16-PT, 1 April 2004, ¶ 22.

[348] Ibid., para 25.

the ICC statute was based on the jurisprudential innovations of ad hoc tribunals. The jurisprudence developed by other courts and tribunals can be taken into consideration by the ICC under Article 21 of the statute. According to Article 21, the decisions of other judicial bodies are not binding on the ICC. However, it is pertinent to mention here that the ICC does not exist outside the framework of ICL. Judge Kaul discussed in his Dissenting Opinion regarding the authorization of the investigation in Kenya that the ICC can refer to the decisions of other international courts while identifying applicable principles and rules of international law under Article 21 (1) (b), or in interpreting provisions of the Statute. Thus, the ICC can interact with other courts and tribunals at the international level and, ultimately, play its role in the development of ICL. However, this interaction has to be in accordance with the mandate and statute of the ICC.[349]

To sum up, there is no precise and uniform practice of international criminal courts and tribunals regarding the acceptance and reception of external judicial precedents. However, the statutory provisions of each institution allow some flexibility to accommodate the jurisprudential developments of the field.

5.7.3 International Criminal Courts and Human Rights

Discussing the relationship between ICL and IHRL is not simple. The analysis is multifaceted. From analyzing the relationship between two regimes of international law to the interaction of international criminal and human rights courts, from handling criminal

[349] Carsten Stahn, Larissa van den Herik, and Nico Schrijver, *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012), 38.

dimensions by the human rights courts to the safeguarding of human rights in criminal proceedings, there are various aspects to be examined.

ICL and IHRL are those areas of international law that focus on individuals. However, the relevant courts of both regimes differ from one another in terms of applicable law and jurisdiction. The differences between these courts do not mean that there is no overlap or interaction between them. The Naletilić case is a perfect example of such jurisdictional overlap/interaction. The defendant contended that this extradition by Croatia to the ICTY resulted in the violation of articles 6 and 7 of the ECHR. This claim was based on the argument that the ICTY is not an independent tribunal established by law, and thus, a fair trial cannot be guaranteed by such a tribunal. However, the ECtHR held that there is no risk of violation of fair trial guarantees since all the necessary guarantees are provided in the statute of the ICTY and its Rules of Procedure and Evidence.

Furthermore, the court differentiated between extradition and surrender to an international court.[350] Hence, the institutional relationship between two different courts was expressed on the basis of mutual trust. As far as the treatment of criminal aspects by human rights courts is concerned, ECtHR has developed a jurisprudence where it tried to navigate between the interests of the victim and those of the claimant.[351]

On the other hand, the treatment of human rights questions by international criminal courts is also an interesting point of scrutiny. ICTY held that the provisions and

[350] See *Soering v. United Kingdom*, European Court of Human Rights, Judgment, 7 July 1989, Series A, No. 161, ¶ 161.

[351] See, Francoise Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights," *Journal of International Criminal Justice* 9, no. 3 (2011): 577–95.

interpretations of the ECHR have a limited scope in the proceedings of the tribunal since it functions within the framework provided by its statute. It was further held that the nature of crimes committed at the international level demands a lenient rule of evidence and limited fair trial guarantees. However, later on, the ECHR attained authoritative value in the jurisprudence of ICTY. It is pertinent to mention that the fair trial guarantees are adjusted according to the needs of international criminal justice. The regular practice of international criminal tribunals is to refer to human rights norms and treaties without explaining the reason for doing so. Tribunals frequently refer to the ICCPR, ECHR, ACHR, and their case law as well. In this regard, the tribunals mainly do not distinguish between regional and general human rights treaties.[352]

The ICC has also adopted a similar approach regarding the application of human rights. Article 21(3) of the statute states that the applicable law of ICC should be consistent with 'internationally recognized human rights' standards. However, it fails to determine the exact scope of these human rights.[353] Thus, it is the prerogative of the court to decide which human rights are recognized internationally. Scholars such as Hafner and Binder have proposed a possible assessment of internationally recognized human rights.[354] However, ICC has not yet done any such in-depth assessment. ICC refers to regional as

[352] Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (Berlin: Springer-Verlag, 2016), 92.

[353] S. Vasiliev, *International Criminal Trials: A Normative Theory* (PhD diss., University of Amsterdam, 2014), 133.

[354] This methodology includes the assessment of the number geographical background of parties. See, Gerhard Hafner and Christina Binder, "The Interpretation of Article 21(3) ICC Statute — Opinion Reviewed," *Austrian Review of International and European Law Online* 9, no. 1 (2006): 188–89, https://brill.com/view/journals/ario/9/1/article-p161_.xml (last accessed December 10, 2022).

well as international human rights treaties and considers them internationally recognized human rights norms. The haphazard approach adopted by ICC reflects a lack of general understanding of the phrase and is referred to as a shotgun approach. ICC refers to ECtHR and IACtHR case laws, but never explains or justifies the legal basis of such use.[355] To sum up, the ICC has adopted a lenient and flexible approach in the determination of internationally recognized human rights. Any human rights norms that are mentioned in any international or regional human rights instrument are considered internationally recognized.

5.8 CONCLUSION

ICL has recently developed as a regime. Early, it was challenging to think about criminal law at the international level. The origins of modern ICL can be found in the Nuremberg and Tokyo trials after World War II. The establishment of ICTY and ICTR and, later on, the creation of hybrid tribunals marked the maturity of ICL. ICL played a significant role in prosecuting individuals for international crimes and thus created a sense of accountability at the international level. The concept of individual criminal responsibility cannot be found in the traditional idea of international law. So, in a way, ICL increased the subjects of international law.

This chapter discusses essential developments in ICL and describes the applicable law of different tribunals and courts. The research reflects that the doctrine of precedent does not apply to international criminal tribunals and courts. However, the courts and

[355] Vasiliev, *International criminal trials: a normative theory*, 120-121.

tribunals have a relationship of mutual trust and confidence. They cite each other and refer to each other's case law. The integrity and coherence of the system are not endangered since the international courts and tribunals are aware of their role, and they avoid giving contradictory judgments.

CHAPTER SIX

EXPLORING THE FRAGMENTATION DEBATE IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS LAW

6 INTRODUCTION

IHRL developed on an international level mainly after World War II. The UDHR is a starting point to explore the development of modern human rights law. The emergence of human rights law is significant since this branch of international law protects individuals and makes them the subject of international law. However, this regime does not operate in isolation, and it interacts with other regimes at various points. This chapter endeavors to explore human rights jurisprudence from different lenses to understand the input of this regime in the fragmentation of international law. The chapter initially explores the development of this branch and then paves the way to explain the intra-regime conflicts. Afterward, the chapter embarks on an investigation of the interaction of human rights courts with one another. The chapter also explores the relationship between the ICJ and human rights law.

6.1 INTERNATIONAL HUMAN RIGHTS LAW: DEVELOPMENT AND ESTABLISHMENT AS A REGIME

The historical development of IHRL is discussed in a previous chapter. The present section navigates this regime to understand the overall structure and work. Human rights have been protected at international as well as regional levels.

6.1.1 United Nations Human Rights System

One of the objectives of the United Nations Organization is to protect human rights. Though there is no definition or list of human rights present in the UN Charter, Articles 55 and 56 refer to the observance and protection of human rights.[356]

UN generally implements human rights through its Charter-based bodies and treaty-based bodies. The Charter-based bodies derive their authority directly from the UN

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[356] Article 55 provides, **'**With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. Higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
3. *universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*' (emphasis added)

Article 56 states, 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

Charter, while the treaty-based bodies are established under the core human rights treaties concluded under the auspices of the UN. The Charter-based bodies have authority over all the UN member states, but the treaty-based bodies are binding on those states that have ratified the relevant treaty or optional protocol.

The Security Council, the General Assembly, the "International Court of Justice" (ICJ), the Economic and Social Council (ECOSOC), and the Trusteeship Council are the principal organs of the UN. However, none of these bodies are expressly dealing with human rights issues.[357] Furthermore, the UN Charter explicitly provides that 'nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.'[358] Interestingly, human rights are mentioned in articles 1 (3), 13(1), and 55 of the UN Charter for the issues surrounding the maintenance of peace and security; thus, the UN organs were not in a position to directly comment on human rights. However, this narrative changed in 1971 when the ICJ held that South Africa was violating its Charter obligations to observe and respect human rights. 'To establish ... and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on the grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation

[357] Mashood A. Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey: Ashgate Publishing Limited, 2010), 217.

[358] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 2(7).

of the purposes and principles of the Charter'.[359] Those 'scattered, terse, even cryptic' clauses in the UN Charter were metamorphosing into legal commitments. While politics may preclude a comprehensive system of monitoring and enforcing human rights, there is ever more evidence of human rights emerging as a pillar of twenty-first-century international law.

Other than these UN Charter bodies, there are treaty-based bodies working under the UN human rights system that primarily focus on the states' compliance with their respective human rights obligations. These treaty bodies focus on specific rights and freedoms and assess the states' compliance with them. These treaty bodies complement the work of the Human Rights Council (HRC) and its mechanisms.[360] However, it may be noted that the nature of human rights treaties results in overlapping obligations;[361] thus, a cross-treaty approach can be helpful in boosting the benefits of the UN human rights system. In this regard, considering the benefits of fusing the systems, there are meetings of representatives of the treaty bodies.[362]

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[359] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] ICJ Rep 16, 57, para. 131.

[360] Nigel Rodley, "United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition?" *Human Rights Quarterly* 25, no. 4 (2003): 882–908.

[361] E. Tistounet, "The Problem of Overlapping Among Different Treaty Bodies," in *The Future of UN Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 383.

[362] The Committee on Elimination of Racial Discrimination (CERD) was the first such body to be established, and it pioneered many aspects of committee work. The treaty bodies also can deploy a wide range of technical cooperation (assistance with compiling reports, creating rule of law institutions, etc.)

6.1 INFLUENCE OF HUMAN RIGHTS LAW ON THE INTERNATIONAL LAW

It may be recalled that international law was traditionally defined as a law that regulates the relationship between states or other sovereign entities.[363] IHRL radically influenced this concept and brought the individual into the realm of international law. Thus, the content and the scope of international law were enlarged due to IHRL. International law is no longer a law of nations only, but it is also a law for individuals as well. IHRL, along with other specialized areas,[364] played a significant role in establishing the new scope and content of international law since it brought individuals from the domestic jurisdiction of the state into the sphere of international law.

Similarly, the traditional subject of international law was the state only, which means the duty and rights holder under international law was merely a state. However, the development of IHRL increased the subjects of international law. Individuals were earlier objects in the domain of international law or only beneficiaries of international rules.[365] In modern times, it is an undeniable fact that international law formally and directly regulates a few relations between States and individuals, and some inter-individual relations. For

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offered under the auspices of the OHCHR. These resources offer public and private support to states genuinely struggling to meet their treaty obligations. Mashood A. Baderin and Manisuli Ssenyonjo, *IHRL: Six Decades after the UDHR and Beyond*, 226.

[363] Malanczuk, *Akehurst's Modern Introduction to International Law*, 1.

[364] ICL and contemporary IHLare such other areas of international law which regulate relations between States and individuals or inter-individual relations.

[365] Malanczuk, *Akehurst's Modern Introduction to International Law*, 91.

instance, the individuals are directly granted rights under the Vienna Convention on Consular Relations 1963.[366]

In addition to this influence, IHRL has also changed the nature and function of the international legal order. The traditional international law was based on the principles of reciprocity and bilateralism; thus, it protected the individual interests of the state, and there was no space for the collective interests of the state community as such.[367] The theory of IHRL, to some extent, created room for cooperation between states to protect the collective interests of the state community. The fundamental role played by human rights law can be highlighted in terms of *erga omnes* obligations. *Erga omnes* obligations refer to the obligations that exist towards all the states of the international community. It would be pertinent to mention that this term was elaborated by the ICJ in the passage of the Barcelona Traction judgment through examples of human rights.[368]

IHRL has a close nexus with other branches of international law. The nexus can also refer to the impact of human rights on other regimes. For instance, the close relationship between human rights and the environment was first recognized in the 1972

[366]International Court of Justice, *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466.; International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 121. International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (India v. Pakistan)*, Judgment, ICJ Reports 2019, paras. 116–19. See also Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, para. 80.

[367] Riccardo Pisillo Mazzeschi, *IHRL: Theory and Practice*, 22.

[368] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment, ICJ Reports 1970, 3 February, paras. 32–34.

Stockholm Declaration on the Human Environment.[369]Principle 1 of the declaration states that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears the solemn responsibility to protect and improve the environment for present and future generations.' The interrelationship and interdependence between human rights and the environment have been mentioned in many binding and non-binding instruments.[370] The right to a healthy environment is provided in many regional human rights instruments, such as the 1981 African Charter on Human and Peoples Rights,[371] the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Social, Cultural, and Economic Rights[372] , and the 2004 Arab Charter of Human Rights.[373]

The human rights law has also influenced some old norms of international law. For instance, the customary international law on the treatment of aliens is heavily impacted by

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[369] United Nations Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, 5–16 June 1972, UN Doc. A/CONF.48/14.

[370] For non-binding instrument example, seeUN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur Fatma Zohra Ksentini, "Human Rights and the Environment," UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994, para. 22.. For legally binding instrument example, see, Paris Agreement, 12 December 2015, entered into force 4 November 2016. Also see, United Nations General Assembly, *Towards a Global Pact for the Environment*, UN Doc. A/RES/72/277, 10 May 2018.

[371] Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, art. 24. This provision states: "All people shall have the right to a general satisfactory environment favourable to their development".

[372] Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador), 17 November 1988, art. 11(1).

[373] League of Arab States, *Arab Charter on Human Rights*, 22 May 2004, art. 24.

the theory of human rights law.[374] In this regard, the rules relating to the admission and expulsion of aliens can be mentioned, which have been changed due to the rights of refugees, the prohibition of extradition, and the principle of non-refoulement. Similarly, the prohibition of discrimination and the right to an effective remedy have significantly changed the scope of protection of aliens and their property.

6.1.1 Regional Human Rights System

The protection and safeguards to ensure adherence to human rights norms are more developed at the regional level than at the universal level. The reason is perhaps that the consensus of states of the same region on the norms and content of human rights is easier to achieve.

6.1.1.1 European Human Rights System

Amongst the regional protection systems, advanced protection is provided under the framework of the Council of Europe. The European Convention on Human Rights of 1950, the European Social Charter of 1961 (revised in 1996), the European Convention against Torture of 1987, the Framework Convention for the Protection of National Minorities of 1995, and the European Commissioner for Human Rights established in 1999 are the significant achievements of the Council of Europe.

[374] Riccardo Pisillo Mazzeschi, "The Relationship Between Human Rights and the Rights of Aliens and Immigrants," in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, ed. Ulrich Fastenrath et al. (Oxford: Oxford University Press, 2011), 552–73.

The European Convention of Human Rights was signed in Rome in 1950 and entered into force in 1953. The Member States of the Council of Europe can accede to it. The Convention consists of two parts: the first part is substantive and lists the rights guaranteed, whereas the second part is procedural and lays down the details about the bodies and mechanisms. Gradually, the convention was updated through amendments made by 16 Additional Protocols. These amendments increased the rights guaranteed in the convention and changed the guarantee mechanism.[375]

The most significant change that transformed the guarantee mechanism occurred in 1998. Before 1998, the guarantee mechanism was complex and was based on three bodies, namely, the Commission, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. This system was changed by Protocol No. 11, which established a permanent court that replaced the commission and the old court. The permanent court started performing the functions that were previously performed by the commission and the old court. Any person, both legal and natural, can now apply directly to the permanent court. Thus, it gives the individual the opportunity to enforce the rights recognized in the convention at the international level. [376]

As far as the substantive part of the convention is concerned, the contracting state parties are required to provide everyone in their jurisdiction with the rights guaranteed. [377]

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[375] *Malcolm N. Shaw, International Law, 8th Edition (Cambridge: Cambridge University Press, 2017),* 255-259.

[376] Mashood A. Baderin and Manisuli Ssenyonjo, *IHRL: Six Decades after the UDHR and Beyond,* 212.

[377]Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended, 4 November 1950, ETS 5, art. 1..

As regards the list of rights protected under the convention, most of them are fundamental rights and civil and political rights.[378] The various rights provided in the convention and its protocol are the right to life (Art. 2), the prohibition of torture (Art. 3), the prohibition of slavery and forced labor (Art. 4), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), the right to respect for private and family life (Art. 8), the freedom of thought, expression, assembly, and association (Arts. 9, 10 and 11), the prohibition of discrimination (Art. 14), the right to property (Art. 1 of Protocol No. 1). Many of these rights are not absolute but are restricted, and many rights may be derogated in time of war or public emergency (Art. 15). The rights provided in the convention impose both negative obligations to abstain and positive obligations to act.

The procedural part of the European Convention is a revolutionary one, and it is pertinent to mention that it has inspired other regional systems as well, which include the American human rights system and the African human rights system. The number of judges of the European Court of Human Rights is equal to the number of state parties to the convention. The court is divided into different formations: a single judge, committees of three judges, a chamber of seven judges, and a grand chamber of 17 judges.[379] The court has jurisdiction over inter-state complaints under Article 33 and individual complaints under Article 34.[380]

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[378] The so-called first generation of human rights.

[379] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended, 4 November 1950, ETS 5, arts. 26–31.

[380] The individual complaints may be filed by natural persons, legal persons and associations or trade unions; but such persons must prove that they are "victims" of the violation of one of the rights guaranteed by the Convention or the Additional Protocols. The question is sometimes complex. The Court

The litigation process of the European court consists of three main stages. In the first stage, the court determines the admissibility of the application (Art. 35). The main condition of admissibility is the prior exhaustion of domestic remedies by the applicant individual or by the individual victim of the violation alleged by the State lodging the application.[381] In the second stage, the facts are examined and investigated. Furthermore, there is an attempt to settle the dispute (Art. 39). If the settlement is successful, the application is removed from the Court's list, and the solution reached is set out in a decision that is forwarded to the Committee of Ministers, which supervises its execution. However, if a friendly settlement cannot be achieved, then the last stage of the procedure is started, where the judgment is pronounced on the merits. The Court's judgments are mandatory for the Member States (Art. 46), even if they are not directly enforceable in domestic law, and

has in the past demonstrated a restrictive attitude, which it now seems to want to review, about complaints coming from organizations that represent collective interests but are not directly affected by the violation. On the other hand, applications by indirect victims, such as family members of the "direct" victim, or by potential victims, are permitted. An example of potential victim is when the applicant complains that the State has adopted a law which has not yet been enforced against him or her, but is very likely to be enforced in the future and to cause him or her direct harm. see, European Court of Human Rights, *Dudgeon v. the United Kingdom*, Series A no. 45, judgment of 22 October 1981. also see, Riccardo Pisillo Mazzeschi, *IHRL: Theory and Practice*, 214.

[381] Another condition of admissibility is that the application must have been lodged within 6 months of the date of notification of the final domestic decision. Furthermore, in individual applications, it is required that the complaint not be anonymous, not concern a matter already submitted to the Court or other international supervisory body, not be manifestly unfounded and that it not constitutes an abuse of the right of application. Finally, a condition of admissibility which was added recently is that the applicant must have suffered a "significant disadvantage". This condition of admissibility was included in Protocol No. 14; and is sometimes criticized in doctrine. see, Riccardo Pisillo Mazzeschi, *International Human Rights Law: Theory and Practice* (Cham: Springer Nature Switzerland, 2021), 214.

thus leave the sentenced State a certain margin of discretion in deciding domestic enforcement measures.[382]

6.1.1.2 American Human Rights System

The conclusion of the Charter of the Organization of American States (OAS) and the American Declaration on the Rights and Duties of Man in 1948 marked the origin of the inter-American system of human rights protection. The Inter-American Commission on Human Rights was established in 1959, and as a body of the OAS, it was entrusted with monitoring compliance with the American Declaration. A significant development in the protection of human rights was the approval of the American Convention on Human Rights in 1969, which came into force in 1978.[383] The human rights provided in the convention were primarily influenced by the European Convention on Human Rights and the UN Covenant on Civil and Political Rights. Furthermore, the convention is also the constituting instrument for the Inter-American Court of Human Rights.[384]

The Inter-American Court of Human Rights has two types of jurisdiction, namely, contentious and advisory. Under the contentious jurisdiction, the Court has the competence

[382] However, the court have developed a new jurisprudence where it pronounces judgements on structural violations of the convention. In these judgements the court directs general measure. In other cases, the court sometimes direct individual measures, thus, leaving no margin of appreciation for the state for implementation of the judgement.

[383] Mashood A. Baderin and Manisuli Ssenyonjo, *IHRL: Six Decades after the UDHR and Beyond*, 254.

[384] For understanding the institutional framework of the curt and analysing its jurisdiction; see, Thomas Buergenthal, "The Inter-American Court of Human Rights", *The American Journal of International Law* 76, No. 2 (1982), 231-245.

to hear and determine actions already submitted to the Commission at the request of the Commission or of the States concerned, subject to acceptance of its jurisdiction by relevant States. In 2001, after a reform of the regulation, complainants could take part in the various phases of proceedings. However, individuals cannot directly invoke the jurisdiction of the court. The contentious proceedings of the court are based on adversarial principles. The judgment of the court determines the alleged violation of the American Convention, and it is also accompanied by concurring or dissenting opinions of the judges. The possible measures for reparations are also decided in the judgment. The decision of the court is final and irrevocable. Unlike the European Convention on Human Rights, the enforcement of the judgment of the Inter-American Court of Human Rights is supervised by the court itself.[385] The court not only receives and examines the reports of the parties regarding the enforcement of the judgment but also submits annual reports to the OAS General Assembly, where it indicates the cases in which the states failed to execute its judgment. This monitoring and supervisory role played by the court for the enforcement of its judgment is quite effective.

As far as the advisory jurisdiction of the court is concerned, the court can render advisory opinions on the interpretation of the American Convention or other human rights treaties enforceable in America. The advisory opinion can be adopted at the request of the member states of the OAS or the bodies of the OAS. Furthermore, the court can also give

[385] Ibid., 226-227.

advisory opinions on the compatibility of national laws with the convention and the human rights treaties.[386]

6.1.1.3 African Human Rights System

The African Charter on Human and Peoples' Rights was adopted in 1981 by the Organization of African Unity (OAU). Recently, the African Union replaced the Organization for African Unity (OAU). The other regional human rights treaties influence the Charter; however, it also provides for the duties of individuals and the rights of people, which is innovative. The rights of people include rights to equality, self-determination, exploitation of natural resources, development, peace and security, and a favorable environment for development. The functioning of the African Commission on Human and Peoples' Rights is regulated under Part II of the Charter. The African Court on Human and Peoples' Rights was established under an Additional Protocol in 1998. The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in 2008, thus marking significant progress in the protection of human rights. However, this protocol has not entered into force.

The African Court on Human and Peoples' Rights consists of eleven judges. The court has both contentious and advisory powers.[387] The court exercises its contentious

[386] Ibid., 228.

[387] Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, art. 4(1). For a detailed introduction and understanding of jurisdiction of African Court see; Robert Wundeh Eno, "The

power and examines the complaints that can be submitted by (a) the African Commission, (b) the State Party that has complained with the Commission, (c) the State Party against which a complaint has been lodged with the Commission; (d) the national State of the victim; (e) all African intergovernmental organizations; and finally (f) also individuals and non-governmental organizations. However, it is important that the state accused of violation has accepted the jurisdiction of the court (Arts. 5 and 34(6) of the Protocol).

The procedure of the Court's proceedings consists of three phases. The first phase deals with the admissibility of the complaint (Protocol, Art. 6), the second phase covers the friendly settlement of disputes (Art. 9), and the last stage of investigation and examination of parties (Art. 10 and 26), after which the court pronounces its judgment. The court can order the accused state to take necessary measures to compensate for the violation (Arts. 27–28). The decisions are final and considered mandatory by the States Parties to the Protocol. The court monitors the enforcement of its judgment (Art. 30-31) and the AU Council of Ministers (Art. 29(2)).[388]

6.2 ADJUDICATIVE BODIES OF INTERNATIONAL LAW AND FRAGMENTATION: AN APPRAISAL OF THE INTERNATIONAL HUMAN RIGHTS REGIME

The present chapter endeavors to explore the main research question again, that is, whether the multiplicity of international courts or tribunals has threatened the unity of

Jurisdiction of the African Court on Human and Peoples' Rights," African Human Rights Law Journal 2, no. 2 (2002): 223–33.

[388] Mashood A. Baderin and Manisuli Ssenyonjo, *IHRL: Six Decades after the UDHR and Beyond*, 244-247.

international law. In this regard, two aspects are considered here: firstly, how do the different courts of human rights interact with each other? Secondly, how do human rights courts refer to the rules of general public international law? To address the former question, the practice of the Inter-American Court of Human Rights and the European Court of Human Rights (ECtHR) is analyzed. For the latter question, the practice of ECtHR is examined since it is a body of the most developed regional system of human rights protection, and it is accused of threatening the unity of public international law.

6.2.1 Judicial Dialogue Between Human Rights Bodies

The fragmentation debate often highlights the multiplicity of international courts and tribunals; thus, it is important to analyze the practice of human rights courts and bodies to understand the real impact of this multiplicity. In this regard, the two regional human rights courts, namely, the Inter-American Court of Human Rights and the European Court of Human Rights (ECtHR), are under scrutiny.

The jurisprudence of ACHR and ECtHR reflects cross-fertilization, which consequently played an essential role in the development of IHRL.[389] Both courts have a common understanding on various points, for example, that the human rights treaties are different from traditional multilateral treaties due to their special nature, that the normative character of human rights treaties calls for limited application of foreign norms, that the provisions of human rights treaties must be interpreted independently; that in applying

[389] Antonio Augusto Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights," *Journal of International Criminal Justice* 2, no. 2 (2004): 309.

human rights treaties, the guarantees provided therein must be protected effectively; and that the permissible limitations and derogations must be interpreted restrictively.

Furthermore, both ACHR[390] and ECtHR[391] have pursued dynamic interpretations of their respective human rights convention. The ACHR held in its 16th Advisory Opinion that the new situation must be protected based on pre-existing rights. A similar view was adopted by ACHR in its 18th Advisory Opinion based upon the concepts of *jus cogens* and *erga omnes* obligations of protection.

In terms of procedural law, one of the significant developments of both courts is the access to justice by individuals at the international level. Individuals were granted the right to bring their case before ECtHR directly after Protocol 11 entered into force on 11 November 1998. Similarly, after the adoption of the present Rules of Court (applicable from 1 June 2001), individuals can directly participate in all the phases of the proceeding before the ACHR. This procedural development refers to the point that the individuals are now subjects of international law, which needs to be stressed.

6.3 HUMAN RIGHTS COURTS AND BODIES AS A CONSTITUTIVE PART OF UNIVERSAL HUMAN RIGHTS LAW

[390]Inter-American Court of Human Rights, *Sixteenth Advisory Opinion on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Series A no. 16.; Inter-American Court of Human Rights, *Eighteenth Advisory Opinion on Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, Series A no. 18.

[391] *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A no. 26; *Marckx v. Belgium*, Judgment of 13 June 1979, Series A no. 31.

Human rights treaties have reinforced each other and, through various interpretative tools, contributed to the universality of human rights protection. The practice of citing each other in their decisions contributes to the development of a uniform interpretation of human rights jurisprudence. These uniform interpretations do not threaten the unity of international law. Instead, the ECHR and ACHR have helped international law evolve positively and thus regulate the relations of individuals more efficiently. The establishment of new courts and tribunals refers to the maturity of the international legal order. Human rights courts are engaged in a judicial dialogue at the international level for two reasons. First, referring to other courts' jurisprudence reflects that the court's reasoning is sound and consistent with the common practices in the field, and other courts would also similarly decide the case. The second reason is that the courts want to influence and be influenced by the other courts, thus becoming active participants in a regime.[392]

It is the practice of the ECtHR to place the European Convention, along with its jurisprudence, in the larger and broader context of IHRL. In a case, the ECtHR held, 'As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.'[393] While interpreting the European Convention on Human Rights, the Court regularly refers to the international human rights treaties and cites the interpretations of the treaty bodies.

[392]Wayne Sandholtz, "Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue," *Global Constitutionalism* 10, no. 3 (2021): 452–53.

[393] *Hassan v. United Kingdom*, Judgment (Grand Chamber), European Court of Human Rights, App. No. 29750/09, 16 September 2014, para. 77.

Similarly, IACtHR explicitly acknowledges the fact that the American Convention on Human Rights and the regional human rights system of America are rooted in the general system of IHRL. In its first advisory opinion, the IACtHR declared: The very nature of the subject matter, however, makes a clear division between regionalism and universalism difficult. All international protective systems are based on the universality of humanity and the rights and freedoms that are entitled to protection. It would be incorrect to draw distinctions in this context based on the regional or non-regional nature of the international duties that governments have taken on, negating the presence of the shared foundation of fundamental human rights norms.[394] The placement of the American Convention in the global context can be confirmed from the preamble to the American Convention and Article 29 of the Convention. [395]

The IACtHR stated that 'The corpus juris of IHRL comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions, and declarations) … This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the individual in contemporary international law.'[396] Multiple examples of a similar nature can be found easily in the jurisprudence of the court. Furthermore, the IACtHR regularly refers to the

[394]Inter-American Court of Human Rights, *Other Treaties Subject to the Consultative Jurisdiction of the Court,* Advisory Opinion OC-1/82, 24 September 1982, Series A no. 1, para. 40..

[395] Organization of American States, *American Convention on Human Rights*, 22 November 1969, art. 29: 'No provision of the Convention may be interpreted as … restricting the enjoyment or exercise of any right or freedom recognized … by virtue of another convention to which one of the said states is a party.'

[396] *Ituango Massacres v. Colombia*, Inter-American Court of Human Rights, Judgment, Series C no. 148, 1 July 2006, para. 157, n. 177.

international human rights treaties and the interpretations of the human rights treaty bodies, thus accepting the existence of a larger and universal system of human rights.[397]

6.3.1 European Court of Human Rights and Case Law of Other Human Rights Bodies

ECtHR does not have a large volume of precedent on the physical integrity rights. The ECtHR referred to the IACtHR on cases dealing with these rights since the IACtHR has a large body of precedent on these rights. ECtHR referred to IACtHR's jurisprudence on the question of forced disappearances. Similarly, ECtHR referred to IACtHR cases dealing with corporal punishment and the extraction of confessions.[398] ECtHR has also referred to the African Commission on the positive duty of the state[399] and on the point that 'unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being.'[400]

As compared to regional courts, ECtHR cites HRC more frequently. The general comment of HRC was cited to argue that emergencies in a state cannot justify the violation of peremptory norms of international law, including the 'fundamental principles of a fair

[397] Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights," *European Journal of International Law* 19, no. 1 (2008): 109–11.

[398] Wayne Sandholtz and Adam Feldman, "The Trans-Regional Construction of Human Rights," in *Contesting Human Rights: Norms, Institutions and Practice*, ed. Alison Brysk and Michael Stohl (Cheltenham: Edward Elgar, 2019), 107–24.

[399] *Bljakaj and Others v. Croatia*, Judgment (First Section), European Court of Human Rights, App. No. 74448/12, 18 September 2014.

[400] *J and Others v. Austria*, Judgment (Fourth Section), European Court of Human Rights, App. No. 58216/12, para. 8, n. 77.

trial, including the presumption of innocence.' [401] Likewise, ECtHR cited HRC to support the point that access to legal assistance must be provided to the accused at all stages of the trial. [402]

6.3.2 Inter-American Court of Human Rights and Case Law of Other Human Rights Bodies

The Inter-American Court has referred to and cited ECtHR on multiple occasions. One significant example deals with the duty of states to guarantee the convention's rights. IACtHR cited ECtHR to support its argument that the failure to stop violence against women amounts to discrimination against women. ECtHR judgment was also referred by IACtHR to support its finding that the violations committed by private actors incur state responsibility.[403] Similarly, on the question of newly arising rights, such as dealing with sexual orientation, IACtHR cited the ECtHR rulings.

IACtHR has contributed to the development of IHRL, and in that process, it has frequently referred to and cited ECtHR and the HRC. The IACtHR cites the African Commission and the African Court far less frequently, but it has done so in cases involving media rights and freedom of expression,[404] the rights of indigenous peoples to the natural

[401] *Al-Dulimi and Montana Management Inc v. Switzerland*, Judgment, European Court of Human Rights, App. No. 5809/08, 21 June 2016, para. 30.

[402] *Simeonovi v. Bulgaria*, Judgment, European Court of Human Rights, App. No. 21980/04, 12 May 2017, para. 71.

[403] *González et al. ("Cotton Field") v. Mexico*, Judgment, Inter-American Court of Human Rights, Series C no. 205, 16 November 2009.

[404]*Herrera Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 107, 2 July 2004, para 114, also citing the R*icardo Canese*

resources on their traditional lands[405] , and in several of its landmark amnesty cases, among other topics.[406]

In multiple areas, the Inter-American Court has developed progressive jurisprudence, and in this regard, it has referred to and cited precedents of other regional courts. For instance, the Inter-American Court developed the principle that the onus of investigating, prosecuting, and punishing serious violations of human rights lies with the state. It is pertinent to mention that ECtHR and the HRC held similar views.[407] Similarly, IACtHR referred to the HRC on the 'prohibition of amnesties that prevent the investigation and punishment of those who commit serious human rights crimes. [408] The IACtHR has cited both the ECtHR and the HRC and established the right to the truth (about the fate of victims of rights violations).[409] With regard to procedural rights, the IACtHR established that the states must follow and observe a minimum standard of due process, even in cases

v. Paraguay, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 111, August 31, 2004, para. 114.

[405] S*aramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 172, November 28, 2007, para. 120, n. 122.

[406] G*omes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 219, November 24, 2010; M*assacres of El Mozote and Neighboring Locations v. El Salvador*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 252, October 25, 2012; *Gelman v. Uruguay*, Monitoring Compliance with Judgment, Inter-American Court of Human Rights, Series C No. 221, March 20, 2013.

[407] *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 153, September 22, 2006, para. 83.

[408] *Gelman v. Uruguay*, Merits and Reparations, Inter-American Court of Human Rights, Series C No. 221, February 24, 2011, paras. 205, 206.

[409] *Street Children' (Villagrán Morales et al.) v. Guatemala*, Merits, Inter-American Court of Human Rights, Series C No. 63, November 19, 1999, para. 176, n. 31.

of expulsion and deportation of foreigners. The Court referred both the HRC and the African Commission in support of the procedural right.[410]

6.4 ICJ AND IHRL

Special courts and tribunals of different regimes are authorized to resolve disputes within their relevant regime. These adjudicative bodies focus on their constituent instruments and the law of their relevant regime. However, the ICJ is a world court in the sense that it applies general international law and is not confined to any particular regime. It deals with human rights in multiple unique ways, such as the relationship of human rights with general international law and IHRL as a specialized regime.[411]

Article 38 of the Statute of the "International Court of Justice", along with its interpretation, provides the legal basis for the engagement of the ICJ with human rights and IHRL. Interpretation and application of treaties, determination of customary international law, and general principles are the various routes through which the ICJ engages with IHRL and human rights. Furthermore, the ICJ can also decide whether a human right has attained the status of *jus cogens* and if the states have *erga omnes* obligations.

The case law of the ICJ indicates multiple approaches of the Court towards human rights and IHRL. Sometimes, the ICJ contributed to the development of IHRL as a branch

[410] *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 272, November 25, 2013, para. 132, n. 157.

[411] Başak Calı, Zeynep Elibol, and Lorna Mcgregor, "The 'International Court of Justice' as an Integrator, Developer and Globaliser of IHRL," in *Human Rights Norms in 'Other' International Courts*, ed. Martin Scheinin (Cambridge: Cambridge University Press, 2019), 74.

of international law. Unlike regional courts, the ICJ can develop the IHRL as a part of customary international law and as a general principle of law. However, there are not many cases in which the ICJ tried to develop IHRL as a regime.

The ICJ, in its earlier case laws, interpreted the UN Charter provisions related to human rights, which helped in the development of IHRL. In this regard, the most significant example is the International Status of South-West Africa Advisory Opinion, where the ICJ held that the UN Charter provides rights to the states as well as the peoples in the mandated territories.[412] Thus, the status of the individual as a right holder was an important development in the case of the ICJ. In the Asylum Case, the court decided that arbitrary actions and manipulation of the rule of law activate the operation of asylum. Thus, the ICJ expressed its willingness to pierce the corporate veil of the state.[413]

The ICJ also interpreted the human rights provisions of the UN Charter in the Namibia Advisory Opinion and held that these provisions are not a principle of policy. Instead, these human rights provisions impose a duty on the states to protect and guarantee human rights.[414] The Court stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[415] This case also developed the content of the right of self-determination,

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[412] *International Status of South-West Africa*, ICJ Reports 1950, 133–34.

[413] Even at this time, however, the dissent of Judge Alvarez called for a more generalised statement on the principle of asylum in general international law, pointing to the fact that 'asylum has been written into the Universal Declaration of Human Rights, which was adopted at the Third Assembly of the United Nations.

[414] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 129–31.

[415] Ibid., 53.

which was previously considered to be a political aspiration only. In the Western Sahara Advisory Opinion,[416] the court adopted the Namibia Advisory Opinion's approach to following human rights with reference to the right to self-determination. Similarly, the ICJ held in another case concerning the diplomatic and consular staff of America in Tehran[417] that causing the wrongful deprivation of human freedoms and physically constraining people in conditions of hardship amounts to a violation of principles enunciated in the UN Charter as well as the UDHR. The court strengthened the human rights provisions of the Charter in this case and did not focus on the dispute as merely a breach of the Amity treaty between America and Iran. The provisional measure, in this case, developed the remedial aspect of human rights.[418]

The ICJ developed human rights by determining the contexts and situations in which they are applied and the effects of other branches on human rights. For instance, the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion[419] developed IHRL in multiple ways. The court held that the use of nuclear weapons involves human rights law, especially the guarantee of life against arbitrary deprivation under Article 6 of the International Covenant on Civil and Political Rights.[420] The court further held that during armed conflict, the scope of the right to life is regulated by the IHL as *lex specialis*.[421] This

[416] *Western Sahara*, ICJ Reports 1975, 12.

[417] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, 3.

[418] Ibid., Para 42, 91.

[419] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226.

[420] Ibid., para 25.

[421] Ibid.

case paved the way for the academic debate on the relationship between IHRL and IHL, which is still ongoing.[422]

In the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion", the ICJ addressed erga omnes obligations and reviewed the Nuclear Weapons Advisory Opinion. The court opined that the IHL cannot always be treated as *lex specialis*.[423] It was held that '[a]s regards the relationship between IHL and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law.'[424]

At times, the ICJ affirms the decisions of regional human rights courts by referring to or citing them, thus giving them globalized exposure and providing the interpretation of regional courts a universal reach.[425] In the case of Diallo,[426] the ICJ held that the court is

[422] See O. A. Hathaway et al., "Which Law Governs during Armed Conflict? The Relationship between IHL and Human Rights Law," *Minnesota Law Review* 96, no. 5 (2012): 1883-1943. In developing the notion of co-application of IHRL and IHL, however, as pointed out by the dissenting opinion of Judge Weeramantry, the Court did not consider the effects of IHRL on IHL. see, *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, 490.

[423]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 105–6.

[424] Ibid., para. 106.

[425] Başak Calı, Zeynep Elibol, and Lorna Mcgregor, "The 'International Court of Justice' as an Integrator, Developer and Globaliser of IHRL," 78–79, in *Human Rights Norms in 'Other' International Courts*, ed. Martin Scheinin (Cambridge: Cambridge University Press, 2019).

[426] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports 2010, 639.

not bound by the HR Committee's approach to the interpretation of ICCPR. However, it was noted that it was significant that 'it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.'[427] The court interpreted the right to protection from expulsion and ensured judicial consistency by explicitly referring to relevant treaty bodies and regional human rights courts.[428] Furthermore, the court decided the reparations and compensation to be paid to Diallo based on human rights law and jurisprudence. In determining the amount of compensation, the court referred to international courts such as the ECtHR and the IACtHR. The court opined that compensation has to be paid to Diallo since he suffered financial loss as well as for his arrest without being informed of his charges, his lengthy period of detention with a lack of remedy, and his unlawful expulsion.

In another case, the ICJ considered the extra-territorial application of the ICCPR and the Interpretation of Article 12(3) of the ICCPR, and thus, the court was directly engaged with the interpretation of the UN Treaty body, the HRC.[429] Furthermore, the Court recognized the extra-territorial application of the ICCPR, the ICESCR, and the Convention on the Rights of the Child.[430] After a year, in the Case Concerning Armed Activities on the

[427] Ibid., para 67.

[428] Başak Calı, Zeynep Elibol and Lorna Mcgregor, *The International court of justice as an Integrator, Developer and Globaliser of IHRL*, 79.

[429] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 109.

[430] Ibid., 113.

Territory of the Congo, the extraterritorial application of human rights law and UN human treaties was confirmed. [431]

In the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,[432] it was held that the respondent state failed to prevent the genocide. In this case, the judges referred to the Osman v. United Kingdom case of the ECtHR. They stated 'that finding a breach of the obligation to prevent requires the identification of a clear missed moment of opportunity to act has been underscored by the (ECtHR) in its interpretation of the positive obligation to protect human life contained in Article 2, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms'.[433]

Similarly, another advisory opinion can be mentioned here,[434] where the ICJ decided that the International Labour Organization had the jurisdiction to address the claims against the International Fund for Agricultural Development. In doing so, the ICJ referred to the general comments of the HR Committee (UN treaty body) regarding the administration of justice.[435] Thus, the ICJ made the international human rights body's

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[431] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005, 168, para. 216.

[432] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, 43.

[433] Ibid.; *Osman v. United Kingdom*, Judgment, Grand Chamber, October 28, 1998, ECHR 1998-VIII.

[434] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, ICJ Reports 2012, 10.

[435] Ibid., para 39.

practice to establish the development of the principle of equality of arms and the realization of justice.

6.5 CONCLUSION

IHRL is also an important regime in the context of the fragmentation of international law debate. It is the area that widened the scope of international law and increased the subjects of international law. The individuals were considered right-holders at the global level with the emergence of IHRL. IHRL aims to protect the rights of individuals, and for this purpose, there are UN Charter-based bodies and treaty-based bodies at the international level. There are regional human rights protection systems as well, such as the American human rights system, the European human rights system, and the African human rights system.

As far as the jurisprudence of IHRL is concerned, the present research concludes that there is a judicial dialogue between the human rights courts. Case laws of ECtHR and IACtHR reflect that they consider themselves an integral part of the universal human rights system. These human rights courts refer to and cite each other's case law and respect the judicial decisions.

CONCLUSION AND RECOMMENDATIONS

To sum up this research, the significant findings, conclusions, and recommendations are summarized below.

International law developed through different stages and periods. In the ancient period, treaties were concluded between political entities for various purposes. For instance, in 3100 BC, a treaty was concluded to define the boundary between the rulers of Lagash and Umma. The concepts and ideas of international law, maybe not in the modern sense, can be found in the Greek and Roman periods. Rules of war, diplomatic relationships, and maritime and commercial rules can be found during different periods of Greek, Roman, and the Middle Ages. The Post-Westphalia period (from the 1648 Peace Treaty of Westphalia to the 1815 Congress of Vienna) is considered the formation of classical international law. The Vienna Congress of 1815 established the collective security system and, thus, restored the old order of Europe. The Treaty of Paris created the Holy Alliance of Christian nations against liberal and nationalist uprisings threatening the established order. The Paris Peace Treaty of 1856 ended the Crimean War, and as a result, Turkey gained admission to the Concert of Europe. World War II marked a new era of international law since it brought the Concert of Europe to an end, the creation of the United Nations, and military trials at Nuremberg and Tokyo.

International law may be extensively used and referred to by states and nations, but the legal character of international law is always under scrutiny. There are frequent claims that international law lacks legal characteristics because there is no centralized authority, a lack of enforcement mechanism, a lack of sanctions in case of violations, and an absence

of a legislative body. The controversy about whether international law is law or not dates back to the times of Hobbes and Pufendorf. This controversy was revived in the nineteenth century with the theory of John Austin. However, the post-1990s period marked yet another challenge for international law. The material expansion of the content and scope of international law triggered the fragmentation debate. However, the debate on fragmentation needs to be explored by understanding the concept of unity.

The concept of unity is complex and multifaceted, and the fragmentation of international law cannot be understood without discussing the notion of unity. Formal unity, out of various kinds of unity, talks about the assemblage of norms in a legal system. The formal unity of international law is assessed through institutionalist, normative, and post-normative approaches. It can be concluded that formal unity cannot be discussed with reference to any one of the mentioned approaches, excluding the others. Thus, the right way is to consider all of them and then assess the unity of international law as a legal system.

The fragmentation of international law received scholarly attention almost two decades ago after the two presidents of the "International Court of Justice", Judge S. M. Schwebel and G. Guillaume, considered it to be an issue and highlighted it in their address to the United Nations General Assembly. Later on, the International Law Commission conducted a group study on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law."

Fragmentation can be of many types: substantive, institutional, and procedural. The literature on the fragmentation of international law is dense and complex. For a better

understanding, the literature can be divided into two generations. The first generation was focused on two fundamental questions: the development of specialized regimes and the proliferation of international tribunals. In comparison, the second generation in the literature was finding the means and methods to achieve the ultimate goal of unity in the international legal order.

The literature on the fragmentation of international law reflects diverging views of scholars. For some, it is a risk that affects the unity and coherence of the international legal system. Institutional fragmentation can result in forum shopping, overlapping of jurisdiction, and conflicting jurisprudence. On the contrary, few argue that the anxiety over fragmentation is an exaggeration. Fragmentation is a natural phenomenon in the development of international law, and it reflects the maturity of the international legal system. Furthermore, the multiplicity of international tribunals and courts enhances the efficiency of the system. The international judges take care of their role as architects of coherence of the international legal system.

Another aspect of the fragmentation issue is the increase in specialized regimes and the material expansion of the norms of international law. It is pertinent to mention that the different regimes were developed to provide adequate solutions to the relevant problems efficiently. However, in that process, the various regimes interacted with each other, and friction and conflict occurred. In the Fragmentation literature, international regimes face important questions: are they self-contained regimes, or do they interact with general international law and other regimes of international law? The present chapter establishes that no international regime is self-sufficient, and they have to fall back on general

international law at some point. However, the interaction of different international regimes between themselves and with the general international law raises the possibility of conflict. These conflicts can be of various kinds. The conflict of norms in international law can affect the material unity of international law, and there are different ways in which the norms of international law can conflict with one another. There are means and methods through which the conflict of norms can be resolved, such as the application of *lex specialis* and *lex posterior*, mutual tolerance, and the interpretative principle of systematic integration. Thus, it is concluded that the fragmentation issue can be resolved through different techniques. The international legal system lacks a hierarchical structure and a set of conflict-resolving rules; however, the mindfulness of judges in their relevant cases about the integrity and coherence of the international legal system can help combat the issue of fragmentation. Here, it is important to note that the doctrine of precedent is not binding at the international level. However, the international adjudicative bodies refer to and cite each other, and this is primarily to have coherence and maintain the integrity of the system.

Here comes the next question of this research: How do the courts and tribunals of the same and different regimes interact with each other, and what can be concluded from that judicial dialogue? These questions are addressed with reference to the ICL and IHRL regimes.

ICL has recently developed as a regime. Early, it was challenging to think about criminal law at the international level. The origins of modern ICL can be found in the Nuremberg and Tokyo trials after World War II. The establishment of ICTY and ICTR and, later on, the creation of hybrid tribunals marked the maturity of ICL. ICL played a

significant role in prosecuting individuals for international crimes and thus created a sense of accountability at the international level. The concept of individual criminal responsibility cannot be found in the traditional idea of international law. So, in a way, ICL increased the subjects of international law.

Different criminal tribunals were created considering the nature of conflicts and the demand for justice. As far as the applicable law of the tribunals, such as ICTY and ICTR, is concerned, the absence of a provision on applicable law has led to inconsistent interpretations, which is regrettable. However, both tribunals, ICTY and ICTR, generally agreed that international law sources are relevant, albeit in a subsidiary manner. On the other hand, Article 21 of the Rome Statute refers to the applicable law of the ICC. Article 21 of the Rome Statute was a unique provision in ICL. This article aims to limit the discretion of judges in defining the applicable law. However, the text of Article 21 is not simple and certain. The possibility of multiple interpretations has made this article ambiguous and complicated.

The research reflects that the doctrine of precedent does not apply to international criminal tribunals and courts. In Hadžihasanović, the ICTY Appeals Chamber rejected the automatic application of the doctrine of precedent across the tribunals, i.e., the judicial decisions of ICTR are not binding on ICTY since their statutes were adopted in different contexts. In the Kupreškić case, the ICTY considered judicial decisions as a subsidiary source of law. Thus, ICTY rejected the application of the doctrine of binding precedent in relation to other criminal tribunals and courts. Since there is no hierarchical structure of courts in the international legal system, the ICTY did not acknowledge judicial decisions

as a direct source of ICL. ICTR also held a similar stance with regard to the human rights treaties and held that the jurisprudence of the European Court of Human Rights and the American Court of Human Rights can be used as an interpretive tool while applying the applicable law of tribunals. However, they are not binding precedents. They can only be used as evidence of international custom. Similarly, the Special Court of Sierra Leone (SCSL) applies the judicial decisions of ICTY and ICTR as a persuasive precedent after reviewing them for necessary changes required for the special court. The SCSL rejected the application of judicial precedents of ad hoc tribunals as binding.

Similarly, according to Article 21, the decisions of other courts and tribunals are not binding on the ICC. However, it is pertinent to mention here that the ICC does not exist outside the framework of ICL. Thus, the ICC can interact with other courts and tribunals at the international level and, ultimately, play its role in the development of ICL. However, this interaction has to be in accordance with the mandate and statute of the ICC. However, the courts and tribunals have a relationship of mutual trust and confidence. They cite each other and refer to each other's case law.

To sum up, there is no precise and uniform practice of international criminal courts and tribunals regarding the acceptance and reception of external judicial precedents. However, the statutory provisions of each institution allow some flexibility to accommodate the jurisprudential developments of the field. Furthermore, the integrity and coherence of the system are not endangered since the international courts and tribunals are aware of their role, and they avoid giving contradictory judgments.

IHRL is also an important regime in the context of the fragmentation of international law debate. It is the area that widened the scope of international law and increased the subjects of international law. The individuals were considered right-holders at the global level with the emergence of IHRL. IHRL aims to protect the rights of individuals, and for this purpose, there are UN Charter-based bodies and treaty-based bodies at the international level. There are regional human rights protection systems as well, such as the American human rights system, the European human rights system, and the African human rights system.

As far as the jurisprudence of IHRL is concerned, the present research concludes that there is a judicial dialogue between the human rights courts. Case laws of ECtHR and IACtHR reflect that they consider themselves an integral part of the universal human rights system. These human rights courts refer to and cite each other's case law and respect the judicial decisions.

Human rights treaties have reinforced each other and, through various interpretative tools, contributed to the universality of human rights protection. The practice of courts referring to each other in their decisions contributes to the development of a uniform interpretation of human rights jurisprudence. These uniform interpretations do not threaten the unity of international law. Instead, the ECHR and ACHR have helped international law evolve positively and thus regulate the relations of individuals more efficiently. The establishment of new courts and tribunals refers to the maturity of the international legal order.

Thus, the research concludes that the integrity and coherence of the international legal system need to be understood through multiple aspects of unity. The fragmentation issue or debate is also incomplete and misleading without clarifying the notion of unity from the perspective of international law. The unity of international law and the legal character of international law have to be revisited and explained before any analysis of the fragmentation debate. Consequent to the needs of states, specialized regimes were developed to address the issues adequately. However, the material expansion and the conflict of norms of the specialized regimes can be minimized through different judicial methods and techniques. The analysis of the jurisprudence of ICL and IHRL signifies that no regime of international law is self-contained, and they interact with one another at some point.

Furthermore, it is established with the help of relevant case laws that the judicial bodies of the respective regimes have judicial dialogue with other courts. Despite the fact that the doctrine of precedent is not binding under international law, the courts and tribunals refer to and cite each other and maintain the integrity of the system. Thus, due to the lack of institutional hierarchy in the international legal system, judges play a crucial role in ensuring its integrity and coherence.

RECOMMENDATIONS:

1. International courts and arbitral bodies should consciously adopt interpretive methods that seek coherence across regimes. Judges should reference relevant jurisprudence from other fields such as human rights, environmental law, or trade law to avoid fragmentation and encourage legal consistency.

2. Legal decisions must be understood not as isolated rulings but as chapters in an ongoing legal narrative. Following Dworkin's chain novel metaphor, each ruling should build on previous decisions and established norms while guiding the development of international law in a coherent and principled direction. Such continuity enhances the legitimacy and predictability of international adjudication.

3. Greater institutional mechanisms and informal channels should be created for dialogue among international tribunals. Such exchanges can foster a culture of cross-referencing, shared principles, and coordinated interpretations across legal regimes.

4. International law curricula should incorporate Dworkin's hermeneutical framework as part of interpretive theory, equipping future legal professionals with tools to approach fragmented legal materials in a principled and coherent manner.

5. The International Law Commission (ILC) can develop interpretive guidelines that promote systemic integration of international law. These guidelines would not impose uniformity but would encourage adjudicators to adopt coherence-preserving approaches.

6. While Dworkin's theory may not fully overcome the structural fragmentation of international law, it provides a compelling interpretive ideal. Legal actors should remain aware of the constraints of international pluralism but still aspire to uphold systemic coherence and moral integrity in legal reasoning.

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