INTERNATIONAL COURTS AND TRIBUNALS SERIES

INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION

PHILIPPA WEBB

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First published 2013
First published in paperback 2016

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 978–0–19–967115–1 (Hbk.)
ISBN 978–0–19–874372–9 (Pbk.)

INTERNATIONAL COURTS
AND TRIBUNALS SERIES

General Editors: Philippe Sands, Ruth Mackenzie, and Cesare Romano

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A distinctive feature of modern international society is the increase in the number of international judicial bodies and dispute settlement and implementation control bodies; in their case-loads; and in the range and importance of the issues they are called upon to address. These factors reflect a new stage in the delivery of international justice. The International Courts and Tribunals series has been established to encourage the publication of independent and scholarly works which address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including their institutional, substantive, and procedural aspects.

For Eric and Charles Henri

Series Editors' Preface

The International Courts and Tribunals series welcomes this debut opus of Philippa Webb. Originally written as a doctoral dissertation for Yale Law School, Webb's work caps more than a decade of academic debate over whether the increased number and diversity in international adjudicative bodies, operating without formal rules governing the relationships between them and in the absence of an ultimate court of appeal to tie them all together, poses a threat to the postulated unity of international law.

The late Jonathan Charney tackled the question at the end of the 1990s, at the beginning of the multiplication of international courts and tribunals.[1] His answer was a resounding no, but what Charney lacked was enough empirical evidence to substantiate what was essentially a correct intuition. Since Charney, the role played by international courts in causing or countering the fragmentation of international law has become a classical theme of international adjudication scholarship.

Webb's work focuses on four international courts (ICJ, ICC, ICTY, and ICTR) to discuss how they have tackled, each from the perspective of its own cases and jurisdiction, three related issues: genocide, immunities, and use of force. Unsurprisingly, she finds a good degree of convergence between these four bodies on these topics, but her real contribution to the field is the identification of the factors that influence the degree of integration or fragmentation among adjudicative bodies.

Cesare PR Romano
January 2013, Santa Monica, California

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

Preface to Paperback Edition

I. Introduction

It is over two years since the hardback edition of this monograph was published. The world today somehow seems more dangerous and unpredictable, with the rise of brutal non-state actors such as ISIS, Russia's actions in Crimea bringing uncertainty and misery, the flows of desperate migrants across land and sea, as well as the unending stream of cases in domestic and international courts involving torture and other inhuman and degrading treatment.

International courts continue to play a critical role in developing and applying the law in difficult cases. I still consider the study of these international courts as an important endeavour. At the same time, having a critical perspective on their limitations, legitimacy and influence is also of continuing importance.

II. Developments in the Three Fields

In the hardback edition, I concluded that 'even though there are few instances of genuine fragmentation in the areas studied, there is a small but genuine risk of incoherence in the development of international law' (p. 227). I maintain this view.

In his recent general course at The Hague Academy of International Law, James Crawford noted that although disagreements between international courts are 'prima facie perturbing, it may fairly be asked whether fragmentation is really a problem'.[1] Similarly, the 2015 European Society of International Law Conference, with its theme of 'The Judicialization of International Law—A Mixed Blessing?', asked whether we should still worry about fragmentation. I think the answer is, in most circumstances, 'No'.[2]

A brief survey of developments since late 2012 (the date to which the hardback edition was updated) in the three fields examined in the book—genocide, immunities, and the use of force—shows that there have been important judgments and events in each area. Most of these have been in line with the trends I identified in 2012. There are inevitably variations and disagreements within and among international courts, but the general trajectory has been towards coherence. A potentially significant departure from this trajectory has been the tension between national constitutional requirements and international norms (see below under 'Immunity').

[1] James Crawford, *Chance, Order, Change: The Course of International Law. Recueil des cours* (Martinus Nijhoff 2013) 9, 365–7.

[2] See also Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (OUP 2015), to which I have contributed chapter 6.

A. Genocide

On 3 February 2015, the International Court of Justice (ICJ) delivered its Judgment on the merits of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* case. This Judgment is the last chapter in the ICJ's 18-year involvement with allegations of state responsibility for genocide in the Balkans. The *Croatia v Serbia* Judgment followed the 2007 *Bosnia v Serbia* Judgment. Although the Court has changed composition since 2007, the judges took a consistent approach to the elements of the crime, the obligations under the Genocide Convention, the relationship between the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY), and the standard of proof.[3]

Complicated assessments of genocide continue to be made with respect to historical events (Armenia and Cambodia) and unfolding situations (Central African Republic and the Sudan). There is clear guidance from the ICJ based on the text of the Convention, though it may not always provide the answer that stakeholders want.

B. Immunities

Of the areas covered in the book, the law on immunity has probably been the most dynamic in terms of judicial activity over the past three years. I have been immersed in these developments through my work with Lady Hazel Fox QC on the third edition (2013) and the third revised and updated paperback edition (2015) of *The Law of State Immunity*.

Lady Fox and I observed that in contrast to the comprehensive recognition of the ICJ of the exclusionary procedural nature of the plea of state immunity in its 2012 *Jurisdictional Immunities* Judgment, 'a more subtle varied interpretation of the scope of State immunity is to be found in recent decisions of national courts, some involving an expansion and others a restriction of the plea'.[4]

A formative decision since the last book has been the 2014 judgment of a chamber of the European Court of Human Rights (ECtHR) in *Jones v United Kingdom*, which confirms that acts performed by state officials in the course of their official duties come within the cloak of the plea of state immunity and consequently bars direct impleading in civil cases of such state officials.[5] This decision followed the *Jurisdictional Immunities* Judgment and extended the ICJ's holding on the immunity of the state to the immunity of state officials from civil proceedings.

[3] For an analysis of *Croatia v Serbia*, see the mini-symposium in the *Leiden Journal of International Law* (2015).

[4] Preface to the Paperback Edition, *The Law of State Immunity* (2015).

[5] *Jones and Others v UK*, Fourth Section, ECtHR, 14 January 2014, Applications nos. *34356/06 and 40528/06*. The ECtHR found that the state practice in this field was in a 'state of flux' (para 213), but it was satisfied that the findings of the House of Lords 'were neither manifestly erroneous nor arbitrary' (para 214).

The *Jones v UK* Judgment, seen together with the Judgments of the Canadian Supreme Court in *Kazemi v Iran* and the US Supreme Court in *Kiobel*,[6] limits the possibilities of establishing jurisdiction in civil proceedings seeking reparation for victims in UK, Canadian, and US courts.

The employment exception to immunity did not receive any attention in the hardback edition. This was because such disputes tend to arise before domestic courts (and the ECtHR) rather than the courts that formed the core of this study. Nonetheless, I have come to realise the employment exception's importance as a potential avenue for addressing human rights violations that occur in the workplace. In particular, there have been cases concerning the alleged exploitation and trafficking of employees of foreign embassies and residences that have engaged the employment contract exception to state immunity. Important cases in the UK include *Benkharbouche & Anor v Embassy of the Republic of Sudan (Rev 1)* [2015] EWCA Civ 33 (now on appeal to the Supreme Court) and *Reyes & Anor v Al-Malki & Anor* [2015] EWCA Civ 32.

Finally, a new fissure has arisen in the law of immunity: not between international courts, but between international courts and national constitutional courts. In Judgment 238 of 22 October 2014, the Italian Constitutional Court held that Italy's compliance with the ICJ's *Jurisdictional Immunities* Judgment was unconstitutional. The Constitutional Court declared unconstitutional the relevant provisions of Law No. 5 of 2013 (passed after the *Jurisdictional Immunities* Judgment) and Law No. 848 of 1957 ratifying the UN Charter (insofar as it required compliance with the *Jurisdictional Immunities* Judgment). In its view, compliance with the ICJ's ruling entailed a disproportionate restriction on the right of access to court (enshrined in Article 24 of the Italian Constitution). Respect for state immunity could not bar access to court where Article 24 applied and the commission of crimes against humanity and war crimes was alleged. The Constitutional Court did not challenge the *Jurisdictional Immunities* Judgment as a statement of customary international law; it instead refused to allow the Judgment to have legal effects at the domestic level.

This decision has echoes of the Canadian Supreme Court's acceptance of the legislation of the Canadian Parliament as final in *Kazemi v Iran*, US state courts' reluctance to apply the decisions of the ICJ as binding in the *Avena* cases, and the resistance of certain European courts to Judgments of the ECtHR and the Court of Justice of the European Union. Sometimes this will only be 'apparent fragmentation' where the language of constitutional norms does not align easily with international law, but in other cases it could be 'genuine fragmentation' in that constitutional norms directly conflict with laws or pronouncements at the international level. The tension is complicated by the fact that often executives and the judiciary within the same state may have different views on compliance with the international judgment or norm in question.

[6] *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2013).

C. Use of force

The controversy surrounding the law on the use of force has intensified in the last couple of years. This has not yet resulted in international judicial decisions that either fragment or integrate the law. Instead, the struggle to apply—or the desire to reject—old models in the face of new conflicts has been taking place in political circles.

States and regional and international organizations have had their notions of the legality of the use of force tested by the use of chemical weapons in Syria, the violence of ISIS in Syria and Iraq, the brutality of Boko Haram in Nigeria, the use of drones to conduct targeted killings, the mobilization of military force against people smugglers in the Mediterranean, and the elusive nature of cyberwarfare.

The Security Council has been deadlocked[7] in some situations. In other cases, it has relied heavily on national or regional peacekeeping forces. Collective self-defence has become more prominent as a justification for the use of force, whereas humanitarian intervention and the Responsibility to Protect have somewhat faded.

The international court cases examined in the hardback edition have not been superseded by new Judgments, but they have been overtaken by events in this field. Those searching for the legal norms governing the use of force in contemporary situations may be better off looking to 'raw' state practice and the practice of organizations rather than the pronouncements of international courts.

III. Application to Other Areas

Chapter 5 of the book sets out a framework of analysis for determining fragmentation and integration among international courts: the identity of the court (whether it is permanent or ad hoc, its function and its institutional context); the content of the applicable law (treaty law or custom, the level of development of the law and the level of controversy and change); and the nature of the judicial process (the extent to which the case is fact-intensive, the process of drafting judgments, and the importance attached to precedent).

These three interrelated sets of factors were deduced from practice in the fields of genocide, immunities, and the use of force. I believe that these factors may also be helpful in parsing developments in other areas of the law. For example, there is a loose network of administrative tribunals associated with international organizations, ranging from the well established and comprehensive (International Labour Organization Administrative Tribunal, United Nations Dispute Tribunal) to the ad hoc and specific. Their decisions may similarly be

[7] Philippa Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19(3) *Journal of Conflict and Security Law* 471.

influenced by their identify, the content of the applicable law, and the nature of the decision-making process.

Maritime delimitation is another field where multiple courts and tribunals are deciding cases, including the ICJ, the International Tribunal for the Law of the Sea, and arbitral tribunals. On the one hand there is a substantial amount of agreement on legal methodology and applicable law, but on the other hand there can also be startling variations on a case-by-case basis.[8]

IV. Reflections

In the past couple of years, some excellent books have come out that have provoked my thinking in related areas.[9] There is still much to explore and reflect upon when it comes to international courts.

There are a number of initiatives underway that will surely enrich our understanding of the interaction among international, regional, and national courts and the resulting effect on the development of the law. The International Law Commission has on its programme of work the topics of 'The Identification of Customary International Law' and 'The Immunity of State Officials from Foreign Criminal Jurisdiction'. The *Institut de droit international* is undertaking a study of jurisprudence and precedents in international law.[10] The American Law Institute is working on *Restatement Fourth of Foreign Relations Law*, with Sovereign Immunity being one of the first topics to be examined. Groundbreaking interdisciplinary academic work is being carried out by iCourts and Pluricourts.[11]

My impression is that the international legal system continues to be characterized by more integration than fragmentation. The fragmentation of international law has become a phenomenon to be monitored rather than to be feared.

Dr Philippa Webb
17 September 2015
London

[8] See the Judgment and Separate Opinions in *Maritime Dispute (Peru v. Chile)*, ICJ Reports 2014.

[9] See, eg, Gleider Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014); Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014); Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012).

[10] Rapporteurs: Alain Pellet and Mohamed Bennouna.

[11] Danish National Research Foundation's Centre of Excellence for International Courts (University of Copenhagen) and Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order (University of Oslo).

Acknowledgements

This book is a revised and updated version of a JSD dissertation I submitted to Yale Law School in April 2011. I was awarded my JSD degree in September 2011, six weeks after the arrival of my son, Charles.

My dissertation was grounded on the wonderful year I spent as an LLM student at Yale Law School in 2003–2004. The classes I took with Professors Brilmayer, Reisman, and Damaška inspired my topic, as did the International Courts Seminar with Judge Wald and Dr Askin. The opportunities afforded to me by Yale, including a clerkship at the International Court of Justice in 2004–2005 and a high-level course in International Criminal Law at the European University Institute, have deepened my knowledge of the areas of law examined here. And the warm friendships that I formed during my LLM year sustained my motivation to complete the dissertation, as I lived and worked in The Hague and Paris.

I am deeply indebted to Professor Brilmayer for her supervision. Her comments were always insightful and she challenged me to improve and rethink my structure and arguments at critical moments in the drafting process. I am very grateful to Professor Reisman and Professor Damaška for their wise advice along the way, their friendly encouragement, and the time that they have taken to read my work. I also benefited from the warm friendship and sound advice of Maria Dino, Director of Graduate Programmes.

From 2004 until the present, I have had the honour of working for Judge Rosalyn Higgins in various capacities. Her impact on this book may be apparent from the footnotes; her influence on my thinking and my career goes much deeper.

Friends and colleagues in New Haven, The Hague, London, Paris, Dublin, New York, Sydney, and elsewhere have helped in important ways. Early advice from Oonagh Breen and Ben Berger has served me well. Amal Alamuddin, Ben Batros, and Rachel Davis have helped me grapple with ideas in a series of invaluable conversations and have commented on multiple drafts. I am also thankful for the comments on specific drafts that I received from Kirsten Roberts, Gleider Hernandez, Antonios Tzanakopoulos, Hirad Abtahi, and Dapo Akande, and for the meticulous editorial assistance of Anja Wiersing. I am grateful for the strong support and interest of Judge Kenneth Keith, Judge Erkki Kourula, Emma Lindsay, Shaun Gatter, Florence Zaoui, Analu Verbin, Horacio Etchichury, Ingrid Barnsley, and Ben Juratowitch. Throughout the writing process I have had in mind Mino Hokari, a dear friend who completed his own thesis and a book based upon it before his untimely death at 32 years old.

Warm thanks are due to John Louth and Merel Alstein of Oxford University Press, the external reviewers, and the General Editors of the International Courts

and Tribunals Series. In finalizing the manuscript, I have benefited from the support of my new colleagues at King's College London.

Finally, I would like to thank my family. My parents and my sister Nicole have, as always, offered constant support. My husband Eric has encouraged me every step of the way, from New Haven to The Hague to Paris, from the first forays into research to the final footnote references. His contribution may be intangible, but it is immense.

Some parts of this book develop material I published elsewhere. A section of the chapter on genocide builds on ideas in Philippa Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide' in Carsten Stahn and Larissa van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* 117 (Martinus Nijhoff 2012). The chapter on immunities contains information and ideas first presented in Philippa Webb, 'Human Rights and the Immunities of State Officials' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* 114 (OUP 2012). My thinking on immunities has been greatly assisted by my work with Lady Hazel Fox QC on the third edition of *The Law of State Immunity* (forthcoming OUP 2013).

The views expressed in this book are my own and do not necessarily represent those of the International Court of Justice or the International Criminal Court. The relevant case law is up to date as of October 2012 unless otherwise indicated.

Dr Philippa Webb
London
31 October 2012

Table of Cases

International Criminal Court