Introduction

In the past decades, the international human rights law system welcomed the proliferation of regional and international human rights adjudicatory bodies, as they meant better and closer protection of human rights for people worldwide. Yet, this proliferation also increased the likelihood of conflicting interpretations of fundamental rights and freedoms, which may trigger what we call judicial fragmentation. Judicial fragmentation, described as the situation where two judicial or quasi-judicial bodies issue contrasting judgments, is certainly a double-sided phenomenon. On the one hand, it can bring adverse consequences, such as reduced legitimacy of the adjudicatory bodies, lower protection of human rights and a threat to universality. On the other hand, fragmentation is a constant element in lawmaking and possibly the only way for the law to develop and adapt to new challenges. In 2006, the International Law Commission (ILC) published a report, which found that fragmentation was significantly threatening international law. Following such a worrying alert, scholars have started investigating whether fragmentation was also affecting international human rights law (IHRL), reaching the initial

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Conclusion that the situation was not as alarming as expected. However, the phenomenon is complex and continuously evolving, also considering that some regional human rights systems have significantly expanded and grown in the last few years, likely offering a different picture. Moreover, very little has been said so far about the possible factors behind convergence and fragmentation and why these two phenomena arise. The aim of this book is exactly to fill this gap in literature by providing a better understanding of the current fragmentation and convergence in IHRL and identifying the triggering factors driving these phenomena. In particular, the book addresses two key questions: (1) is judicial fragmentation actually affecting IHRL or does convergence prevail, looking at the three regional human rights systems and the UN Human Rights Committee?; (2) what are the factors that can be identified as contributing to this situation?

The answer to the first question builds on what scholars have demonstrated so far and ensures that the recent development in case-law and approach of all regional human rights systems, including the African and the Inter-American ones, are taken into account. International human rights law certainly offers a fertile ground for fragmentation given the endless struggle between universality and cultural relativism, the high sensitivity of the issues related to many human rights norms and the determinant role of social, cultural, religious and historical concerns. The African Court on Human and Peoples’ Rights (ACtHPR) has seen an incredible growth both in terms of judgments issued and complexity of its reasoning in the last ten years. Likewise, the Inter-American Court of Human Rights (IACtHR) has significantly expanded the range of rights and topics addressed in its judgments, facing for the first time new rights and issues. These developments urge a new assessment of the...
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judicial convergence and fragmentation picture in IHRL. Offering a new perspective and constantly looking at the three main regional human rights systems (the African, European and Inter-American), this book confirms that judicial convergence is predominant in international human rights law.

The ILC Report mentioned earlier certainly provided clarity on the definition and importance of fragmentation for international law, but it did not put an end to the debate on its merit. There is very little agreement among scholars on whether we should see fragmentation as a positive or negative phenomenon, in international law as in international human rights law. Indeed, fragmentation is so multifaceted that it is naturally subject to a wide range of different opinions. As described by Martineau, a historical overview of fragmentation highlights how the concept has been varyingly used and abused for political and functional purposes. Over the last 150 years, international lawyers have had recourse to the language of fragmentation as an argument for criticism and contestation. Indeed, the development of international law through specialised mechanisms is sometimes seen as healthy pluralism (“diversification”), sometimes as a perilous division (“fragmentation”).

On the one hand, fragmentation as diversification and expansion of a legal system produces positive effects such as, according to Hefner, the elaboration of more specialised regimes capable of answering to specific needs of protection and regulations and the development of law for higher and more suitable standards for all parties. Moreover, fragmentation is pluralism and this ensures the democratisation of the international law space, where different ‘political’ preferences can express themselves in the international arena. Likewise, as Peters recalls, fragmentation also means competitive pressure on international courts and tribunals to improve their performance and be more effective. In the specific context of IHRL, fragmentation could be considered advantageous for human rights users as it is a natural development of the law to address emerging needs, and thus an opportunity to increase the level of protection of human rights.

4 ibid, 2.
5 Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’, 859.
8 Brems and Ouald-Chaib (eds), Fragmentation and Integration in Human Rights Law, 3.
On the other hand, fragmentation as the proliferation of contrasting norms and regulatory frameworks can ‘jeopardise’ the credibility and authority of IL and IHRL, with specific regimes increasing the possibilities of frictions between them. It can also threaten the coherence and unity of the IL and IHRL system. Moreover, especially when arising from institutions with overlapping jurisdictions, fragmentation undermines legal certainty, which is a key safeguard of any rule of law system and could encourage states not to comply with human rights judgments and recommendations.

Some commentators stand for a middle position, holding that ‘proliferation is either an unavoidable minor problem in a rapidly transforming international system or even a rather positive demonstration of the responsiveness of legal imagination to social change’. Indeed, the interplay between fragmentation as positive diversification and fragmentation as negative proliferation is a matter of political interpretation and perspectives. ‘Every development of international law is good insofar as it is teleologically directed towards the greater fulfilment of mankind. Perceptions of breakdown or fragmentation emerge when this objective is blurred, when international lawyers experience a world that has failed them and has malignantly stopped striving for unity.’ Applied to the IHRL space, one could argue that judicial fragmentation should be avoided unless it leads to an increased protection of human rights. Indeed, this book does not depict judicial fragmentation as the ultimate threat and danger for IHRL, as it also recognises its important role in improving and adapting the law to emerging needs. As it comes out throughout the book, although convergence is usually desirable, it is possible to

identify instances of ‘negative convergence’, where courts show a race to the bottom in terms of human rights standards and a ‘positive fragmentation’, where the divergent ruling increases the level of protection of human rights.

Whatever value and significance one wants to attribute to judicial convergence and fragmentation in IHRL, one should not stop at the assessment of one or the other phenomenon, but it is crucial to investigate further why and under which circumstances they arise and when they can lead to a decreased protection of human rights. In particular, if judicial fragmentation is not really affecting IHRL as we expected despite the differences in terms of history, culture, religion and legal frameworks of the regional systems, the obvious follow-up question is why. What could be the factors that drive this overall convergence? Are there any elements that are likely to trigger fragmentation while others to maintain convergence? Are any of them likely to change in the future? The second part of this book attempts to provide an answer to all these questions. Only if we gain a better understanding of all this, can we avoid triggering the kind of judicial fragmentation that could ultimately undermine the protection of individuals’ human rights and the legitimacy and functioning of the international human rights adjudication system.

In order to answer these questions, this book looks at the classical legal factors traditionally linked to international comparative adjudication, but with a strong focus on both what ensures convergence now and what may trigger fragmentation in the future. The theory of interpretation is certainly important. In particular, the fact that all the regional and international bodies have embraced the principle of evolutive interpretation is a strong safeguard for convergence, even though the different interpretation clauses contained in regional human rights instruments leave the door open to a possible fragmentation. Likewise, the development and application of legal principles, tests and doctrines such as necessity and proportionality or deference and subsidiarity are absolutely key to understanding the approach of each body to human rights adjudication. Despite differences in the text of the provisions, the understanding and application of the principle of necessity have found a convergent, yet vague, application across all systems, supporting the current overall convergence. Similarly, all human rights bodies ultimately resort to the proportionality test, possibly intrigued by its flexibility. The entire international system of human rights protection is based on the principle of subsidiarity, and regional systems have often prided themselves on their deferential approach to member states. Nevertheless, the margin of

15 See Chapter 3.
16 See Chapters 5 and 6.
appreciation doctrine developed by the European Court of Human Rights (ECtHR) and the conventionality control doctrine developed by the Inter-American Court of Human Rights could be applied in such a contrasting way to easily trigger fragmentation in the future.\textsuperscript{17}

In addition, the current judicial convergence is also helped by an increasing judicial dialogue between human rights bodies. As broadly discussed by scholars, the meaningful use of external references is one of the best tools to maintain convergence or, at least, a reasoned and thought-upon fragmentation. However, one of the features of the current judicial dialogue in IHRL is the activism of the African and Inter-American bodies in methodically looking at the case-law of their European counterpart and at the UN system. In the very recent years, both the African and the Inter-American courts have started to significantly reduce the number and importance of external references in their judgments, suggesting that a change in the trend, and therefore in the outcome, is very much possible.

All of the above factors are certainly important and could be pivotal in the explanation of judicial convergence and fragmentation, yet they could be seen as quite narrow, since they do not look outside of the judgments. The law is a social construct,\textsuperscript{18} and the case-law of a body is the outcome of the interpretation of a group of individuals. As such, when looking at the reasons why a judicial or quasi-judicial body behaves in a certain way, one should investigate the composition of that body and the people who are called to interpret and apply the law.\textsuperscript{19} Through the analysis of the identity and background of international and regional judges and commissioners, this book will show how education and work experience could play a role in maintaining convergence in IHRL.\textsuperscript{20}

\textsuperscript{17} See Chapter 6.
\textsuperscript{20} See Chapter 4.
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Equally, as these human rights institutions do not work in a vacuum, there are other actors and dynamics that could affect their adjudication and impact judicial convergence and fragmentation. In addition to member states and the political pressures they exercise on regional courts, the structure and functioning of the institutions' registries and secretariats could also have an influence on the adjudication. Furthermore, non-governmental organisations could also be extremely influential in steering IHRL adjudication, both by intervening directly in a case and by deciding what to prioritise in the courts' agendas.21

All these factors contribute somehow and in different ways to the shaping of IHRL adjudication and, as a consequence, on dynamics such as judicial convergence and fragmentation. They do not all operate at the same time, nor they all have the same impact on each body. Yet, they are all extremely important aspects of the IHRL adjudicatory environment that deserve attention and careful consideration. With regional and international institutions constantly changing and evolving, growing in experience and judgments issued, they are also likely to evolve in the future, possibly changing from being the cause of convergence to being that of fragmentation.

METHODOLOGY

The book addresses the two main questions of whether there is judicial convergence or fragmentation in IHRL and what could be the contributing factors, mainly adopting a doctrinal and comparative methodological approach, complemented by other interdisciplinary methods for the second part.

In line with the current literature, as further explained in Chapter 1, judicial fragmentation is defined as the phenomenon that arises when two courts, or quasi-judicial bodies, seized of the same or similar matter, issue contrasting judgments.22 On the contrary, judicial convergence is the phenomenon that arises when two courts, or quasi-judicial bodies, seized of the same or similar matter, issue convergent judgments. This implies that if there are no two similar cases brought before two bodies, then it is not possible to assess judicial fragmentation or convergence.

Following these definitions, the book engages with a doctrinal and comparative analysis of primary sources of international human rights law, both at the regional and international level. After an initial perusal of the international

21 See Chapter 7.
human rights law framework, the book mainly focuses on civil and political rights. In particular, it examines the Universal Declaration and the International Covenant on Civil and Political Rights together with the core human rights instruments of the regional bodies, namely the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, the Arab Charter on Human Rights, the ASEAN Human Rights Declaration and the European Convention on Human Rights. This choice is motivated by the necessity of finding a compromise between ensuring the comprehensiveness of the analysis in terms of both regional scope and human rights issues addressed. Civil and political rights are preferred over social, economic and cultural rights because they are the common denominator between all the systems under analysis and allow a broader evaluation, given the higher number of cases decided by the adjudicatory bodies.

Differently, for the assessment of judicial fragmentation and convergence, the doctrinal and comparative analysis of the case-law takes into consideration only five bodies: the UN Human Rights Committee, the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. The Arab League and the ASEAN are excluded as they have not produced relevant human rights case-law. As for the three regional human rights systems, this book focuses on bodies that have similar features and issue binding judgments for their member states, as this element may have particular relevance when fragmentation is triggered. Nevertheless, it includes the African Commission on Human and Peoples’ Rights due to the limited case-law available from the African Court, especially at the time this research started. Due to the extensive case-law of these five bodies, it was necessary to adopt a selection method to carry out a detailed examination.

As explained in Chapter 2, a first-level analysis has been conducted on all the leading judgments of these bodies concerning all civil and political rights with the only criterion that all four jurisdictions had to have dealt with these rights (see Appendix 2). After this initial screening that revealed substantial convergence, some specific rights and freedoms have been selected on the basis of specific features that may lead to fragmentation and analysed in detail, even including specific topics on which only two bodies ruled. Doctrinal and comparative legal methods were then used to analyse the content of these judgments and views, highlighting situations of convergence and fragmentation. This book considers the case-law of the five bodies up to 30 June 2021.

I perfectly recognise the limit imposed by the methodological choice made. Conducting a quantitative or qualitative study on all judgments through keywords, using for example text analysis, has the merit of including all the
judgments issued and may have produced different results. However, it would not have allowed a detailed analysis of the text of the judgments, thus preventing the understanding of hidden or not evident cases of convergence or fragmentation. The methodology chosen ultimately appeared as the most appropriate, considering that the aim of this book is not merely to assess the extent of judicial fragmentation and convergence but, most importantly, to identify the possible causes.

The book adopts the same doctrinal and comparative methods also for identifying the legal factors explaining convergence and fragmentation. However, especially for what concerns the non-legal factors presented in Part II, it was necessary to resort to some empirical analyses. Drawing inspiration from the increasing literature on the importance of including behavioural analysis into legal research, an empirical study has been conducted on the background of the judges, commissioners and committee members of the five bodies under analysis, collecting data from the official websites of these bodies and other internet sources. In addition, this book also benefits from interviews conducted with judges, commissioners and committee members as well as with members of the registries and secretariats of the five bodies and with NGOs involved in litigation before them. The outcome of these exchanges informs and supports arguments and findings based on primary and secondary sources.

**STRUCTURE**

The book is divided into two parts. Part I focuses on answering the first question, whether judicial fragmentation is actually affecting IHRL and to what extent. To this end, Chapter 1 introduces the issue of fragmentation in public international law, defining the meaning and features of fragmentation and convergence. Drawing inspiration from the ILC Report on fragmentation in public international law, the chapter assesses the likelihood of fragmentation to arise in international human rights law, setting the ground for the following study. Differently, Chapter 2 conducts a screening of the case-law of the five bodies under analysis in order to assess the extent of judicial fragmentation within IHRL. After a general perusal, it focuses on some specific topics, both exploring the prevalent dynamics towards convergence and providing a detailed analysis of the few encountered instances of judicial fragmentation.

Against this background, Part II attempts to identify some explanatory factors of judicial convergence and fragmentation in IHRL. More in detail, Chapter 3 focuses on the approach of treaty interpretation and the resort to judicial dialogue as a key path to judicial convergence. Chapter 4 explores the impact that the composition of the adjudicatory bodies may have on their interpretation and ultimately on convergence and fragmentation and the role played by their secretariats and registries. Chapter 5 reflects on the use and interpretation of two fundamental elements of human rights adjudication, the notions of necessity and that of proportionality. Similarly, Chapter 6 addresses the adoption by the bodies under analysis of the doctrine of deference and subsidiarity and the margin of appreciation. Finally, Chapter 7 discusses other factors that may influence fragmentation and convergence, such as the role of NGOs and civil society actors and the several elements that may prevent a specific case from reaching the merit stage.