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Beyond Fragmentation

Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals

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The international community in the twenty-first century is both more legalized and more judicialized than at any other period in human history. In terms of legalization, international law has developed substantially over the past century in depth as well as breadth, laying down both binding laws and nonbinding norms governing the behavior of states and non-state actors across a wide range of issue areas, from the use of force through trade, finance, investment, the protection of the global environment, the law of the sea, and human rights, among others. In terms of judicialization, many (though not all) of these bodies of law are now subject to interpretation and application by international courts and tribunals (ICTs), which offer the promise of authoritatively interpreting the law and settling disputes about its application.

Yet the twenty-first-century international legal order is also plural, or fragmented. Over the past half century, together with the long-standing body of general international law, a bewildering multitude of specialized legal regimes have arisen in areas such as trade, investment, environmental protection, and human rights, each with diverse memberships of states and/or individuals. This multiplication of legal regimes has been accompanied, over the past three decades, by the proliferation of international courts and tribunals, with some two dozen courts and hundreds of arbitral tribunals interpreting international law and adjudicating international legal disputes. By the turn of the century, the initial postwar euphoria over the spread of international law and courts gave way to widespread concern about the fragmentation of the international legal order into specialized and regional regimes adjudicated by an uncoordinated assemblage of courts and tribunals with overlapping jurisdiction

and with the possibility of inconsistent or divergent interpretations of the law.

In this volume, we and our fellow authors explore international judicial proliferation "beyond fragmentation." The contributors to the book, representing a diverse range of legal practitioners as well as scholars in law, sociology, and political science, explore the interactions among international courts and tribunals across a wide range of issue areas. Building on a lively debate over the past two decades, we ask whether the proliferation of international courts and tribunals has produced harmful judicial competition, forum shopping, divergent interpretations, and fragmentation of international law, or – conversely – whether international courts have been able to cooperate to solve or mitigate these concerns, producing not divergence and fragmentation but rather convergence and unity within the international legal order.

Throughout the volume, we focus on the core theme of "cross-fertilization" across international courts and explore the interaction of different international courts from many diverse angles. While previous works have theorized in broad terms about how international courts and judges can coordinate amongst themselves to prevent fragmentation, promote convergence, and jointly "manage" the international legal and judicial orders, we and our contributors look more closely at processes of formal and informal cross-fertilization in practice. In doing so, we address three important themes.

A first set of chapters examines cross-fertilization in the area of *procedural law*. As we shall see, international courts receive only vague guidance from statutes and rules of court on many areas of procedure, and one might therefore expect that courts and tribunals with distinctive substantive coverage and with diverse state and non-state litigants might take very different approaches to procedural questions. Yet a growing body of literature suggests that states learn and borrow from each other and from general principles of law in establishing procedural rules, which show signs of convergence across both standing courts and arbitral tribunals. Contributions to the volume seek to understand the nature of procedural cross-fertilization as well as the factors that promote and limit cross-fertilization and convergence of procedural law and practices.

A second set of contributions looks at cross-fertilization in the area of *substantive* international law. Here, the focus shifts to the question of how different international courts and tribunals adjudicate similar substantive issues. Increasingly, complex international cases are now litigated in front of multiple international forums, raising multiple questions. Do courts

engage with, cite, and perhaps even defer to each other's jurisprudence? If so, is there a de facto hierarchy of international courts, in which some courts – such as, perhaps, the International Court of Justice (ICJ) – are more central, widely cited and influential than others? What sorts of factors explain the highly variable decisions of judges on diverse courts and tribunals to engage with and cite the decisions of other courts, or conversely to ignore or break with those decisions? Perhaps most profoundly, what evidence do we see for convergence or divergence over time in the substantive jurisprudence of international courts and tribunals?

Third and finally, a set of contributors focus on identifying and understanding the *actors* or *agents* of cross-fertilization, including judges, states, litigants, counsel, and international and nongovernmental organizations. As we shall see, existing accounts of cross-fertilization tend to focus primarily on international judges as actors, often assuming that judges possess an overarching interest in cooperating to protect the coherence of the international legal order. Chapters of the volume question this assumption, exploring the mixed motives of international judges who often balance their interest in the coherence of international law with their equally legitimate interests in the autonomy of their respective legal regimes, the substantive values of those regimes, and their own autonomy as courts. Many of our contributors also look beyond international judges to ask about the roles of other actors. States, for example, have both created a plurality of dispute settlement mechanisms and sought (at least at the margins) to establish doctrines to limit jurisdictional competition, while opportunistically taking advantage of such competition where convenient. We also focus on litigants, both state and non-state, and on the role of counsel as potential agents of cross-fertilization. These latter actors, we argue, may have few or no systemic concerns about the coherence of the international legal order, yet they may, like bees pollenating flowers, serve as unintended or unwitting sources of cross-fertilization, by sampling and using procedural or substantive questions across multiple international courts and tribunals. To these actors may be added the secretariats of various international arbitral institutions, such as the Permanent Court of Arbitration (PCA) and the International Centre for the Settlement of Investment Disputes (ICSID), as well as nongovernmental actors such as the International Bar Association, all of which can and do promote standardization and learning across international courts and tribunals. For this reason, we argue, a full understanding of the phenomenon of cross-fertilization requires us to look beyond judges and to understand

the interests and activities of a much wider range of judicial, state, and other actors.

In this introduction, we set the stage for the contributions in the book by reviewing the relevant literatures, defining key terms, exploring important debates about fragmentation and unity of law in a world of international judicial proliferation, and previewing the core themes and contributions of the current volume. The chapter is organized in four parts, the first three of which explore concepts and debates from existing literature, while the fourth previews the chapters to come.

We suggest that the understanding of judicial proliferation and the fragmentation of international law has progressed through three broad phases. In the first phase beginning in the 1990s, international legal scholars and practitioners reacted with alarm to the proliferation of the post–Cold War years, which they feared would lead to fragmentation in the international legal system. They sought to understand whether (and if so, how) the proliferation of international courts and tribunals had created "systemic problems" for international legal principles – for example, through problems of overlapping and contested jurisdiction or through conflicting and divergent interpretations of law by different tribunals.[1] Diagnoses during this first period varied, with some analysts identifying serious potential problems, while others suggested either that the problem had been exaggerated or that the benefits of judicial proliferation vastly outweighed the possible inconveniences. Throughout this period, however, "postmodern anxieties" about the conceivable negative effects of international judicial proliferation weighed heavily on the field.

A second reaction produced a shift in the literature toward a more optimistic and heavily prescriptive view of international courts and tribunals. In this second phase, members of the invisible college of international law empirically identified – and normatively championed – a series of overlapping developments whereby international courts and other actors have sought more or less effectively to address the challenges of legal and judicial fragmentation through techniques such as "cross-fertilization" and

[1] Although the terms are sometimes used interchangeably, we distinguish here between "conflicting" and "divergent" interpretations by international courts and tribunals. We thus refer to *conflicting* or *inconsistent* interpretations when two or more ICTs interpret a concept differently at any one point in time. By contrast, judicial interpretations can be *convergent or divergent*, meaning that they move either closer together or farther apart over time. The notion of conflicting interpretations provides a snapshot, a measure of judicial disagreements at a single moment, while the notion of diverging interpretations poses the even more disturbing prospect of judicial disagreements increasing with time.

"management" across international courts, producing "convergence" in international procedural and substantive law and, in some accounts, recentralization of international law under the leadership of the ICJ. Put simply, the pendulum has swung in two decades from deep concern to a far more optimistic view that problems of judicial proliferation were essentially practical and not systemically threatening. Indeed, they turned out to be relatively minor, so judges and other actors could manage them through techniques already in use in various corners of the international legal and judicial landscape.

This new and optimistic view has become the conventional wisdom in the international legal community today. However, in the opening salvos of a possible third wave, we begin to see the pendulum swinging back, as skeptics have questioned aspects of the "management" account, suggesting that theorists of management and convergence may adopt unrealistically optimistic assumptions about the motivations of judges and generally on cross-fertilization. These works, while hardly taking us back to the nightmare scenarios of the 1990s, suggest a series of hard questions, leading us not only to celebrate cross-fertilization but also to ask about how cross-fertilization plays out in areas of procedural and substantive law, the actors who promote and oppose it, and the limits of cross-fertilization in an international legal order that lies somewhere between fragmentation and unity.

This ongoing debate serves as the intellectual and analytic backdrop for all the chapters in this volume, and the next three sections of this chapter explore these three waves in greater detail. A fourth and final section previews the themes of the book and the contributions of its individual chapters before summarizing our core findings about procedural and substantive cross-fertilization and about the core actors involved in the process. With respect to procedural cross-fertilization, we suggest that there is indeed what Hélène Ruiz Fabri and Joshua Paine call a "procedural cross-fertilization pull," with common or similar approaches being adopted across standing international courts and arbitral tribunals with respect to a wide range of procedural questions, in a fashion that seems to support the more optimistic accounts of "managed pluralism" and convergence. By contrast, our authors' studies of substantive cross-fertilization find a more mixed picture, with an impressive level of cross-referencing and the emergence of what Alina Miron calls an "*acquis judiciare*" in the law of the sea, but with a much more spotty and asymmetric record of cross-citation and engagement in Erik Voeten's study of human rights courts, calling into question the more

optimistic accounts of international judicial dialogue. With respect to actors, finally, we argue that the observed patterns of procedural and substantive cross-fertilization can be explained only as a result of the interactions of a wide range of actors, including not only judges but also international governmental organizations, international court registries and arbitral secretariats, member states, litigants, and counsel. Each of these actors possesses mixed motives, weighing their (perhaps weak) interest in the coherence of the international legal system against their more parochial (perhaps dominant) interests in their own regional or substantive legal order, or indeed with simply winning their current dispute. The picture that emerges is one in which international judicial cross-fertilization and convergence are real and important, but also highly variable and asymmetric across courts and issue areas, and likely to remain so.

I Initial Suspicions: Judicial Proliferation, Legal Fragmentation, and "Postmodern Anxieties"

The decade of the 1990s stands clearly as the height of international judicial proliferation. At the beginning of the decade, there were six standing international courts in the world, alongside the panel-driven dispute settlement system of the General Agreement on Tariffs and Trade. By the end of the decade, at least a dozen new international courts had been created in a great wave of international judicial proliferation that saw the creation of the new World Trade Organization (WTO) Appellate Body and two international criminal tribunals (for the former Yugoslavia and for Rwanda), followed at the end of the decade by the International Criminal Court (ICC), as well as a welter of regional economic and human rights courts.[2]

Although hailed by many as a great leap forward in the legalization and judicialization of the post–Cold War international order, the rapid creation of a series of mostly specialized global and regional international courts also created widespread concerns about the potentially negative and unintended consequences of judicial proliferation. As Benedict Kingsbury posed it in his introduction to a 1999 symposium on the subject:

> [T]he initial question ... is whether the proliferation of international courts and tribunals, in a horizontal legal arrangement lacking in

[2] For good discussions of judicial proliferation during the 1990s, see, for example, Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N. Y. U. J. Int'l. L. & Pol. 709–51 (1999); Karen J. Alter, The New Terrain of International Law: Politics, Courts, Rights 68–77 (2014).

> hierarchy and sparse in any formal structure of relations among these bodies, is fragmenting or system-building in its effects on international law. Or to put it more succinctly, is proliferation a problem?[3]

Nor was concern about the negative effects of international judicial proliferation limited to scholars. In a speech to the UN General Assembly, for example, ICJ president Gilbert Guillaume warned that one of the unfortunate consequences of international courts and tribunals' proliferation was the risk of overlapping jurisdictions and forum shopping.[4] As Martti Koskenniemi and Jo Leino also famously discussed in a 2002 article, the uncoordinated and simultaneous operation of multiple international courts created "postmodern anxieties" among international judges themselves, including ICJ presidents, who raised the alarm about the potentially deleterious effects of proliferation on the coherence and unity of the international legal order.[5] While the concerns expressed by scholars and practitioners were multiple, two – jurisdictional competition and divergent interpretations of law – stand out in most accounts.

First is the concern for overlapping jurisdiction.[6] The fear was one of unregulated *jurisdictional competition*, since multiple courts with potentially overlapping jurisdiction could potentially be seized with disputes addressing the same facts or the same set of legal questions.[7] This

[3] Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?* 31 N.Y.U. J. Int'l L. & Pol. 679 (1999). We would like to note at the outset that although most of the sources for this book were written in English, the authors who have written and engaged with studies on cross-fertilization represent a variety of legal cultures, regions, and languages. Indeed, many of those who wrote in English (including several contributors and one of the editors of this book) use English as their second language. Significant non-English sources exist, including Rosario Huesa Vinaixa & Karel Wellens, L'influence des sources sur l'unité et la fragmentation du droit international (2006) and Eric Loquin & Catherine Kessedjian (eds.), La mondialisation du droit (2000) (in French) and Isabelle Buffard, James Crawford, Alain Pellet, & Stephan Wittich (eds.), International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner (2008) (in both German and English).

[4] Press Release, President of World Court Warns of "Overlapping Jurisdictions" in Proliferation of International Judicial Bodies, GA/L/315 (2000).

[5] Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden Int'l L. J. 553 (2002).

[6] Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 Austl Y.B. Int'l. L. 191, 683 (1999) ("An obvious concern is multiple tribunals addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction").

[7] The literature on international judicial cooperation is large and growing. For a seminal treatment, see Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals (2004) and Chiara Giorgetti, *Horizontal and Vertical Relationships of International Courts and Tribunals: How Do We Address Their Competing*

overarching concern then raised multiple potential subproblems, including the possibility of simultaneous legal proceedings and/or the possibility that litigants (both state and non-state) might engage in abusive forum shopping,[8] with powerful actors in particular taking advantage of their ability to litigate before the court or tribunal most conducive to their case-specific interests, and without regard to the health of the international legal system as a whole.[9]

The second concern is that proliferation would result in *inconsistent or divergent interpretations* of identical or similar international legal provisions.[10] The fear in this situation was a threat to the coherence of the international legal system and a "cacophony of views" that would undermine the perception that an international legal system exists, because if like cases are not treated alike, the very essence of a normative system of law will be lost.[11]

These concerns about legal fragmentation were fed by a series of high-profile episodes in which both existing and newly created courts insisted upon their autonomy, as well as instances in which multiple international courts took inconsistent approaches to important questions of international law. With respect to the former, many commentators were upset by the pronouncement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), when it stated in its 1996 *Tadic* ruling that:

> International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour

Jurisdiction? 30 ICSID Rev. 99 (2015) ("The a-systematic growth of international judicial bodies has resulted in possible competition between international courts and tribunals. This happens when two or more competent courts are seized on similar issues, either legally or factually").

[8] For an excellent discussion of the forum-shopping debate in international law, see Shany, *supra* note 7, at 131–39.

[9] *Id.*, at 143 ("In similarity to domestic and cross-boundary foreign shoppers, international forum shoppers may take into account a variety of considerations. These may include 'shopping' for applicable legal standards which are in the party's best interest [e.g. selection between the human rights definition under the European HR Convention and the ICCPR], the most appropriate procedure [e.g. selection between the NAFTA one-tiered panel system and the WTO two-tiered machinery], the most hospitable judges [e.g. selection between the diversely composed ICJ and a regional tribunal, composed of judges coming from the same region], and weighing the balance of conveniences to the parties [e.g. selection between an expedited regional procedure and a cumbersome and distant global procedure]").

[10] Kingsbury, *supra* note 3, at 683.

[11] Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 NYU J. Int'l L. & Pol. 697, 699 (1999).

> among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).[12]

In that same ruling, the ICTY challenged established ICJ jurisprudence over the issue of State responsibility for actions of irregular forces, developing its own distinctive standard.[13] Indeed, when seized of the issue in 1986, the ICJ had held that State responsibility could only be found when a State exercised "effective control" over irregular forces.[14] Several years later, the ICTY adopted a different standard and found that an "overall control" test should be applied. In the case at issue, heard by an international criminal tribunal on matters related to personal jursdiction, that meant that under the ICTY "overall control" test, the Federal Republic of Yugoslavia had overall control of the irregular forces of the Bosnian Serb Army of the Republica Srspka, and thus the provisions for conflict of an international nature applied.[15] The ICJ then reassessed the application of the principle a few years later in the context of an interstate dispute, and reaffirmed its initial holding that an effective control of irregular forces was required to find State responsibility.[16]

Underlying the fear of both judicial competition among courts and tribunals and divergent interpretations of international law was a concern for the unity of the "international legal system." As Kingsbury

[12] *Prosecutor* v. *Tadic*, ICTY Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 11, available at www.icty.org/x/cases/tadic/acdec/en/51002.htm.

[13] See generally Giorgetti, *supra* note 7, at 38.

[14] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) (Merits)[1986] ICJ Rep 14, para. 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed").

[15] *Prosecutor* v. *Tadic* ("Prijedor")IT-94–1, Appeal Decision (July 15, 1999), www.icty.org/case/tadic/4, accessed February 7, 2020 ("Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State"). Note that under the application of Article 2 (Grave Breaches of the 1949 Geneva Conventions) of the ICTY Statute could not be triggered in the case of an internal conflict. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, UNSCOR 48th Session, 3217th mtg at 1–2 (1993); 32 ILM 1159 (1993), art 2.

[16] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) (Judgment) [2005] ICJ Rep 168 (the Court concluded that Uganda did not control the irregular forces of the Mouvement de Liberation du Congo).

noted in his early review of the subject, it is an open question whether a single international legal system – as opposed to a series of overlapping generalist and specialist, global and regional systems – can be said to exist.[17] On both positivist and critical grounds, he notes, one can argue that international law lacks the necessary coherence to be referred to as a system at all.[18]

Along similar lines, James Crawford pointed out that proliferation and fragmentation are innate features of international law. He underscored how "[t]alk of proliferation tends to miss the point" as "international law has always been diverse and has always had the capacity to fragment." Crawford highlighted that the very foundational Treaty of Westphalia was "a proliferation of bilateral treaties" that "gave rise to no single institution; and that has been true ever since." Indeed, he remarked that "international law proceeds by accretion and by the casting of a historical memory in new forms, sometimes forgetting its origin."[19]

The majority position on this question, among an otherwise diverse collection of international legal scholars, is that the international legal order *does* possess sufficient coherence to qualify as a legal order.[20] For example, Yuval Shany argues that, whether one defines a legal system in normative or institutional terms, the international legal order does indeed qualify as a coherent legal system.[21] And Mads Andenas and

[17] See Kingsbury's concrete question: "[I]s the substantive content and efficacy of international law as it now exists – which in the ordinary-language understanding of its practitioners comprises a plethora of sources, rules, and tribunals – sufficiently coherent and grounded to amount to a unified legal system?" Kingsbury, *supra* note 3, at 690.

[18] *Id.*, Ralf Michaels and Joost Pauwelyn, by contrast, refer to the "system" question about international law as an "ontological question," arguing that one need not answer it definitively in order to analyze and understand how courts deal with conflicts of norms within legal systems, and conflicts of law across them. See Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law,* in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW, 19–44 (Tomer Broude & Yuval Shany, eds., 2010) available at: https://scholarship.law.duke.edu/facultyscholarship/2310.

[19] James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISP. SETTLEMENT 3, 23–24 (2010). More generally, see James Crawford, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, General Course on Public International Law, The Pocket Books of The Hague Academy of International Law/Les livres de poche de l'Académie de droit international de La Haye (2014).

[20] Kingsbury, *supra* note 3, at 688–93.

[21] Shany, *supra* note 7, at chapter 3. Shany does, however, supplement this finding with a second argument to the effect that the international *judiciary* is fragmented and does not itself constitute a system.