

BEYOND FRAGMENTATION

Beyond Fragmentation assembles a unique team of expert practitioners and leading scholars to explore and advance the study of cross fertilization among international courts and tribunals. Using an inter-disciplinary and multi-method approach, contributors analyse how international courts and tribunals interact and why it matters in practice. After a thorough review of prior assessments of cross-fertilization and fragmentation, the editors offer a new take on competition and cooperation across courts and tribunals, exploring both substantive and procedural elements as well as the diverse agents of cross fertilization. Contributors engage with procedural issues, identifying a “procedural cross-fertilization pull” and exploring how procedure is converging among international courts and tribunals. Case studies on the convergence in the law of the sea and human rights provide contrasting experiences of substantive cross-fertilization. The volume also identifies a variety of agents of cross-fertilization, including judges, litigants, counsel, and international organizations.

CHIARA GIORGETTI is Professor of Law at Richmond Law School. Prior to joining academia fulltime, she was a clerk at the International Court of Justice and acted as counsel in numerous international arbitrations in law firms in Geneva and Washington, DC. In her practice, she has represented States and private actors. She also served with the United Nations in New York and Nairobi, Kenya.

MARK POLLACK is Professor of Political Science and Law and Jean Monnet Chair at Temple University, in Philadelphia, having previously taught at the University of Wisconsin-Madison and the European University Institute. He has published widely on the politics of international law and international institutions, international courts, and the European Union.

Cambridge University Press
 978-1-009-10049-6 — Beyond Fragmentation
 Edited by Chiara Giorgetti, Mark Pollack
 Frontmatter
[More Information](#)

STUDIES ON INTERNATIONAL COURTS AND TRIBUNALS

General Editors
 Andreas Føllesdal, University of Oslo
 Geir Ulfstein, University of Oslo

Studies on International Courts and Tribunals contains theoretical and interdisciplinary scholarship on legal aspects as well as the legitimacy and effectiveness of international courts and tribunals.

Other books in the series:

- Eric De Brabandere *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach*
- Mads Andenas and Eirik Bjorge (eds.) *A Farewell to Fragmentation: Reassertion and Convergence in International Law*
- Cecilia M. Bailliet and Nobuo Hayashi (eds.) *The Legitimacy of International Criminal Tribunals*
- Amrei Müller with Hege Elisabeth Kjos (eds.) *Judicial Dialogue and Human Rights*
- Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal and Geir Ulfstein (eds.) *Legitimacy and International Courts*
- Robert Howse, Hélène Ruiz Fabri, Geir Ulfstein and Michelle Q. Zang (eds.) *The Legitimacy of International Trade Courts and Tribunals*
- Theresa Squatrito, Oran Young, Andreas Føllesdal and Geir Ulfstein (eds.) *The Performance of International Courts and Tribunals*
- Marlene Wind (ed.) *International Courts and Domestic Politics*
- Christina Voigt (ed.) *International Judicial Practice on the Environment: Questions of Legitimacy*
- Freya Baetens (ed.) *Legitimacy of Unseen Actors in International Adjudication*
- Martin Scheinin (ed.) *Human Rights Norms in 'Other' International Courts*
- Shai Dothan *International Judicial Review: When Should International Courts Intervene?*
- Daniel Behn, Szilárd Gáspár-Szilágyi and Malcolm Langford (eds.) *Adjudicating Trade and Investment Disputes: Convergence or Divergence?*
- Silje Langvatn, Mattias Kumm and Wojciech Sadurski (eds.) *Public Reason and Courts*
- Sondre Torp Helmersen *The Application of Teachings by the International Court of Justice*
- Chiara Giorgetti and Mark Pollack (eds.) *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals*

BEYOND
FRAGMENTATION

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

Edited by
CHIARA GIORGETTI
University of Richmond
MARK POLLACK
Temple University



Cambridge University Press
978-1-009-10049-6 — Beyond Fragmentation
Edited by Chiara Giorgetti, Mark Pollack
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781009100496
DOI: 10.1017/9781009118002

© Cambridge University Press 2022

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2022

A catalogue record for this publication is available from the British Library.

ISBN 978-1-009-10049-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of
URLs for external or third-party internet websites referred to in this publication
and does not guarantee that any content on such websites is, or will remain,
accurate or appropriate.

Cambridge University Press
978-1-009-10049-6 — Beyond Fragmentation
Edited by Chiara Giorgetti , Mark Pollack
Frontmatter
[More Information](#)

Per voi, Charlotte e Alexander, sempre
CG
For Cameron and Fiona
MAP

Cambridge University Press
978-1-009-10049-6 — Beyond Fragmentation
Edited by Chiara Giorgetti , Mark Pollack
Frontmatter
[More Information](#)

CONTENTS

<i>List of Contributors</i>	page ix
<i>Foreword</i>	xi
CHIARA GIORGETTI AND MARK POLLACK	
<i>Preface</i>	xiii
ANDREAS FØLLESDAL AND GEIR ULFSTEIN	
1 Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals	1
CHIARA GIORGETTI AND MARK POLLACK	
2 The Procedural Cross-Fertilization Pull	39
HELENE RUIZ FABRI AND JOSHUA PAINE	
3 Procedural Convergence in International Courts and Tribunals	87
JOHN R. CROOK	
4 New Media Evidence across International Courts and Tribunals	113
REBECCA J. HAMILTON	
5 The <i>Acquis Judiciaire</i> , a Tool for Harmonization in a Decentralized System of Litigation? A Case Study in the Law of the Sea	128
ALINA MIRON	
6 Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights	162
ERIK VOETEN	
7 Of Gardeners and Bees: Theorizing the Actors of Cross- Fertilization	182
CHIARA GIORGETTI AND MARK POLLACK	

viii	CONTENTS
8	A View from the Coal Face: The Authors of Cross-Fertilization from the Perspective of the Permanent Court of Arbitration 218 FEDELMA C. SMITH
9	Agents of Cross-Fertilization: Abusive Forum Shopping or Legitimate Forum Choice? 242 FREYA BAETENS
	<i>Index</i> 275

CONTRIBUTORS

FREYA BAETENS (Cand.Jur./Lic.Jur. [Ghent]; LL.M. [Columbia]; PhD [Cambridge]) is a professor of public international law at the PluriCourts Centre of Excellence (Faculty of Law, Oslo University) and affiliated with the Europa Institute (Faculty of Law, Leiden University). As a member of the Brussels Bar, she regularly acts as counsel or expert in international disputes.

JOHN R. CROOK is a judge on NATO's Administrative Tribunal, teaches international arbitration at George Washington University Law School, and frequently acts as an arbitrator in international proceedings. He served as a commissioner on the Eritrea-Ethiopia Claims Commission and as the general counsel of the Multinational Force and Observers. During three decades as a US State Department lawyer, he was the US agent at the Iran–United States Claims Tribunal and was deeply involved in creating the UN Compensation Commission. Crook is past vice president of the American Society of International Law and an honorary editor of the *American Journal of International Law*.

CHIARA GIORGETTI is a professor of law at Richmond Law School. Prior to joining academia full time, she was a clerk at the International Court of Justice and acted as counsel in numerous international arbitrations in law firms in Geneva and Washington, DC. In her practice, she has represented states and private actors. She also served with the United Nations in New York and Nairobi, Kenya.

REBECCA J. HAMILTON is an associate professor of law at American University Washington College of Law. Her scholarship draws on her experience in the prosecution of genocide, war crimes, and crimes against humanity, as well as her work in conflict zones as a foreign correspondent.

ALINA MIRON is a professor of international law at the University of Angers (France) and a codirector of the Master of International and European Law program. She has also been counsel and advocate in a number of cases before the International Court of Justice, the International Tribunal for the Law of the Sea, and arbitral tribunals.

JOSHUA PAINE is a lecturer in law at the University of Bristol. His research primarily focuses on international investment law and international dispute settlement and has been published in leading journals and several edited volumes. He serves as an associate editor of the *Journal of World Investment & Trade*.

MARK POLLACK is a professor of political science and law and the Jean Monnet Chair at Temple University in Philadelphia, having previously taught at the University of Wisconsin–Madison and the European University Institute. He has published widely on the politics of international law and international institutions, international courts, and the European Union.

HELENE RUIZ FABRI is a professor of international law and the director of the Max Planck Institute Luxembourg for Procedural Law. Her research primarily focuses on international procedural law. She serves as the general editor of the *Max Planck Encyclopedia of International Procedural Law* and the co-editor in chief of the *Journal of World Investment & Trade*.

FEDELMA C. SMITH is a barrister qualified in England and Wales, with fifteen years of experience at international courts and tribunals in The Hague, Mauritius, and Singapore. Educated at Wadham College Oxford and the University of Leiden, Fedelma currently serves as senior legal counsel at the Permanent Court of Arbitration.

ERIK VOETEN is the Peter F. Krogh Professor of Geopolitics and Justice in World Affairs at Georgetown University's Edmund A. Walsh School of Foreign Service and Government Department and a visiting professor at PluriCourts, University of Oslo. Professor Voeten is the editor in chief of *International Organization*. His new book, *Ideology and International Institutions*, appeared with Princeton University Press in January 2021.

FOREWORD

CHIARA GIORGETTI AND MARK POLLACK

The main idea behind this book came to mind while we were sitting on the stairs of the Ronald Reagan Building in Washington, DC, during a break of the historic 2014 annual meeting of the American Society of International Law (ASIL) and the Biennial Conference of the International Law Association (ILA), which for the first time occurred together. We had all been working on various aspects of international courts and tribunals for several years already, and we were struck by how many similarities we were seeing and how, despite warnings of impending doom, most courts and tribunals acting in the international legal space seemed to get along and mostly concurred with each other. While talking informally about this, we realized and agreed that this initial intuition was worth pursuing with a more systemic and deeper analysis.

We therefore decided to organize a series of workshops to discuss and explore these ideas and to develop our thinking further. The first such workshop took place at Tillar House, ASIL's headquarters in Washington, DC, on June 19 and 20, 2017. We met again in Oslo on June 11 and 12, 2018, at the offices of PluriCourts, the Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, and the Center of Excellence at the Department of Public and International Law, Faculty of Law, the University of Oslo.

Our aim as organizers was to gather a group of interesting and interested scholars to reflect on the important issues of cross-fertilization in international courts and tribunals from many perspectives and viewpoints, with the cognizance that these issues have both theoretical and policy implications. We were delighted to be able to assemble a group of such diverse and extraordinary experts, including legal academics, lawyers, political scientists, and practitioners. It was gratifying to participate in the exchanges that occurred and we are grateful to all of the contributors for their generosity and willingness to share their ideas and engage in fruitful dialogue. In addition to the contributors to this book, our gratitude

goes to those who participated in the workshops and shared their ideas and commented on the chapters, especially Joan Donoghue, Paul Reichler, Kate Parlett, Joost Pauwelyn, and Pierre Bodeau-Livinic.

We are grateful to PluriCourts for its generous support for this project. A personal note of thank you goes Andreas Føllesdal and Geir Ulfstein for their kind and continuous support in our effort.

Thanks also to Richmond Law School and Dean Wendy Perdue for her generous support for the first symposium in Washington, DC, and to the staff of Tillar House for hosting us in their beautiful location. Mark Pollack thanks the College of Liberal Arts at Temple University for generous research support.

Writing and editing this book with our colleagues was an enjoyable and enriching process of discovery. We hope our readers will feel the same, and will find these contributions both stimulating and intellectually rewarding.

PREFACE

International courts and tribunals (ICs) have grown in number and influence. With the increase in ICs comes the opportunities for cooperation and coordination – but also for conflicts among them. With their salience has come scrutiny and even resistance against ICs from some quarters, with worries ranging from who guards the guardians to the fragmentation wrought by the uncoordinated growth of ICs in ever more issue areas, with ever more overlapping jurisdictions.

The editors Chiara Giorgetti and Mark Pollack have collected an outstanding team of authors to explore how international courts and tribunals interact and cross-fertilize formally and informally, across a wide range of issue areas. The authors address three main areas. First, they examine cross-fertilization in the area of procedural law, surveying the many areas in which ICs increasingly borrow existing practices from other jurisdictions. Second, with respect to substantive international law, contributors to the volume explore how and when international judges cite other courts – and when not – and the resulting convergence or divergence in doctrine. Third, the authors and editors insist that to understand these processes we must consider many actors and agents of such cross-fertilization, ranging far beyond judges and states, even to non-governmental organizations.

Importantly, the authors and editors identify shifting attitudes over time from anxiety about fragmentation, to more optimistic harmonization – and perhaps recently a more realistic view that also attends more closely to the complex mixed motives of the actors, and the multiple challenges they face. This new phase is reflected in the title of the book which aspires to look *beyond* the previous either-or of pessimistic or optimistic views of the interaction between ICs.

The editors draw together the various authors' detailed maps of such modes of interaction, noting that cross-fertilization does indeed occur among the many actors, but that it varies greatly and asymmetrically across courts and issue-areas. The differences may, *inter alia*, reflect the

varying power and prestige of the ICs. The editors see no trace of emerging harmonization in this regard. Indeed, the findings underscore that both the objective of cross-fertilization and some of the means - such as citation practices - merit more legal, empirical and normative scrutiny. Some extent of fragmentation among ICs may be if not desirable, at least not unbearably problematic – compared to the alternatives.

The volume contributes with well-founded nuanced evidence to the central discussions of whether, when and why international law is characterized by fragmentation, harmonization, or both; and not least why this should matter. The volume thus fits very well with the Cambridge University Press *Series on International Courts*, which seeks to present theoretical and interdisciplinary scholarship on the content, impact and broader implications of the emerging international judiciary.

Andreas Føllesdal and Geir Ulfstein