

International Courts: Uneven Judicialization in Global Order

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‘Law without courts’ seemed to Hugo Grotius an entirely coherent approach to the juridification of international relations. The first edition of his *Law of War and Peace* (1625) reflects an intense commitment to framing claims and rules for conduct outside the state in terms of legal rights and duties, but not to judicialization, even though arbitration between sovereigns was addressed in earlier works he had read, such as Alberico Gentili’s *Law of War* (1598). Yet in modern times international judicialization – the creation and use of international courts and tribunals – has been not only a significant component of liberal approaches to international order, but for some thinkers an indispensable concomitant of juridification.

Section I of this chapter provides an overview of the waves, and accretion, in the formation of what are now ten basic types of international courts. Section II offers some balance to the tendencies (implicit in the approach taken in Section I) to acclaim each flourishing legal institution as an achievement and to study only what exists, by considering the marked unevenness in the issues, and in the ranges of states, currently subject to juridification through international courts and tribunals. Section III addresses the question whether the density and importance of the judicially-focused juridification that now exists has implications for politics, law, and justice that are truly significant and qualitatively different from what has gone before. This is explored by examining some of the main roles and functions of international courts, considered not simply as a menu but as a complex aggregate. Section IV concludes.

International courts and tribunals are institutions, and are increasingly analyzed as such. This includes basic institutional design, the specified functions and powers of the court, the degree of its embeddedness in related political institutions which may provide support or checks on it, the processes of appointment of the judges and their degree of independence and expertise as well as their socio-professional reference groups, the funding and work capacity of the institution in relation to demands on it and its efforts to expand its reach or scale, whether the institution has an enduring identity and whether its judges are part-time (as the WTO Appellate Body is, by design) or focus principally on the institution, and the ways in which the court also acts not judicially but administratively e.g. supervising appointment of defence counsel, or a compensation fund for victims. Explaining why these institutional features are the way they are illuminates much about a particular court: its judgments, its substantive motivations in different cases, and its legal methods. Tribunals develop their own hermeneutics connected with many of these institutional factors – thus the WTO Appellate Body purports to adhere closely to the underlying treaty texts, while the ECJ may be more expressly teleological in aiming to achieve the purposes of the EU treaty. It is something of an international law myth that there is one unified approach to interpretation that is embodied in the

Vienna Convention on the Law of Treaties and shared among all tribunals. The sociology of those practicing in particular courts, and the wider constituencies for those courts, is also important. These institutional questions cannot, however, be considered further in the confines of this chapter.

This chapter will not propose a tightly specified definition of ‘international court’. ‘Court’ undoubtedly exerts some pull as a regulative idea, that is as an ‘ideal type’ which there is cognitive and sometimes political pressure for judicial-type institutions to approximate both in their design and in their operations. V.S. Mani (1980) put this in terms of rights to be heard, to a duly constituted tribunal free from corruption and fraud, to due deliberation, and to a reasoned judgment (which should more stringently be expressed as ‘reasoned judgment in accordance with the applicable law’). But it is doubtful that a single sharply-delimited concept of ‘court’ prevails sufficiently in international law practice. ‘International’ is used in what follows to indicate courts created by inter-governmental agreement (including agreements made within, or by, inter-governmental organizations), or by agreement between a national government and a foreign private entity, where the court is legally situated either fully or partly outside the national juridical and governmental system of any state.

I. Ten Types of International Courts – History and Overview

This section provides a sketch of ten major types of international tribunals and courts. These are presented in a loosely chronological way reflecting the first significant appearance of each type in international practice. This typology is based on form and function of the institutions, criteria chosen to provide an overview likely to be useful and accessible. Many other typologies are possible. International courts vary in the degree to which they rest on consent of (or delegation from) the affected states or legal persons, in the independence (*vel non*) of judicial appointments and judicial decisions from those actors, in their levels of independent agency as actors over time, in the extent of their impact on material outcomes or on political actors or on legal norms or on values such as individual or collective freedom or responsibility or self-determination, and in the reasons for their creation and for their sustained activity or inactivity.

The arbitrations of claims concerning losses to private individuals pursuant to the Britain-U.S. Jay Treaty 1794, and of inter-state claims of the U.S. against Britain in the *Alabama* award of 1872, were by the late 19th century espoused as emblematic of the increasing possibilities of bilateral and multilateral arbitration. The 1899 Hague Peace Conference created the Permanent Court of Arbitration (the PCA), which despite its name, was and continues to be a structure enabling arbitration by ad hoc panels – after a flurry of cases in its first two-three decades, it was virtually unused from 1935 until a pronounced recrudescence which began in the mid-1990s. By the beginning of the 20th century there were thus established three basic structural patterns of international arbitration that continue to be significant.

1. **Inter-Governmental Claims Commissions** created by two governments on the Jay Treaty model, allowing private claims against the other state from a defined set of events to be presented (in the past this was done through the government, but increasingly it is done directly by the claimant's legal team or through special small claims processes) for law-governed arbitral decision. The Iran –US Claims Tribunal (1981-, created under the 1981 Algiers Accords) and the Eritrea-Ethiopia Claims Commission (2001-09, created under the 2000 Algiers Agreement) exemplify this form. Both operated during periods of difficult and sometimes hostile relations between the relevant states, which the tribunals themselves, based in The Hague, could do little to ameliorate beyond processing their dockets of historic claims. Both also had jurisdiction over certain state-state claims – large claims by Iran against the U.S. relating to military equipment ordered and paid for by the Shah's government but not delivered by the U.S. to the post-revolution government were long left unresolved given the substantial political difficulties.

2. **Ad hoc Inter-State Arbitration** governed by law, on the Alabama model. Such tribunals have been created at a rate of about one per year since 1945. Territorial disputes and boundary delimitation (land or maritime), fishing, and some specific treaty disputes (e.g. U.S.-France *Air Services*; New Zealand-France *Rainbow Warrior*) have comprised a large share of the arbitrated disputes.

3. **Inter-State Arbitration Embedded in Pre-Existing Legal Institutional Structures**, with the PCA currently the dominant example (as in Ireland-U.K. *MOX Plant* 2008; Belgium-Netherlands *Iron Rhine* 2005). The PCA facilities, and some of its mechanisms, are now used also in arbitrations that are not simply state-state. Illustrative are the 2009 *Abyei* arbitration between the Government of Sudan and the SPLM/A, under the North-South peace agreement; the 2003 *Reineccius* awards against the Bank for International Settlements in favour of private shareholders in the BIS with regard to the purchase price for buying out their shares; and the *Channel Tunnel* arbitration (partial award in 2007) in which the commercial operator claimed against both France and the UK, while the two governments were themselves in disagreement over access to trains and the tunnel from a very nearby French government-operated camp for political asylum seekers. The PCA also provides facilities in the competitive market for contract-based or treaty-based claims by individuals or corporations against foreign states, particularly under commercial arbitration rules such as those of UNCITRAL, which unlike ICSID or the Stockholm Chamber of Commerce does not provide arbitral facilities even for cases under its rules.

Three further structures were formalized in the immediate aftermath of World War I:

4. **Standing International Courts.** Long-cherished hopes finally came to fruition in the decision of the Paris Peace Conference to create the Permanent Court of International Justice (PCIJ, established in 1920), which in its inter-state contentious jurisdiction was structured as a blend of arbitral-type bilateral dispute

settlement and adjudication that communicated to wider audience and took some account of systemic issues. Its separate jurisdiction to give legally-grounded advisory opinions to the League of Nations brought inter-governmental organizations into the ambit of adjudicated international law – the PCIJ struggled in its early opinions with the legal character and proper powers of these organizations before settling on a functionalist approach which allocated extensive powers to them provided these were needed to perform their treaty-specified functions. The PCIJ was replaced by the International Court of Justice (ICJ) in 1946, pursuant to the supersession of the League by the United Nations. The ICJ's Statute (a treaty annexed to the UN Charter) and jurisdiction, and its structure of 15 permanent judges operating in plenary and augmented by ad hoc judges where states in a contentious case have no judge of their nationality on the court, are similar to those of the PCIJ, whose location at the Peace Palace in The Hague the ICJ took over.

5. International Criminal Courts. A criminal trial of the German Kaiser for 'a supreme offence against international morality and the sanctity of treaties' (especially the violation of Belgium's neutrality) was envisaged in Article 227 of the Treaty of Versailles (1919), although his flight to the Netherlands – which refused extradition – stalled the plan. Trials under Allied military authority of other German officers, contemplated in Article 228, were abandoned in favour of lacklustre trials in German courts. More convincing precedents for multi-national courts were set by the International Military Tribunal at Nuremberg, and the International Military Tribunal for the Far East in Tokyo, each of which were staffed with judges and prosecutors from a range of victor states. In the 1990s, the UN Security Council adopted binding resolutions establishing the International Criminal Tribunal for Former Yugoslavia (ICTY, 1993-) and the International Criminal Tribunal for Rwanda (ICTR, 1995-). The Rome Statute of the International Criminal Court (ICC), a treaty adopted in 1998 which entered into force in 2000, created a standing criminal court empowered to try for specified categories of heinous offences persons whose country of nationality has ratified the treaty, or persons alleged to have committed these crimes in the territory of a state party, provided the states with jurisdiction are unable or unwilling to pursue prosecution. Situations may also be referred to the Court by the UN Security Council or the ICC itself. In contrast to the majority of non-criminal international courts, the consent of the parties is not required to bring actions in these institutions.

6. International Administrative Tribunals. The dominant early model of an international administrative tribunal, established to address employment grievances of staff of international organizations, was that of the International Labour Organization (ILOAT). This tribunal continues to be used by many other organizations. After many decades of lassitude, the United Nations reformed its internal justice system in 2009 to establish a two-tier structure with a United Nations Appeals Tribunal. Much reform of such tribunals has been precipitated by actual or threatened decisions of national courts to reject the immunity of the

international organization in employment-related cases if rights-respecting alternatives were not in place. Generally these tribunals do not have jurisdiction over claims by third parties (except staff dependents) against the organization, leaving a substantial lacuna confronting victims of physical abuse or recklessness.

To these six structural forms that were put in place by the end of the 1920s, four further categories of tribunal may be added as post-1945 innovations (although each had some antecedents):

7. The European Court of Human Rights (in Strasbourg, France) has jurisdiction over complaints against states parties by individuals claiming to be victims of violations of the 1950 European Convention on Human Rights (as well as jurisdiction in inter-state cases, utilized by Georgia against Russia in relation to the 2008 war.) By 2008 the Court had jurisdiction over all 47 Council of Europe states, with a total population of some 800 million. It was receiving some 50,000 applications per year and issuing some 1500 substantive judgments annually, making it the international court with the largest caseload. The 1950 Convention also created a European Commission of Human Rights to screen and adjudicate individual claims, to promote 'friendly settlements' of cases, and in effect to filter cases reaching the Court. It was eventually abolished in favour of direct access to a clearly judicial body. The Inter-American Commission on Human Rights (based in Washington, D.C.) was complemented by the establishment in 1979 in San José, Costa Rica of the Inter-American Court of Human Rights, the jurisprudence of which has become increasingly important in national law and politics since 'third wave' democratization in Latin America. The African Commission of Human and People's Rights (based in Banjul, Gambia) was augmented by the creation in 2004 of the African Court of Human and People's Rights (in Arusha, Tanzania), which gave its first judgment in 2009. Comparable bodies do not exist in the greater Asia-Pacific area, nor is there a World Court of Human Rights. Several supervisory bodies created by UN human rights treaties have powers to investigate and report on complaints by individuals against states accepting this jurisdiction, but these bodies generally do not hold hearings with the parties present, do not have powers to issue binding decisions, and are at most quasi-judicial rather than functioning as courts. The UN Human Rights Committee is a leading example.

8. The European Court of Justice, created under the 1957 Treaty of Rome and related European treaties, has been a driving force in legal integration of the 27-state European Union. The power of national courts to apply European law directly, and their acceptance of the authority of the ECJ as final judicial arbiter on such issues combined with their right (and in some circumstances their obligation) to seek preliminary rulings from the ECJ, has brought national judicial institutions strongly into the European law project. A power of issuing preliminary rulings is also held by the Andean Court of Justice (mainly on intellectual property matters), and the Caribbean Court of Justice and the proposed African Court of Justice are among other bodies which could interact

closely with national courts on regional legal issues, but none of these is likely soon to come close to emulating the ECJ in reach and impact.

9. The General Agreement on Tariffs and Trade (GATT) of 1947, operated a system of panels to report on complaints by one state party against another. These reports could have legal effect if adopted by consensus by the plenary body of all states members of GATT. This system was transformed into a more formal and more judicial system with the creation of the World Trade Organization in 1994. Three-member ad hoc panels issue reports in the same way, but typically with much more legal reasoning; these can be appealed to a standing Appellate Body. Final panel reports or Appellate Body decisions become legally binding unless rejected by the member states by consensus (a rare occurrence). Legally reasoned rulings, in some cases with appeals processes, are also issued under other trade agreements such as Mercosur or chapters 19 and 20 of NAFTA.

10. Arbitration of claims by foreign investors against states was given a systematic structure in the World Bank's ICSID Convention of 1965 (albeit with other arbitration modalities often still available instead), accompanied by a lattice of what is now well over 2500 bilateral investment treaties, a few comparable multilateral treaties such as the 1994 Energy Charter Treaty and chapter 11 of the 1994 NAFTA, a structure of national laws for enforcement of commercial arbitral awards including under the 1958 New York Convention, and a raft of investor-State contracts.

Among the other significant but singular tribunals not fitting into these types are the International Tribunal for the Law of the Sea, established under the 1982 UN Convention on the Law of the Sea (its caseload has been small, apart from "prompt release" proceedings concerning detained foreign-flag fishing boats, but the *Bangladesh-Burma* case may mark the beginning of an increase.)

As this synoptic account indicates, much juridification occurred in the 1990s, even while often building on earlier precedents. The WTO, NAFTA, and the Energy Charter were all adopted in 1994. ITLOS began to operate in Hamburg following a 1994 agreement that enabled entry into force with wide acceptance of the 1982 UNCLOS. BITs were adopted at a high rate, paving the way for the subsequent boom in investor-state arbitration. The ICTY, the ICTR, and then the path-breaking ICC were created. The reach and impact of the European and Inter-American Courts of Human Rights grew, and other regional courts were mooted or established in partial emulation of existing bodies. The PCA and the ICJ both became much busier. From the late 1990s onward, many of these different tribunals began increasingly to refer to each other. Forum shopping, or multiple claims in different tribunals relating to the same basic factual situation, began to raise legitimacy issues, as when two investment arbitrations (*Lauder*, and *CME*) against the Czech Republic produced opposing results on the same basic facts and law. Development of systemic principles such as *lis pendens* remained slow, but some comity and mutual accommodation was more readily achievable in inter-state contexts (as with a Law of the Sea arbitral tribunal giving priority to the ECJ on matters of EU law in the

Ireland v. UK *MOX Plant* dispute). Case management strategies such as the NAFTA procedure for consolidation of multiple claims, or sampling of small claims in the UN Compensation Commission, began to develop. International courts began to be cited more by national courts, which became increasingly involved in international law and transnational governance (Benvenisti and Downs, 2009). This involvement was symbolically epitomized by the 1999 *Pinochet* case in the English House of Lords (a body which in 2009 became the Supreme Court in deference to a global-liberal view that formally independent courts are the proper form of separated judicial power).

All of this has led to a new paradigm of routinized litigation and judicial governance being layered alongside the traditional paradigm of episodic international (inter-state) dispute settlement by tribunals. In some tribunals, on some kinds of issues, juridification is reaching the point where litigation is routine: while far from quotidian, it is not rare, and is even habitual for some repeat players. The ECJ and the ECHR are the leading examples, but among global bodies routinization is also evident in the WTO. Thus the United States, the European Union and China between them were defendants in 11 of the 14 new cases initiated in the WTO in 2009, and the EU and the US file a third party intervention in almost every case litigated in the WTO by any of the 153 members (there were over 400 cases 1995-2009). International criminal trials and jurisprudence are also becoming more routinized: the ICTY had indicted 161 persons and had completed proceedings against 121 by early 2010 (and local Bosnian courts, buttressed and influenced by such international regimes, had tried many more.)

II. Unevenness in Juridification through International Courts and Tribunals

This image of judicialization and of a new paradigm can easily be exaggerated: international courts and tribunals are significant on some issues but not others, in some parts of the world much more than others.

The issues being adjudicated under this new paradigm are largely those of a global legal order dominated by liberal interests. The economy of freer trade, intellectual property, investor-protection to increase flows of private funds and protect property rights, protection of basic civil and political rights (including for corporations and associations), and retrospective trials of perpetrators of certain kinds of carefully-delimited atrocities, dominate much of the juridification (although not all). Environmental issues occupy a predictable position: they will receive a sympathetic hearing in many of these tribunals, but are not a central focus of the rules or causes of action or indeed of expertise. New global tribunals have almost all been created as parts of specialized regimes, designed to enhance these regimes, rather than as courts of general jurisdiction which might reach too far beyond what the creating states wish to see investigated and adjudicated. It is notable that acceptance of the general jurisdiction of the ICJ under the Optional clause has remained more or less constant (approximately 63 states, out of 192 UN members), and newer treaties seldom include obligations to accept ICJ jurisdiction on treaty disputes. Indeed the ICJ's route into major security-related issues has in recent decades often been through oblique paths, such as the Genocide Convention (*Bosnia v. Serbia*, 2007), the

Racial Discrimination Convention (*Georgia v. Russia*), or the advisory jurisdiction (the *Nuclear Weapons* case, 1996; the *Israel Wall* case, 2004; the *Kosovo* case, 2010). The specialist tribunals typically do not have mandates to adjudicate issues concerning the conduct of the global governance institutions of which they are part: thus the WTO Appellate Body does not rule on major actions or inactions of the WTO, only on what member states do. In NAFTA and the WTO, the contracting states retain the power to re-interpret a treaty if they disagree with a tribunal’s interpretation, without needing to formally amend the treaty; the NAFTA Free Trade Commission used this power in 2001 in response to the first Pope & Talbot arbitral award.

Many kinds of issues are thus not densely judicialized in international courts, even if some may very occasionally reach a tribunal. These include most military and intelligence issues including arms control, disarmament, nuclear weapons, and nuclear energy governance; global financial governance; most anti-terrorism renditions and data-sharing; most religious issues; most issues concerning general migration policy; most issues concerned with taxation, education, social welfare, labour, local government, land, forests, water, air, urban policy, and climate; corruption; social violence; political decision processes in almost every formal and informal global governance body; forms of pressure or encouragement by global bodies on specific governments and their policies; hazardous wastes; humanitarian assistance and disaster response; most support of tyranny; most participation in spoliation of natural resources; most forms of inequality; most poverty, and most issues affecting people’s lives in poor countries. The relative absence of judicialization of these subject areas is readily explicable and in many cases may be preferable, given the severe limits of what tribunals can manage or achieve; but this absence is an important part of the picture.

Which major states commit in advance to accept jurisdiction of international courts?

Uneven juridification is also reflected in the uneven rates of acceptance in advance of jurisdiction of international tribunals. One indication of such unevenness is a comparison of two different categories of major states: those with the largest populations (Table 1) and the largest economies (Table 2).

	ICJ COMPULSORY JURISDICTION UNDER “OPTIONAL CLAUSE”	UN HUMAN RIGHTS COMMITTEE FIRST OPTIONAL PROTOCOL PETITIONS BY INDIVIDUALS	ACCEPTED 2008 PROTOCOL TO ICESC RIGHTS INDIVIDUAL PETITIONS	ACCEPTED REGIONAL HUMAN RIGHTS COURTS (INCLUDING EUROPEAN COURT OF HR AND INTER- AMERICAN COURT OF HR)	<u>RATIFICATION OF ICC STATUTE</u>	<u>WTO MEMBERS</u>
China						X
India	X					X
USA						X
Indonesia						X
Brazil		X		X	X	X

Pakistan	X					X
Russia		X		X		
Bangladesh						X
Nigeria	X				X	X
Japan	X				X	X

Table 1: Acceptance of jurisdiction of international courts and quasi-judicial international institutions (ten most populous states), March 1, 2010

	ICJ COMPULSORY JURISDICTION UNDER "OPTIONAL CLAUSE"	UN HUMAN RIGHTS COMMITTEE FIRST OPTIONAL PROTOCOL PETITIONS BY INDIVIDUALS	ACCEPTED 2008 PROTOCOL TO ICESC RIGHTS INDIVIDUAL PETITIONS	ACCEPTED REGIONAL HUMAN RIGHTS COURTS (INCLUDING EUROPEAN COURT OF HR AND INTER- AMERICAN COURT OF HR)	<u>RATIFICATION OF ICC STATUTE</u>	<u>WTO MEMBERS</u>
USA						X
Japan	X				X	X
Germany	X	X		X	X	X
China						X
UK	X			X	X	X
France		X		X	X	X
Italy		X		X	X	X
Canada	X	X			X	X
Spain	X	X	X	X	X	X
South Korea					X	X

Table 2: Acceptance of jurisdiction of international courts and quasi-judicial international institutions (ten states with highest GDP), March 1, 2010

The world's most populous states tend not to accept in advance the jurisdiction of the ICJ, the ICC, human rights courts, or the UN Human Rights Committee. However, almost all are in the WTO, and in UNCLOS. The world's largest economies, which include more states committed to economic and political liberalism, are similarly engaged with the WTO and UNCLOS, but vastly more likely to be in the ICC, and appreciably more likely to accept some international human rights tribunal. This may reflect the greater influence of these liberal states on the decisions to create these tribunals and on their specific design. This data also points to the possibility that with growing heterogeneity among major powers, as China, India, Brazil and others become major forces and potential veto players in negotiations, creation of new international courts and indeed of new global treaty institutions may become less likely. If the ICJ did not already exist, it is far from clear that it could now be created. Even the WTO, which most states have been eager to join, might well not have been created in a comparable way at a later time, as the tortuous progress of the Doha Round of negotiations after 2001 illustrates. Liberal legalism continues to have substantial reach and influence, but further judicialization through global treaty institutions may be unlikely in the near term, particularly outside the broad fields of trade, investment and property claims.

III. Divergent Roles and Functions of International Courts

In keeping with the functionalist typology adopted in section I, the creation, design, and practical juridical operations of these various international courts can be described in instrumental terms as the performance of different roles and functions. The headings below adopt this approach, although international courts can also be assessed in many other ways. The roles and functions any court actually plays are linked to the perceptions of participants and the expectations of their constituencies. These are thus connected to institutional culture and social relations with different audiences, which are often exchange relations or tied to status and values. .

Courts as Dispute Settlers

Courts are a subset of third-party settlers of bilateral disputes. The acceptance by two parties of a role for a third, with a voice and involvement going beyond a mere post-box function, opens up the possibility of a triangular model of adjudication (Shapiro 1981). This model can often face relational instability. First, the two disputing parties may act jointly to bring the tribunal closer to their wishes (and away from some of its other constituencies or obligations). This is one way of understanding the problems posed for the International Court of Justice when states asking it to create a 5-member chamber sought to control which judges were then appointed, for example in the *Gulf of Maine* case (Canada/USA). Problems arise with sham litigation, where two parties collusively litigate against each other to obtain a court decision that helps them directly against third parties (as in some intellectual property cases) or indirectly by establishing a judicial precedent on the law that helps them elsewhere. Second, one party may withdraw its support if it believes or asserts that the third party (the adjudicator) has improperly aligned with the other party. Courts seek to avoid this through procedural rules such as those precluding ex parte communications between judges and one disputing party alone, and through structuring their decisions and reasoning to explicitly address the principal factual claims and legal arguments of each party. Many other techniques also used for these purposes are exemplified in the structure and practice of the International Court of Justice (ICJ), including judicious use of delay or timing. An example is the *Nicaragua v. USA* case, in which the ICJ made a substantive ruling on the merits in 1986, but forbore from issuing any ruling on the financial quantification of the USA's liability for long enough that a political understanding was reached between the governments and the case withdrawn.

Given that the jurisdiction of international courts over states depends on some act of consent by the state, why do states choose to submit any particular inter-state dispute to third-party legal settlement? Ordinary rational-choice analysis, in which the state is modeled as a unitary interest-maximizing actor with ordinally-ranked preferences, models judicial settlement of bilateral disputes as a coordination game, in which both parties have more to gain from any plausible or reasonably-likely judicial decision by a highly-reputed and unbiased third party than they do from continuation of the dispute.

These coordination problems have multiple possible equilibria, that is several possible solutions which would achieve the overall objective, but which would allocate the gains differently as between the two states (or which would produce different sets of winners and losers within the two states). Thus resort to a third-party legal institution rather than settling the dispute by bilateral negotiation is explained by desire of national politicians to avoid the audience costs they would face if they themselves negotiated and agreed to a solution that was less attractive for their constituents than other possible solutions. The Canada-U.S. *Gulf of Maine* case in the ICJ (1984) exemplifies this structure – the U.S. Senate was unwilling to bear the political cost of endorsing the maritime boundary negotiated between the two countries' executive branches, while the U.S. political elite accepted that the costs in fractious incidents and lost business opportunities resulting from not having a fixed boundary with a friendly neighbor were greater than the costs from any likely ICJ-set boundary. Estimates of the costs of unresolved boundary disputes have been attempted (Simmons 2002). The Argentina-Chile land boundary and territorial disputes that were resolved in 1995 were estimated to have reduced trade levels by about \$9bn 1967-94, an average of \$326m per year in lost trade (actual trade averaged \$574m per year, but without the boundary dispute its expected level was \$900m). Politicians who allow the state to be committed to binding international court proceedings do risk significant political costs themselves. Strong reaction in Nigeria to the ICJ's decision awarding the Bakassi Peninsula to Cameroon (2002) included intense criticism of the government's handling of the case, and delayed Nigerian implementation for several years. For maritime boundaries the political costs are often somewhat less, as many maritime areas have neither the symbolic significance and intense human histories nor long-time residents, and fewer vested economic interests (fishing and some oil wells excepted) because technological and legal bases for coastal state exploitation are recent or prospective. Uncertainty about many aspects of the law of maritime boundary delimitation makes it difficult for politicians to bargain accurately in the shadow of the law. For these reasons, reference to the ICJ or to binding inter-state arbitration of maritime boundary cases, and to a lesser extent terrestrial boundary and territorial cases, has been relatively common.

Courts as Institutions to Make Commitments Credible

The previous paragraphs considered why states might submit a specific dispute to third party adjudication. A bigger puzzle is why states create international courts, or give advance acceptances of jurisdiction, in relation to unknown cases in which they may well be defendants.

Simple reciprocity provides a starting point, but a further element of the basic politics and bargaining which can lead to the creation and acceptance of jurisdiction of international courts is that these assist in making commitments credible. When states negotiate a treaty (e.g. a trade agreement) involving expensive changes in internal policies and administration as well as shifts in private economic patterns, the possibility of recourse to effective courts bolsters trust that reciprocal obligations will be fulfilled. Less powerful states in particular require assurances that the promises of powerful states are credible. The remedies available to them if they win a case may provide some bargaining leverage,

but they rely much more on the prospect that the court process and eventual decision will help mobilize other major states to put pressure on the powerful state in order to maintain the rule-governed system and respect for its institutions. Furthermore, while an international court will seldom induce a very powerful state to do what its political elite and public are unified in refusing to do, on trade issues there are usually substantial domestic constituencies who benefit from compliance with the agreement in other cases, and who may suffer from remedial actions or from fraying of the bargain.

The credibility of commitments may also be essential if behaviour of private actors is to be motivated by the agreement, as in the argument that assurances of binding external arbitration are essential for some countries to attract foreign private investment.

Routinized Adjudication as Governance

Courts are created as part of the governance regime for particular issue areas, to enhance the success and effectiveness of the regime. Thus multilateral trade agreements, such as those of the WTO, establish courts with binding jurisdiction in inter-state cases, as well as political bodies with supervisory powers, to help ensure the economic gains from the treaty commitments are in fact realized. Such courts may fill in terms on which agreement was not reached in the inter-state bargaining ('incomplete contracts'), and may operate to overcome or manage impasses in the ongoing political processes of the inter-state governance institutions to deal with new issues once these are operating. Thus the WTO Appellate Body commented that, since the inter-state trade and environment committee of the WTO had after several years not managed to produce normative materials, the Appellate Body would itself have to enunciate criteria for addressing certain environmentally-based restrictions on trade.

A second kind of governance role for international courts is in enabling the influential articulation, and on occasion the legal vindication, of private commercial interests, non-commercial or public interests, and even governmental interests which are not adequately represented by the executive branch of the government. Acceptance of amicus briefs (which is now well established in the WTO, and in NAFTA and ICSID arbitral tribunals, but not in some other arbitral tribunals), and the de facto espousal by state litigators or third states of private interests in specific cases, may obliquely perform this role. But this governance role is more clearly central to institutions such as the European or Inter-American Court of Human Rights, in which private individuals, religious entities and corporations (particularly in Europe), and indigenous groups or professional associations (particularly in Latin America) initiate and win cases against states. Investor-state arbitral tribunals, composed and conducted according to a pre-specified procedures and applying pre-specified bodies of law, operate in this way, although each particular tribunal is composed on an ad hoc basis, whereas standing courts exist in human rights.

Courts as Producers of Legal Knowledge

The idea that juridification should as far as possible be accompanied by judicialization – by the creation or empowerment of courts to adjudicate claims and render judgments –

gathered momentum as a programmatic aspiration from the late 19th century. This was in part connected to the view that the existence and operations of courts should be part of the definition or at least the ideal of 'law', which has been seeping, particularly from Anglo-American legal thinking, into thought about international law since at least the late 18th century. As A.V. Dicey put it in *The Law of the Constitution*: "A law may be defined as... 'any rule which will be enforced by the courts'... [in contrast to] understandings, customs, or conventions which, not being enforced by the courts, are in no true sense of the word laws." (1960 edition, pp. 40 and 469.)

The rising quantum of judicial decisions, and the growth in materials (pleadings, commentaries etc) generated in the engagement of state institutions with them, has significant effects on international law as a field of practice and reflection. International law practitioners can and do specialize in branches of such litigation or advising about such possibilities, and both textbooks and judgments quote and cite judicial pronouncements as primary materials of first-order importance. The pronouncements of international courts and tribunals have added a layer to, and been one factor displacing heavy reliance on, the distillation of norms from masses of treaties found in Martens-style compilations or treaty series, or from other forms of 'state practice' found in national yearbooks. Judicialization has thus become more than an aspiration for, and validation of, juridification. Courts that produce law and stimulate practice drive and shape juridification.

This can have important normative dimensions: many international lawyers see international courts as potentially building a legal order with its own core principles, and as influencing the norms and principles followed in international political behavior, or in national law, with implications for basic political values such as commitments to equal concern and respect or to corrective justice. (Bogdandy and Venzke 2011; Teitel and Howse 2009; Cancado Trindade 2010).

As well as making statements about law, international courts are frequently required to elicit, marshal, re-package, and formally authenticate and enunciate factual information. This function as manager of information confronts the basic problem that much of the key information is 'private information', that is it is held by legal entities or individuals who do not make it readily available to the court. Other necessary information may be beyond anyone's capacity to obtain. Standard models of courts suggest that one level of appeal may be optimal in highly institutionalized systems to correct errors and elicit as much information and analysis as is reasonably attainable without driving up costs and delay excessively. The WTO and international criminal tribunals follow this pattern; ICSID does not. Indeed, the WTO excepted, arbitral and judicial tribunals dealing with inter-State cases are, for the most part, simultaneously first instance and final-instance tribunals. As first-instance tribunals, they must ensure production of sufficient evidence, find facts, and make legal rulings addressing the issues raised by these facts. Their powers to compel states to produce evidence are limited. While they can exert some leverage through threatening to make findings on a contested factual issue that are adverse to a party which holds but fails to produce key documents or other evidence, in some circumstances they will be reluctant even to use this power, as with the ICJ's

unwillingness to try to force the Serbian Government to hand over unredacted cabinet minutes in the Genocide case brought by Bosnia (2007). Where some facts are sharply contested or obscure, these courts frequently try to rely on facts authoritatively established or admitted by organs of the state against whose interests such facts operate, as with the ICJ's use of US Congressional findings in *Nicaragua v. USA* (1986), or the ICJ's reliance on the Porter Commission established by the Uganda government in *DRC v. Uganda* (2005). They may also rely on findings by UN bodies (as in *DRC v. Uganda*, 2005), or by international criminal courts (the ICJ made some use ICTY findings in *Bosnia v. Serbia*, 2007.) Otherwise, they have little choice but to try to side-step difficult factual issues and to structure their legal analyses accordingly.

Justice and Rule of Law

The relationship of international courts to political demands framed in terms of justice and substantive equality has been difficult. On such matters, international courts have been the frequent embodiments of hopes, episodically the objects of bitter controversy and rejection, and on occasion have engendered great disillusion. The ICJ's 1966 decision in the *South-West Africa* cases that it did not have a basis to adjudicate the claims of Ethiopia and Liberia against South Africa's introduction of apartheid into the Territory it had received to administer under a League of Nations Mandate caused much disillusion in developing countries. Japanese perceptions that the Yokohama *House Tax* arbitration award of 1905 reflected bias against Japan was a factor in Japan's reluctance to accept binding inter-state litigation until it joined the WTO and the Law of the Sea Convention in the 1990s (Japan's success in the 2000 *Southern Bluefin Tuna Arbitration* in deflecting claims concerning overfishing brought by Australia and New Zealand, thus had further significance unrelated to the merits of the issue.) Thailand had a somewhat comparable experience with the *Temple of Preah Vihear* case in the ICJ (1962).

Grotius argued that law reaching beyond a single state (*civitas*) should aspire to achieve corrective justice, but not distributive justice. This is, generally speaking, the pattern in modern tribunals adjudicating inter-state issues. In ICJ practice, money damages payments even for corrective purposes are very rarely awarded or quantified for injury to state (as opposed to private) interests (the *Corfu Channel* case, concerning Albania's responsibility for mining of British warships was exceptional.) Money claims by individuals before international tribunals are frequent, but are almost invariably decided on a corrective justice basis, apart from occasional small symbolic monetary awards.

Certain international tribunals play some marginal role in advancing other contemporary conceptions of justice. Cosmopolitan justice for individuals is at least symbolically associated with their locus standi in international cases. Deliberative conceptions of justice may be somewhat advanced by norms concerning participation, reason-giving and other features of voice, process and accountability, but international tribunals usually focus on these as duties of public authorities within states, and seldom apply them directly to global governance institutions. Republican ideas of non-dominance seem barely to figure in the jurisprudence of global governance, beyond basic principles of order that oppose forcible intervention and external imposition of public power. Overall

there are large gulfs between contemporary political theorizing about global justice and what actually is done in most international tribunals, although more is now being done to bring this theory into practice and this practice into theory.

IV. Conclusion

This chapter cannot address three already-important dimensions of judicialization which may give the phenomenon a significantly different quality in the future.

First is the vital role of national courts, acting individually and in informal networks with each other and (in some situations) with international courts. Their jurisprudence on multilateral treaties and webs of bilateral treaties is much more important than the roles of international courts on many topics (for example, cross-border child abduction, or air and rail transport), and it is increasingly central on human rights, war crimes, and other areas in which international courts are active. National courts have strong interests in limiting executive branch activity or international institutions that would bypass national democratic controls. They are also much more likely to adjudicate issues concerning private (non-state) regulatory governance. One function of international courts can be to address negative externalities (external effects) of a particular state's law or actions, where the national courts and the national political system do not take adequate account of the interests adversely affected. Thus were the national courts do act, the role for international courts may decrease. The requirement that individuals adversely affected first exhaust reasonably available domestic remedies before resorting to international courts, is an instantiation of this idea.

Second is the role in transnational governance of adjudication, arbitration or other dispute settlement not primarily involving, or dependent on, states. ICANN internet domain names dispute resolution, and the International Court of Arbitration for Sport on doping allegations against athletes, are illustrative. These formally autonomous or self-regulatory structures are often closely connected to state and inter-state regulatory action.

Third is the role of bodies which are not judicial and not necessarily even quasi-judicial, but which make authoritative and reasoned rule-based determinations after some kind of hearing and extensive deliberation. The World Bank Inspection Panel, the UN Commission on the Outer Limits of the Continental Shelf, and the Executive Board of the Clean Development Mechanism, are among the myriad examples. This kind of administrative-adjudicatory power is typically theorized quite separately from international courts, under rubrics such as global administrative law, but in functional and governance terms the lines of separation are much more indistinct.

From a normative perspective, the kinds of judicialization addressed in this chapter do not *necessarily* produce better political outcomes, nor better socio-political processes, nor more justice, than would other means of governance. Fine-grained encompassing critiques are nowadays rarely articulated, but sophisticated specific critiques appear in

debates on some international courts (concerns about structural bias, or procedural legitimation of what is substantively unjust, or non-litigability of important but juridically-marginalized claims, or about distorting effects of de-localization of trials of massive atrocities).

With the surge in the creation of international courts in the 1990s, and the rapid growth in cases in many existing and new international courts, the view that judicialization might not always be a desirable objective seemed procrustean – judicialization was turned from a desideratum into an accomplishment, helping also to assuage Diceyan doubts about the law in international law. The more frequently senior national politicians in different countries make public comments on specific proceedings and decisions in international courts, whether critical or supportive, the more these courts seem salient to real controversies.

The wave of judicialization in the 1990s resulted in the creation of several important international trade, investment, criminal, and law of the sea courts and tribunals. Perceptible changes since then in the global distribution of power amongst major states, and shifts in dominant approaches to international order, have put in question both the prospects of governance through major new comprehensive global treaties, and the creation of new global courts under such treaties. However, the increase in caseloads and judicial output of major existing tribunals is likely to be sustained, and some regional projects for further judicialization may well be pursued. A multi-polar global political order, especially one not dominated from the US and Europe, would come into tension with these enduring structures of liberal-legalist juridical order that are particularly associated with open but regulated economic markets and information flows, basic liberal property and political rights setting limits on state powers, rule of law, and some hierarchical governance structures dominated by liberal polities and their corporate and civil society groupings. Debates about formalism vs anti-formalism, material vs non-material drivers of compliance, styles of legal method etc, which have had a Euro-American internecine character, could thus rapidly be sidelined by struggles among quite different sets of ideas about what global governance is and how law and legal institutions can and should function.

Yet the very success of the judicialization project – and its close ties to a liberal approach to international order which has become increasingly contested – have generated not only reformist criticisms, but some starker resistance and repudiation. The range extends from frustration with delays in high-volume international human rights courts and quasi-judicial bodies which reject selectivity and have not found other justice-respecting mechanisms to manage rising caseloads, to calls for improvements in processes of judicial appointment and in ethical norms for judges and lawyers, to attacks on the legitimacy of *ad hoc* investor-state arbitration tribunals reviewing public policy choices, and objections to the human and political costs or to more deep-seated inequality in certain indictments issued by the International Criminal Court. To these may be added more specific state policies: Russia's pushback in delaying reform of the ECHR for several years, then terminating its provisional application of the Energy Charter Treaty in 2009; continued opposition in the U.S. to multilateral treaties such as UNCLOS simply

because of binding dispute settlement, and the refusal (in the *Medellin* case, 2008) of the U.S. Supreme Court to assure compliance with the ICJ's *Avena* judgment; China's reluctance to accept international court jurisdiction over its activities outside the trade and investment sphere; the preference for non-treaty bodies such as the G20 or the Financial Action Task Force over formalized legal institutions in increasing swathes of global regulatory governance; several Latin American denunciations of the ICSID Convention. Despite all of this, neither juridification nor judicialization have been the subject of strongly-influential fundamental critique in contemporary international law and politics. Current global politics remain, in aggregate, reformist rather than rejectionist with regard to judicialization. Whether that will change as world balances of power shift, is a question with high stakes; the answers are in the making, in a mixture of transnational dynamics and the national politics of many countries, which will determine the future of liberal-legalism as world order and transnational governance adjust to new realities of power and interdependence.

Bibliography

Eyal Benvenisti and George Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', (2009) 20 *European Journal of International Law* 59-72

Armin von Bogdandy and Ingo Venzke, 'In Whose Name?: An Investigation of International Courts' Public Authority and its Democratic Justification' (2010), in Armin von Bogdandy et al (eds.), *International Judicial Institutions as Law Makers* (forthcoming)

Antonio Cancado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (The Hague: Martinus Nijhoff, 2010)

Ruti Teitel and Robert Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', (2009) 41 *NYU Journal of International Law and Politics* 959-90

V.S Mani, *International Adjudication, Procedural Aspects* (The Hague: Martinus Nijhoff, 1980)

Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981)

Beth A. Simmons, 'Capacity, Commitment, and Compliance: International Institutions and territorial Disputes,' (2002) 46 *Journal of Conflict Resolution* 829-56

Cases

International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence in

Respect of Kosovo, 2010 ICJ Gen. List No 141

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (pending)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 2005 ICJ 168

Avena and Other Mexican Nationals (Mexico v United States of America), 2004 ICJ 12

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), 2007 ICJ Gen. List No 91

Case Concerning the Land Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), 2002 ICJ 303

Case Concerning the Temple of Preah Vihear (Cambodia v Thailand), 1962 ICJ 6

Corfu Channel (UK v Albania), 1949 ICJ 4

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), 1984 ICJ 246

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 136

Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226

Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) (Nicaragua v United States of America), 1984 ICJ 392

Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States of America), 1986 ICJ 14

South West Africa (Second Phase) (Ethiopia v South Africa; Liberia v South Africa), 1966 ICJ 6

International Tribunal for the Law of the Sea

Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, ITLOS Case No. 16 (pending)

Permanent Court of Arbitration

Abyei Arbitration (The Government of Sudan-The Sudan People's Liberation Movement/Army), Final Award of 22 July 2009

Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium-Netherlands), Award of 24 May 2005

Channel Tunnel Arbitration (Channel Tunnel Group Ltd and France-Manche SA v United Kingdom and France), Partial Award of 30 January 2007

Japanese House Tax (Germany, France and Great Britain v Japan), Award of 22 May 1905

MOX Plant (Ireland v UK), Order No 6 of 6 June 2008 (terminating proceedings)

Reineccius v Bank for International Settlements, Final Award of 19 September 2003

Other International Arbitrations

Alabama Claims Arbitration, United State of America-Great Britain, Award of 14 September 1872

Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France, 54 ILR 304 (1979)

CME v Czech Republic (Partial Award of 13 September 2001), 9 ICSID Reports 121; (Final Award of 14 March 2003), (2003) 42 ILM 919

Lauder v Czech Republic (Award of 3 September 2001), 9 ICSID Reports 66

Pope & Talbot Inc v Canada, (Award on the Merits of Phase 2), (2001)

Rainbow Warrior (New Zealand v France), 82 ILR 499 (1990)

Southern Bluefin Tuna (Australia and New Zealand v Japan), 39 ILM 1359 (2000)

National Court Decisions

R v Bow Street Magistrates; ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147

Medellín v Texas, 552 US 491 (2008)

Further Reading: Books

José E Alvarez, *International Organizations as Law-makers* (Oxford: OUP, 2005)

Hervé Ascensio, Elisabeth Lambert Abdelgawad & Jean-Marc Sorel (eds), *Les juridictions pénales internationalisées (Cambodge, Kosovo, Sierra Leone, Timor Leste)* (Paris: Société de législation comparée, 2006)

Chester Brown, *A Common Law of International Adjudication* (New York: OUP, 2007)

Sabino Cassese, *I Tribunali di Babele: I giudici alla ricerca di un nuovo ordine globale* (Rome: Donzelli Editore, 2009)

Hélène Ruiz Fabri & Jean-Marc Sorel, *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales : regards croisés* (Paris: Pedone, 2003)

Hélène Ruiz Fabri & Jean-Marc Sorel, *Le principe du contradictoire devant les juridictions internationales* (Paris: Pedone, 2004)

Hélène Ruiz Fabri & Jean-Marc Sorel, *Le tiers à l'instance devant les juridictions internationales* (Paris: Pedone, 2005)

Hélène Ruiz Fabri & Jean-Marc Sorel, *La saisine des juridictions internationales* (Paris: Pedone, 2006)

Hélène Ruiz Fabri & Jean-Marc Sorel, *La preuve devant les juridictions internationales* (Paris: Pedone, 2007)

Hélène Ruiz Fabri & Jean-Marc Sorel, *La motivation des décisions des juridictions internationales* (Paris: Pedone, 2008)

Duncan French, Matthew Saul & Nigel D White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart Publishing, 2010)

Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (New York: OUP, 2010)

Shabtai Rosenne, with the assistance of Yaël Ronen, *The Law and Practice of the International Court, 1920-2005* (4th edn, Leiden, Boston: Martinus Nijhoff, 2006)

Carlo Santulli, *Droit Du Contentieux International*, (Paris: Montchrestien, 2005)

Stephan W Schill (ed.), *International Investment Law and Comparative Public Law* (New York: OUP, 2010)

Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*

(Oxford: OUP, 2003)

Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (New York: OUP, 2006)