

CHAPTER 1

**MAPPING
INTERNATIONAL
ADJUDICATIVE
BODIES, THE ISSUES,
AND PLAYERS**

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THE editors' preface to this volume explained how the study of international adjudication has changed over time, and how this handbook takes a new approach to the topic of international adjudication. Our primary goal for this introductory chapter is to document the institutional, legal, and empirical terrain that is the focus of this

handbook, thereby saving individual contributors the task of engaging in mapping exercises for their specific issue area. We also want to put forward a quick digest for the rest of the volume. However, rather than trying to summarize the contributions of the 40-plus authors, we aim here to elucidate how the individual chapters connect and relate to aspects of international adjudication.

We begin our mapping exercise by establishing definitional criteria and explaining key concepts, particularly what differentiates adjudicative bodies from diplomatic means and other non-binding procedures; judicial bodies from arbitral bodies; and international adjudicative mechanisms from their domestic counterparts. We then arrange the dozens of international adjudicative bodies currently existing into two large groups: judicial bodies and arbitral bodies, and then divide these two groups into several sub-groups, according to similarities in structure or function.

A classification might help legal scholars who are interested in bodies applying similar subject matter law and need to consider litigation options. It might guide social scientists who want to know about institutions that share design elements. But, for us, it is mostly a tool to organize this handbook. Yet, as any tool, it comes with some operating instructions and must be used with a great amount of care and flexibility. Categories are often arbitrary and rarely watertight and can, to a degree, overlap.¹ Indeed, since international adjudicative bodies—and most certainly international judicial bodies—are expensive to create and maintain, states often try to economize by giving multiple roles to individual institutions.

After laying down some key concepts and terms (Section 1), we propose a basic classification (Section 2). Then we present the greatest challenges faced by contemporary international adjudication (Section 3), the actors who participate in international adjudication and the main stakeholders (Section 4), and, finally, we overview the main theoretical models applied to the study of international adjudication (Section 5).

1 SOME KEY DEFINITIONS AND CONCEPTS

The term adjudication, from Latin *adjudicare* (*ad* = to/toward + *judicare* = to judge), indicates a particular law-based way of reaching a final decision in a contention.

¹ For examples of possible classifications of international adjudicative bodies, see C Romano, “The Proliferation of International Judicial Bodies: The Pieces of the Puzzle” (1999) 31 N.Y.U.J. Int’l L. & Pol. 709; C Romano, “A Taxonomy of International Rule of Law Institutions” (2011) 2(1) JIDS 241; KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014); B Kingsbury, “International Courts: Uneven Judicialization in Global Order” in J Crawford and M Koskeniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press 2012) 203–27.

Often referred to as “litigation,” adjudication involves one or more individuals (i.e., the adjudicators), making a binding decision after an adversarial procedure during which the parties benefit, to varying degrees, from an equality of rights. The law-based nature of adjudicative decision-making distinguishes adjudication from other processes, such as political decision-making and mediation. Also key is that adjudication leads to a binding outcome that has the force of law. The legally binding nature of outcomes distinguishes adjudication from mediation, conciliation, good offices, and the like, known as “alternative dispute resolution” nationally and “diplomatic means” internationally.

In essence, there are two distinct modes of adjudication: by way of judicial bodies and by way of arbitration. Judicial bodies (also generically referred to as “courts” or “tribunals”) *pre-exist* the question that is to be decided. The adjudicators are selected, elected, or nominated through a mechanism that does not depend on the will of the litigating parties. They sit on the body’s bench and decide a series of cases. The judge’s authority derives from a public mandate and the outcome is, in essence, a “public good.”² Conversely, in arbitration, the adjudicators are selected by the parties *after* the dispute arises, with the aim of deciding a particular case. The arbitral tribunal or panel is dismissed after issuing the decision (known as the “award”). Since the parties select the members of arbitral bodies, the mandate of arbitrators is circumscribed to administering “private justice.” These important differences notwithstanding, both judicial decision-making and arbitration are law-based processes that render legally binding decisions. Furthermore, since international judicial bodies have developed from institutionalized forms of arbitration, both processes share some common attributes (such as the ability of parties to some judicial and arbitral procedures to influence the composition of the bench, and the establishment of both procedures pursuant to an international law instrument). These fundamental similarities are why these two distinct processes are often treated together, as is often the case in this handbook.

These concepts and the two distinct modes of adjudication are universal, valid across time and space.³ Yet there are some key differences between how adjudication is framed nationally and internationally. At the national level, adjudication is often compulsory, meaning that it does not depend on litigating parties explicitly accepting the jurisdiction of the adjudicating body. Generally, litigation is initiated by one party suing or indicting the other; enforcement of the decision is ensured by the national public authorities. Internationally, adjudication has traditionally depended on some form of consent of the parties, either through an explicit endorsement of the adjudicator’s compulsory jurisdiction or consent to adjudicate a particular case. The ruling of the adjudicative body is legally binding at both national and international levels, but at the latter level there is no centralized authority to

² C Romano, “The Price of International Justice” (2005) 4 LPICT 281.

³ See M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) 1–17.

enforce the ruling. While these are important differences between domestic and international adjudication, this handbook shows that international adjudication has evolved in some fields and regions to the point that adjudication is often compulsory. Moreover, as William Schabas (Ch. 10) and André Nollkaemper (Ch. 24) explain in their contributions to this volume, increasingly national or supra-national authorities ensure enforcement of decisions of international adjudicative bodies or these rulings are given the force of law within national systems.

While international dispute settlement mechanisms are the common ancestor of the current array of international adjudicative bodies, starting from the middle of the twentieth century, international adjudication has evolved and diversified (to some extent in concert with national judicial evolutions). As José Alvarez explains in his essay in this handbook (Ch. 8), settling disputes has become just one of the several functions that international adjudication fulfills; one that nowadays is at the core of the mandate of just a minority of the current range of adjudicative bodies.⁴ These developments mean that the traditional distinction between “international adjudication” and “diplomatic means” makes sense only in the context of dispute settlement, a largely surpassed theoretical framework that this handbook deliberately eschews.

What are the essential features of international adjudicative bodies? What distinguishes them from “diplomatic means” and even political decision-making and quasi-judicial bodies, such as United Nations agencies and expert committees? In the scholarly literature, there seems to be consensus that international adjudicative bodies are:⁵

1. international governmental organizations, or bodies and procedures of international governmental organizations, that...
2. hear cases where one of the parties is, or could be, a state or an international organization, and that...
3. are composed of independent adjudicators, who...
4. decide the question(s) brought before them on the basis of international law...
5. following pre-determined rules of procedure, and...
6. issue binding decisions.

⁴ For instance, Karen Alter has classified the four main functions of contemporary international judicial bodies as: “dispute settlement”; “constitutional review”; “administrative review”; and “enforcement” Alter, note 1. The chapters by Samantha Besson (Ch. 19), and by Armin von Bogdandy and Ingo Venzke (Ch. 23) identify additional functions adjudicative bodies serve.

⁵ Compare C Tomuschat, “International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction” in *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium* (Springer 1987) 285–416, at 290–312 (defining “international courts and tribunals”); Romano, note 1, at 711 (defining “International Judicial Body”); C Tomuschat, “International Courts and Tribunals” in *Max Planck Encyclopedia of Public International Law* (3rd edn, Oxford University Press 2011) para. 1 (defining “international courts and tribunals”); Alter, note 1, at 70 (defining “international courts and tribunals”); JE Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) (defining “international courts and tribunals”).

The first two criteria are needed to distinguish international adjudicative bodies from national or transnational dispute settlement bodies. Thus, the International Chamber of Commerce, the London Chamber of Commerce, or the Stockholm Chamber of Commerce are essentially private organizations incorporated in the national legal system of some states (i.e., France, the UK, and Sweden, respectively) that offer arbitral services for interested parties. By contrast, the European Court of Human Rights (ECtHR) was created by the European Convention on Human Rights—a treaty—and the International Criminal Tribunal for Rwanda was created by a resolution of the UN Security Council—a binding decision of an international organization. Because international adjudicative institutions have a public international origin, their legal personality does not depend on the national law of any given state.

The second defining criterion is that states, or international organizations, or their organs, are usually the parties to the cases that international adjudicative bodies decide. This criterion must be understood correctly and applied with a modicum of flexibility. For example, in international criminal courts the parties are the public “Office of the Prosecutor,” which is an organ of an international institution, and an indicted individual. Sometimes, international adjudicative bodies might hear cases where neither party is a state or an international organization. For instance, the Court of Appeals of the Organization of Harmonization of Business Law in Africa (OHADA) hears appeals of national courts’ decisions in cases that involve two private actors. The Court of Justice of the European Union and the Andean Tribunal of Justice can issue preliminary rulings, at the request of national judges, in cases between private parties. Still, both also have jurisdiction over states or international organizations and their organs, which other kinds of transnational and national adjudicative bodies typically do not have. For some issues and cases, these bodies may even have exclusive jurisdiction.

The third defining trait is that international adjudicative bodies are composed of individuals who serve independently in their own professional capacity and do not represent any state. These individuals—called “judges” in the case of international judicial bodies, and “arbitrators” in the case of arbitration, or sometimes just plainly “members”—are required to possess certain minimum qualifications, such as having high moral character, expertise in a legal subject matter, language qualifications, or judicial experience (some adjudicators have also held the highest judicial office in their own countries before being appointed to an international court). To say that adjudicators are independent does not mean that the parties do not have significant influence and sometimes even control over who serves in these bodies. Members of adjudicative bodies are generally nominated by governments. They can be even handpicked by the litigating parties, as often happens in arbitration. This volume includes a chapter on the appointment process and who becomes a judge (Mackenzie, Ch. 34), the background of judges (Swigart and Terris, Ch. 28), international judicial behavior (Voeten, Ch. 25), and judicial ethics (Seibert-Fohr, Ch. 35), to better understand the behavior,

background, and actions of adjudicators. But a key point is that, regardless of how adjudicators are selected and appointed, in the end, they do not represent a country or a party to the dispute and they are required to act independently.

The fourth defining criterion—international adjudicative bodies decide cases on the basis of legal standards and apply pre-determined rules of procedure—signifies that adjudicators act “under the shadow of the law”⁶ and specifically under the shadow of international law.⁷ This too is an important distinctive feature. The International Court of Justice (ICJ), the UN Security Council, the Organization for Security and Cooperation in Europe (OSCE), and the Assembly of the African Union all engage in international dispute settlement. But in contrast to the political bodies, the ICJ justifies its decisions solely on legal considerations.⁸

The fifth defining trait—international adjudicative bodies act on the basis of publicly articulated rules of procedure that are abstract, being set before the arising of any case or situation—is important because it means that the litigating parties do not control the terms of decision-making once the adjudicative process has begun. Adjudicative bodies often draft their own rules of procedure, and as Yuval Shany’s chapter on jurisdiction and admissibility (Ch. 36) and Chester Brown’s chapter on inherent powers (Ch. 38) demonstrate, key procedural elements can end up being defined through practice. But the fundamental point is that unlike arbitration, where the parties can choose the procedural law,⁹ international adjudicative bodies rely on their own rules of procedure when adjudicating disputes.

The sixth and final defining criterion—that decisions of international adjudicative bodies are legally binding—means that governments and private actors are obligated to follow the ruling. Whether an international legal decision will be or might be enforced or complied with is a separate and rather intricate issue, discussed by Alexandra Huneus (Ch. 20). The reality that respect for international legal rulings can be improved does not detract from the essential binding nature of the legal ruling. It should be noted that some international adjudicative bodies can also render decisions that are advisory in nature, and thus not legally binding. Advisory opinions are often influential and even authoritative, but as a matter of

⁶ JE Alvarez, “The New Dispute Settlers: (Half) Truths and Consequences” (2003) 38 *Texas Int’l L. J.* 405; Alvarez, note 5.

⁷ Be that as it may, it should be noted that sometimes some international adjudicative bodies might apply, besides international law, other bodies of law. For example, hybrid international criminal courts, like the Special Court for Sierra Leone, can apply, in addition to international law, the criminal laws of the country in which they have been set up. Arbitral tribunals might be asked to apply the law of this or that state, together with or instead of international law, to decide an international dispute.

⁸ Yet, sometimes, if the parties so wish, an international adjudicative body might be able to set aside the law and reach a decision purely on considerations of fairness and equity (the so-called decision *ex aequo et bono*).

⁹ In arbitration, the parties often choose off-the-shelf sets of rules of procedure, like those of the United Nations Commission on International Trade Law (UNCITRAL), or delegate the task of drafting

law they are not considered legally binding. The key point is that what differentiates adjudicative bodies from expert and sundry quasi-judicial bodies is the ability to issue binding rulings.

2 MAPPING INTERNATIONAL ADJUDICATIVE BODIES

One of the most remarkable features of contemporary international relations is the large and growing array of international adjudicative bodies. In little over a century, the world went from one adjudicative institution—the Permanent Court of Arbitration—to dozens. Mary Ellen O’Connell and Lenore VanderZee chronicle the early days of international adjudication (Ch. 3), while Karen Alter identifies factors driving this more recent multiplication of judicial bodies (Ch. 4). Yet, far from being unstoppable, the march of international adjudication has been full of obstacles and dead-ends, as Cesare Romano explains (Ch. 6). The result is a very large array of bodies, operative or idle, that have been mapped in the pull-out chart included at the beginning of this volume.¹⁰

Admittedly, sheer numbers aside, ordering this disparate collection of rather heterogeneous bodies and procedures is a methodological more than visual challenge, for any ordering is to some extent arbitrary and ultimately depends only on what criteria one adopts. Several caveats are in order. First, the galaxy of adjudicative bodies still does not form a coherent judicial system. As Cesare Romano explains in his other chapter on the shadow zones of international judicialization (Ch. 5), inconsistencies and loopholes still abound. Ordering risks giving the illusion of order and structures when in reality there are none. Second, all maps are arbitrary. Often they contain arbitrary distinctions or emphasize features that may not be very salient (e.g., waterways of historical rather than contemporary relevance, or notional borders in a desert), while omitting factors that may sometimes be very important. Indeed, a number of chapters in this volume question our categories. William Schabas (Ch. 10) asks whether a criminal court set up by a multilateral treaty is all that different from a body set up by a single country or the parties to the military conflict, especially since the laws of the two bodies and the personnel of the court can be the same and since nationally focused bodies can apply international law and include international jurists. Solomon Ebobrah (Ch. 11) asks whether

and adopting them to the arbitrators. Rarely, if ever, do the parties themselves draft ad hoc their applicable rules of procedure.

¹⁰ For an explanation of the illustrations see, in this handbook, Romano, Alter, and Sebregondi, Ch. 2.

it makes sense to label as “human rights courts” bodies associated with specific binding international human rights instruments when there are also regional courts that apply the same instruments, review human rights practices, and grant similar types of remedies. David Caron (Ch. 13) asks whether it makes sense to distinguish between permanent bodies and bodies that are not permanent but still operate for an indefinite period of time. Sean Murphy’s treatment of adjudicative bodies for state-to-state disputes (Ch. 9) raises a related concern and blurs distinctions as he considers adjudication by permanent courts and ad hoc mechanisms, both of which render binding rulings for disputes between states. Laurence Helfer (Ch. 21) adds weight to these critiques when he notes that the legal effect of a ruling can spill beyond the case, the country litigating, and even the adjudicative body.

All in all, while there are reasonable and important critiques to consider, we think that even imperfect maps are helpful in orienting a person entering a new terrain. Our purpose in this chapter and in the pull-out charts is merely to provide a basic guide and a touchstone for discussion.

We have already mentioned one fundamental distinction between “judicial bodies” (also referred to as “international courts and tribunals”) and “arbitral bodies.” Judicial bodies pre-exist the dispute and have judges that are selected, elected, or nominated through a mechanism that does not depend, by and large, on the will of the parties to a given dispute. In contrast, arbitral panels are selected and nominated by the parties to the dispute, after the dispute arises, with the aim of settling it and disbanded after the award is rendered. This is the first branching out in the classification of international adjudicative bodies, separating judicial settlement from arbitration.

Even with this fundamental distinction we see some classificatory blurring in practice. Sometimes one can find arbitration intermingled with judicial settlement. For example, the World Trade Organization (WTO), Southern Common Market (Mercosur), South African Development Community, and OHADA all allow for disputes to be adjudicated by ad hoc arbitral panels composed of experts chosen by the parties, with decisions subject to appeal before permanent appellate judicial bodies.

Of course, both international judicial bodies and arbitral bodies and procedures can be further divided into sub-categories.

2.1 Arbitral bodies

One way to classify arbitral bodies and procedures is to distinguish between ad hoc arbitration—a purely isolated, one-time exercise—and arbitration taking place within *institutionalized frameworks*. Most of the international arbitration that took place during the nineteenth century was of the former kind. For instance, in 1893, the United States and Great Britain appointed seven arbitrators (two each by the

United States and Great Britain and the remaining three appointed by the President of France, the King of Italy, and the King of Norway) to settle a dispute over the management of fur seals in the Bering Sea.¹¹ However, as Mary Ellen O’Connell and Lenore VanderZee explain (Ch. 3), the creation of the Permanent Court of Arbitration (PCA), in 1899, led to the beginning of the institutionalization of arbitration, a first step towards the current universe of international adjudication. With the PCA, states had a ready-made list of trusted experts from which they could pick their arbitrators, a venue where proceedings could take place (at the Peace Palace in The Hague), specialized secretarial support, and a ready-made set of procedural rules to follow.

Nowadays, most international arbitration takes place within institutional frameworks, such as the PCA, but also the International Center for Investment Disputes (ICSID), which is discussed in this handbook by Christoph Schreuer (Ch. 14). These institutional frameworks can be permanent, existing independently from the vicissitudes of a single case or historical event, or temporary. ICSID and PCA are a good example of permanent arbitral institutions, while international claims and compensation bodies, discussed by David Caron (Ch. 13), such as the Iran–US Claims Tribunal, or the United Nations Compensation Commission, are temporary. These are institutions created in the aftermath of a major catastrophe or conflict to decide appropriate compensation for international claims. Almost 90 mixed arbitral tribunals and claims commissions were created in the nineteenth and twentieth centuries in the wake of armed conflicts and revolutions.

Nowadays, purely ad hoc inter-state arbitration, of the kind practiced in the early days of the history of international adjudication is relatively rare. Even when arbitration does not take place within an institutional framework, there might be a legal framework that threads together the otherwise independent and separate arbitral panels. For instance, states that are party to the United Nations Convention on the Law of the Sea have a number of options to settle their disputes, including the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and two kinds of arbitrations (one generic—the so-called Annex VII, and one by way of scientific experts—the so-called Annex VIII). While each arbitral panel convened to settle a dispute under the Law of the Sea Convention is a one-time temporary, arbitral tribunal, the legal framework of the convention ensures a certain degree of continuity and coherence between the various panels. The same happens, for instance, in the case of bilateral investment treaties, another source of much arbitral activity these days. Each dispute generates its own arbitral panel, which is dismissed after the award is rendered, but the investment treaty provides the unifying legal framework for the

¹¹ *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration, Convened at Paris Under the Treaty Between the United States of America and Great Britain, Concluded at Washington February 29, 1892 for the Determination of Questions Between the Two Governments Concerning the Jurisdictional Rights of the United States in the Waters of Bering Sea* (Government Printing Office 1895).

activities of each arbitral body. Both Murphy and Schreuer (Chs 9 and 14) address these issues.

2.2 International judicial bodies

There are at least five distinct types of international judicial bodies, if one groups them by their fundamental institutional and jurisdictional attributes.

2.2.1 *Courts for disputes between states*

As Mary Ellen O'Connell and Lenore VanderZee describe in their chapter (Ch. 3), at the outset, contemporary international adjudication was mostly, if not solely, aimed at peacefully settling disputes between states. The first international courts were of this kind.¹² These days, there are only three courts with jurisdiction mostly, if not exclusively, over disputes arising between sovereign states: the ICJ, the ITLOS and the World Trade Organization Appellate Body (WTO AB). Of the three, the ICJ has the broadest potential jurisdiction. It can hear any dispute between any states on any matter of international law (provided that the two states consent to the court's jurisdiction). The other two have a narrower, specialized jurisdiction, in a specific area of international law (i.e., law of the sea and WTO law). Disputes between states are also often settled through international arbitration, ad hoc, or under the aegis of some arbitral organization. Sean Murphy tackles international adjudication of disputes between states (in Ch. 9).

2.2.2 *Human rights courts*

Human rights courts hear cases concerning violations of an individual's human rights. Cases are brought to these courts directly by the victims, or indirectly through specially designated human rights commissions that vet individual and state complaints.¹³ Although human rights courts can also hear cases raised by one state against another state, such litigation is rare. Currently there are three courts whose jurisdiction is solely focused on human rights: the ECtHR, the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (ACtHPR). Human rights courts are discussed by Solomon Ebobrah (Ch. 11). As Ebobrah notes, however, there are also bodies that have not been conferred jurisdiction to adjudicate human rights violations as such, but because of the nature of the cases they decide, from time to time they carry out functions very much similar to those of courts specialized in human rights. For instance, the Court of Justice

¹² Karen Alter uses the label "old style" international court to capture this category. See Alter, note 1.

¹³ The African Union system allows governments to raise cases on behalf of their citizens, but it still requires that governments first consent to let individuals bring cases to the commission.

of the Economic Community of West African States has jurisdiction to adjudicate human rights complaints raised by individuals. This court's docket is dominated by human rights cases and it has issued some landmark judgments where it has concluded that certain international human rights standards have been violated.¹⁴ The Caribbean Court of Justice serves as an appellate body for some national legal systems, hearing cases that often involve human rights issues.¹⁵ Since 2010, with the entry into force of the Charter of Fundamental Rights of the European Union, the Court of Justice of the European Union (CJEU) has a specific mandate to adjudicate complaints that EU law violates human rights.

2.2.3 *Courts of regional economic and/or political integration agreements*

These are courts embedded in regional arrangements for economic cooperation and integration. They comprise the largest family of international judicial bodies, numerically speaking. In this handbook, Carl Baudenbacher and Michael-James Clifton (Ch. 12) identify 12 courts for regional economic and political integration agreements, but if one counts formally negotiated legal instruments establishing regional courts, the number would be closer to 20, as the pull-out chart in this handbook illustrates.

Of all international courts, courts of regional integration agreements have the most diverse and complex subject matter jurisdiction and the greatest variation in the types of adjudication and the range of actors that can be legal parties in adjudication. For example, in regional courts of economic and political integration agreements, states can often bring noncompliance suits against other states; directly affected parties can challenge community rules and/or state application of these rules; and institutional actors can challenge rules adopted using improper procedures or in violation of provisions of the regional agreement. Some regional courts also serve as international administrative tribunals, hearing employment disputes between the organization and its employees and contract disputes involving third parties. Others, as we have just noted, cross over to human rights courts. Most regional courts allow national judges to refer questions of interpretation to the community court and receive a "preliminary ruling" that they then apply to the case at hand.¹⁶

As Karen Alter (Ch. 4) explains, many regional courts mimic the model of the CJEU (formerly known as the European Court of Justice). Yet, a number of regional bodies also follow the template of the WTO dispute settlement system. For example, the North American Free Trade Agreement dispute settlement system does not rely on

¹⁴ For more, see KJ Alter, L Helfer and J McAllister, "A New International Human Rights Court for West Africa: The Court of Justice for the Economic Community of West African States" (2013) 107 *AJIL* (4).

¹⁵ See e.g., *DaCosta Cadogan v. The Queen* [2006] CCJ 4 (AJ) (Caribbean Ct. J. Dec. 4, 2006).

¹⁶ The name is somewhat of a misnomer in that "preliminary rulings" are not subject to a final determination of the matters in question, but are in fact final determinations of certain legal questions.

permanent courts but rather on a series of ad hoc arbitral panels. Then again, a number of regional courts mix and match, incorporating design features of both the European Union and the WTO. For example, the Andean Tribunal of Justice largely replicates the European Court of Justice, but it allows for retaliatory sanctions against countries that have violated community rules, as is done at the WTO. The Mercosur system copies primarily the WTO's system of ad hoc dispute resolution, but national supreme courts can also seek preliminary ruling references from the Permanent Review Body.

2.2.4 *International criminal courts and tribunals*

These international courts and tribunals exercise just one kind of jurisdiction—criminal jurisdiction—but it is a jurisdiction that is not exercised by any other international judicial body.¹⁷ Defendants in international criminal cases are always individuals, particularly high-level political and military leaders, and the Office of the Prosecutor shoulders the burden of the prosecution; thus an organ of an international institution (generally the UN) initiates prosecution. International criminal courts and tribunals form a very heterogeneous family, one that could be further divided into sub-classes. For instance, one could distinguish between permanent and temporary institutions, or between international and hybrid—international/national—criminal courts, or between bodies focused only on a given region or state and bodies with potentially global jurisdiction (see pull-out charts). William Schabas provides an overview of this family (Ch. 10). Kevin Jon Heller explains the role of the international prosecutor (Ch. 31) and Kate Gibson the role of defense counsels (Ch. 32) in the international criminal process.

2.2.5 *International administrative tribunals*

Last but not least, there are International administrative tribunals. International administrative tribunals, boards, and commissions are bodies of a judicial character attached to an international organization, whose main function is adjudicating disputes between international organization and their staff members. These bodies do apply international law (primarily the internal regulations of international organizations), but they are more similar to domestic labor courts than to international courts. International administrative tribunals meet all criteria to be classified as international judicial bodies, but because of their limited mandate and because they do not apply general international law or issue rulings that bind states, but only the international organization in question and its employee, legal scholars and

¹⁷ Criminal courts are the only bodies that hold individuals accountable. David Caron (Ch. 13) observes that claims and compensation bodies generate state liabilities for legal violations in war, and Alexandra Huneus notes that the IACtHR acts as a criminal court when it identifies violations and orders remedies, including the prosecution of individuals responsible for human rights atrocities. A Huneus, “International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of Human Rights Courts” (2013) 107 AJIL 1.

political scientists usually ignore this category. Chittharanjan Amerasinghe's essay (Ch. 15) aims to fill this gap.

3 COMMON CHALLENGES

The growth in number of international adjudication bodies, the expansion of their jurisdictional mandate, and their increased diversification has transformed international courts and tribunals into important tools of international governance.¹⁸ Beyond their traditional dispute-settling role, international courts and tribunals increasingly find themselves in the business of law interpretation, law application, administrative review, and even constitutional review. These functions often involve a degree of law creation, and almost always the prioritization and advancement of policy goals inscribed in the DNA of the judicial institution (or its overarching international organization), for example promoting trade liberalization, protecting human rights, and prosecuting mass atrocities. The growing visibility of international adjudication bodies renders their shortcomings more apparent, and the increased influence of international courts and tribunals invites criticism by those discontented with their operation or rulings. The more powerful these institutions become, the louder and more urgent the calls for reforms to address known problems.

This section considers challenges international adjudicative bodies face. The previous sections grouped international courts and tribunals into like families. Each family has its own distinct challenges, some of which are discussed in the individual contributions in Part II of this handbook. But it is also the case that certain challenges are common to all, or at least most, international courts and tribunals. Pierre-Marie Dupuy and Jorge Viñuales have contributed a chapter (Ch. 7) discussing the challenge created by the proliferation of international courts. Here, we discuss problems in their most common and general form.

Four groups of challenges have been repeatedly raised: legitimacy concerns, effectiveness challenges, quality control, and systemic problems. Some of these concerns are legal, while others are more politically charged. Several raise practical issues, yet others are more conceptual in nature. Although the four types of concern overlap with one another to some extent, they represent different issues common to

¹⁸ See e.g., Y Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 EJIL 73, 79–83.

international judicial structures and procedures, and the outcomes these adjudicative bodies generate.

3.1 Legitimacy challenges

One set of challenges directed against virtually all international courts and tribunals involves the questioning of their legitimacy, understood here as a justified claim to authority informed by notions of fairness, justice, and legality.¹⁹ Like most other international governance organs, international adjudicative bodies suffer from a democratic deficit.²⁰ Of course courts by their very nature are not democratic institutions. (While some states in the United States allow for the election of judges, in most of the world it is considered inappropriate to elect judges or to subject judges to popular review.) Nationally, a court's legitimacy rests on the government's legitimacy. But the more international courts are able to rule on the validity of policies created by accountable democratic governments, the more problematic it becomes that unelected international adjudicators far removed from the communities affected by their decisions can sit in judgment of the actions of accountable political actors.²¹ The difficulty of changing international rules should governments disagree with judicial interpretations only underscores the extent to which international adjudicators are by and large non-accountable to local communities or to the governments that created them.²²

Another set of legitimacy concerns involves the relationship between international governance and international justice. To the extent that international adjudication supports legal norms and political institutions that are associated in the eyes of important constituencies with controversial political and ideological projects such as imperialism, colonialism, capitalism, and other -isms, their legitimacy is likely to be challenged. For instance, during the past few years some Latin American countries have withdrawn from ICSID, alleging that the investment

¹⁹ See e.g., WC Gay, "The Violence of Domination and the Power of Non-violence" in LF Bove and LD Kaplan (eds), *Philosophical Perspectives on Power and Domination: Theories and Practices* (Amsterdam: Rodopi 1997) 15, 24.

²⁰ See e.g., C Romano "Deciphering the Grammar of the International Jurisprudential Dialogue" (2009) 41(4) N.Y.U.J. Int'l L. & Pol. 755, 780.

²¹ For example, the CJEU decides upon controversial social issues, such as the enlistment of female soldiers or limiting industrial activities near nature reserves. See *Kreil v. Bundesrepublik Deutschland*, Case C-285/98, 2000 E.C.R. I-69; *Commission v Spain (Marimas De Santona)*, Case C 355/90, 1993 E.C.R. I-4221. In the past, such issues were addressed by elected domestic institutions or by domestic courts monitored to some extent by elected institutions. (See also, in this handbook, Besson, Ch. 19).

²² See e.g., D Terris, C Romano, and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press/Oxford University Press 2007) 150; BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 135.

regime is pro-investors and neo-colonial.²³ The heads of the African Union have complained that the International Criminal Court (ICC) focuses exclusively on African disputes while ignoring mass atrocities by powerful Western countries and their allies.²⁴ These critiques can be explained in part by reference to broader North–South tensions that underlie the specific operations of these international adjudicative bodies.

Concerns about the legitimacy and accountability of adjudicators are not unique to international courts. Parallel concerns are often raised with respect to domestic legal systems and international institutions in general. Still, international adjudication is often more contested. One reason international courts are critiqued is that they operate in a more volatile political environment than their domestic counterparts. Domestic courts are able to establish their reputation for sound decision-making through their handling of many mundane cases. By contrast, many international courts focus primarily on high politics cases. International criminal tribunals target political leaders “who bear the greatest responsibility,”²⁵ yet, precisely in these cases, it is often difficult to establish a link between a political decision and the perpetration of an atrocity. The most straightforward cases of trade barriers tend to be resolved out of court, with the result that the WTO’s dispute settlement mechanism ends up dealing with the most difficult and contentious cases.²⁶

The fact that international courts are relatively new bodies, without a tradition of acceptance of their authority, further contributes to the questioning of their legitimacy, as does the different nature of international judicial procedure compared to domestic procedure.²⁷ Also, as is the case with most adjudicatory processes, no full equality of arms exists. Before domestic courts, certain litigants are more advantaged than others since they might have easier access to lawyers with greater experience and expertise.²⁸ In the international realm, this difference means that rich countries sometimes out-lawyer less well-off countries. All of these differences

²³ See C Schreuer, “Denunciation of the ICSID Convention and Consent to Arbitration” in M Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Wolters Kluwer 2010) 353–354; see, in this handbook, Romano, Ch. 5.

²⁴ See D Akande, “The African Union takes on the ICC Again: Are African States Really Turning from the ICC?” (June 26, 2012) <<http://www.ejiltalk.org/the-african-union-takes-on-the-icc-again>> accessed May 12, 2013.

²⁵ See e.g., Statute of the Special Court of Sierra Leone, 16 January 2002, Art. 1(1).

²⁶ See e.g., ML Busch and E Reinhardt, “Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes” (2000) 24 *Fordham Int’l L.J.* 148; C Davis, *Why Adjudicate: Enforcing Trade Rules in the WTO* (Princeton University Press 2012) 246.

²⁷ See e.g., R Mackenzie and P Sands, “International Courts and Tribunals and the Independence of the International Judge” (2003) 44 *Harv. Int’l L.J.* 271, 275; Terris, Romano, and Swigart, note 22, at 147 ff.

²⁸ M Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Society Rev.* 95.

make observers question the fairness of international court procedures, and as a result, the legitimacy of some international adjudicative processes.²⁹

A number of handbook chapters address directly legitimacy challenges facing international adjudication. Cesare Romano (Ch. 5), Leigh Swigart and Daniel Terris (Ch. 28), and Natalie Klein (Ch. 26) document the dominance of certain countries in supplying international judges and litigants, implicitly challenging the claim that international adjudication is indeed a global phenomenon. Samantha Besson (Ch. 19) argues that a number of philosophical questions need to be addressed before we proceed further with judging international law. Tom Ginsburg (Ch. 22) discusses the political constraints under which international courts and tribunals operate (a question that reflects, *inter alia*, on the perceived legitimacy of international adjudication). Other chapters, for example, Armin von Bogdandy and Ingo Venzke's chapter on judicial law-making (Ch. 23), Ruth Mackenzie's chapter on Judicial Election and Selection (Ch. 34), and Anja Seibert-Fohr's chapter on Ethics of International Adjudication (Ch. 35), present key factors which may affect the evaluation of any particular court or tribunal's legitimacy.

3.2 Effectiveness concerns

Another set of common challenges facing international adjudicative bodies concerns their effectiveness—understood narrowly as their ability to engender respect for their legal rulings and the rules they help enforce,³⁰ or more broadly as their ability to promote the attainment of a set of policy goals assigned by the political organs that create them.³¹ Adjudication has been thought to be a cost-effective method for settling disputes (or solving problems), supporting legal norms and international institutions, and conferring a degree of accountability on international governance projects.³² The more resources devoted to international adjudication and the more powerful international courts become, the more observers expect adjudication to resolve disputes and promote the policy goals of the organization. With expectations high and growing, international adjudicative bodies may be destined to disappoint some of their core constituencies.

Twenty years after the end of the Cold War, the record of accomplishment of many international courts and tribunals remains uneven at best. While some have

²⁹ See generally, N Grossman, "Legitimacy and International Adjudicative Bodies" (2009) 41 *Geo. Wash. Int'l L. Rev.* 107, 128–9; D Bodansky, "Legitimacy in International Law and International Relations" in J Dunoff and M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 321–41.

³⁰ See, in this handbook, Helfer, Ch. 21.

³¹ Y Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (2012) 106 *AJIL* 225, 230.

³² Shany, note 31, at 244–7.

clearly made an impact on the policy areas on which they adjudicate (human rights, trade, investment), the normative direction that they have pursued has sometimes met with criticism by important stakeholders.³³ At the same time, the impact of some newer adjudicative bodies, especially international criminal courts, on state actor performance and norm-internalization by such actors is often rather limited.³⁴

More specifically, concerns have been raised with respect to the negative correlation that some commentators have identified between the increased ambition of certain adjudicative bodies and the level of compliance with their decisions. It sometimes seems that the more ambitious and far-reaching judicial decisions, the greater the resistance displayed by losing parties.³⁵ International adjudication bodies may even face a trade-off between immediate compliance with their rulings, and with it the perceived effectiveness of the institution in the short run, and building legal doctrines that might contribute to long-term changes but which produce short-term non-compliance. For example, compliance with decisions of the IACtHR is lower than those of the ECtHR. This is in part because the Inter-American Court requests a number of restorative remedies other than compensation that are often difficult for the targeted state to implement, leading to just partial compliance with any given ruling.³⁶ Recent statistics on reduced levels of compliance with general measures issued by the ECtHR,³⁷ and the suspension of the Tribunal of the Southern African Development Community, in response to its perceived judicial activism,³⁸ may also illustrate the trade-off between ambition and effectiveness.

In a world where resources assigned to international adjudication may get scarcer, and international judicial bodies find themselves in competition with other important international governance projects, one may expect increased demands being made on international courts and tribunals to provide good value for money. Indeed, the completion strategy for both the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

³³ See e.g., A Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Legal Order* (Oxford University Press 2011) 150–1; G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 77–8.

³⁴ See e.g., D McGoldrick, “The Legal and Political Significance of a Permanent International Criminal Court” in D McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing 2004) 453, 458; A Huneeus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights” (2011) 44 *Cornell Int’l L.J.* 493, 507–511.

³⁵ See generally, Y Shany, “Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-based Analysis” (2010) 3 *Select Proceedings of the Eur. Soc’y Int’l L.* 229; D Hawkins and W Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights” (2010) 6 *J. Int’l L. & Int’l Rel.* 35.

³⁶ Hawkins and Jacoby, note 35, at 35.

³⁷ See Council of Europe, *Supervision of the execution of judgments and decisions of the European Court of Human Rights* (2012) 11.

³⁸ E de Wet, “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa,” *ICSID Review* (2013) 1–19.

(ICTR),³⁹ and the move to consolidate the as yet non-existing African Court of Justice with the ACtHPR⁴⁰ may suggest that the long-term existence of international adjudication bodies should not be taken for granted. International judges increasingly need to worry that institutional design, court procedures, and even judicial outputs will be subject to review by stakeholders who are concerned with both their effectiveness and cost-effectiveness.

A number of handbook chapters are concerned with the effectiveness of international adjudication. Laurence Helfer's chapter discusses different ways of assessing the effectiveness of international adjudicative bodies (Ch. 21). Other chapters address interesting components of any effectiveness and cost-effectiveness evaluation. Alexandra Huneeus focuses on the question of compliance with decisions of international courts (Ch. 20), and André Nollkaemper investigates the interaction between international and national courts more generally—an issue that comprises an important area of judicial impact (Ch. 24). Christine Gray discusses the various remedies international adjudicative bodies issue, identifying a range of legal outputs that one might put on a continuum of the degree in which remedial objectives can be attained (Ch. 40). Finally, Thordis Ingadottir's chapter on financing (Ch. 27) considers the cost of international adjudication.

3.3 Quality control

Both the legitimacy and effectiveness of international adjudicative bodies are tied to the quality of the work generated by international courts—objective and subjective (i.e., as perceived by external and internal observers). Several commentators monitoring different international courts and tribunals have expressed concerns about the qualification of certain judges, their independence and impartiality, the paucity of the administrative support they receive, and the inadequacy of certain court procedures.⁴¹ More generally, the machinery of international justice has been viewed at times as over-worked and under-funded, and, at other times, under-utilized and even facing the risk of irrelevance.⁴²

³⁹ See e.g., D Raab, "Evaluating the ICTY and its Completion Strategy," (2005) 3 J. Int'l Crim. Just. 82, 84.

⁴⁰ See e.g., R Mackenzie et al., *Manual on International Courts and Tribunals* (Oxford University Press 2009) 389–90.

⁴¹ See e.g., R Falk, *Reviving the World Court* (University Press of Virginia 1986); SW Tiefenbrun, "The Role of the World Court in Settling International Disputes: A Recent Assessment" (1997) 20 Loy. L.A. Int'l & Comp. L.J. 1, 2; M Bohlander, "Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts" (2009) 12 New Crim. L. R. 529, 530; C Romano, "The Americanization of International Litigation" (2003) 19 Ohio St. J. on Disp. Resolution 89, 95–104.

⁴² See e.g., JM Czarnetzky and RJ Rychlak "An Empire of Law?: Legalism and the International Criminal Court" (2003) 79 Notre Dame L. Rev. 55, 59; LA Dickinson, "Transitional Justice in

Problems associated with deficient court structures and procedures may translate to weak decisions that misconstrue the law, fail to establish the relevant facts, and serve as poor legal precedents. Capacity problems, exacerbated by limited funding prospects, further reduce the possibility of maintaining high professional quality standards. There can be considerable turnover in the staff of international courts, and the newness of many international courts and their judges generates high-profile growing pains. For example, the first group of judges of the Court of Justice of the Economic Community of West African States (ECOWAS CJ) was appointed in 2001 when the court lacked any human rights jurisdiction. Since these judges were not selected because of their human rights expertise, it should not come as a surprise that the court lacked sufficient human rights expertise when member states gave the court a human rights jurisdiction in 2005.⁴³

Several handbook authors address the question of the capacity and qualification of international adjudicators. Ruth Mackenzie writes about the process of electing and selecting international judges (Ch. 34). Several chapters discuss the role of the publicly-funded international prosecutors (Kevin Jon Heller, Ch. 31), defense counsels (Kate Gibson, Ch. 32), and registries and legal secretariats (Cristina Hoss and Stephanie Cartier, Ch. 33). Leigh Swigart and Daniel Terris analyze the attributes of judges who make it through the selection process (Ch. 28). Other relevant chapters that deal with the quality of judicial structures, procedures, and outcomes include the aforementioned chapters on judicial law-making (von Bogdandy and Venzke, Ch. 23), the financing of international adjudication (Ingadottir, Ch. 27), as well as the chapters on evidence and fact-finding by Anna Riddell (Ch. 39) and inherent powers by Chester Brown (Ch. 38).

3.4 Systemic problems

A final set of challenges for international adjudication involves the effects that the empowerment of international courts and tribunals has on the unity of the international legal system. According to a number of scholars and practitioners, the rise of specialized courts contributes to “tunnel vision” types of decision, meaning rulings that consider complex problems from one perspective only or that apply one particular treaty or branch of international law without considering other relevant parts of international law. The concern is that such decisions can accelerate the fragmentation of international law, leading to different outcomes depending on the

Afghanistan: The Promise of Mixed Tribunals” (2002) 31 *Denv. J. Int’l L. & Pol’y* 23, 33; Terris, Romano, and Swigart, note 22, at 160–4; M Parish, *Mirages of International Justice: The Elusive Pursuit of a Transnational Legal Order* (Cheltenham: Edward Elgar Publishing 2011) 73–81.

⁴³ Alter et al., note 14.

venue in which a case is adjudicated and the law applied there.⁴⁴ The creation of specialized legal bodies with compulsory jurisdiction that treat a set of cases in a relatively isolated manner may render some parts of international governance more effective and legitimate compared to other areas. Still, excessive specialization might come at the expense of the broader project of international governance, which may itself become less manageable as different adjudicative bodies pull law in different directions.⁴⁵

The concern about coherence raises the ontological and sociological question of whether there is, or ever can be, a single international legal system that international courts belong to. Can or do international courts speak on behalf of the broad objective of an international rule of law? Is there an international community of legal adjudicators, or rather are these adjudicators constituent elements of specific separate regimes (e.g., trade regimes, human rights regimes)? In practice, the jury is out on these questions. Whereas decisions such as *Kadi v. Council*⁴⁶ and *Brazil—Retreaded Tyres*⁴⁷ suggest an interest in sustaining self-contained regimes and rejecting calls to coordinate different branches of law, decisions such as *Bosphorus v. Ireland*⁴⁸ and *Continental Casualty v. Argentina*⁴⁹ may be reflective of a greater interest by some judicial bodies in harmonization across different legal regimes.

The existence of numerous adjudication bodies, often exercising parallel, comparable and even overlapping jurisdictional powers, raises numerous practical concerns such as: what should be the proper division of labor between the different courts? Should the adjudication processes be synchronized? Should, for example, the WTO reject cases that were heard first in regional adjudicative systems or that could be heard in such bodies? Should actors in one set of proceedings be prevented from litigating further in other forums by the outcomes of other proceedings?

⁴⁴ See e.g., J Pauwelyn, “Fragmentation of International Law” in *Max Planck Encyclopedia of International Law* (Oxford University Press 2006); Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Analytical Study)* (UN Doc A/CN.4/L.682, 2006); see, in this handbook, Dupuy and Viñuales, Ch. 7.

⁴⁵ See G Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks” (1999) 31 N.Y.U.J. Int’l L. & Pol. 919, 925 (“The further the division of labor and specialization, the greater the need for the preservation of the unity of the whole that makes specialization possible and meaningful, but which becomes harder to maintain because of the centrifugal effects of specialization”).

⁴⁶ Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council* [2008] ECR I-6351 (rejecting a Security Council Resolution adopted in a manner that violated EU human rights standards).

⁴⁷ Case WT/DS332/AB/R *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. 07-2682 (AB Report, 2007) (rejecting a defense claim for a WTO infringement based on a Mercosur norm).

⁴⁸ *Bosphorus v. Ireland* 2005-VI ECtHR Reports 107.

⁴⁹ *Continental Casualty v. Argentine Republic*, ICSID Case no. ARB/03/9, Award (Sept. 5, 2008), at para. 192 (harmonizing necessity under the Bilateral Investment Treaty (BIT) with necessity under the General Agreement on Tariffs and Trade (GATT)). The award was upheld by an ad hoc annulment committee on September 16, 2011.

The systemic attributes of the universe of international adjudication are discussed in a number of handbook chapters. These include Cesare Romano's chapter on the shadow zones of international adjudication (Ch. 5), Karen Alter's chapter on the multiplication of international courts in the post-Cold War period (Ch. 4), and Pierre-Marie Dupuy and Jorge Viñuales's chapter on the challenge of proliferation (Ch. 7).

4 THE ACTORS INVOLVED

The different challenges presented above reveal certain tensions between the expectations from international adjudication and actual court performance. International courts and tribunals are expected to promote legitimate, effective, high quality, and comprehensive international governance, yet are perceived by some to fall short of these expectations. In actuality, however, some of the frustrated expectations are a reflection of the divergent constituency of international adjudication. International courts and tribunals serve a variety of parties—states, intergovernmental organizations (IGOs), and private litigants (e.g., corporations and individuals). Furthermore, their decisions impact a variety of third parties—non-participating states, other IGOs and, more generally, civil society. Some may be able to participate in proceedings, but some may not have had a voice during the process of adjudication.⁵⁰ Since international judicial rulings apply to countries with significant geographical, economic, and political diversity, and differing legal cultures and traditions, it is not surprising that judges fail to find solutions that please all and that there is a broad range of conflicting expectations applied to international adjudication.

One example of this tension is the well-known peace versus justice conundrum that confronts international criminal courts. One set of actors prioritizes peace-restoring measures, such as amnesties, and this objective may be in conflict with the objective of pursuing justice, which may disappoint a different set of actors. Yet a third group of actors may be focused on the long-term development of international criminal law. It may well be impossible to satisfy all of these audiences, and the effort to do so might make every audience unhappy. Another example concerns disappointment in the administration of trade law by international judicial bodies. Judges applying trade law, or adjudicating investor disputes, may generate outcomes that are at odds with values that are not fully covered by

⁵⁰ See e.g., in this handbook, Ronen and Naggan, Ch. 37.

the regime in question, such as the promotion of environmental concerns.⁵¹ Tom Ginsburg's chapter on political constraints on adjudication (Ch. 22) deals with some of these issues.

But a diversity of actors exists not only outside the judicial institution, but also inside it. An international court is a complex organization, manned by groups of individuals with distinct career paths and institutional roles and structural incentives. While, traditionally, the focus in the literature has been on judges—the “men and women who decide the world's cases”⁵²—and on their selection process, ethical commitment, different judicial roles, and the judicial strategy they employ (see e.g., Swigart and Terris, Ch. 28; Madsen, Ch. 18; and Seibert-Fohr, Ch. 35), there is increased appreciation of the function of other actors involved in the operation of the international justice machinery, such as prosecutors, counsel, and registrars (see e.g., Sthoeger and Wood, Ch. 29; Heller, Ch. 31; Gibson, Ch. 32; and Hoss and Cartier, Ch. 33).

The litigants and their legal representatives initially motivate the court to act and provide it with cases, that is, they offer it opportunities to make judicial impact. During the litigation they may open up or constrain the legal options available to the adjudicators, as litigators choose which legal arguments to pursue, populate the factual dockets and delineate the space available for judicial resolution (e.g., by agreeing or disagreeing across the aisle on law and fact). Natalie Klein (Ch. 26) examines which countries invoke international litigation; Antoine Vauchez (Ch. 30) deals with communities of international litigators, and Eran Sthoeger and Michael Wood (Ch. 29) discuss the international bar and their role in international adjudication. In some areas, the work of the legal representatives is so essential to the proper functioning of an international court and its legitimacy, so as to justify their integration into the court's structure. Thus, in the field of international criminal law, the office of the prosecutor operates as a branch of the court; and, increasingly, international criminal courts also integrate the office of defense (or public counsel) into their organizational frameworks. Kevin Jon Heller (Ch. 31) and Kate Gibson (Ch. 32) address, respectively, the role of prosecutors (from a sociological and legal perspective) and defense counsels.

The court's secretariat and registry, addressed in the handbook by Cristina Hoss and Stéphanie Cartier (Ch. 33), is another important locus of judicial-supporting activity. Not only does it provide the court with a range of legal and administrative services; the registry often serves as the court's *de facto* “foreign ministry,” responsible for many of the interactions between the court and the outer world of national and international government institutions. In busy courts, such as

⁵¹ See e.g., E Brown Weiss and J Jackson, “The Framework for Environment and Trade Disputes” in E Brown Weiss, JH Jackson, and N Bernasconi-Osterwalder (eds), *Reconciling Environment and Trade* (2nd edn, Leiden: Martinus Nijhoff 2008) 16–20.

⁵² See Terris, Romano, and Swigart, note 22.

the ECtHR and the WTO dispute settlement system, the registry (or secretariat) offers adjudicators significant assistance in formulating decisions. This service is particularly important where judges serve on the bench for a short time only, and have little, if any, institutional memory of the court.

5 THEORETICAL MODELS

One final perspective to the study of international adjudication offered in the handbook is a theoretical one. There is already a considerable body of literature which places international adjudication under tools of academic investigation developed in a variety of intellectual disciplines, including political science, political philosophy, international relations, sociology, economics, behavioral studies, and inter-disciplinary critical studies. Such disciplines provide us with rich perspectives and important insights about international adjudication. Part III of the handbook comprises chapters surveying the state of the art in applying a multiplicity of disciplines to international adjudication

Other chapters too contain important theoretical insights about international adjudication, merging legal theory and other academic disciplines. Such insights may ultimately lead to the emergence of distinct inter-disciplinary theoretical frameworks for the study of international adjudication. For example, one strand of the theoretical literature views international courts and tribunals as a particular sub-set of international organizations. Under this approach, discussed for instance in Yuval Shany's chapter on jurisdiction and admissibility (Ch. 36), delegation and consent are key determinates in understanding the legal powers and authority of international adjudication bodies. Furthermore, as discussed in José Alvarez's chapter on the functions of international adjudication (Ch. 8) international judicial functions are intertwined with those of the international regimes in which they are institutionally embedded. Thus, the study of international courts cannot be divorced from the study of international organizations—their history, legal competences, and manner of operation, as made clear by Mary-Ellen O'Connell and Lenore VanderZee's chapter on the history of international adjudication (Ch. 3), Karen Alter's analysis of the decision to add international courts to existing multilateral agreements (Ch. 4), and also Cesare Romano's chapter (Ch. 6) on the dead-ends of international adjudication.

Second, an increasingly rich body of academic literature applies theories and analytical tools developed with a view to studying the operation of domestic courts in respect of the study of international courts. These "theoretical transplants" include

the study of judicial behavior (Erik Voeten, Ch. 25) and legal sociology observations concerning the influence of the personal backgrounds of legal actors and social and political environments on the outcomes of adjudication processes (Mikael Madsen, Ch. 18).

Finally, a strand of the rational choice literature applies some distinct approaches to the relations between international courts and tribunals as well as the states and IGOs that created them. According to the principal–agent model, courts are tools in the hand of states and/or other entities that create and continue to control them in order to advance thereby their joint policy preferences; yet, under a competing trusteeship model, courts are understood as delegates no longer subject to direct state control. Such trustees are invested with considerable autonomy to decide legal issues pursuant to objective criteria, even if such decisions run contrary to the wishes of the litigating parties or the author’s original intent. Law serves under both models as a central point of reference, controlling the mutual obligations and expectations of all of the relevant actors. These different ideas are discussed by José Alvarez (Ch. 8).

To some extent, all of these theoretical directions deal with the same core questions: what renders international courts legitimate and whom do they represent? What is their role in the promotion of international governance? Are they effective? Do they attain their goals? Do they advance the cause of justice? And are they fair? All handbook chapters provide us with important information and insights that may help us in confronting these problems and developing a better understanding of the promise and limits of international adjudication.