II. Contributions from visiting professors

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - BY-NC-ND

A Taxonomy of International Rule of Law Institutions

Cesare P.R. Romano[*]

This article revises and updates a seminal article written by the author in 1998, which was the first attempt to tally how many and what kind of international courts and tribunals existed at that point in time. It contained a chart that placed international courts and tribunals in a larger context, listing them alongside quasi-judicial bodies, implementation-control and other dispute settlement bodies. The present article has three aims. The first is to provide an update, since several new bodies have been created or have become active in the last decade. The second aim is a bit more ambitious. It is time to revise some of the categories and criteria of classification used back in 1998. More than a decade of scholarship in the field by legal scholars and political scientists has made it possible to gain a better understanding of the phenomenon. The abundance of data over a sufficiently long time-span is making it possible to start moving away from a mere 'folk taxonomy' towards a more rigorous scientific classification. The hallmark of truly scientific classifications is that classifying is only the final step of a process, and a classification only the means to communicate the end results. Besides making it possible to discover and describe, scientific classifications crucially enable prediction of new entities and categories. Thus, the third aim of this article is to attempt to discern some trends and make some predictions about future developments in this increasingly relevant field of international law and relations.

Order and simplification are the first steps toward the mastery of a subject.
Thomas Mann

Order is the shape upon which beauty depends.
Pearl S. Buck

It has often been said that one of the most remarkable features of international law and relations since the end of the Cold War has been the rapid

[*] Professor of Law and W. Joseph Ford Fellow, Loyola Law School Los Angeles; Co-Director Project on International Courts and Tribunals. Email: cesare.romano@lls.edu.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

multiplication of international institutions controlling implementation of international law and/or settling disputes arising out of its interpretation and implementation. Yet, the sheer dimensions of the phenomenon, with well over 142 bodies and procedures, has defied many attempts to comprehensively map this fast growing sector of international relations.

This article revises and updates an article I wrote in 1998 and published in the NYU Journal of International Law and Politics.[1] That article, entitled 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', was the first attempt to tally how many and what kind of international courts and tribunals existed at that point in time. It contained a Synoptic Chart that placed international courts and tribunals in a larger context, listing them alongside quasi-judicial bodies, implementation-control and other dispute settlement bodies.[2] The Synoptic Chart was also diachronic; it included bodies that once existed but that had ceased operations or were terminated, bodies that had been long dormant, and also bodies that had just been proposed.

The Synoptic Chart, which was prepared for the Project on International Courts and Tribunals (PICT), has since been updated three times, the last of which in November 2004,[3] and has been cited and reproduced in several articles and books since.[4] Every scholar who has ventured, or will venture, in the field of international courts and tribunals at some point had to grapple with the preliminary question of demarcating the scope of their research and pinpoint exactly which intuitions and bodies were to be considered. This article aims to provide an updated and improved taxonomy of bodies in the field.

This article has three aims. The first is limited. As we just said, since several new bodies have been created or have become active since it was published, an update is overdue. The second aim is a bit more ambitious. It is time to revise some of the categories and criteria of classification used back in 1998. More than a decade of scholarship in the field by legal scholars and political scientists has made possible a better understanding of the phenomenon. The abundance of data over a sufficiently long time-span is making it possible to start moving away from a mere 'folk

1 Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU J Intl L Pol 709–51.

2 Ibid. 718–19.

3 PICT <http://www.pict-pcti.org/publications/synoptic_chart.html> accessed 24 November 2010.

4 See eg Jose' E Alvarez, *International Organizations as Law-Makers* (OUP, Oxford 2005) 404–07.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

taxonomy'[5] towards a more rigorous scientific classification. The hallmark of truly scientific classifications is that classifying is only the final step of a process, and a classification only the means to communicate the end results. Besides making it possible to discover and describe, scientific classifications crucially enable prediction of new entities and categories. Thus, the third aim of this article is to attempt to discern some trends and make some predictions about future developments in this increasingly relevant field of international law and relations.

1. *Classification, Typology and Taxonomy*

Since the dawn of time, humans have tried to make sense and understand the world around them by arrangement or ordering of objects and ideas in homogeneous categories that could be juxtaposed or put in relation with one another. It is ingrained in our nature. Almost anything – animate objects, inanimate objects, places, concepts, events, properties and relationships – may be classified according to some scheme. We use classification in every aspect of our lives. When we go to the supermarket for oranges, we know we are on the right track when we can see vegetables. When our email inbox starts to get overwhelmed with emails, we create named subfolders and sort our emails into them for ease of retrieval later. Yet, while classification, and the science of it, is arguably one of the most central and generic of all conceptual exercises, it is also one of the most underrated and least understood.[6]

---

5 A folk taxonomy is a vernacular naming system, and can be contrasted with scientific taxonomy. Folk biological classification is the way people make sense of and organize their natural surroundings/the world around them, typically making generous use of form taxa like 'shrubs', 'bugs', 'ducks', 'ungulates' and the likes. Astrology is a folk taxonomy, while astronomy uses a scientific classification system, although both involve observations of the stars and celestial bodies and both terms seem equally scientific, with the former meaning 'the teachings about the stars' and the latter 'the rules about the stars'. Folk taxonomies are generated from social knowledge and are used in everyday speech. They are distinguished from scientific taxonomies that claim to be disembedded from social relations and thus objective and universal.

6 Kenneth Bailey, *Typologies and Taxonomies: An Introduction to Classification Techniques* (Thousand Oaks, California: Sage Publications 1994) 1–2. See also, in general, Geoffrey Bowker and Susan Leigh Star, *Sorting Things Out: Classification and its Consequences* (Boston, MIT Press 1999).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

In its simplest form, classification is defined as the ordering of entities into groups or classes on the basis of their similarity.[7] Statistically speaking, we generally seek to minimize within-group variance, while maximizing between-group variance.[8] We arrange a set of entities into groups, so that each group is as different as possible from all others, but each group is internally as homogeneous as possible.[9]

Taxonomy and typology are both forms of classification, and in fact they are terms often used interchangeably.[10] But if one was to find a fundamental difference between the two, it is that while the term typology tends to be used in social sciences, the term taxonomy is more generally used in biological sciences.[11] While typologies tend to be conceptual, taxonomies tend to be empirical.[12] Since this article carries out a rather empirical classification of international bodies, and we rely on the categories of the Linnaean classification, we will call this exercise a taxonomy of international rule of law bodies, not a typology. Still, one could call this exercise a typology, too.

Taxonomies use taxonomic units, known as taxa (singular taxon). A taxonomic scheme ('the taxonomy of...') is a particular classification. In a taxonomic scheme, typically taxa (categories) are arranged hierarchically, by 'super-taxon/sub-taxon' relationships. In these generalization-specialization relationships (or less formally, parent-child relationships) the sub-taxon has all the same properties, behaviours and constraints as the super-taxon, plus one or more additional properties, behaviours or constraints, which differentiate it from the other taxa. The utility of taxonomies is thus that they make it possible to immediately grasp the essential traits of the classified object by simply knowing in which category and with which other objects it has been grouped. The progress of reasoning proceeds from the general to the more specific when descending the hierarchy, and the opposite when ascending. For example, a bicycle is a subtype of two-wheeled vehicle. While every bicycle is a two-wheeled vehicle, not every two-wheeled vehicle is a bicycle, since there are also motorcycles, scooters, tandems and the like. Going up the hierarchical tree, a two-wheeled vehicle is a sub-type of vehicle, but not the only one, as there are also airplanes, animal traction vehicles and so on.

---

7 Bailey, ibid. 1.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

The biological classification, sometimes known as 'Linnaean taxonomy', from its inventor, Carl Linnaeus, brought order in the seemingly chaotic complexity of life on our planet, and was the essential pre-requisite for the development of numerous branches of science, starting with the theory of evolution. Famously, the ranks of the Linnaean taxonomy are, in increasing order of specificity: Kingdom, Phylum, Class, Order, Family, Genus and Species. When needed in biological taxonomy, intermediary taxa, such as Super-Families or Sub-Species, are also resorted to.

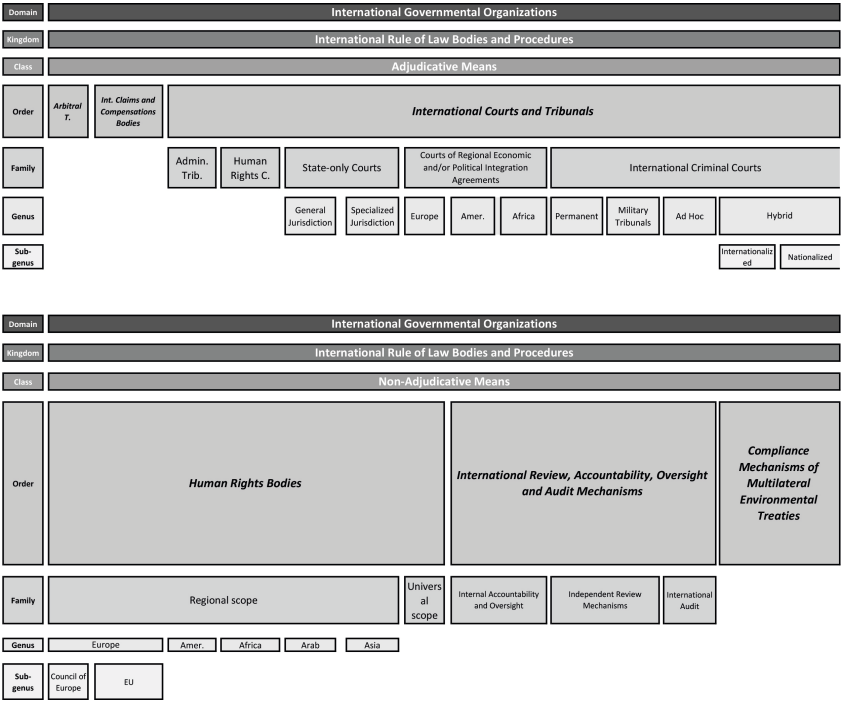
If we apply the nomenclature of the 'Linnaean taxonomy' to international courts and tribunals, a classification, from the most specific to the broadest category, might look like this:

Species: Special Court for Sierra Leone
Sub-genus: International
Genus: Hybrid criminal courts
Family: International criminal courts
Order: International Courts and Tribunals
Class: International Adjudicative Bodies
Kingdom: International Rule of Law Bodies and Procedures
Domain: International Governmental Organizations

A whole taxonomical scheme would look like this (Figure 1).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

Fig. 1. A Taxonomy of International Rule of Law Institutions and Procedures



Again, anything can be classified according to countless criteria. Other scholars might put forward equally valid classifications, and surely the various categories could be named in other ways (e.g. Level 1, 2, 3 etc.). However, because the Linnaean taxonomy is still the most widely known form of taxonomy, I find it expedient to adopt it when classifying international bodies. The only deviation is that I will not use the term 'species' that sounds exceedingly naturalistic, but rather the generic term 'body' to indicate the various courts, tribunals, procedures and the like considered in this classification.

The basic rule of all forms of classification is that classes (taxa) must be both exhaustive and mutually exclusive.[13] If N entities are to be classified, there must be an appropriate class for each (exhaustivity), but only one correct class for each, with no entity being a member of two classes (mutu-

13 Ibid. 3.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

al exclusivity). Thus, in the ideal classification, there must be one class (but only one) for each of the N persons.

However, this is most definitively not an ideal classification. The rules of classification must be applied with a minimum degree of flexibility, if one is to produce a classification that is still minimally meaningful to those in the field. Indeed, the chosen field presents significant classification challenges. Some bodies might simply not perfectly fit the various categories. Some might fit two or more separate categories. For instance, the Caribbean Court of Justice (CCJ) is unique because it has both original and appellate jurisdiction. In its original jurisdiction, the CCJ is responsible for interpreting the Revised Treaty of Chaguaramas that establishes the Caribbean Community Single Market and Economy. Thus, when acting in that capacity, it would be classified in the family of 'Courts of Regional Economic and/or Political Integration'. Yet, the CCJ is also a sort of national court, therefore falling outside the scope of this classification, as it is the common final court of appeal for those states which have accepted its jurisdiction (at the moment, Guyana and Barbados).

Other international courts straddle categories in other ways. The adjudicative body of the Organization for the Harmonization of Business Law in Africa (OHADA), a regional economic integration organization, is the OHADA Common Court of Justice and Arbitration. It can be classified in multiple taxa because it has multiple functions. First, it provides advice to the Council of Justice and Financial Ministers on proposed uniform laws before they are adopted by it. Second, it acts as court of cassation common to OHADA members, in place of national courts of cassation, on all issues concerning OHADA laws. Third, it monitors and facilitates arbitrations: it appoints arbitrators when they cannot be chosen by the parties; it monitors the proceedings so as to ensure their impartiality; and it reviews the arbitral awards before they are rendered, without having the power to impose changes on their substance.

Otherwise, consider the future African Court of Justice and Human Rights, the result of the merger between a human rights court (i.e. African Court of Human and Peoples' Rights) and a court of a regional economic and political integration agreement (i.e. the Court of Justice of the African Union). How should it be classified?

Bodies can straddle different orders. For example, the World Trade Organization (WTO) and Mercosur (Mercado Comu´n del Sur) dispute settlement machineries have a two-level structure: an arbitral panel, as first instance of jurisdiction, and an appellate body. The first level of jurisdiction fits the order of Arbitral Tribunals, but the appellate level falls in the

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

order of International Courts and Tribunals, and specifically the family of State-only Courts and the Genus of Courts with Specialized Jurisdiction.

Finally, some courts might fit in either family depending of what jurisdiction they exercise. Consider, for example, the Court of Justice of the Economic Community of Western African States (ECOWAS). It is, in essence, a court of a regional economic integration agreement, similar to the European Court of Justice. However, in recent years it has ruled on human rights issues, mimicking a human rights court. The European Court of Justice, now called the Court of Justice of the European Union, once it starts exercising jurisdiction over the European Charter of Fundamental Rights, will take on functions of a proper human rights court too.

Some bodies can concurrently be International Administrative Tribunals whenever they, or special courts or chambers within them, are endowed with jurisdiction to hear employment disputes between the organization and its employees, and Court of Regional Economic and/or Political Integration Agreements. Thus, until 2004 in the European Community/Union, the Court of First Instance exercised jurisdiction over administrative matters. The Central American Court of Justice has appellate and last instance jurisdiction for disputes concerning administrative acts of the organs of the Central American Integration System that affect the organization's employees.

One final caveat. As in the case of the original Synoptic Chart, I tried to be as exhaustive as possible. However, it is no attempt to classify all international organizations, not even just international governmental or intergovernmental organizations. It is too vast a world. The Yearbook of International Organizations lists almost 2,000 entities.[14] The main focus of this article is international courts and tribunals; but to shed some light on their nature, it is also necessary to zoom out and place them in a wider context. But even that might be too ambitious. Like any classification, this is a work in progress; one that could strive to completeness only through the contribution of all in the field.[15]

---

14 This is the sum of 'conventional international bodies' (245 = Federations of international organizations, universal membership organizations; intercontinental membership organizations; regionally oriented membership organizations) and 'other international bodies' (1743 = organizations emanating from places, persons, or bodies; organizations of special form; internationally oriented organizations). Yearbook of International Organizations (Brussels, Union of International Associations, 2004/2005), Number of International Organizations in this Edition by Type, app 3, Table 1.

15 Please, send corrections additions or comments to cesare.romano@lls.edu.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

A. Domain: International Governmental Organizations

The beginning point of our taxonomy is the Domain of International Governmental Organizations (also referred to as Intergovernmental Organizations). Of course one could begin even higher in an ideal taxonomical scheme. For instance, one could conceive of a generically labelled 'International Organizations' group that would comprise several separate domains, one of which would be 'International Governmental Organizations'. But there would also be several other separate domains, one of which would certainly be 'Non-Governmental Organizations' that would branch out into 'non-profit organizations' and 'for-profit organizations', and so on. However, that would take us too far from the object of this taxonomy.

All international governmental organizations share three fundamental characteristics. They are:

(i) Associations of states and/or other international governmental organizations;
(ii) established by a treaty or other instruments governed by international law; and
(iii) capable of generating through their organs an autonomous will distinct from the will of its members.[16]

The first criterion needs little explanation. The parties to the constitutive instruments of the organizations in question are a state and/or another intergovernmental organization. While members of international organizations are predominantly States, international organizations themselves have become increasingly active as founders and/or members of other organizations. For instance, the European (Economic) Community (EC), an international governmental organization, although one of a special kind, which sometimes is referred to as 'supra-national organization', is a founding member of the WTO and a member of the Food and Agriculture Organization of the United Nations. None of the bodies considered in this classification has as parties to their statute entities other than sovereign states or international governmental organizations.

Second, all international governmental organizations are established by an international legal instrument. This legal instrument is exclusively

16 Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' MPEPIL (3rd edn), s A2. The International Law Commission also adds that they are 'possessing ... own legal personality'. International Law Commission 'Report of the International Law Commission, Fifty-fifth Session' [5 May-6 July and 7 July-8 August 2003] GAOR 58th Session Supp 10, 38.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

governed by international law. Typically, this is a treaty. The Rome Statute of the International Criminal Court is an example. Similar constitutive instruments are subject to ratification and confirmation by States and international organizations seeking membership, respectively.[17] However, it can also be an international legal instrument deriving its force from a treaty. For instance, the ad hoc international criminal tribunals for Yugoslavia and Rwanda were established by Security Council Resolutions, deriving their force ultimately from Chapter VII of the Charter of the United Nations.[18] Likewise, the Court of First Instance of the European Communities was originally established by a decision of the Council of Ministers,[19] whose authority to issue such decisions ultimately rested on the EC treaties. Similarly, the hybrid criminal courts established in Kosovo and East Timor, were established by Regulations issued by the Special Representative of the Secretary General.[20] The authority of similar regulations rests on UN Security Council Resolutions.[21]

It should be noted that this does not mean that International rule of Law Bodies and Procedures must have been established *solely* by an international legal instrument. For instance, the genus of hybrid criminal courts, comprises bodies that have been established both by an international legal instrument, such as a treaty, and by national law.

Finally, the third fundamental criterion of this Domain is that organizations and/or bodies must be capable of generating through their organs an autonomous will distinct from the will of their members. This helps distinguish intergovernmental organizations from other forms of multilateral policy-making. For instance, the so-called Group of Eight (G8) is, however influential it might be, is just a periodic meeting of head of states of eight states, not an international governmental organization. There is

---

17 Sometimes international governmental organizations are simply created by governmental consensus reached at international conferences (eg Organization of the Petroleum Exporting Countries (OPEC)) or by a decision of an international organization (eg United Nations Industrial Development Organization (UNIDO) created by United Nations General Assembly Resolution 35/96 of 13 December 1979).

18 The Statute of the ICTY was adopted by UN Security Council Resolution 827 (1993). The one for Rwanda was UN Sec Res 955 (1994).

19 Decision of the Council of Ministers (EC) 88/591 (24 October 1988) [1988] OJ No 88/L319/1 (25 November 1988) vol 31, 1.

20 In the case of East Timor, Reg 2000/11. In the case of Kosovo, Reg 2000/34 and 2000/64.

21 Res 1272 of 25 October 1999 and the United Nations Mission in Kosovo (UNMIK) through Res 1244 of 10 June 1999.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

no permanent structure. Joint declarations of the G8 are not an expression of the group itself but rather consolidated statements of the Heads of State and Government.[22] The decision of an international court or tribunal, reached by a group of independent judges, who do not represent the states that appointed them or whose nationality they have, is an expression of such an independent will. As a matter of fact, the will of international courts and tribunals can be so independent as to challenge directly major interests of states that create and fund them.

B. Kingdom: International Rule of Law Bodies and Procedures

Continuing with the nomenclature of the Linnaean taxonomy, the Domain of International Governmental Organizations can be broken down into several sub-types, called Kingdoms. One of those could be dubbed 'International Rule of Law Bodies and Procedures'.[23]

All bodies within this Kingdom share the fundamental traits of the Domain of International Governmental Organizations, but what characterizes bodies within this Kingdom and separates them from other kingdoms are three further criteria:

---

22 Ina Gätzschmann, 'Group of Eight (G8)' MPEPIL (3rd edn).

23 The rise of this kingdom amongst international organizations has been dubbed the 'legalization of world politics.' Kenneth Abbott and others, 'The Concept of Legalization' (2000) 54 Intl Org. It has been noted that since the end of the Second World War, through the signing of an array of treaties and the delegation of decision-making powers to international agencies, states have accepted a growing number of international legal obligations, with three key characteristics. First, states' behaviour is increasingly subject to scrutiny under the general rules, procedures and discourse of international law, and often domestic law as well. Second, these rules are increasingly precise in the conduct they require, authorize or proscribe. Third, and this goes to the core of the phenomenon of the multiplication of international institutions referred to at the beginning of this article, the authority to implement, interpret and apply those rules, and to create further rules and/or settle disputes arising out of their implementation, is often delegated. These three phenomena (obligation, precision and delegation) are the 'three dimensions' of the so-called 'legalization of world politics'. International courts and tribunals are a specific aspect of the larger phenomenon of the legalization of world politics; a phenomenon that could be called the 'judicialization of world politics'. Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge* (Oxford, OUP 2007) 6. The 'judicialization of world politics' is characterized by a high degree of delegation.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

(iv) They apply international legal standards;
(v) act on the basis of pre-determined rules of procedure;
(vi) at least one of the parties to the cases they decide, or situation they consider, is a State or an international organization.

Broadly speaking, entities within this Kingdom are the incarnation of a widely shared aspiration to abandon a world where only sovereign states matter, in favour of an order where fundamental common values are shared, protected and enforced by all members of a wider society, composed not only of states but also of international organizations and individuals, in all of their legal incarnations.

More specifically, all bodies in this kingdom, when applying international legal standards and pre-determined rules of procedure, act 'under the shadow of the law'.[24] This is a crucial distinction. For instance, while both the International Court of Justice (ICJ) and the UN Security Council or the Organization for Security and Cooperation in Europe or the Assembly of the African Union engage in international dispute settlement, it is only the ICJ that does so being guided mostly, if not solely, by legal considerations. This is why the ICJ is classified here as an 'International Rule of Law' body and the others are not, although the others might ensure that the rule of law is respected by enforcing international law.

As to the first criterion, in general, bodies within this Kingdom carry out two basic functions: monitoring compliance with international law, and/or settling disputes arising out of the implementation or interpretation of those standards. All organizations and bodies belonging to this Kingdom rely on international law to carry out their functions, be that verifying compliance with international standards or settling disputes. Specifically, substantive law and procedural law used by international courts and tribunals is international law, not the domestic laws of any given state. Be that as it may, it should be noted that to meet this requirement international rule of law bodies do not need to rely *solely* on international law. For instance, sometimes international courts might apply, besides international law, other bodies of law. To wit, hybrid international criminal courts, like the Special Court for Sierra Leone, can apply, besides international law, the criminal laws of the country in which they have been set up.

Second, they act on the basis of rules of procedure that are abstract, being set before the arising of any case or situation, and are public. Most of

24 Jose' E Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 Texas Intl L J; Alvarez (n 4).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

the time, it is the bodies themselves that are given the power to draft their own rules of procedure; sometimes they are not. But the point is that the parties to the case, dispute or situation under scrutiny, do not have control over them. There are some limited exceptions, though. For instance, in certain instances, the parties might have some limited control over the way in which an adjudicative body proceeds. In international arbitration, the parties are believed to have complete control over which rules of procedure the arbitral tribunal will apply. In reality that is not completely true. More often than not, the parties either select 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 and adopting them to the arbitrators. Rarely, if ever, do the parties themselves draft rules of procedure *ad hoc*.

Third, the last criterion is that all bodies belonging to this kingdom handle situations, where at least one of the parties is a State or an international governmental organization. This criterion is self-explanatory. It just requires a clarification for what concerns international criminal courts. Bodies within this family try cases where an individual is the defendant. States cannot be charged with international crimes, yet.[25] Prosecution is done by an organ of the criminal court or tribunal in question, called 'Office of the Prosecutor' that is an organ of an international organization or agency. In this sense, the family of international criminal courts satisfies this criterion.

This last criterion separates this Kingdom from national courts or arbitral tribunals deciding cases of commercial disputes between entities located in different jurisdictions. Thus, the International Chamber of Commerce, the London Chamber of Commerce or the Stockholm Chamber of Commerce, all institutions that facilitate international commercial arbitration, do not belong to this grouping. Even though they are well-established institutions of international repute and usefulness, they handle only disputes between private parties. Nor, for that matter, have they been established by treaty. Rather, they are incorporated in the national legal system of certain states (i.e. France, UK and Sweden).

Finally, as every other criterion, this one, too, must be applied with a minimum degree of flexibility. For instance, while the Permanent Court of Arbitration mostly facilitates the settling of disputes between states or

25 Derek Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility' (1998) 9 EJIL 163–73.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

states and private individuals, sometimes it facilitates the settlement of disputes between private parties, too.

C. Class: Adjudicative Means

The Kingdom of International Rule of Law Bodies and Procedures can be divided in at least two distinct classes:

- Adjudicative Means and
- Non-Adjudicative Means

All organizations and bodies belonging to the Adjudicative Means class share all the traits of those belonging to the super-types (i.e. the Domain of International Governmental Organizations and the Kingdom of International Rule of Law Bodies and Procedures), but what sets the Class of Adjudicative Means apart from the class of Non-Adjudicative Means are two features.

(vii) They produce binding outcomes;
(viii) They are composed of independent members.

First, the decisions of the organizations and bodies belonging to the Adjudicative Means class are binding, legally binding. It means that the outcome of the process, be it called decision, award, report or otherwise creates a new legal obligation on the parties, namely compliance with the outcome. Conversely, the outcome of Non-Adjudicative Means is not legally binding. They are just recommendations that the parties are free to adopt or reject. Granted, certain international courts, besides issuing binding judgments, sometimes also have the power to act in a non-binding fashion. For example, the International Court of Justice can issue advisory opinions that are not binding. Yet, advisory jurisdiction is not the only, nor the most important, jurisdiction it has. Most of the time, the ICJ issues binding judgments in contentious cases. Also, recommendations of some of the non-adjudicative means, such as the findings of the Inter-American Commission on Human Rights, or the World Bank Inspection Panel, or the implementation committee of any of the major environmental treaties, carry significant weight and can be authoritative. Still, they are not legally binding.

Second, they are composed by individuals who serve in their own personal capacity and do not represent any state. These individuals are called judges, in the case of international courts and tribunals, arbitrators, in the case of arbitral tribunals, or experts or just plainly members, in the

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

case of bodies monitoring compliance with international legal regimes.[26] These individuals are required to possess at a minimum integrity, often high moral character, and specific professional qualifications such as, in the case of the major international courts and tribunals, those for appointment to the highest judicial office in their own countries, or be experts of recognized competence in the applicable law areas.

Again, the requirement of independence should be understood properly. It does not mean that the parties do not have control over who is nominated to serve in these bodies, or the composition of the body, or the composition of the particular bench, chamber or panel that decides the matter. Members of bodies within this Class are always nominated by governments and selected through various mechanisms to serve. In arbitration, parties have a large control over the composition of the panel, although in most cases it is not a total control. An arbitral tribunal is normally composed of an odd number of arbitrators. Each party selects an equal number and then the party-appointed arbitrators are often given the power to pick an umpire, chair or president. Even in the case of some international courts and tribunals, the parties can have a degree of control over the composition of the bench that will decide a case to which they are party. For instance, in the International Court of Justice, if the parties agree, they can have the case heard by a selected group of judges (a 'chamber', in ICJ jargon) rather than the full court. Or, if a judge of their nationality is not sitting on the bench, they can appoint a judge ad hoc. But, these considerations notwithstanding, members of bodies belonging to this Class, once appointed, are required to act independently.

Before continuing descending the lineage towards the Order international courts and tribunals, the focus of this article, it is necessary to discuss briefly the Class of Non-Adjudicative Means, since the bodies in this Class play an important and growing role, in international law and relations.

26 The exception to the rule that members of international courts and tribunals are called judges is the WTO Appellate Body, whose members are just called 'members. This is due to the fact that historically, the WTO and its members have resisted characterizing the WTO Appellate Body as a judicial body, mostly for fear of losing control over it.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

D. Class: Non-Adjudicative Means

All bodies in the class of Non-Adjudicative Means share the trait of producing outcomes that are not binding. They are called 'reports' or 'recommendations' and do not create a legal obligation on their recipients, who remain free to adopt or ignore them. Some of them might be composed of independent members, an essential trait of the Adjudicative Means class, but not all do. Some might be composed of governmental representatives.[27]

Thus, the UN Human Rights Council, or the United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee on Conventions and Recommendations belong to the class of Non-Adjudicative Means because they are composed of States' representatives and not independent experts and because they issue non-binding reports. The Inter-American Commission of Human Rights is composed of independent experts but still the outcome of its work is a non-binding report, not a binding decision.

The Non-Adjudicative Means class is composed of at least three distinct Orders, which can be divided in Families, Genera and Sub-Genera, totaling about 75 bodies, procedures and mechanisms currently active:

(a) Human Rights Bodies
- Bodies with Universal Scope
- Bodies with Regional Scope
  - Europe
    - European Union
    - Council of Europe
  - Americas
  - Africa
  - Arab Countries
  - Asia-Pacific

27 Some are composed of representatives of governments but also representatives of non-governmental organizations, such as trade unions or employers' organizations. This is the case of the International Labour Organization bodies such as the ILO Committee of Experts on the Application of Conventions and Recommendations; ILO Conference Committee on the Application of Conventions; ILO Governing Body Committee on Freedom of Association.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

(b) International Review, Accountability, Oversight and Audit Mechanisms
- Independent Review Mechanisms
- Internal Accountability and Oversight
- International Audit

(c) Compliance Mechanisms of Multilateral Environmental Agreements.

(a) Human Rights Bodies: bodies of this Order are made of independent experts whose general mandate is to monitor compliance by States, party to human rights treaties, with their obligations to respect and ensure the rights set forth therein. In particular, the two main functions they carry out are examining:

Reports that States must regularly file about their implementation of the rights contained in the relevant human rights treaties; and 'considering communications'[28] by individuals alleging violations of human rights treaties by states party;

From time to time, these bodies also consider communications by a State or a group of States against another State alleging breach(es) of relevant human rights treaty obligations;[29] and prepare commentaries to the relevant human rights instruments.

Human Rights Bodies are a large Order, comprising at least 33 bodies currently in operation plus several more that have been discontinued. This large Order could be broken down in several sub families. One possible way of sub-categorizing these bodies would be dividing them between bodies of regional governmental organizations (and then dividing them into genera corresponding to the major regions) and all bodies belonging to international organizations with a global scope (i.e. 'Universal Bodies'). Another way would be to differentiate between bodies that have compulsory jurisdiction from those whose jurisdiction is optional. Compulsory

28 In UN practice, complaints of violations of human rights obligations are generally referred to as 'communications', while the regional human rights systems speak of 'petitions', 'denunciations', 'complaints' or 'communications'.

29 The inter-state human rights complaints mechanism has never been used at the global level. At the regional level, the former European Commission of Human Rights dealt with 17 inter-State cases until it was disbanded in 1998. The European Commission referred to the European Court of Human Rights one case before and three cases after the entry into force of Protocol No 11. The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights have each heard one such case.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

jurisdiction means that States Parties by ratifying the convention have accepted the competency of the body to receive complaints, whereas optional jurisdiction requires a separate declaration, or ratification of a special protocol, by the States in question. At the global level, only the Commission on the Elimination of Racial Discrimination enjoys compulsory jurisdiction, while the jurisdiction of the other human rights treaties is optional.

A number of non-adjudicative mechanisms may be listed. The list which follows notes the year in which each mechanism began operating:

- Bodies with Universal Scope
  1. ILO Commission of Inquiry (1919)
  2. ILO Committee of Experts on the Application of Conventions and Recommendations (1926)
  3. ILO Conference Committee on the Application of Conventions (1926)
  4. (UN) Commission on the Status of Women (1946)
  5. ILO Governing Body Committee on Freedom of Association (1950)
  6. (UN) Committee on the Elimination of Racial Discrimination (1969)
  7. (UN) Human Rights Committee (1976)
  8. UNESCO Committee on Conventions and Recommendations (1978)
  9. (UN) Committee on the Elimination of All Forms of Discrimination Against Women (1981)
  10. (UN) Committee on the Elimination of Discrimination against Women (1982)
  11. (UN) Committee on Economic, Social and Cultural Rights (1987)
  12. (UN) Committee Against Torture (1987)
  13. (UN) Committee on the Rights of the Child (1990)
  14. International Humanitarian Fact-Finding Commission (1992)
  15. (UN) Committee on Migrant Workers (2004)
  16. (UN) Committee on the Rights of Persons with Disabilities (2008)
- Bodies with Regional Scope
  - o Europe
    - Council of Europe
  17. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989)
  18. European Commission Against Racism and Intolerance (1993)
  19. European Committee of Social Rights (1998)

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

20. Council of Europe European Commissioner for Human Rights (1999)
21. Committee of Expert on Issues Pertaining to the Framework Convention for the Protection of National Minorities (2005)
22. Group of Experts on Action against Trafficking Human Beings (2009)
    - European Union
23. European Ombudsman (1992)
24. European Union Agency for Fundamental Rights (2007)
    o Americas
25. Inter-American Commission of Women (1948)[30]
26. Inter-American Commission on Human Rights (1979)
27. Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities (2007)
    o Africa
28. African Commission on Human and Peoples' Rights (1987)
29. The African Committee of Experts on the Rights and Welfare of the Child (2002)
    o Arab Countries
30. Arab Commission of Human Rights (1968)
31. Arab Human Rights Committee (2009)
    o Asia-Pacific
32. ASEAN Intergovernmental Commission on Human Rights (2009)

Also, it should be taken into account that some thematic rapporteurs or working groups appointed by the United Nation Human Rights Council may also accept complaints about violations of specific human rights. For instance, this is the case of the Working Group on Disappearances; the Working Group on Arbitrary Detention; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also bases her work on the receipt of communications as does the Special Rapporteur on Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous

30 The Inter-American Commission of Women was created at the Sixth International Conference of American States (Havana, 1928) to prepare 'juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political equality of women in the continent'. However, it is only the Ninth International Conference of American States (Bogota´, 1948) that approved the first Statute of the Commission, which consolidated its structure and authorized the Secretary General of the Organization of American States to establish the Permanent Secretariat of the Commission.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

Products and Wastes on the Enjoyment of Human Rights. If these were added, the list would be even longer.

(b) International Review, Accountability, Oversight and Audit Mechanisms: bodies within this Order are internal organs or divisions or mechanisms of international organization, particularly those with large budgets or that disburse large quantities of funds. They ensure the compliance with organizations' policies and integrity of the organizations' activity. One could distinguish at least three Families of such bodies.

- Independent review mechanisms: These allow individuals, groups and other civil-society stakeholders harmed by international development banks' projects to allege that the institution failed to comply with its own policies and procedures in pursuing a particular development project. They are designed to provide mediation and compliance review services to stake- holders regarding banks' projects in both the public and private sectors.
  1. World Bank Inspection Panel (1994)
  2. Inter-American Development Bank Independent Investigation Mechanism (1995)
  3. Asian Development Bank Inspection Policy (1995)
  4. Office of the Compliance Advisor/Ombudsman for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) (1999)
  5. Asian Development Bank Accountability Mechanism (2003)
  6. Independent Recourse Mechanism of the European Bank for Reconstruction and Development (2003)
  7. African Development Bank's Independent Review Mechanism (2004)
- Internal Accountability and Oversight: These are divisions within international organizations that are responsible for ensuring the integrity of an organization's activities. To further this goal, the divisions are typically responsible for investigating allegations of corruption, fraud or staff misconduct; and promoting a professional culture denouncing these practices amongst the Bank staff and the regional member countries. These bodies report their findings to the head of the organization (e.g. the Bank's President), who ultimately decides whether the investigation confirms the claims filed.

Although the Independent Review Mechanisms and the Internal Accountability and Oversight bodies and processes are related, they are made to address different types of grievances. The former address the organizations'

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

actions, while the latter address individuals' (within the bank or outside the bank) actions.

Examples of Internal Accountability and Oversight bodies and processes are:

8. Office of the Chief Compliance Officer of the European Bank of Reconstruction and Development
9. Integrity Division of the Office of the Auditor General of the Asian Development Bank (1999)
10. World Bank Group Department of Institutional Integrity (1999)
11. Office of Audit and Oversight of the International Fund for Agricultural Development (2000)
12. Black Sea Trade and Development Bank Procedure for the Receipt, Retention and Treatment of Complaints (2001)
13. Oversight Committee on Fraud and Corruption of the Inter-American Development Bank (2001)
14. Inter-American Development Bank Office of Institutional Integrity (2004)
15. Anti-Corruption and Fraud Division of the Office of the Auditor General of the African Development Bank (2005)

- International Audit: these are internal control bodies of international governmental organizations that check that the organization's funds are actually received, correctly accounted for and spent in compliance with the rules and legislation. The results of these bodies' work, published in reports, are used by the main organs of the organization as well as by Member States, to improve the financial management of the organizations. Examples of these bodies are:

16. European Court of Auditors (1977)
17. United Nations Office of Internal Oversight Services (1994)
18. Court of Auditors of the West African Economic and Monetary Union (2000)

The Court of Auditors of the West African Economic and Monetary Union and the European Court of Auditors are not quite international courts, despite the appellation. They do not formally adjudicate. Sometimes, as in the case of the European Court of Auditors, they may be called upon to provide opinions on new or updated legislation with a financial impact.

(c) Compliance mechanisms of multilateral environmental agreements: the bodies of this Family share the common goal of furthering the implementation of the relevant environmental agreements. To this end, and

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

similarly to what Human Rights Bodies do, they carry out two main functions within international environmental regimes. First, they consider periodic reports by states about the measures they took to implement obligations contained in the relevant treaties and, second, they consider cases of alleged non-compliance. They are 'non-confrontational, non-judicial and consultative in nature'.[31] In most cases, they are made of representatives of states, even though, sometimes they might be bound to 'serve objectively and in the best interest of the Convention'.[32] However, in few significant cases, such as, for instance that of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), they are made of independent experts serving in their personal capacity. Bodies made of independent experts acting in their personal capacity approximate in nature and operation adjudicative means, to the point that sometimes they have been referred to as quasi-judicial bodies. In any event, their decisions are never binding but only reports transmitted to either the conference of all parties to the relevant treaty or a special subset (e.g. a Compliance Committee). This makes them a substantially different breed from adjudicative mechanisms.

Most major international environmental regimes that have been created since the 1990s feature one of these bodies or procedures. Several of those created before 1990 were retrofitted with similar bodies and procedures. A non- exhaustive list would include:

1. Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer (1990)
2. IMO Sub-committee on Flag State Implementation (1992)
3. Implementation Committee of the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution (1997)
4. Kyoto Protocol Compliance System (1997)
5. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)

---

31 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447; 38 ILM 517 (1999) art 15.

32 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 126; 28 ILM 657 (1989). Decision VI/12 on Establishment of a Mechanism for Promoting Implementation and Compliance, doc UNEP/CHW.6/40 (10 February 2003) Annex, para. 5.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

6. Multilateral Consultative Process for the United Nations Climate Change Convention (1998)
7. Stockholm Convention on Persistent Organic Pollutants (2001)
8. Convention on the Protection of the Alps and its Protocols (2002)
9. Committee for the Review of the Implementation of the Desertification Convention (2002)
10. Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal Compliance Committee (2003)
11. Espoo Convention on Environmental impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment (2003)
12. Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Compliance Committee (2003)
13. 2003 Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention
14. Compliance Committee of the Cartagena Protocol on Biosafety (2005)
15. International Treaty on Plant and Genetic Resources for Food and Agriculture (2006)
16. 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter (2007)
17. Barcelona Convention on the Protection of the Mediterranean Sea and its Protocols (2008)
18. 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (2008)

E. Orders of International Courts and Tribunals, Arbitral Tribunals and International Claims and Compensations Bodies

The Class of 'International Adjudicative Means' can be divided in at least three distinct Orders:

(a) International Courts and Tribunals
(b) Arbitral Tribunals
(c) International Claims and Compensations Bodies

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

(a) International Courts and Tribunals: all bodies within the Order of International Courts and Tribunals share seven fundamental traits.[33] They:

(i) have been established by an international legal instrument;
(ii) rely on international law as applicable law;
(iii) decide cases on the basis of pre-determined rules of procedure;
(iv) are composed of independent members/judges;
(v) only hear cases in which at least one party is a State or an international organization;
(vi) issue legally binding judgments; and
(vii) are permanent.

Again, as in every taxonomical scheme the sub-type shares all the traits of the super-type, but has also some of its own that sets it apart from all other sub-types at the same level of the taxonomical scheme. Thus, all bodies included in the 'International Governmental Organizations' Domain satisfy the first criterion in this list. All 'International Rule of Law Bodies and Procedures' Kingdom satisfy criteria one, plus those from two through five. All those belonging to the 'International Adjudicative Means' class satisfy all those criteria plus the sixth one (issuing binding judgment). It is only the seventh criterion (permanency) that truly distinguishes international courts and tribunals from the other orders belonging to the Class of International Adjudicative Means.

---

33 See Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU J Intl L Pol 713–23. Others have used a different list of criteria. For instance, Christian Tomuschat originally listed five (permanency; establishment by an international legal instrument; international law as applicable law; predetermined procedures; and legally binding judgments). See Christian 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* (Berlin; Heidelberg; New York, Springer 1987) 285–416. Several years afterwards, he relied still on five criteria but replaced 'establishment by an international legal instrument' with 'independence of the judges'. 'International courts and tribunals are permanent judicial bodies made up of independent judges which are entrusted with adjudicating international disputes on the basis of international law according to a pre-determined set of rules of procedure and rendering decisions which are binding on the parties. Contrary to international arbitral bodies, the composition of International courts and tribunals does not reflect the configuration of the litigant parties in a specific dispute according to a model of parity'. Christian Tomuschat, 'International Courts and Tribunals' MPEPIL (3rd edn) para. 1.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

Yet, permanency is an easily misunderstood criterion. What is meant when it is said that 'international courts and tribunals' are permanent is not that the court or tribunal itself is permanent. Rather, that they are made of a group of judges who are sitting permanently and are not selected ad hoc by the parties for any given case. The bench as a whole may sit in smaller groups of judges (chambers or panels), but the decision it issues is still on behalf of the whole court or tribunal. The fact that judges serve a limited term does not invalidate the criterion since judges might rotate but the bench is permanent.

Thus, the ad hoc criminal tribunals, such as the ICTY and ICTR and the hybrid criminal tribunals, such as the Special Court for Sierra Leone, are temporary institutions that will be terminated once they complete their mandate. However, they are permanent because, once their judges have been appointed, they decide a long series of cases relating to the same situation. Judges can rotate, but there is at any given time a group of judges (the bench) that is not constituted ad hoc to hear a particular case.

The WTO dispute settlement system meets the requirement of permanency of the bench only partially. Indeed, disputes between WTO members are to be submitted to an ad hoc panel, composed of three experts chosen by the parties. These elements closely recall arbitral tribunals. The Appellate Body, converse- ly, has more pronounced judicial features. It is a standing organ that decides appeals against findings of ad hoc panels and is composed of seven persons, three of whom sit on any one case in rotation and can hear only appeals relating to points of law covered in the report and legal interpretations developed by the panel. The same is true in the case of the adjudicative procedures of the Mercosur. First, disputes are decided by arbitral panels. Awards can be appealed before the Permanent Tribunal of Review.

Permanency is the criterion fundamentally distinguishing the Order of International Courts and Tribunals of Arbitral Tribunals and International Claims and Compensation Bodies, both of which belong also to the Class of International Adjudicative Means.

(b) Arbitral Tribunals: Arbitral Tribunals are essentially *à-la carte* exercises in justice, where the parties are free to pick and chose the arbitrators, applicable law (substantive and procedural). They are disbanded after the award is rendered. Because they are ad hoc in nature, it is impossible to provide a comprehensive list of arbitral tribunals. There are as many as the disputes they decided. However, there is a limited number of permanent international governmental organizations whose sole *raison d'être* is to facilitate international arbitration. Curiously enough, the first one of the list, the oldest of all, is the Permanent Court of Arbitration (PCA) that is

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

famously neither a 'court' nor 'permanent.' What is permanent in the PCA is its bureaucracy (the registry), not its arbitrators, who are appointed ad hoc for a given case and are disbanded after the award is rendered.

1. Permanent Court of Arbitration (1899)
2. International Joint Commission (1909)
3. Bank for International Settlements Arbitral Tribunal (1930)
4. International Civil Aviation Organization Council (under the 1944 Chicago Convention the ICAO Council has certain dispute settlement competences) (1944)
5. International Centre for the Settlement of Investment Disputes (1966)
6. Gulf Cooperation Council Commission for the Settlement of Disputes (1981)
7. Court of Arbitration for Sport (1984)
8. North American Commission on Environmental Cooperation (1993)
9. NAFTA Dispute Settlement Panels (1994)
10. Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997)
11. Arbitration and Mediation Center of the World Intellectual Property Organization (1994)

There are a number of such institutions that have been long dormant, or were never resorted to, that should be listed, at least for sake of completeness and because they might still be activated:

12. Arbitral Tribunal of the Inter-governmental Organization for International Carriage by Rail (OTIF) (1890)
13. Arbitral College of the Benelux Economic Union (1958)
14. Court of Arbitration of the French Community (1959)
15. Arbitration Tribunal of the Central American Common Market (1960)
16. OSCE Court of Conciliation and Arbitration (1994). Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China (1994)

(c) International Claims and Compensation Bodies: likewise, all international mechanisms and institutions established to settle claims arising out of international conflicts (e.g. the United Nations Compensation Commission), or major domestic unrest (e.g. the Iran–USA Claims Tribunal or the 1868 American–Mexican Claims Commissions) are ad hoc bodies and fail

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

the permanency test. As in the case of Arbitral Tribunals, a comprehensive list is beyond the scope of this article. Almost 90 mixed arbitral tribunals and claims commissions were created in the 19th and 20th century in the wake of armed conflicts and revolutions. Most of them were created in the aftermath of the First and Second World Wars.

Amongst those still active, there are:

1. Iran-United States Claims Tribunal (1980)
2. Marshall Islands Nuclear Claims Tribunal (1983)
3. Eritrea-Ethiopia Claims Commission (2000)

F. Families of International Courts and Tribunals

The Order of 'International Courts and Tribunals' can be divided in at least five distinct Families. Listed about in the order in which they emerged, they are:

(a) State-only Courts
(b) Administrative Tribunals
(c) Human Rights Courts
(d) Courts of Regional Economic and/or Political Integration Agreements
(e) International Criminal/Humanitarian Law

(a) State-only Courts: International Courts and Tribunals of this family have jurisdiction mostly if not exclusively over cases between sovereign states. There are only three courts that belong to this Family, at this time:

1. International Court of Justice (1946)[34]
2. International Tribunal for the Law of the Sea (1996)
3. World Trade Organization Appellate Body (1995)

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea is open, in some circumstances, to state enterprises and natural or juridical persons, but, to date, it has heard only cases involving states. The International Court of Justice can issue advisory opinions at the request of certain UN principal organs and some authorized agencies,

34 The International Court of Justice is the successor of the Permanent Court of International Justice (1922- 1946). Although they are formally two separate institutions, there is a large degree of continuity between the two, to the point that both, together, are usually referred to as the 'World Court'.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

but the court rarely issues advisory opinions that are, in any event, not binding.

Because courts of this Family can only hear cases between states, and because there are fewer than 200 states in the world, they serve a numerically small community and, accordingly, their caseloads tend to range from a few to several dozen per year. However, exactly because they hear cases between sovereign states, their cases tend to attract public attention, particularly in the countries involved. The International Court of Justice is the only international court that has both universal jurisdiction and can hear any dispute on any matter of international law (i.e. general jurisdiction). The other courts in this family all have specialized jurisdiction in a specific area of international law (i.e. law of the sea and WTO law). It is thus possible to separate this Family in two quite distinct Genera.

It should be noted that, because of their state versus state nature, in these courts, diplomacy and sovereignty play important roles. These are the courts where the arbitral heritage and the dispute settlement original rationale of international courts and tribunals is the most evident. They are, in a way, old-style courts, carrying in their structure and jurisdiction traits of the early days of the development of the current galaxy of international bodies.

(b) International Administrative Tribunals*:* The second Family of interna- tional courts and tribunals is the one made of administrative tribunals, boards and commissions in international organizations.[35] International administrative tribunals are bodies of a judicial character attached to international organiza- tions, whose main function is to adjudicate disputes between international organizations and their staff members. International administrative tribunals meet all criteria to be classified as international courts. However, they form a family that is the most different in nature from the others Families within the Order of International Courts and Tribunals, up to the point that they are usually not listed amongst international courts in legal scholarship. Admittedly, in several respects, they recall more domestic administrative tribunals than international courts. The law they apply is indeed international law, but of a very specific kind, that is to say internal regulations of international organiza- tions. Disputes concerning the rights and duties of international civil servants closely resemble similar disputes between national agencies and their employees. After all, the only rationale for having international administrative

35 See, Anna Riddell, 'Administrative Boards, Commissions and Tribunals in International Organizations' MPEPIL (3rd edn).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

tribunals is simply that international organizations enjoy jurisdictional immunity and municipal courts have no jurisdiction to settle disputes between them and their personnel.

All major international organizations are endowed with some administrative tribunals, boards and commissions. A comprehensive list is therefore beyond the scope of this article. However, the most significant ones are:

1. International Labour Organization Administrative Tribunal (1946)[36]
2. United Nations Administrative Tribunal (1949)[37]
3. Appeal Board of the Organization for Economic Cooperation and Development (1950)
4. Appeals Board of the Western European Union (1956)
5. Council of Europe Appeals Board (1965)
6. Appeals Board of NATO (1965)
7. Appeals Board of the Intergovernmental Committee for Migration (1972)
8. Appeals Board of the European Space Agency (1975)
9. Administrative Tribunal of the Organization of American States (1976)
10. World Bank Administrative Tribunal (1980)
11. Inter-American Development Bank Administrative Tribunal (1981)
12. Asian Development Bank Administrative Tribunal (1991)
13. International Monetary Fund Administrative Tribunal (1994)
14. African Development Bank Administrative Tribunal (1998)
15. Latin American Integration Association Administrative Tribunal (2002)
16. European Civil Service Tribunal (2005)

(c) Human rights courts: The features that this Family possesses, apart from all other families of international courts and tribunals, are that their subject matter jurisdiction covers certain specific human rights treaties and that they hear cases brought by individuals against states. Individuals can submit to these courts – directly (in Europe) or indirectly through specific organs of international organizations called commissions (in the Americas and Africa)—cases concerning the violation of their rights as provided for

36 The International Labour Organization Administrative Tribunal acts also as administrative tribunal for a number of other international organizations.

37 Replaced the League of Nations Administrative Tribunal (1927–1945).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

in the respective basic regional human rights agreements. They might also have jurisdiction to hear cases brought by states against other contracting parties to those human rights treaties, and thus share a feature with the family of states-only courts, but in practice state to state human rights litigation is a very rare occurrence.[38]

At this time and age, there are three human rights courts, all of them with regional jurisdiction:

1. European Court of Human Rights;
2. Inter-American Court of Human Rights; and
3. African Court of Human and Peoples' Rights.

There is not yet a human rights court with jurisdiction at the universal level, though one has been proposed from time to time. Nor are yet human rights courts with jurisdiction over other areas of the globe.

The range of issues addressed by courts in this family is considerable, and is in many regards similar to the human rights issues addressed by national supreme courts: for instance the death penalty, extra-judicial killings, condi- tions of detention and fair trials; issues of discrimination, freedom of expression, participation in political life, relationships within the family; and rights to housing, health and sexual identity.

(d) Courts of regional economic and/or political integration agreements: The courts and tribunals of this Family reflect the growing trend towards regional arrangements for economic co-operation and integration and the consequential need for dedicated dispute settlement arrangements.

Numerically, this is the largest Family of international courts and tribunals. Excluding the courts that have been discontinued, one can count about two dozen such bodies. However, most of these never actually started functioning, or, after timid beginnings, were abandoned and have not been used for years, or are active, but only minimally. Only about ten of those are actually active or active at significant levels. Even so, for the sake of clarity and simplicity courts of this family are better broken down in three basic Genera, corresponding to three regions: Europe, Americas and Africa.

The relatively large number of courts makes this Family rather more heterogeneous than other Families within the order of international courts and tribunals. Nonetheless, one can discern certain patterns and similarities. For instance, one of the features distinguishing courts within this Family from those of other Families is that they exercise various kinds

38 See (Section F.a), above.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

of jurisdiction, other than contentious and advisory, and can be accessed by a larger and more diverse array of parties. Thus, a typical court of a regional economic and/or political organization can be seized by any State member of the organization, claiming violation of the organization's legal regime by another State party or the organization's organs; or can hear cases brought by the organizations organs alleging a member State has failed to comply with the organization's laws; or hear cases brought by individuals against either Member States or Community organs for violation of the organization's laws. Also, some courts of this family cross-over to the family of International Administrative Tribunals whenever they, or special courts or chambers within them, are endowed with jurisdiction to hear employment disputes between the organization and its employees,[39] or human rights courts whenever they rule on human rights matters or apply human rights legal documents, like the Charter of Fundamental Rights of the European Union.[40]

But what is truly unique about several courts in this family is that most can be seized by national judges or courts of Member States. Whenever matters pertaining the interpretation or validity of the organization's laws are raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a 'preliminary ruling' thereon.[41] No other Family of international courts, with the partial exception of hybrid criminal courts, bridges the gap to this extent between the national and the international judicial sphere.

Overall, several of the courts within this family have been deliberately designed on the template of the European Court of Justice (now called the Court of Justice of the European Union).[42] Not only is it the longest standing and in many ways most successful of all, entrenching and, at times, driving the European process of integration, but it has also provided the template, acknowledged or unacknowledged, of other courts of regional economic integration agreements. As regional economic and/or political integration agreements have spread around the world, sometimes in an attempt to recreate the 'European miracle', so have courts of this family.

---

39 See (Section F.b), above.

40 See (Section F.c), above.

41 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 the law in question.

42 Ruth Mackenzie, Cesare Romano and Yuval Shany, *The Manual on International Courts and Tribunals* (Oxford, OUP, 2nd edn, 2009) 250.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

Nowadays, Africa is the home to most of the European Community-like organizations and, thus, home to most courts of this Family.[43]

Yet, the influence of the European model should not be overstressed. Indeed, while many regional courts have followed the ECJ template,[44] others are more akin elaborate permanent arbitral tribunals. For instance, the NAFTA dispute settlement system does not rely on permanent courts but rather on a series of ad hoc arbitral panels.[45] The NAFTA model – as well as the one of the WTO – patently influenced the design of the dispute settlement system of Mercosur. It is a two-level system that is a cross-over between the European, ECJ-like and the North American and WTO templates. The two-level (arbitral panel and appellate body) set up is derived from the WTO dispute settlement system. The NAFTA imprint is obvious at the first jurisdictional level of the system, where cases are heard by Ad Hoc Arbitral Tribunals, while a permanent judicial body, named Permanent Tribunal of Review, somewhat similar to that of traditional regional economic agreements, is the appellate level. The ASEAN Dispute Settlement Mechanism is a rather close replica of the WTO Dispute Settlement system.

Europe

- Active
  1. Court of Justice of the European Union (2010)[46]
  2. Benelux Economic Union Court of Justice (1974)

43 It should be noted, incidentally, that mimicking the European Community structure has not necessarily led to the same results. Many regional courts in Africa are inactive or suffer other problems.

44 This include courts whose structure and jurisdiction resembles that of the ECJ (eg the Andean Tribunal of Justice and, to a certain extent, the Economic Court of the Commonwealth of Independent States); and hybrid courts that combine ECJ-like functions to that of national highest court of appeal (eg the Caribbean Court of Justice).

45 This is why it is not listed in this classification amongst international courts, but rather in the Order of Arbitral Tribunals.

46 This is the judicial body of the European Union (EU). It is made of three separate international courts: the European Court of Justice (originally established in 1952 as the Court of Justice of the European Coal and Steel Communities, as of 1958 the Court of Justice of the European Communities), and its two-partially subordinated courts: the General Court (created in 1988; formerly the Court of First Instance) and the Civil Service Tribunal (created in 2004).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

3. Economic Court of the Commonwealth of Independent States (1993)
4. EFTA Court (1994)

- Dormant or active at very low levels
  5. European Nuclear Energy Tribunal (OECD) (1957)
  6. European Tribunal on State Immunity (Council of Europe) (1972)

Africa

- Active
  7. Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997)
  8. East African Court of Justice (2001)
  9. Court of Justice of the Economic Community of West African States (ECOWAS) (2001)
- Dormant, or active at very low levels, or nascent
  10. Judicial Board of the Organization of Arab Petroleum Exporting Countries (1980)
  11. Court of Justice of the Economic Community of Central African States (1983)
  12. Court of Justice of the Arab Maghreb Union (1989)
  13. Court of Justice of the African Economic Community (1991)
  14. Court of Justice of the West African Economic and Monetary Union (1996)
  15. Court of Justice of the Common Market for Eastern and Southern Africa (1998)
  16. Southern Africa Development Community Tribunal (2000).
  17. Court of Justice of the Central African Monetary Community (CEMAC) (2000–)
  18. Court of Justice of the African Union (2003)[47]

---

47 The Court of Justice of the African Union is intended to be the 'principal judicial organ of the Union' with authority to rule on disputes over interpretation of AU treaties. African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008 http://www.unhcr.org/refworld/docid/4937f0ac2. html, accessed 25 November 2010, art 2.2. A protocol to set up the Court of Justice was adopted in 2003, and entered into force in 2009. However, at this time the court has not yet started operating. In 2008, a protocol to merge it with the African Court of Human and Peoples' Rights, thus creating a new African Court of Justice and Human Rights, to be based in Arusha, Tanzania, was adopted. 2008 Protocol on the Statute of the African Court of Justice and Human Rights <http://www.africa-union.org/root/au/Documents/Treaties/text/ Protocol%20on%20the%20Merge%20Court%20-%20EN.pdf>, accessed 25

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

Americas

- Active
  19. Court of Justice of the Andean Community (1984)
  20. Caribbean Court of Justice (2001)
  21. Permanent Review Tribunal of the Mercosur (2004)
- Dormant or active at very low levels
  22. Central American Tribunal (1923)
  23. Central American Court of Justice ('Corte Centroamericana de Justicia') (1994)

Asia

- Active

ASEAN Enhanced Dispute Settlement Mechanism (2005)

(e) International Criminal Courts: Courts belonging to this Family are a completely different breed from all other international courts. They are highly specialized and exercise only one kind of jurisdiction – criminal jurisdiction— that is not exercised by any court of the other families. In the exercise of criminal jurisdiction they try international crimes and, eventually, determine appropriate criminal sanctions. Defendants in international criminal cases are always individuals, particularly high-level political and military leaders or those most-responsible, while the burden of the prosecution is shouldered by the Office of the Prosecutor, an organ of an international organization.[48]

The international criminal courts and tribunals family can then be divided into four fundamental Genera (in parenthesis the years in which they became operational and eventually terminated operations).

(i) International Military Tribunals
  - International Military Tribunal at Nuremberg (1945–46)
  - International Military Tribunal for the Far East (1946–48)

(ii) Permanent International Criminal Courts
  - International Criminal Court – ICC (2004)

(iii) Ad Hoc International Criminal Tribunals

November 2010. The African Court of Justice and Human Rights will have two chambers – one for general legal matters and one for rulings on the human rights treaties.

48 See (Section A), above.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

- International Criminal Tribunal for the Former Yugoslavia – ICTY (1993)
- International Criminal Tribunal for Rwanda–ICTR (1995)

(iv) Hybrid criminal tribunals (also known as 'mixed criminal tribunals' or 'internationalized criminal tribunals')

- Serious Crimes Panels in the District Court of Dili, East Timor (2000–2005)
- Panels in the Courts of Kosovo (2001)
- War Crimes Chamber of the Court of Bosnia-Herzegovina (2005)
- Special Court for Sierra Leone (2002)
- Extraordinary Chambers in the Courts of Cambodia (2006)
- Special Tribunal for Lebanon (2009).

International Military Tribunals: for several structural and procedural reasons, the International Military Tribunal at Nuremberg (1945–1946) and the International Military Tribunal for the Far-East (1946–1948) (also known as the Tokyo Tribunal) are a genus of their own within the Family of International Criminal Courts. Grouping them in this family, or even within the Order of International Courts and Tribunals, is not without problems. First of all, at this time in history there does not exist an active international military tribunal. Second, unlike most, if not all bodies in this family and order, the Nuremberg and Tokyo tribunals were not genuine international bodies but rather military occupation courts. The powers that vanquished Germany and Japan unilaterally established them, were prosecutor and judge and enforced sentences. As a matter of fact, the Tokyo Tribunal was not established by treaty but rather by a special proclamation of General Douglas MacArthur, issued in his capacity as Supreme Commander of the Allied Powers in Japan. The basis of MacArthur's powers was not a treaty, but rather customary international law, and, specifically, laws of war. Still, the Nuremberg and Tokyo tribunals are included here because they are important precedents that paved the way for the emergence, almost a half-century later, of all other genera of international criminal bodies.[49]

Another significant difference between bodies of this genus and those of all other genera of international criminal courts is that the United Nations did not play any role in them. Conversely, the United Nations has been,

49 Amongst other precedents one could also consider the African Slave Trade Mixed Tribunals (1819–1866 circa), or the International Prize Court (1907) that was supposed to adjudicate on issues pertaining to the jus in bello. The Statute of the International Prize Court never entered into force.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

to varying degrees, involved in the creation and/or operation of all other international criminal courts. The reason why the UN did not play any role in the international military tribunals is obvious. At that time the UN was just taking its first, tentative steps. But this also suggests why it is unlikely that there will be more international military tribunals in the future. It is hard to imagine such bodies without some degree of United Nations participation, and that would place any future similar bodies within one of the other Genera in this Family. *Permanent International Criminal Courts:* what separates this genus from all others is that courts of the other genera are temporary institutions with limited jurisdiction (*ratione loci*, *temporis and personae*). This genus is made of bodies that are permanent and have jurisdiction not strictly limited.

The only court belonging to this genus is the International Criminal Court. The jurisdiction of the ICC includes crimes committed after the entry into force of the Statute on 1 July 2002 but with no temporal limit going forward. The ICC is a court with, at least potentially, universal scope, as ratification of the Rome Statute of the ICC is open to any state. The number of States that have done so (currently 116) has gradually expanded since the entry into force of its Statute. Conversely, the jurisdiction of all other criminal courts in this family is restricted geographically (e.g. to the Former Yugoslavia, Sierra Leone, Cambodia, Lebanon or other areas).

Given the permanent and universal nature of the ICC, it is possible that this Genus will always remain populated by only one body. It is indeed difficult to see how there could be sufficiently wide support to create another permanent and universal alternative international criminal court. However, considering that several major powers, including the United States, have shown little intention to ever accept its jurisdiction, the possibility should not be completely ruled out.

Ad Hoc International Criminal Courts: bodies of this genus have the unique distinction of having been created by resolutions of the UN Security Council, acting under Chapter VII of the UN Charter. There are currently only two of them: International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The characteristic this genus shares with the International Military Tribunals and the Hybrid Criminal Courts genera is that it is made of temporary judicial institutions. Also, like all other international criminal courts genera but the Permanent one, they are also reactive institutions, having been created after large-scale international crimes have been committed, not before. Specifically, the ad hoc Tribunals have been created as means

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

to foster restoration of international peace and security in specific regions and will exist until the United Nations Security Council decides that they have terminated their mission. At the time of this writing, under the so-called 'completion strategy' adopted by the UN Security Council, the ICTY reported it could finish the last appeals by 2014 and the ICTR by 2013, provided none of the fugitives were apprehended in the meantime.[50]

Unlike all other bodies in the Family of international criminal courts, the ad hoc tribunals are tightly connected to the United Nations, being subsidiary organs of the UN Security Council. This gives them two fundamental advantages over all other criminal bodies. First, they can rely on UN Security Council powers to have their orders and decisions enforced. Security Council backing is something all other courts do not necessarily enjoy. Second, their financing is secured because their budgets are part of the larger UN budget for peace-keeping operations. All UN members have a legal obligation to pay a share of the UN regular and peace-keeping budgets. However, hybrid criminal courts are funded through voluntary contributions, which have proven to be unreliable. The ICC budget is shared only by States party to the Rome Statute, a considerably smaller pool of contributors than those of the United Nations. Finally, it should be mentioned that the ICTY and ICTR are much more similar to each other than probably any other bodies belonging to the same groups in this classification. Indeed, the two ad hoc tribunals have been called the 'twin tribunals' because of their structural and jurisdictional similarities.

Arguably, they are Siamese twins joined at the head since Appeals Chambers are comprised of the same judges.[51]

Hybrid: what distinguishes hybrid criminal tribunals from the other three Genera of international criminal tribunals is that they are not purely international.[52] They combine in their structure, law and procedure elements of both international and domestic criminal jurisdictions. They

50 Letter dated 31 May 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, 1 June 2010, S/2010/270, para. 8; Letter dated 28 May 2010 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, 28 May 2010, S/2010/259, para. 82.

51 See Statute of the International Tribunal for Rwanda, Article 12, paragraph 2.

52 On hybrid criminal tribunals, see generally Cesare PR Romano, Andre Nollkaemper and Jann Kleffner, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, OUP 2004) and Cesare PR Romano, 'Mixed Criminal Tribunals' MPEPIL (3rd edn).

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

are usually composed of a mix of international and national staff (judges, prosecutors and other personnel) and apply a compound of international and national substantive and procedural law. Ad Hoc International Criminal Tribunals and Permanent International Criminal Courts are purely international endeavours, created by the international community at large and prosecutions and trials are held on behalf of humanity. In the case of those two Genera, nationals of the countries where crimes occurred play a very limited role and appear before tribunals only as either suspects or victims.[53] They are also all geared towards the prosecution of high-level political and military leaders. Conversely, hybrid courts are not necessarily focused only on those most responsible at the highest levels of the political and military leadership, but have in many instances prosecuted lower-ranks.

Hybrid criminal tribunals make up a very diverse genus, each body being the result of unique political and historical circumstances. Should a finer classification be attempted, probably one could identify two sub-genera. One could be called, for lack of a better expression, 'internationalized domestic criminal tribunals'. These are in essence national criminal courts that have been injected, for the sake of ensuring their independence, impartiality and overall due process, some international elements. The other could be called, 'domesticated international criminal tribunals'. These are bodies that in structure, powers and rationale are very similar to fully international courts, like the ICTY or ICTR, but that have been localized by adding national elements, such as judges, prosecutors and by adding some local laws to the otherwise fully international procedural and substantive law.

Placing bodies within Sub-Genera is ultimately a matter of choice of criteria, degree and point of view. Also, some bodies might have started at one point of the spectrum and then moved to a different point as circumstances changed. For instance, the hybrid criminal body in Kosovo started as a national one with a robust international presence (called, 'Regulation 34 & 64' Panels), where international judges could veto their national counterparts, but morphed into a decidedly national body with a light international oversight provided by the European Union (EULEX). The same could be said about the War Crimes Chamber of the Court

53 Another reason why International Military Tribunals are misfits in this larger family is that they are not created and operated by the international community at large, but only the victor powers. Nationals of the countries where crimes occurred were both prosecutors and judges.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

of Bosnia-Herzegovina, which has operated under the increasingly more relaxed supervision of the ICTY. On the other hand, the Special Court for Sierra Leone and, to a lesser degree, the Special Tribunal for Lebanon are international courts in structure and rationale but with national elements to localize them. Finally, the Extraordinary Chambers in the Court of Cambodia seem to be somewhere astride the two groups. Depending on how they are viewed, they are either the most international of national courts or the most local of international courts.

2. *Conclusions*

At the risk of being proven spectacularly wrong in a decade or so, I would like to make a few educated guesses – and a few wishes – about how the Kingdom of International Rule of Law Bodies and Procedures might develop in the short, medium and long term. After all, any classification that aims to be more than a folk-taxonomy must enable predictions, possibly accurate.

The first prediction, but probably merely a matter-of-fact observation, is that the breathtaking expansion of the number of bodies administering International Rule of Law is leveling off. The breakneck pace of the 1990s and 2000s is giving way to more modest gains.

There are two main forces that are already at work to slow down the pace at which new international rule of law bodies are being created. The first one is strictly pragmatic. As the international infrastructure expands, so do the costs of maintaining it. At a time when states, and particularly those into whose pockets most of the international agencies fish, are under enormous budgetary pressure, there is little chance of some major new body being created.

The second is political. In the never-ending power struggle between the judiciary and the elected powers (executive and legislative) for much of the 1990s and 2000s judges have been gaining ground, nationally (particularly in the West), and internationally. The tide is turning back, across the board, slowly but unmistakably.

Moreover, most, if not all, areas of international relations that were apt at being legalized and judicialized, have been so. Issues like financial and monetary relations, military activities and migration, matters that presently are at the centre and front of international attention, are as unlikely to give rise to judicial and quasi-judicial bodies as they have always been. Rules about national and international budgetary and financial matters might be tightened, and the need for independent and impartial enforce-

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

ment of those rules becoming more apparent, but I cannot imagine the creation of an International Financial Court, or anything like that, with a broad mandate. At best, something might emerge with a limited scope on certain issues, such as bad-faith manipulation of markets or fraud, but even that is a very long shot.[54]

One might reply that military activities and immigration have already been well legalized and judicialized. After all, that is the stuff of international humanitarian law and human rights law, two of the areas of international law that have given rise to a vast array of bodies during the past two decades. However, I surmise that the legalization and judicialization of those fields have left untouched large areas that are, indeed, very much central to contemporary international relations discourse. One of those is when, and to what extent, states should be mandated to use force. It is a variation of the *jus ad bellum* that could be dubbed *jus foederis* and *jus ad defendum*. Although states have, for centuries, entered into legally binding agreements committing to go to war to defend each other or support each other's plans, from the Athenian League to the United Nations and NATO, I simply cannot see an international judicial body being given the power to bindingly declare that a state has violated those obligations by refusing to deploy troops. Second, although in recent years a new responsibility to protect civilians from international crimes has emerged—leaving aside the fact that many still contest the very existence of the rule – I cannot possibly imagine an international judicial body being created or given the power to ultimately declare that some states, or the international community as a whole, have failed to live up to that obligation. To the extent states might want to submit those matters to adjudication, the International Court of Justice could be resorted to, without the need for a new body.

Incidentally, exactly because it is the main judicial organ of the United Nations, and because the United Nations is the main universal organization of our time, the ICJ is going to remain for long the only one in the Genus 'General Jurisdiction' of the 'State-only Courts' Family, of the 'International Courts and Tribunals' Order.

The same reasoning could apply to the International Criminal Court, another giant with universal aspirations, occupying most of its field. Indeed, given the permanent and universal nature of the ICC, it is possible

54 Martha Graybow, 'Lawyers seek global forum to handle Madoff cases' (2009) Reuters <http:// www.reuters.com/article/idUSTRE5286FE20090309> accessed 4 January 2011.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

that this Genus will always remain populated by only one body. It is difficult to see how there could be sufficiently wide support to create another permanent and universal alternative international criminal court. However, considering that several major powers, including the United States, have shown little intention to ever accept its jurisdiction, the possibility should not be completely ruled out. Similarly, the creation of permanent criminal courts at a regional level, at some point in the future, cannot be entirely ruled out. After all, once international regimes are created at the global level, soon or later, they are replicated at the regional level, too or vice-versa. The whole international infrastructure is full of redundancies.

If any new international criminal adjudicative bodies are going to emerge they are most likely to be of the hybrid Genus. This has been an exceedingly prolific category. Six new bodies have been created in the span of a decade and a few more were proposed. Because they are highly flexible tools, that can be shaped to meet any particular area and situation, they are going to remain the answer of choice of the international community to calls for international justice. But that is only until the day the international community realizes that they are failing miserably to deliver on the many promises they made.[55] Then I predict the return of the ad hoc international criminal tribunals, once it is realized they were criticized too harshly, too soon.

What is definitively not coming back is the Nuremberg and Tokyo-style military tribunals. The world has hopefully grown beyond victors' justice. It is hard to imagine such bodies without some degree of United Nations participation.

Should any developments take place, it will be at the regional level, not the global one. In particular, big and rising Asia has by and large remained at the margins of the phenomenon of the legalization and judicialization of world politics.[56] There are timid signs that Asia might after all, one day, follow the trend. For instance, in 2009, the Arab Human Rights Committee and the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights were created. These bodies, once they start operating, might one day give rise to more bodies of similar type and then perhaps a full blown judicial institution, like a human rights court. Bangladesh was the last Asian state to ratify the Rome Statute of the ICC in March 2010. Japan is going to appear before the

55 Laura Dickinson, 'The Promise of Hybrid Courts' (2003) 97 AJIL 295–310.

56 See, 'Can You Hear Me Now? Making the Case for Extending the International Judicial Network' (2009) 9 Chi J Intl L 233–73, 255.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

International Court of Justice for the first time in its history in a case brought by Australia on whaling in the Antarctic. All these developments deserve headlines, but when compared to the size of the continent and growing role that Asia is playing in the international scene, they are very modest indeed.

Looking ahead, well into the 21st century, there are far more cogent reasons to doubt that the judicialization of world politics might be a permanent phenomenon. The West, the traditional champion of legalization and judicialization, is seeing its relative share of wealth and influence decreasing. Europe, whic has inspired much of contemporary judicialization in all continents, is losing its capacity to inspire and provide models of development to be replicated by emerging new democracies that aspire to become economic powerhouses. At the same time, the heralded great powers of the 21st century, Brazil, Russia, India and China (collectively called BRICs), have been largely left untouched by the judicialization of international relations. They rarely submit to the jurisdiction of international courts and tribunals. They remain unexcited and ambivalent towards the benefits of an international system based on the rule of law, overseen by a large cadre of independent and impartial international bodies.

In the end, what the world needs is not more Rule of Law Bodies and Procedures, but better ones. It needs bodies that are better staffed, by a well-trained cadre of truly independent experts; better funded, with more resources to cope with a growing tide of cases and situations; and bodies whose decisions are better enforced by virtue of greater integration in the national legal systems, and acceptance by national judges, and more respectful political leadership, nationally and internationally.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND

My iCourts experience

Last week, tragedy struck. I was doing dishes and a cherished iCourts mug — one of those that are given to all participants of iCourts summer schools — slipped out of my fingers and broke. Until then, I was the proud owner of a complete collection, from 2012, the first iCourts summer school, to 2019, the last one before the world was shut down by the Covid 19 pandemic.

Every day, those mugs are the first thing I see. I grab one when I reach in the cupboard, with my eyes still not quite open, to brew a quick coffee with my Nespresso machine. Then, it sits on my desk, as I start going through my clogged email inbox. Sometimes, as I turn it in my hand, my mind goes back to Copenhagen, to the colleagues and the students I had the pleasure to interact with over the years.

For almost a decade, iCourts summer school was the highlight of my academic year. Once a year, for two weeks, I could retreat with a group of bright graduate students from all over the world, to discuss, in an informed and intelligent way, issues that have been at the core of my work since the mid-1990s. As you can imagine, finding people who get excited about arcane aspects of the law and procedure of international courts and tribunals is not easy in Santa Monica, California, the beach town by the Pacific where I live. Even at the school where I teach — Loyola Law School, Los Angeles — few students are interested in international law and even fewer in international adjudication. Rarely anyone ask me a question about this or that international court. However, once a year, for two intense and beautiful weeks, all I talk about is that!

One of my contributions to the study of international courts and tribunals has been the systematization and classification of international adjudicative bodies. When I was managing the Project on International Courts and Tribunals, at New York University, in the 1990s, at the outset I set out to try to find out all international adjudicative bodies that had ever been created, or even just proposed. Mapping the terrain is the necessary first step in preparation of any endeavor and, as I begun, I quickly realized that no one had compiled a truly comprehensive list. Obviously, at the outset, I had to answer a question for which there was no easy answer: what is an international court or tribunal? The criteria used until then were much wanting. Moreover, the multiplication of international adjudicative bodies that took place during those years, and the differentiation of their functions, tested the limits of existing classifications.

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - CC BY-NC-ND

Over the years, I articulated a series of criteria to classify international adjudicative bodies, and published various lists and tables to help scholars navigate a vast and rapidly expanding universe. Finally, in 2011, I published an article entitled "A Taxonomy of International Rule of Law Institutions", in the *Journal of International Dispute Settlement*, (Vol. 2, No. 1, 2011, pp. 241-277), reproduced in this book, which tried to organize not only international adjudicative bodies, but also cognate "genera", "families", "orders" and "classes" of the much larger "kingdom" of the international rule of law bodies".

It is probably because of that foundational article that, at iCourts, I was assigned the task of delivering the kick off lecture. It quickly came to be known among my colleagues as the "duck lecture". Applying to international courts the famous abductive reasoning test "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck", I led students, much like a mother duck, into the mare magnum of international adjudicative bodies. After that, I spent the rest of the week raptured, listening to the lectures of my colleagues and engaging the students in our afternoon workshops, where we honed their dissertation-writing skills.

When I did my last lecture, in 2019, my mood was somber. After witnessing and chronicling the tumultuous development of international adjudication for almost three decades, the tide was turning. Everywhere I looked, I saw disillusion and disappointment with international institutions, and the scapegoating of international courts and tribunals. Yet, I also saw an opportunity for reflection, reform and rebirth. I called the students to action, urging them not to limit themselves to studying international courts and tribunals, but also to find ways to practice before them and to advocate for them, domestically and internationally.

I have no doubts iCourts alumni will play a key role in the next critical phase of the development of the international judiciary. I remain in touch with many students, former iCourts fellows who have taken off in academia, and my colleagues, in Copenhagen and around the world. iCourts created a large cosmopolitan intellectual community that will carry the study of international courts and tribunals as a discrete field, separate from the study of international dispute settlement from which it branched out, well into the century. I am honored to be part of it and I look forward continuing this exciting intellectual journey together.

Prof. Dr. Cesare P.R. Romano
Professor of Law, Loyola Law School, Los Angeles

https://doi.org/10.5771/9783748927884-47 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC-ND