

Towards A Political Theory of International Courts and Tribunals

by
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INTRODUCTION

Arbitrators, foreign ministry officials, scholars, secretariat staff members and members of non governmental organizations at locations around the world are designing and using international courts and tribunals. They are considering creating a new court or tribunal, changing the rules of the game for one that exists, or arguing a particular case or issue before another. They are doing this more than perhaps at any other time in history. These observations reflect not only the complexity and legalization of modern international relations, but also the current political assessment that international courts and tribunals can successfully fulfill various political objectives.

Over the past decade, theoretical explanations for various aspects of international courts and tribunals have been offered. Although scholarly attention to a theoretical framework has progressed dramatically over this period, the inquiry lacks a broad theoretical foundation, and addresses only in part the range of institutions in operation or the issues they face.

This Symposium volume of the *Berkeley Journal of International Law* contains thirteen student articles written in an advanced international law writing seminar focused on international courts and tribunals. This essay seeks to capture the essence of the discussion that animated the seminar and introduce the range of articles that resulted.

The discussion in the seminar that informs many of these articles in part should be seen as reflecting my then crystallizing views as to a political theory of international courts and tribunals that was subsequently delivered as lectures at the Hague Academy of International Law. In this essay, I provide a sketch of this theory, the detailed exposition of the theory is best sought elsewhere.¹

The seminar discussion examined international courts and tribunals as a particular form of international institution. It explored the span of an institution's life: its creation, design and operation, and closing down. This

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1. David D. Caron, *A Political Theory of International Courts and Tribunals*, RECUEIL DES COURS (forthcoming) (hereinafter "Lectures").

discussion, while legal, was focused through the perspective of political science. Three themes in the seminar have particular relevance to this Symposium:

First, our understanding of, and theorizing regarding, international courts and tribunals may be enriched and furthered by having regard to not only theories of international relations, but also to political science research concerning courts generally.

Second, that incorporating the teachings of political science regarding courts generally, among other things, emphasizes a wider range of functions for international courts than is usually present in the existing literature and, in some instances, has significant implications for how one evaluates the 'effectiveness' of a given international court or tribunal.

Third, that the design and operation of international courts and tribunals can be understood through a theory of bounded strategic space within which actors in at most five, and at least two, institutional positions contend with one another, or against the space itself, so as to fulfill the logic of their position.

Before introducing the articles in this volume, this essay offers three sets of comments. First, by way of introduction to the field, this essay suggests two basic distinctions between types of international tribunals, distinctions present in many of the articles in this Symposium. Second, an overview of selected political science literature is provided to introduce a more expanded view of the function of international courts. Third, the essay provides a sketch of the bounded strategic space theory as a means for understanding and explaining international courts and tribunals.

I. TWO DISTINCTIONS

One way of introducing a field is to provide an account of its development. The history of international courts and tribunals has been ably set forth elsewhere.² For the purposes of this essay, I would stress that the history of modern international courts and tribunals is quite recent.³ The use of international arbitral tribunals is often traced back to the late 1700s and their use in the Jay Treaties following the U.S. Revolutionary War.⁴ Moreover, if the emergence of modern international tribunals is recent, the call for the permanent international courts is even more so. That movement finds its roots in the mid 1800s. The movement's first partial expression can be found in the creation of the Permanent Court of Arbitration as a result of the 1899 Peace Conference; its first full expression, in creation of the Permanent Court of International Justice

2. See JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION, FROM ATHENS TO LOCANO* (1929).

3. Although some histories would trace contemporary arbitration back to very early examples of arbitration such as those between Greek city states, I do not see a significant direct connection between ancient and modern international dispute resolution systems beyond the notion of employing a third party to decide disputes. See, e.g., DAVID D. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001).

4. See generally, David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4 (2000); and John R. Crook, *Thoughts on Mass Claims Processes*, 99 AM. SOC'Y INT'L L. PROC. 80 (2005).

in the interwar period.⁵

Taxonomies of international courts and tribunals, like their history, have also been extensively detailed in the literature.⁶ Some dimensions of distinction are not ones particularly relevant to a study emphasizing the political and institutional side of international courts and tribunals. Yet the breadth of the taxonomies available reflects the diversity of these institutions. Indeed, it reminds us that unlike the domestic scene where the shape of courts can become rigid or limited by constitutional norms of process; institutions in the international arena come and go with all manner of experiments underway. For the purpose of this essay, I emphasize two important distinctions: community-originated institutions vs. party-originated institutions and retrospective institutions vs. prospective institutions.⁷ In a sense, both of these distinctions point to the difference between a court and a tribunal.

A. COMMUNITY-ORIGINATED INSTITUTIONS VS. PARTY-ORIGINATED INSTITUTIONS

Some dispute resolution institutions are created by a community and some are created by the particular parties to appear before the institution. This is a significant distinction in terms of the bounded strategic space theory described within and is employed in several of the contributions to this Symposium.

A party-originated dispute resolution mechanism is one where two parties create an institution to resolve a dispute between them. The dispute may be an existing one or one that will arise in the future. If the institution ever functions, it is the two states that created it that will be the parties before it. An example of a party-originated dispute resolution institution is the *ad hoc* tribunal that decided the Anglo-French Continental Shelf dispute. The two states – the United Kingdom and France – by international agreement created the dispute resolution mechanism, defined the question to be decided by that institution and simultaneously entrusted that institution with the resolution of that question. Having created the institution, the two states normally pay the expenses of the institution.

A community-originated institution in contrast is created by a group of states to resolve disputes of concern to that community. A key distinction is that although members of the originating community may at some point be a party that eventually appears before the institution's dispute resolution processes, that

5. Both the recourse to international arbitration and courts and the creation of international courts and tribunals arguably has tended to come in bursts following perceived success in a particular instance. For example, there arguably was a burst of use after the Jay Treaties in the late 1700s, the Alabama Arbitration in the late 1800s, and the Iran-United States Claims Tribunal in the late 1900s.

6. For a recent example see the synoptic charts prepared by the Project on International Courts and Tribunals (PICT). Project on International Courts and Tribunals, Synoptic Charts, http://www.pict-pecti.org/publications/synoptic_chart.html (last visited Jan. 3, 2007).

7. Examples of other distinctions include criminal vs. civil, nested vs. free-standing, jurisprudentially insular vs. jurisprudentially integrated. For further discussion, see Lectures, *supra* note 1.

is not necessarily the case. There are also more subtle consequences of an institution having a community, rather than party, origin. Most importantly, the institution exists for the ends of the community, not the ends of the parties. This ownership difference shifts control of the institution's work away from the parties. This shift can be seen, for example, in terms of the question for who does the judge or arbitrator believe themselves to be working? Members of a party-originated tribunal believe themselves to be working for the parties, while judges within a community-originated institution believe themselves to be working for that community. This perspective is reflected in the system of ethics applicable to, and oaths taken by, the members of the tribunal or court.

B. RETROSPECTIVE INSTITUTIONS WITH FIXED DOCKETS VS. PROSPECTIVE INSTITUTIONS WITH OPEN-ENDED DOCKETS

A second distinction is that a court or tribunal, whether its origin is with the parties or some larger community, may have a finite existing docket or it may have an open ended docket. The institution with a finite docket has a finite life, it will close down when it finishes the stated set of disputes it is to address. In this sense, the institution with a finite docket is retrospective. An example of an institution with a finite docket is the Eritrea-Ethiopian Claims Tribunal, the jurisdiction of which consists of "all claims for loss, damage or injury * * * that are (a) related to [a defined armed conflict] and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."⁸ Although it is not clear precisely how many disputes there are within this defined docket, it is finite number and a set of claims that is in the past, not the future. An institution with an open ended docket, on the other hand, has an indefinite life span. An example of such an institution is the Inter-American Court of Human Rights whose jurisdiction includes not only existing cases, but also future ones. In this sense, the court with the open ended docket is forward looking. The retrospective vs. prospective distinction has (in my experience) subtle implications for the jurisprudential approach of the adjudicators in the two types of institutions. A retrospective institution is arguably more concerned with equality among the various defined claimants than with applying norms of justice as they evolve over time and thus its jurisprudence is heavily path dependent. Once one set of claimants has been treated in a particular way, the retrospective institution will be loath to depart from the initial path – preferring instead to treat all similarly situated claimants similarly. The prospective tribunal, in contrast, is more willing to depart from its previous jurisprudence since it possibly has even more unknown claimants awaiting it in the future than those it has already addressed in the past.

With these two distinctions in mind, the following sections in turn explore the functions of courts and introduce the bounded strategic space theory of international courts and tribunals.

8. Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Article 5, December 12, 2000, *available at* <http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html>.

II. THE FUNCTIONS OF COURTS

It is difficult to build on a poorly understood foundation – it's not necessarily impossible, but it is difficult. This is a basic challenge for theorizing about international courts and tribunals. Doing the best they can in such a context, scholars have offered theories about particular aspects of international courts and tribunals, often recognizing the absence of a more general frame.⁹

Martinez, for example, offers a normative and prescriptive theory to promote a “functioning system” of international courts and tribunals “for solving disputes across borders.”¹⁰ Slaughter and Helfer offer a normative and prescriptive theory to explain the effectiveness of “supranational adjudication” and thereby enable its further emergence.¹¹ Posner and Yoo, more normatively, offer design prescriptions asserting that effective international tribunals are those where the parties select the adjudicators.¹²

Each offers a theoretical view. Each view also is offered not only on the basis of limited cases, but also with sometimes unstated assumptions about the functions of courts. Martinez, Posner and Yoo appear assume to the function of courts is resolution of the disputes presented to the court and therefore effectiveness is measured by reference to the fulfillment of that task. Clearly, this is a function of courts, but the question is whether it is the sole function?¹³

Theorizing about international courts and tribunals often takes theories of international relations as a point of departure. In seeking a foundation for political theories of international courts, this essay argues that it is also instructive to refer to theories in the U.S academic political science community regarding courts generally. I have discussed elsewhere the transferability of theories of domestic courts to the international arena.¹⁴ For the purposes of this essay and the various contributions in this Symposium, only a more limited claim need be made. In particular, the essay asserts that our understanding of the

9. The term “theory” as used in social science and law has numerous meanings. Ernie Haas explained that a theory for a given phenomenon may (1) provide a framework for understanding it, (2) explaining it (3) modeling how it behaves, (4) modeling it so accurately so as to offer predictions, or (5) offering normative prescriptions as to how it should be approached.

10. Jenny S. Martinez, *Towards an International Judicial System*, 56 STANFORD L. REV. 429 (2003).

11. Lawrence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997-98).

12. Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

13. In offering a theoretical view, each view is also based on assumptions about the types of international courts and tribunals extant, the types of disputes that are raised before them and the relationship of these institutions and disputes to one another. Each speaks of the growth in number of these institutions and disputes as a justification. Martinez in a breathless paragraph echoes the words of others in noting that there are “now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years,” that international private arbitration is on the rise, and that national courts increasingly are faced with “applying international law.” Martinez, *supra* note 2 at 430.

14. David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, in PROCEEDINGS, 100 AM. SOC'Y INT'L L. PROC. __ (forthcoming 2006).

variety of political functions of, and justifications for, courts becomes richer and more complex by examining international courts and tribunals not only in terms of international relations, but also in terms of the political theory of domestic courts.

A. POLITICAL THEORY OF NATIONAL COURTS AND THEIR FUNCTIONS

There is a small but significant set of writings offering a political theory of courts.¹⁵ A singularly important contribution is Martin Shapiro's "Courts: A Comparative and Political Analysis."¹⁶

Shapiro's book begins with a description of ideal court – or what he terms the prototypical view of courts. This prototypical view of courts involves "(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal wrong and the other found wrong."¹⁷ Martin's overall strategy is to look to the political functions served by courts and to identify how these functions all necessarily involve an institution that is different in form from (indeed, potentially in conflict with) this prototypical view. The three functions discussed by Shapiro are (1) conflict resolution, (2) social control or regime enforcement, and (3) lawmaking. Of course, Shapiro's analysis is nonexhaustive – other functions have been identified since his writing¹⁸ – but this does not undercut his conclusions regarding the conflicted position of courts *vis-à-vis* his prototypical statement of courts.¹⁹

Shapiro begins with the function of *conflict resolution*, not because he views it as the foundational political function served by courts, but rather because "everyone seems to agree that conflict resolution is a basic task of courts" while there is less consensus as to the other functions he mentions.²⁰ He begins with the function (conflict resolution) on which there is the greatest consensus as to the political justification for courts so that he might crack the

15. The majority of works reflect particular political inquiries into national courts. *See, e.g.*, FORREST MALTZMAN, JAMES F. SPRIGGS AND PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (Cambridge University Press, 2000); LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (CQ Press, 1998); *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton and Howard Gillman, eds., University of Chicago Press, 1999).

16. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1983). *See also* MARTIN SHAPIRO AND ALEC STONE SWEET, *ON LAW, POLITICS, & JUDICIALIZATION* (2002); and THOMAS GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIA* (2003).

17. SHAPIRO, *supra* note 16, at 1. Curiously, but perhaps not surprisingly, Kaplan and Katzenbach offer a quite similar prototypical phrasing for "law" at the outset of their 1968 study: "Perhaps the purest analytical concept of 'law' is that in which an impartial judge objectively applies a pre-established rule to decide a controversy." MORTON KAPLAN AND NICOLAS DEB. KATZENBACH, *THE POLITICAL FOUNDATION OF INTERNATIONAL LAW* 3 (John Wiley & Sons, 1961).

18. *See, e.g.*, Thomas Ginsberg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 225 (2005).

19. In addition to this broad description of the political science view of courts as institutions, law and economics posits that effective courts allow parties to make more credible commitments and that courts also, in a way similar to Shapiro's lawmaking function, allow parties to avoid contracting problems by delegating interstitial issues to courts to resolve.

20. SHAPIRO, *supra* note 16, at 17.

prototypical view even for the strongest case. Shapiro's first argues that recourse to the court is only one way to fulfill the function of conflict resolution, more generally conceived. He thus places courts at one end of a conflict resolution spectrum where the mechanisms listed increasingly move from the consensual to the coercive, from the notion of compromise to the satisfaction of principle, from diplomatic settlements to law-based dichotomous decisions.

Shapiro asserts that the logic of conflict resolution requires a triadic structure (i.e. the two disputing parties and the decision-maker) where the decision-maker possesses some measure of authority to address the dispute because the parties have consented to such a role. For the ideal triad, the consent is proximate, ongoing and real. Indeed, where there is continuing consent, the question of whether the losing party will comply with the decision is by definition a forgone conclusion. Shapiro's major contention is that courts as a general matter do not possess the consent of the parties, except in some remote social contract sense, and thus the idea that courts can fulfill the function of conflict resolution is fundamentally at odds with the logic of the triad. For Shapiro, those officials within the courts and otherwise responsible for the courts thus go to tremendous efforts to cloak themselves with the logic (and power) of the triad: "A substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one."²¹

Shapiro then shifts from conflict resolution to what he sees as historically and politically as the prime function of courts: *social control*. In other words, courts are the means by which the state rules *through* law.²² To the extent that the law reflects the views of an element of society either in terms of their interests or, more subtly, their view of the world, then the law and courts, captured by that element, enable that element to gain a measure of social control and regime enforcement. An example used by Shapiro is the law favoring creditors. No matter how independent and impartial the court is, the debtor knows that the substantive law is against their interests and, indeed, the mechanistic vision of a court applying the law only ensures that the court will be a trustworthy agent of the state. Of course, the most powerful example of social control through the courts is the criminal legal system.

The third function advanced by Shapiro is that of *lawmaking*. Here, Shapiro asserts that all courts are engaged in not only interstitial lawmaking, but also more dramatic forms of lawmaking. Thus not only is there not the continuing consent required of the conflict resolution triad, but the image of a judge applying a preexisting rule may also not be present.

21. SHAPIRO, *supra* note 16, at 2.

22. Importantly, Shapiro when focusing on conflict resolution addresses on disputes between two members of the community or claims of the state against the individual. He does not particularly address disputes against the state. There appear to be three types of these disputes: (1) claims of individuals against the state, (2) claims that a member of the state is a criminal, and (3) claims that elements of the state are acting contrary to the political agreement underlying the state. In all of these cases, the transition can be seen as one from rule *through* law to one of rule *of* law.

B. THE FUNCTIONS OF INTERNATIONAL COURTS AND TRIBUNALS

If there is not an extensive theoretical literature to explain courts, either national or international, there are well elaborated and contending theories as to international relations generally. The international relations theories, to the degree they address the matter, appear to assume that function of international courts and tribunals is to resolve the disputes presented to them. In realist terms echoing closely those of Martin Shapiro for the “prototypical court,” Hopmann, for example, sees international courts at one end of a conflict resolution spectrum where third parties are involved to assist two disputants that can not otherwise reach a solution.²³ Like Shapiro, Hopmann mentions the “go-between,” the mediator and ultimately the arbitrator. The institutionalists have a similar view but tend in addition to study international courts and tribunals as a type of institution nested within a general theory of international institutions.²⁴ Although this might lead to a broader statement of function, institutionalist accounts tend to describe international courts and tribunals as institutions tasked with resolution of particular disputes through application of law, as mechanisms for avoiding contracting problems, or as devices to increase the credibility of international commitments. The constructivist school of international relations has the broadest view, adding and emphasizing functions such as norm creation, augmentation, and diffusion.

The legal literature often takes international relations, consciously or not, as its point of departure in thinking about the function of international courts and tribunals. A common approach, for example, is to model the decision to create international courts and tribunals in terms of a rational actor weighing how it might most favorably resolve a conflict arising in regard to a particular treaty regime, issue area, or other relationship. Typically, these models assume that states are leery of surrendering important issues to binding adjudication and that line of reasoning runs to the oft stated conclusion that two states will only agree to binding tribunal- or court-based conflict resolution devices only when the matter involved is not of particular significance to the state. I do not argue that this approach is necessarily incorrect, but I would suggest that it is incomplete. Rather, I assert that in fact states decide quite often to undertake to create (or, as importantly, to not create) an international court or tribunal for reasons other than those associated with resolving a particular conflict or the function of resolving conflicts.

There are a wide variety of international courts and tribunals at present, and they are not all of equal consequence. The possible functions of these

23. P. TERRENCE HOPMANN, *THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS* 221(1996) (“noting that his “previous analyses . . . depended primarily on [the disputing parties’] own interests and negotiating skills in overcoming differences” while here he “introduces third parties that are not direct participants in the negotiations, but whose role is to assist the conflicting parties to reach agreement in what otherwise basically remains a bilateral negotiation.”).

24. One particular theory present is that of the rational design project, *see* INTERNATIONAL ORGANIZATION, *THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS* (Barbara Koremenos, Charles Lipson, and Duncan Snidal, eds.) (2004) (first published in Koremenos, et. al., *The Rational Design of International Institutions* 55 INT’L ORG. 761, (No. 4, 2001).

institutions should lead to observations about form, or – as a matter of diagnosis – their form might imply something about their functions. In the previous section, it was seen that theories of domestic courts assert a broader range of functions than we see generally in the literature regarding international courts and tribunals. I suggest that not only are the functions of international courts and tribunals more numerous than generally thought, I would argue that in some instances more functions are placed on international courts and tribunals than is the case with domestic tribunals. Indeed, it is the relative paucity of international institutions generally that may lead states to vest courts and tribunals with functions not normally associated with domestic judicial institutions.

I would argue that, historically, it is sometimes the case that the political circumstance, or a significant part of the circumstance, motivating the highest-level decisions to create an international court or tribunal is other than the resolution of the particular disputes that ultimately will be placed before the international court or tribunal. The political decision to create, or entertain the possibility of creating, an international court or tribunal needs to be distinguished from the task of implementing such a decision. It is after the political decision to create is taken that legal staffs are involved to operationalize the decisions in legal terms and in terms that satisfy shared notions of what it means to create something labeled a “court.” In these instances, the task is not so much whether to create a court or tribunal, but rather what that tribunal will look like. Although, doubts at the legal level as to the wisdom of the decision to create the court or tribunal certainly could result in a minimalist institution that meets the political objective, but goes no further.

An example of the political motive to create can arguably be seen in the string of decisions made to create international criminal tribunals in the last century. An assumption in much of the legal literature derived from the language of the constituent instruments is that the function of these institutions is hold war criminals accountable and, possibly, to bring a measure of restorative justice. That certainly is a function, but there are other political functions possibly present. This is not to suggest that there are not some state actors or non state actors who sought accountability. Rather, it is to argue that a significant, if not key, force in particular decisions to take the route of creating an international criminal tribunal or court is more than simply the accountability of the accused.

Thus the story of the Nuremberg tribunal has been described as a decision prompted as an alternative to the initial view of some powers that the leadership of Nazi Germany should be summarily executed. The Yugoslav Tribunal story has been told by some insiders as a decision prompted by a desire to do something given NATO’s unwillingness to do more something serious, such as commit ground forces. Similarly, the story of the decision to create the Rwanda Criminal Tribunal can be told as one of shame for not acting in the first place and as a response to the demand that the developed world be consistent in its treatment of greater Europe and Africa. The decision to proceed down the track that leads to the International Criminal Court can be told as one resulting from a contest for influence between the General Assembly and the Security Council

given the Council's creation of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda.

Judge Thomas Buergenthal reflecting on this discussion of function asked what we should make of the fact that there may have been some additional initial political motivations.²⁵ The relevant important difference between international courts and tribunals and their domestic counterparts is that almost all international courts and tribunals are relatively young and, as a general matter, more dependent on continuing political support from member states. In contrast, domestic courts are (for the most part) so deeply woven into the social fabric that their continued existence is not seriously threatened by short term political changes in domestic legislative and executive institutions. This is significant because in those instances where there are important political functions served by international courts and tribunals that are different from those stated in the constituent instrument, and since those "unwritten" and initially motivating political necessities may dissipate over time, the political consensus as to the continued need for particular international courts and tribunals may also degrade over time.

Finally, if this is an accurate account of the political functions served by these bodies, an important implication arises for academia: When assessing the value or effectiveness of international courts and tribunals scholars should not only proceed in terms of how well a given institution serves its constituted ends, but also how well it serves the unstated purposes.

III. THE DESIGN AND OPERATION OF INTERNATIONAL COURTS AND TRIBUNALS:

A THEORY OF BOUNDED STRATEGIC SPACE

More than most international institutions, international courts and tribunals are highly structured spaces of contestation. They are not designed, for example, to promote cooperation or facilitate discussion. Rather, regardless of the several functions they may serve, they are designed for the presentation of argument by disputing parties to a third party.

Broadly stated, the theory offered in this section is that the structure and operation of international courts and tribunals can be understood as the result of the interactions of five or less different groups of actors *within* and *against* the bounded strategic space defined by the constitutive instrument establishing the international court or tribunal.

In this sense, the rules of procedure employed in the bounded strategic space may be viewed as the legal expression of the political efforts of these groups to control the influence of each other on the operation of the court or tribunal. Each of the groups of actors are defined by their institutional position and each group is motivated by the logic of that institutional position. Thus each group seeks to advance its logic by influencing, or limiting the influence of the other institutional positions, and in this effort they may seek, for example, to

25. Thomas Buergenthal, *Brief Observations*, in PROCEEDINGS, 100 AM. SOC'Y INT'L L. PROC. __ (forthcoming 2006)

make allies of others. The net result of the efforts of the various institutional positions to control one another is the construction of a set of rules and practices that define a bounded strategic arena in which a contest takes place.

The significance of this approach is at least two fold. First, it leads to a dynamic view of international courts and tribunals as opposed to the prevalent static view. Much of the legal literature tends to describe the institutions as more stable than they often are in my experience. The dynamic view captures that initial design is a consequence of politics, and that that political contest can continue in further rounds both within the space created and in efforts to redraw the bounds of the space. Second, this approach exposes the legal structure in terms of efforts of groups to control the efforts of other groups.

Again, noting that the detailed exposition of this theory should be sought elsewhere, the sketch of the theory in this section proceeds in the following fashion. First, I outline the fundamental concept of a bounded strategic space. Second, I provide a brief overview of the five actor groups and their institutional logics. Third, the important added step of placing this model in motion in terms of strategic action by these various actors within or against the bounded strategic space is beyond the scope of this overview and thus only noted with the reader referred to the more detailed exposition elsewhere.

A. THE BOUNDED STRATEGIC SPACE

The 'systems' addressed by this theory are each of the various international courts and tribunals. This theory does not address the aggregate of all the international courts and tribunals, but rather offers a way of understanding and explaining the structure and operation of each of the many international courts and tribunals. Obviously, there are a great many different international courts and tribunals. This theory asserts that there is a shared underlying dynamic structure that manifests itself in these different institutions.

In brief, the system of each particular international court or tribunal is defined by the constitutive instrument of that court or tribunal. For each international court or tribunal there is a 'big bang,' a moment of creation. The period of gestation may be a matter of only months, or it may last for years. But regardless of the period of negotiated development, there is a moment when a constitutive instrument is concluded, and in that moment the international court or tribunal comes into being. If the creators are states, then the instrument creating an international court or tribunal most often will be a treaty.

The constituent instrument creates a system that can be modeled because the system formed is quite fixed. For the system to set up a game that can be modeled in some way, the boundaries of this system and the "rules of the game" must be defined and relatively fixed. The constitutive instrument establishes such boundaries and rules for two reasons. First, as already stated, the institution that is created is intended to be an arena for contestation. The rules for this contest are thus demanded. Second, the shape of the institution is relatively fixed because (1) states negotiating international instrument as general matter make amendment difficult and (2) this tendency is particularly the case with

international courts and tribunals where efforts to alter the strategic space later may be viewed as strategic moves to gain advantage in a particular contest within that strategic space. For these reasons, this theory terms the system modeled as a ‘bounded strategic space.’

In addition to creating a system that can be modeled, the institutional positions created in the various international courts and tribunals are sufficiently similar that the model of a bounded strategic space occupied by five or less institutional positions holds true for the majority of such courts or tribunals.²⁶

Some examples will help demonstrate the concept of a bounded strategic space. The Iran-U.S. Claims Tribunal (IUSCT), for example, is an institution created by a set of instruments collectively termed the Algiers Accords. The Accords define the basic shape of an institution, its docket, and the law it is to apply. In doing so, the Algiers Accords create a bounded space within which various groups of actors assess their interests and contest with others to gain some measure of control over the activities of the institution. Using the distinctions offered above, the IUSCT is a party-originated mechanism where both of the two state parties and their nationals could appear as claimants. The fixed nature of this specific strategic space is particularly apparent. Inasmuch as relations between the United States and Iran are strained, it has been difficult to imagine the two states succeeding in rewriting the dimensions of the space through amendment of the Accords. In this sense, the contest for influence has been carried out entirely within the strategic space created by the Accords. In defining the docket, the Accords at best could anticipate, and at a minimum set up, the challenges the institution has faced. The docket of approximately 4800 claims before the Tribunal was anticipated in the Accords by the requirement that the IUSCT be composed of nine arbitrators who would work in Chambers of three, along with the explicit authorization for the number of chambers in the Tribunal to be expanded.

The United Nations Compensation Commission (“UNCC”), in contrast, was a community-originated institution created by resolution of the U.N. Security Council. The UNCC’s docket – with some 2.5 million individual claims and around 200,000 larger claims by corporations, individuals and governments – was clearly much larger than that of the IUSCT. The originating resolution of the Security Council (which incorporated by reference a report detailing the recommendations of the Secretary General) anticipated that the challenging docket demanded an innovative and flexible approach. This flexibility was gained in part by not specifying all the details of the space in the constituent instrument, but rather by delegating authority for the elaboration of those details to bodies within the space.

There are two important points to add given the system definition adopted in this theory. First, not every institution that is labeled an international court or tribunal is equal in terms of its capacity for being modeled as a game. In

26. The significant exception to this assertion is the institutional position of Prosecutor present in the case of the international criminal courts and tribunals. This exception leads to a variation on the details of the theory offered. For a discussion of this variation, see the Lectures, *supra* note 1.

particular, the open-ended nature of what has been termed ‘diplomatic’ arbitration in the 1800s, where a party could withdraw because they had lost confidence in the process or declare, with little possibility of review, the outcome of the arbitration a nullity, alters the shape of the space sufficiently that it may be more akin to structured negotiation or conciliation than the more legalized international court or tribunal of today. Similarly, it is worth noting that some strategic spaces may not be viable, that is, the space created may be incapable of achieving its stated function. This possibility may be the unintended consequence of negotiated positions or it may be in fact precisely the outcome an actor or actors seek. There are unfortunately instances where the basic genetic structure of the court or tribunal so limits the institution that it is, from the outset, challenged to do other than fall short of the expectations for it.

The second important point is that the defining of a system leads one to consider the relationship of the system to everything outside of it. The state that hosts the institution, the state that is requested to assist in securing evidence for the work of the court or tribunal, or the state non-party that claims to be affected by the contemplated decision of the court or tribunal are just three examples. The ‘outside’ of the system may be explicitly brought in as part of the system in the constitutive instrument and this is addressed in terms of one of the groups of actors, the “other interested parties.” But more broadly, and beyond the scope of this overview, the topic of what is outside of the system can be viewed as a question of the autonomy or dependency of the system, depending on one’s perspective.

B. THE ACTORS

In defining the boundaries of the system, we are led also to define the actors within the system. A critical insight in this regard is that the actor types found existing within international courts and tribunals repeat across the range of institutions. This theory asserts that there are at least five institutional positions, or actors, to potentially consider. The five groups of actors are each defined by a specific and distinct institutional position with each position being identified by a particular logic. In other words, “where one stands” – a diplomatic adage goes – “depends on where one sits.” Thus in referring to actors, I do not refer to interest groups, but rather to institutional positions common to many international courts and tribunals. Specifically, the parties, the adjudicators, the constitutive community, the secretariat, and other interest parties. Although they are commonly present, these five actor groups do not exist in every institution, nor are they of equal power or influence.²⁷

27. The existence of five positions means the views of some of these actors will often coincide. Indeed, not only may the groups coincide, but in some cases one group may serve as an agent of another. Such coincidental agency does not mean that such positions need not be considered in as much as the coincidence on one point does not require agreement on all points, nor is there necessarily a shared emphasis even when views coincide.

1. The Parties

A central institutional position is the group of actors who are present as the parties before the institution. In case of the Iran-United States Claims Tribunal, the parties were the governments of Iran and the United States and, as claimants, the nationals of those two states.

The logic of the parties to a dispute is defined as one seeking maximal attainment of their interests in the resolution of the dispute. In the vast majority of cases, the interest of the parties is to win on the legal merits of the dispute, but the spectrum of interests is varied and parties might reasonably hope only to minimize the degree of loss. In this strict definition, the logic of the party's desire to attain their interests trumps any countervailing interests of the institution or larger community.

This logic might be thought to be inconsistent with the presence of procedures that seek to ensure impartial and independent tribunals. But if we assume on average a measure of equality in bargaining power and skill, one would expect the logic of the parties to lead each party to seek to limit undue influence by the other party thus moving the international courts and tribunals toward the dominant preference for impartial and independent tribunals. The logic allows for the possibility, however, that a party would not be concerned with its possible tainting of a community-originated institution assuming its doing so would further its logic. Conversely, it should not be surprising that in a community-originated institution that the institution, the community that created the institution, and the adjudicators whose oath is to the institution and not the parties, may view the parties in terms of this logic.

2. The Adjudicators

A second institutional position is that occupied by the "adjudicators," a term used here to encompass the sole arbitrator or the panel of judges or arbitrators who will carry out the adjudicative function of the institution.

The logic of this position is difficult to articulate because the logic in practice is complex and varied. A dominant logic, applicable more clearly among international commercial arbitrators, is one of self interest where the adjudicator seeks to be retained as an adjudicator again either on an *ad hoc* basis or within an institution. This logic is also applicable to the adjudicators in international courts and tribunals considered by this theory. The difficulty is that the self interest of the cadre of adjudicators in international courts and tribunals is often more complex than simply future retention and thus must be more loosely defined as a logic that seeks to maintain or increase the reputation of the individual adjudicator. The reasons for, and difficulties generated by, this logic are beyond the scope of this brief introduction, but are broadly speaking a product of the fact that international adjudicators can look to maintain their reputation or status not only within the world of international adjudicators but also, for example, within their national political realms or within the academic community from which they are often drawn. Again, this issue is discussed at some length in the full exposition of this theory.

In terms of the narrower logic of seeking to be retained as an adjudicator

either on an *ad hoc* basis or within an institution, adjudicators are concerned with determining what their task is and, most importantly, with determining who has defined their task and will judge their performance of that task. That focus leads to the distinction of whether an institution finds its origin in the will of a community or the parties. If the institution was created by the parties, then the arbitrator serves in essence as a contractual agent of the parties, and his or her duties *as arbitrator* derive from that relationship. In contrast, a judge with a community-originated institution shares the community's concern with the long term integrity of the institution. As a consequence, for example, the adjudicator in an community-originated institution will recognize that although the individual decision is the only thing of importance to the parties, the place of the individual decision in the overall framework of the institution's jurisprudence may be of importance to the community that created the institution.

3. The Community

The first two institutional positions are present in all international courts and tribunals, the remainder are not. In the case of a party-originated international tribunal, the parties both create the institution and appear before it. In a community-originated institution, the parties are still present as the actors appearing before the institution, but it is some community that creates the institution. It is this community that is the third institutional position. The group of actors that form this community in addition to creating the institution, often also have continuing roles outlined in the constitutive instrument. The community often funds the operation of the institution. In addition, the community as originating group often gives to itself authority over the selection of the adjudicators or members of the secretariat.

The logic of the community is *a priori* concerned with the interests of the community in the resolution of the identified disputes, and not necessarily the interests of the particular parties or the outcomes of particular disputes. The community in this sense may view particular parties with distrust.

In order to protect the interests of the community in creating the court or tribunal over the particular interests of the parties in the resolution of their specific case, the community, as stated above, may empower the court to take action on its own initiative. The community does so because it believes its conception of what may be at stake in the court's hearing a particular matter may not be adequately captured by the interests of the particular parties before the court. It is rare that the parties themselves grant such *sua sponte* authorities to the adjudicators. An example is the International Court of Justice, which possesses the power to order interim measures of protection *sua sponte*, while in the case of party-originated institutions the authority to grant interim measures first requires a party request.²⁸

28. See, e.g. David D. Caron, *International Dispute Resolution: Comparing the Roles Accorded the Parties and the Community Surrounding Them*, 85 AM. SOC'Y INT'L L. PROC. 65 (1991) (under the heading "Remarks by David Caron").

4. *The Secretariat*

A fourth institutional position in many international courts and tribunals, but not all, is the “secretariat” of the institution. The functions of the secretariat vary. Among other things, the secretariat may assist the adjudicators in their work, perform clerical and administrative tasks, or act as host for meetings of the governing body. In practice, secretariats thus can exhibit a range of powers running from ones purely clerical to those critically important to both governance and adjudication.

The logic of the secretariat is similar to that of the adjudicators, that is, the logic of the members of the secretariat is to seek the continuation of the position enjoyed or the occupying of a similar or better position. The members of the secretariat likely do not enjoy the security of employment of the adjudicators and may not feel as secure in their positions. Often their logic of continuing their positions means that the secretariat is defensive of the long term health of the organization. They can seek both to promote the institution and defend its integrity and reputation. The logic of the secretariat differs from that of the community in that the secretariat seeks the continuation of the institution, while the community values the institution only to the extent that it satisfies the interests that led the community to create the institution in the first place.

As stated, the functions and powers of secretariats vary significantly. One hypothesis is that there is an inverse relationship between the powers of the adjudicators and those of the secretariat: The stronger the adjudicators, the weaker the secretariat. One may appropriately view the creation of the WTO appellate body primarily as a manifestation of the legalization of the WTO. But, the creation of a permanent appellate body also moved the locus of control at the appellate level from the secretariat toward the adjudicators. It takes repeat interactions for adjudicators to be comfortable with one another and a full time presence for the adjudicators to take greater responsibility for an institution (as opposed to simply deciding the particular case put before them). In contrast, the adjudicators within the dispute settlement panels of the WTO can be seen as operating at a disadvantage vis-à-vis their colleagues in the appellate body. When a dispute settlement panel (an *ad hoc* group) is convened, they are aided in their work by an analysis of the secretariat applying the jurisprudence of the WTO. Given that these panelists may not have worked together before this, their ability to push back collectively on this secretariat analysis, it can be argued, is structurally limited. The more adjudicators are present and the more they can interact, the more they will operate at the extent of the powers available to them under the constitutive instrument. The more the secretariat is left day to day to manage an international court or tribunal, the more it will operate at the extent of powers available to it.

The secretariat thus in some instances is a weak force, while in other circumstances, particularly, for example, when it has a role in selecting the *ad hoc* adjudicators, the secretariat can shape greatly the work and life of an institution.

5. *The Other Interested Parties*

As mentioned in the discussion of the bounded strategic space, there are numerous states and other actors outside of the space. Moreover, the bounded strategic space may be dependent on, or relatively autonomous of, this outside area. There is a final institutional position inside the strategic space of some international courts and tribunals that is intended to accommodate some of these outside entities. This is a group of actors that arguably possess a special interest in the outcome of particular proceedings to which they are not a party. One example would be non-governmental organizations who are allowed to make non party submissions in investment arbitrations under Chapter 11 of the NAFTA. Another example would be third states that in specific circumstances may intervene in proceedings before the International Court of Justice.

The logic of the other interested parties is to represent and further the interest that justifies their participation. Their claim often is that they represent an interest that is affected and arguably not protected or represented by parties. The parties are more interested in the outcome of their case, then the consequences of that outcome for the interests of others, for a principle potentially at stake or for its spillover into another dispute.

C. SETTING THE MODEL IN MOTION: CONTESTATION WITHIN AND AGAINST THE BOUNDED STRATEGIC SPACE

The final step of envisioning the dynamic interactions of the various actors and the manifestations of these interactions in the structure of the various international courts and tribunals is beyond the scope of this overview. I briefly note only three points.

First, the five actors described above are not always present in every international court and tribunal. Historically, the most common model involved only the parties and the adjudicators in the most typical party-originated institution – *ad hoc* arbitration. The substitution of a community for the parties as the originating basis for the institution is crucial in this sense and in my view marks the transition from an international arbitral tribunal to an international court. To both the party-originated tribunal and the community originated court may be added secretariats and other interested parties.

Second, as to contestation *within* the bounded space, the possibility of contest invites both a search for allies and a search for control. In addition, as the various actor groups may have different images of the functions of the institution and may possess different interests as to the decisions, integrity and vision of the institution, such differences are often foreseen and controls on the behavior of various groups are built into the institution, into the structure of the strategic space.

For example, the community may exert some influence over the adjudicators by requiring that they possess certain qualifications. Adjudicators may have to possess certain experience or qualities of character. Adjudicators may be required to apply specific norms spelled out in a treaty so as to limit

judicial doctrinal innovation, may be granted the power to write dissents as a way to limit the law-making possibilities of the majority, may be removed from their posts for certain behaviors, or may be required to supply reasons for their decision so as to limit their discretion. The adjudicators are likewise controlled if decisions are subject to appeal, annulment or political review.

In this way, one may investigate each of the possible relationships between actors in a international courts and tribunals to understand the potential for alliance and conflict, and to identify the various control devices manifest in existing institutions. For example, the community in most community-originated institutions continues to exert influence past the formal creation of the institution through a formal or informal voice in the selection of adjudicators and the head of the secretariat. In other cases, the community has a continuing role through a governing body which is representative of the originating community.

Third, as to contestation *against* the bounded strategic space, it is important to note that there are at least to two phases to the construction of the bounded strategic space. First, there is the conclusion of the constituent instrument which establishes the court or tribunal. But this layer of DNA sometimes provides only the skeleton of the institution and not the final details of the organism. The second phase comes with the initial governance of the institution, whether that governance is located in a governing body formed by the community, in the adjudicators or in the secretariat. In general, it is a characteristic of dispute resolution mechanisms that the structure arrived at, in both phases, is difficult to alter. Yet, although the odds are against successfully altering the bounded strategic space, the groups acting within the bounded strategic space may chose to act against the bounded space itself seeking to alter it, or defect from it.

IV. THE CONTRIBUTIONS TO THIS SYMPOSIUM

The contributions to this Symposium volume address a broad range of questions relating to the political and institutional aspects of international courts and tribunals. Several of the articles consider the conditions that bear on the decision to create, or the refusal to create, an international court or tribunal.

Charles Seavey in *The Anomalous Lack of an International Bankruptcy Court* asks why bankruptcy courts should be so common both historically and domestically, while they are yet to be created for sovereign nations. Seavey notes that despite the desperate financial situation of a number of developing states, there is not a sovereign bankruptcy mechanism but that rather “the IMF, the World Bank, and the Paris Club can at best be said to operate in the mediatory continuum.”²⁹ Seavey argues that “[m]ost participants in the debate over a sovereign bankruptcy court, with a few exceptions, agree with the notion that creating such a court would result in more equitable sovereign fresh starts while creating massive new [long term] efficiencies in the conversion process.”³⁰ Seavey asserts a number of reasons that potentially explain the

29. 24 BERKELEY J. INT.'L L. 500, 518 (2006).

30. *Id.* at 507.

decision to not create such a court. Among other things, Seavey concludes that the tendency towards the establishment of international courts and tribunals must be evaluated in terms of the existing institutional framework absent such a court. "Courts and tribunals are not desirable to a given party if they dilute their ability to dominate other parties. When a given institutional structure *already* creates domination or a disproportionate power for some parties over others, and when the dominant parties simultaneously control whether or not the institution creates an IC&T, that institution is unlikely to create an IC&T."³¹

Jennifer Heindl's contribution can be seen as a case study of creation (or refusal to create depending on one's starting point). In *Toward a History of NAFTA's Chapter 11*, Heindl using newly released materials offers a valuable negotiating history of Chapter 11 and the political context surrounding that negotiation. An official within the U.S. Trade Representative's Office at the time of the negotiation commented to me that the U.S. sought to keep the institutional aspect of Chapter 11 to a minimum so as to avoid what was perceived as a tendency of any international institution to seek to grow in its range of competence. Heindl's study is an important step in uncovering the history of that negotiation and the factors that were at play.

The decision to create to a tribunal is related to (1) the scope of the power given to a tribunal, (2) the question of when it is time to close a tribunal and how one will go about that task and (3) the extent of support enjoyed by an existing tribunal. The first question is addressed in the contribution by Anne-Sophie Massa: *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*³² Massa asks not why an institution was created, but instead considers how prosecutorial discretion serves as a limitation on the reach of an existing institution. A similar study of the limits placed on the powers provided an institution is offered in Corrina Heyder's contribution: *The U.N. Security Council Referral of the Crimes in Darfur to the International Criminal Court in the Light of the U.S. Opposition Towards the Court.*³³ Heyder explores the seemingly conflicted position of the United States opposing International Criminal Court ("ICC") jurisdiction over its nationals while simultaneously accepting the value of the Security Council referring specified crimes in Dafur to the ICC. For Heyder, the U.S. participation in the referral of crimes in Dafur to the ICC means that "the U.S. will find it hard to ignore the court and has now factually admitted its legitimacy with respect to universal jurisdiction in cases of violent and horrific crimes" and that "it is hoped that the results of a properly working court will calm down the fierce concerns of the U.S. and lead to possible *ad hoc* cooperation in the long run."³⁴ The second question, that of closing down a court or tribunal, is considered by Laura Bingham in *Strategy or Process:*

31. *Id.* at 515.

32. 24 BERKELEY J. INT.'L L. 611 (2006).

33. 24 BERKELEY J. INT.'L L. 651 (2006).

34. *Id.* at 672.

*Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda.*³⁵ Bingham examines the end game for the international criminal tribunals for the Former Yugoslavia and Rwanda. She asks what the functions of these tribunals are and how that vision of function should inform the shape of a strategy to wrap-up their efforts. Finally, in *The Glue That Binds Us: Explaining the Broad-Based Support for WTO Adjudication*, Laura Granger examines the third question by considering why adjudication at the WTO, despite the fact that the matters addressed can be crucial to the disputing nations, is broadly supported.³⁶

Contestation within the strategic space of an international court is examined by Shoab Ghioas in his contribution, *The Expansion of Judicial Doctrine by WTO Appellate Body.*³⁷ Ghioas examines the expansive practice of the WTO Appellate Body and the efforts of various actors to exert control over that expansion.

Two contributions focus on efforts to alter the strategic space of international courts and tribunals. Tom Walsh in *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?* examines various calls for the establishment of an appellate mechanism for investment disputes generally and within ICSID specifically.³⁸ He considers the proposal offered for debate by the ICSID Secretariat, and the divide between states that listen to the generally cautionary voice of the investor community and states that fear being the subject of adverse award. Christina Hioureas in *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights* considers the most recent effort to amend the European Convention on Human Rights which in turn became a debate about the function of the European Court of Human Rights.³⁹ Unlike many strategic spaces, the European Court of Human Rights has been amended numerous times, although as the size of the Council of Europe increases, it remains to be seen whether this most recent effort, Protocol 14, will be ratified as quickly as previous instruments.

It is sometimes argued that the strength of the European Court of Human Rights is a consequence of the desire of states to use the Council of Europe as a means of transition to the European Union. The eventual conferral of the economic benefits of the Union are seen as the hook pulling states toward compliance with the human rights and rule of law requirements of the European Convention on Human Rights. It is in this vein that Rebecca Wright in *Foreign Aid Donors and Institutional Change: Possibilities for Growth at the New African Court on Human and Peoples' Rights* looks to the possible linkage of compliance with the new African Court on Human Rights to foreign aid as a device whereby the African Court over time may be strengthened.⁴⁰ The new African Court is often described as a start, but also as a quite limited institution. Wright explores linkage as a means for institutional transformation. More

35. 24 BERKELEY J. INT.'L L. 689 (2006).

36. 24 BERKELEY J. INT.'L L. 522 (2006).

37. 24 BERKELEY J. INT.'L L. 536 (2006).

38. 24 BERKELEY J. INT.'L L. 444 (2006).

39. 24 BERKELEY J. INT.'L L. 720 (2006).

40. 24 BERKELEY J. INT.'L L. 464 (2006).

generally, Mike Burstein in *The Will to Enforce: The Political Constraints Upon a Regional Court of Human Rights* considers why it is that one regional human rights court may flourish while another does not.⁴¹ Burstein notes that “[t]he range of external forces that can constrain or enhance a regional court of human rights’s ability to function effectively is overwhelmingly broad, ranging from the structure of the court as defined in its organic treaty to the adequacy of funding a court receives from its member states or outside forces.”⁴² For Burstein, a regional court “is going to be as good as its community will allow it to be.”⁴³

Lastly, there is a look back. Durwood Reidel in *The U.S. Military Tribunals at the Former Dachau Concentration Camp: Lessons for Today?* examines not the well known International Military Tribunal at Nuremberg, but rather the far numerous trials of German war criminals before U.S military tribunals.⁴⁴ For Reidel, there can be seen in these often forgotten trials, an earlier manifestation of the notion expressed today as ‘complimentarity,’ and of the need to see international tribunals and national courts as a system possibly working together rather than at odds.

CONCLUSION

International courts and tribunals, like all courts and tribunals, are institutions. And although legal scholars appropriately may isolate courts from the surrounding political context as they study the jurisprudence of a court or tribunal, it is quite artificial to examine the court as an organic institution without reference to the functions it serves and political context of which it is an integral part. When examined in this way, the dynamic nature of these institutions is readily apparent. This Symposium is offered as a step towards a political theory of international courts and tribunals.

41. 24 BERKELEY J. INT.’L L. 423 (2006).

42. *Id.* at 424

43. *Id.* at 443

44. 24 BERKELEY J. INT.’L L. 556 (2006).