Introduction

The focus of inquiry

This book studies the role that legal rules on jurisdiction and admissibility play in the life and operation of international courts. I will argue that jurisdictional rules define the legal powers of courts and that admissibility rules define their ability to refrain from exercising legal power. Accordingly, the underlying subject of this book is the legal power that international courts can exercise in the international realm. Of course, legal powers are not the only type of power that courts may exercise, courts also exert political influence and moral authority, and contribute to shaping the legal culture of the various constituencies with which they interact.[1] Nevertheless, legal powers are central to the operation of international courts. Not only do legal powers constitute the most dominant or quintessential set of powers exercised by international courts; legal powers also delineate and confer legitimacy upon the other powers wielded by international courts, thereby facilitating and controlling all aspects of their operation.

Arguably, the most important consequence of the application by international courts of the rules on jurisdiction and admissibility governing their legal powers is case selection. Jurisdictional and admissibility rules introduce legal criteria that provide an answer to

[1] See e.g. Karen J Alter, 'The European Court's Political Power' (1996) 19 *West European Politics* 458; Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, NJ: Princeton University Press, 2000), pp. 17–18; Jack Wade Nowlin, 'Judicial Moral Expertise and Real-World Constraints on Judicial Moral Reasoning', in Christopher Wolfe (ed.), *That Eminent Tribunal: Judicial Supremacy and the Constitution* (Princeton, NJ: Princeton University Press, 2004), p. 118.

the question whether international courts can or should adjudicate specific international disputes. Case selection thus mediates the influence that international courts exert on the world of international law and international relations. The centrality of case selection for understanding and appreciating the scope of international judicial power underlies my decision to focus my attention in this book almost exclusively on the implications of jurisdiction and admissibility rules for case selection. I will therefore allude here only in passing to other meanings of the term 'jurisdiction', which are sometimes employed in the literature on international adjudication to refer to aspects of legal power other than case selection such as the judicial power to issue specific remedies or adopt certain interim measures.[2]

Outline

The book adopts the following thematic structure: Part I investigates from a primarily theoretical perspective the concepts of jurisdiction and admissibility and their contribution to the life and operation of international courts. My main claim in this regard is that jurisdiction and admissibility can be understood as a form of delegated authority afforded to international courts to exercise adjudicative powers and/or to refrain from doing so. Parts II and III, which constitute the main parts of this book, then examine the actual application by international courts of rules on jurisdiction and admissibility (Part II focuses on rules of jurisdiction and Part III on rules of admissibility). The analysis I offer in both of these parts is as much prescriptive as descriptive. My main claim in this regard is that a critical assessment of the relevant practice and literature on questions of jurisdiction

[2] Some surprising links can be found between different meanings of the term 'jurisdiction'. E.g. the broad power of the ICJ to entertain advisory opinion (jurisdiction to adjudicate) may be explained in part by reference to the non-binding effect of the decision (jurisdiction to prescribe), and the Court's inability to issue any remedies (remedial jurisdiction). *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (first phase), 1950 ICJ 65, 71 ('The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different concerning advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take').

and admissibility reveals numerous inconsistencies, thereby highlighting the absence of a coherent theory on jurisdiction and admissibility and their role in international adjudication. The functional approach I advance in this book has, I believe, the potential to address many of the shortcomings found in the existing practice and literature and to explain in coherent terms the exercise of judicial power.

Part I

The concept of jurisdiction and admissibility in international adjudication

1

Jurisdiction as a policy tool

A functional approach to jurisdiction and admissibility

The approach I present in this book to the study of rules on jurisdiction and admissibility and their contribution to the operation of international courts is primarily functional (or instrumental) in nature, and places jurisdictional and admissibility rules in the context of the variety of functions international courts and tribunals serve in the life of the international community (or international society). Such functions include: (1) conflict resolution or, more broadly, advancing the solution and/or facilitating the management of policy problems occupying states, international organizations and other relevant actors; and (2) interpretation of relevant legal norms and their application to concrete factual situations, thereby potentially contributing to the development of international law norms, strengthening their centrality in international relations and inculcating the notion of the rule of law at the international level.[1]

More generally, international courts can also be understood as policy instruments in the hands of two principal sets of constituencies: (1) their mandate providers – that is, the states and international organizations that establish international courts, fund and support their operation, and who may ultimately decide to shut down and dissolve them; and (2) the parties to any specific dispute,

[1] For a discussion of the functions of international courts, see Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49; Yuval Shany, *Assessing the Effectiveness of International Courts* (New York: Oxford University Press, 2014), pp. 37–48.

who may choose to submit their differences to adjudication before an international court. The decision by both sets of constituencies to create an international court or to utilize it in any specific case can be explained in policy terms by the perceived functional utility of adjudication in addressing policy problems confronting international actors. One functional utility of adjudication is legitimization, and this may explain the choice of adjudication over other problem-solving alternatives. The establishment and activation of international courts, which exercise legal powers in an independent and impartial manner and reach their decisions through a process, which is generally perceived as fair and professional, can be understood as a method by which international actors bolster and legitimize specific dispute-resolution outcomes, as well as, more broadly, the governance of the international legal regimes to which they belong.[2]

From this functional perspective, one may view the establishment of international courts, the conferral of jurisdiction upon them and their actual activation in concrete cases as means to an end: a way to advance the goals, interests and values of international actors belonging to relevant political communities or legal regimes. In this context, rules on jurisdiction typically serve as the method by which the mandate providers and disputing parties control the space reserved for the court's judicial operations and, consequently, the extent of its functional utility. Rules on admissibility, however, allow international courts to resist certain attempts to utilize them in a manner they consider improper or harmful to their own institutional interests or those of their constituencies.

The conferral of *ex ante* jurisdiction upon an international court, discussed in Part II of this book, reflects the choice of the mandate providers or potential parties to any given dispute to create conditions under which certain political, economic or societal interactions will take place under the shadow of international adjudication – that is, in a judicialized environment, where rights can be enforced before a court of law.[3] Such a judicialized environment stands in marked

[2] On the relationship between legitimacy and functional effectiveness, see Shany, 'Assessing the Effectiveness of International Courts', pp. 137–138.

[3] E.g., see Understanding on Rules and Procedures governing the Settlement of Disputes (Annex 2 of the WTO Agreement), 15 April 1994, art. 3(2), 1869 UNTS 401 (hereinafter 'DSU') ('The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognize that it serves to preserve the rights and obligations of the

contrast to the traditional state of affairs in international relations, where specific problems, including problems with conspicuous legal dimensions, have tended to be resolved (if at all) through diplomacy.[4] In the same vein, the actual activation of an international court's jurisdiction in any specific case (through unilateral seizing of the court or through reference by way of agreement of the parties) reflects a choice by one or more of the disputing parties to realize the potential offered by the legalized environment in which they operate and to opt for law-based problem solving through the process of adjudication.[5]

In both cases – the *ex ante* conferral of jurisdiction upon international courts and its *ex post* invocation – the scope of jurisdiction held and exercised by international courts is expected to correlate, by and large, to certain broadly held notions about the utility of adjudication, which are explored in the ensuing pages. Furthermore, the actual caseload of international courts is likely to reflect the beliefs and expectations of parties to litigation about the type of situations in which international courts may serve as useful tools for advancing law-based problem solving.

A similar functional analysis may be offered with regard to rules on admissibility. As Part III shows, the conferral upon an international court of the power to reject cases as inadmissible equips it with independent case-selection capabilities which may help it to protect its reputation and adjudicative functions. In addition, the actual dismissal of cases by international courts as non-admissible is indicative of judicial perceptions of the circumstances under which

members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'); Security Council Resolution 827 (25 May 1993), preamble, UN Doc. S/RES/827 (1993) ('Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim [bringing international criminals to justice] to be achieved and would contribute to the restoration and maintenance of peace').

[4] See e.g. Bernardo Sepulveda-Amor, 'Opening Remarks', in Laurence Boisson de Chazournes, Marcelo G Kohen and Jorge E Vinuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (Leiden: Martinus Nijhoff Publishers, 2013), p. 7.

[5] See e.g. Patricia Rey Mallén, 'Landlocked For A Century, Bolivia Now Wants Access To The Sea, Asks Chile For Help', *International Business Times*, 14 June 2013 (alluding to Bolivian president Morales's decision to go to 'international courts and organizations, asking for the right of Bolivia to have its own way to the Pacific' as underlying the Bolivia-Chile ICJ case).

adjudication would be disruptive of the judicial function or undesirable for other reasons. For example, the International Court of Justice (ICJ) has in the past taken the position that adjudicating a case raising only hypothetical legal questions, without any practical consequences, is incompatible with the judicial function and should thus be resisted through designating the case as inadmissible.[6] This is reflective of a perception about the non-utility of adjudicating legal disputes without any real-life consequences, which can be said to stem from a particular view about the function of international courts in international life.

The granting of jurisdiction to international courts over a category of disputes or over any specific dispute does not, however, imply that judicial settlement is always regarded by the relevant mandate providers or disputing parties as the only suitable form of problem solving. An agreement to refer a matter to an international court, by way of an ad hoc agreement on jurisdiction (*compromis*) or through a jurisdictional provision found in an international treaty delegating to it *ex ante* adjudicative power (such as a compromissory clause found in a specific treaty or a treaty provision entailing the general acceptance of 'compulsory' jurisdiction over disputes arising in a certain bilateral or multilateral context),[7] merely implies a choice by the relevant international actors to add adjudication to the tool box available to them for handling the policy problem at hand. Other political or diplomatic measures are still likely to be utilized before, after and in tandem with the adjudicative process.

For example, parallel to the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) by Resolutions 808 (1993) and 827 (1993),[8] the Security Council has taken other measures designed to facilitate the resolution, or at least the management, of the conflict in the Balkans, including sanctions against the Former Yugoslavia, the dispatch of peacekeepers to the region (UNPROFOR) and several political initiatives.[9] Hence, the establishment of the ICTY

[6] *Northern Cameroons* (*Cameroon* v. *UK*), 1963 ICJ 15, 34.
[7] See e.g. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951, art. 9, 78 UNTS 277 (hereinafter 'Genocide Convention'); European Convention for the Peaceful Settlement of Disputes, Strasbourg, 29 April 1957, in force 30 April 1958, art. 1, ETS 23.
[8] Security Council Resolution 808 (22 February 1993), preamble, UN Doc. S/RES/808 (1993); Security Council Resolution 827 (25 May 1993), preamble, UN Doc. S/RES/827 (1993).
[9] See e.g. Security Council Resolution 787 (16 November 1992), UN Doc. S/RES/787 (1992).