Introduction

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The post–Cold War era has been called 'the age of international adjudication'[1] on account of the multiplication of international courts and tribunals (ICTs)[2] and the rise of a plethora of other international adjudicatory and quasi-adjudicatory bodies. International courts and tribunals have mushroomed at the global and regional level in parallel to the proliferation of international organisations and the extension and diversification of international law.[3] This phenomenon has in turn led to several strands of academic writings about the rise of 'international legalism' and the 'judicialization of world politics'[4] within the framework provided by a burgeoning 'global community of courts'.[5] However, the golden age of international adjudication may be losing momentum. The growth of populism in several countries has aggravated a sovereignist pushback against the international rule of law and, thereby, against international dispute settlement mechanisms. A prominent commentator has warned that 'large-scale retreat into nativism and unilateralism'[6] risks having serious detrimental effects on international adjudicative processes and the rule of law on the international plane.

[1] Shany, Y., 'No Longer a Weak Department of Power? Reflection on the Emergence of a New International Judiciary' (2009) 20 (1) *European Journal of International Law* 73.

[2] See Alter, K. J., *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014).

[3] For a general examination of the so-called proliferation phenomenon and its implications for the purported 'fragmentation' of international law see Dupuy, P.-M. and Viñuales, J. E., 'The Challenge of Proliferation: An Anatomy of the Debate', in C. Romano, K. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), pp. 135–157.

[4] See e.g. Shapiro, M., and Stone Sweet, A., *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002).

[5] Slaughter, A. M., 'A Global Community of Courts' (2004) 44 (1) *Harvard International Law Journal* 191.

[6] Crawford, J., 'The Current Political Discourse Concerning International Law' (2018) 81 *The Modern Law Review* 1.

Conceived and developed as an attempt to revisit a prevailing account of the history of international adjudication, which emphasises institutional 'progress' in relatively well-defined 'phases', this volume casts a retrospective eye on a selected number of historical experiments in international adjudication. As further explained in Chapter 1, by 'experiments' we refer to attempts, sometimes fully developed – whether subsequently successful in their operation or not – but sometimes also aborted at an early stage, to resort to international adjudication for a variety of purposes. International adjudication is broadly understood to include not only ad hoc and permanent international courts and tribunals but also hybrid (domestic/international) processes or institutionalised arbitration systems. In this context, the volume returns to several such experiments in order to: (i) unearth past and illuminating – sometimes pioneering – experiments in international adjudication, (ii) conceptualise a range of approaches to international adjudication pursued historically, and (iii) understand the deeper roots of international adjudication and thereby shed light on the workings of current mechanisms. More generally, the book hopes to contribute to the flourishing field of the history of international law by expanding its reach towards international adjudication. This core area within the discipline has remained largely impervious to the methodological innovations and historiographical debates highlighted by what has been called the 'turn to the history of international law'.[7]

The analysis is conceptual and historical. It is conceptual because its connecting thread is not organised on the basis of a chronological line but focuses on approaches to the idea of international adjudication. After two initial transversal chapters discussing the overall conceptual approach and the historiographical state of the art in international adjudication, the volume presents a series of historical experiments organised under four main approaches: dispute-specific adjudication (mechanisms established to address a single dispute); context-specific adjudication (mechanisms established to address several cases arising from a broader conflict or situation); permanent and general adjudication (mechanisms that attempt to replicate the structure of domestic judicial systems on the international legal plane); and specialised and professionalised adjudication (mechanisms that focus on a specific area of international law, by analogy with the allocation of jurisdiction *ratione materiae* in domestic judicial systems).

Although these four approaches could be organised following an 'organic growth' logic (i.e. from ad hoc adjudication, to narrow and then general permanent mechanisms, to more sophisticated and specialised ones), these categories are not used as stages in a linear progress narrative. In point of fact, one purpose of the book is to show that experiments of the four types were conducted throughout the last two centuries without necessarily following an organic evolutionary line. This becomes clear when

[7] Skouteris, T., 'The Turn to History in International Law' (2017), 1 *Oxford Bibliographies of International Law* 1–31. www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0154.xml

some little known – sometimes forgotten – experiments are used to shed new light on widely held conceptions as to the time when an idea emerged, thus breaking through the narrow confines of the classical canon of facts and events that are commonly cited in the literature on international adjudication. For this reason, the volume is above all a historical account in that it explores different episodes in the history of international adjudication in their intellectual, socio-political and international legal context. The selection of these four vantage points is, however, anachronistic to some extent. As discussed in Chapter 1, it is only through the eyes of the present that these four categories of mechanisms can be distinguished. The architects and, more generally, the experimenters involved in most of the cases discussed in this volume were not necessarily aware that they were developing an institution of a certain category. Rather, they most often responded to the specific circumstances of a dispute or a certain political moment. It is only in retrospect that the four categories selected acquire conceptual meaning, and this mild anachronism is perhaps the price to pay for placing a range of diverse experiments, past and present, within a single conceptual cartography that makes their comparison possible.

The first part of the volume contains two chapters written by the editors. These chapters are intended to provide some methodological clarifications, connect past and present experiments, review the growing literature on the history of international adjudication and, more generally, highlight the potential of applying historical perspectives to nurture a renewed understanding of international adjudication. The opening chapter, by Jorge E. Viñuales, focuses on the enduring relevance of certain uses of international adjudication. Such uses are offered as an analytical prism through which past and present experiments can be brought together to shed light on international adjudication. In his chapter, Viñuales surveys a relatively large set of experiments in international adjudication, past and present, organised on the basis of five recurrent uses: face-saving uses, making up for political weakness, legitimising political strength, the quest for equality, and genuine dispute settlement.[8] The second chapter, by Ignacio de la Rasilla, examines the 'turn' to the history of international adjudication. De la Rasilla first characterises the causes behind the turn to the history of international law and its contribution to novel historiographical debates and thematically specialised areas of international legal history. He then examines the analytical toolkit of the research tradition of 'historical institutionalism', pointing to some of the new research perspectives this opens in the history of international adjudication. Finally, the chapter surveys the topical expansion that this field has experienced since 2000 and points to how certain of its peculiarities have become translated into specific methodological and historiographical debates. The conclusion examines why the 'turn' to the history of international

[8] See Chapter 1 by Jorge E. Viñuales, 'Experiments in International Adjudication: Past and Present'.

adjudication matters, for historical reasons, as well as for reasons regarding the present and the future of international adjudication.[9]

The second part of the book is devoted to examining experiments in dispute-specific adjudication. It encompasses three chapters that illustrate what can be referred to as 'ad-hocism' in the history of international adjudication. Chapter 3, by Inge van Hulle, provides a historical counterpoint to the success story of nineteenth-century international arbitration by examining its role as an 'inherent part of the imperial legal infrastructure' of Western states in Africa. Van Hulle's analysis of the imperial side of international arbitration begins by examining the 'general context' in which territorial and boundary arbitrations with respect to Africa took place among imperial powers between 1870 and the outbreak of World War I. It then traces the 'political roots of territorial arbitrations' and their interpretation of the 'doctrine of title to territory' before discussing how boundary disputes were settled through arbitration. This was, according to van Hulle, a mechanism that lent 'an aura of legitimacy to the colonial acquisition of Africa' while reaffirming 'an exclusionary and Western version of international law' that 'objectified African communities as they were mostly treated as passive bystanders to an acquisition process that was never fundamentally questioned'.[10] Chapter 4, by Jan Martin Lemnitzer, focuses on the peculiar case of the North Sea Incident Commission of 1905, which he persuasively presents as the first International War Crimes Tribunal. Relying on a wealth of archival historical materials, Lemnitzer provides a vivid account of this largely forgotten episode in which the Russian navy opened fire on British fishermen near the Dogger Bank on its way to Asia to fight the Japanese fleet. The incident led to the completely unprecedented setting up of a tribunal to establish the individual responsibility and guilt of high-ranking officers of a great power who were accused of killing civilians and thus marked, according to the author, 'a quantum leap for the idea of judging individuals for violations of the laws of war'. While the novel commission of inquiry was 'credited with preventing a war in its day, and inspired an American arbitration treaty initiative that if successful might have averted World War I', the North Sea Incident Commission of 1905 epitomises the less than glorious fate of certain experiments in international adjudication that were ahead of their time.[11] Better remembered today is the Arbitral Tribunal for Upper Silesia, the subject of Chapter 5 by Gerard Conway. In this chapter, the historical background and operation is 'first outlined and discussed, followed by an assessment of its significance for and contribution to the development of international law'. The creation of the tribunal resulted from a provision of the Treaty of Versailles stipulating that a plebiscite should be held in Upper Silesia

[9] See Chapter 2 by Ignacio de la Rasilla, 'The Turn to the History of International Adjudication'.
[10] See Chapter 3 by Inge van Hulle, 'Imperial Consolidation through Arbitration: Territorial and Boundary Disputes in Africa (1870–1914)'.
[11] See Chapter 4 by Jan Martin Lemnizer, 'How to Prevent a War and Alienate Lawyers: The Peculiar Case of the 1905 North Sea Incident Commission'.

to decide whether it should be part of Germany or Poland. Conway highlights the far-reaching character of the 'substantive personal and material jurisdiction as well as of the mechanisms and procedure for the enforcement of the decisions' offered by this innovative interwar experiment in international adjudication and its role as a historical antecedent in paving the way for subsequent regional European courts.[12]

Under the broad category of context-specific redress mechanisms, the third part of the volume contains three chapters on what could be seen as embedded international adjudication. Chapter 6, by Frédéric Mégret, focuses on the 'early model among international adjudicative experiments' represented by the mixed claims commissions that 'were set up in the nineteenth and first half of the twentieth century' to deal primarily with the vindication of the rights of foreigners residing abroad, that is, with the international law relating to the 'protection of aliens'. In order to illustrate a certain moment in the history of international law, Mégret's chapter emphasises those mixed commissions established to address mass claims between European or North American powers on the one hand, and Latin American states on the other, with particular attention to the General Claims Commission set up to mediate US- and Mexican interests between 1924 and 1931. The chapter begins by looking at the commissions' origins, before analysing some of the fundamental features that set them apart and reflecting on some of their main contributions. Having served as an early testing ground for 'diplomatic protection, exhaustion of local remedies or the content of 'minimum standards', mixed claims commissions enable us, according to Mégret, to better appraise subsequent 'developments in such diverse areas as the international law of human rights or investment protection', and to deepen our 'understanding of the legal issues surrounding human mobility'.[13] Chapter 7, by Jean d'Aspremont, adopts a different vantage point for the analysis of the General Claims Commission (Mexico and the United States) and its contribution to what d'Aspremont calls the 'invention of international responsibility'. The chapter first elaborates on the 'idea of inventing an argumentative tradition' in international legal thought before 'recalling some of the main paradigms that came to inform the shaping of the doctrine of state responsibility' in international law. It then turns its attention to the historical work of the General Claims Commission, and to how the International Law Commission invoked the Commission's awards to support the commonly accepted and applied mode of legal reasoning about state responsibility. D'Aspremont's critical examination of the 'artificiality of the genealogy built by the ILC' presents this Commission as a decisive experiment insofar as 'it epitomizes how central modes of legal reasoning of international law and fundamental doctrines are designed by reference to imaginary precedents with a view to staging the authority of those modes of legal reasoning' in judicial and decision-

[12] See Chapter 5 by Gerard Conway, 'The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication'.

[13] See Chapter 6 by Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens'.

making processes.[14] Finally, in Chapter 8, Cesare P. R. Romano turns his gaze to the neglected story of 'six regional courts that Arab states have tried to establish since World War II', none of which can be deemed 'a successful instance of regional judicialization' at present or appear likely to become so in the near future. Either already 'defunct', or predominantly inactive to varying degrees, these experiments in international adjudication are, according to Romano 'the Arab Court of Justice; the Arab Investment Court; the Arab Court of Human Rights; the Islamic Court of Justice; the Judicial Body of the Organization of Arab Petroleum Exporting Countries; and the Court of Justice of the Arab Maghreb Union'. After examining the context in which these courts were created and their main features, the chapter analyses 'some of the reasons why these bodies have failed to come into being or be effective' and the factors fostering and discouraging regional judicialisation in the Arab world.[15]

The fourth part of the book, which consists of three chapters tackling the features of permanence and generality in international adjudication and, more specifically, the deliberate quest for a permanent international court, begins with Chapter 9, by Andrei Mamolea, on the Permanent Court of Arbitration (PCA) that is, famously, neither permanent nor an actual court. Mamolea approaches the study of the PCA from its inception to World War I with a critical eye, characterising it as a mechanism that was 'used to conjure the appearance of adversarialism and legal process for disputes that were largely settled through diplomatic back-channels well before they ever reached The Hague.' Through the study of some of its landmark cases from the period, Mamolea argues that, far from being settled by 'impartial judges applying international law', these were, in fact, cases where 'the arbitrators, the relevant law, the relevant facts, and sometimes even the text of the awards, were supplied by the litigants'. In his view, this made the PCA nothing more than an 'instrument for governments to save face'.[16] Chapter 10, by Freya Baetens, also focuses on the early twentieth century period. Baetens examines the short-lived – yet historically momentous – experiment of the Central American Court of Justice (1907–1918), also known as the Court of Cartago: the first ever 'supranational court with jurisdiction to render binding decisions against states, not only in interstate disputes but also in cases brought by individuals against states'. Baetens' chapter places this seminal experiment in its historical context by reference to the regional and international 'causal factors underlying the design, establishment and operation' of the Court. In doing so, she attempts to capture the 'international legal consciousness' of the times 'as displayed in Central America in the first two decades of the twentieth century' and to examine regional precedents such as the 'dead-letter' Central American

[14] See Chapter 7 by Jean d'Aspremont, 'The General Claims Commission (Mexico/US) and the Invention of International Responsibility'.
[15] See Chapter 8 by Cesare P. R. Romano, 'Mirage in the Desert: Regional Judicialization in the Arab World'.
[16] See Chapter 9 by Andrei Mamolea, 'Saving Face: The Political Work of the Permanent Court of Arbitration (1902–1914).

Arbitration Tribunal. The chapter then 'scrutinises the Court's legal structure, focusing on its composition, jurisdiction and applicable law before providing a detailed survey of all judgments delivered by the Court'. The conclusion identifies a range of 'factors of success and failure' that contributed to the 'crystallisation, implementation and eventual demise' of the Court of Cartago and highlights the lessons that, in Baetens' view, can still be learnt from this historical experiment in international adjudication for the 'current Central American Court of Justice and regional integration courts elsewhere'.[17] Finally, Chapter 11, by Donal Coffey, examines a little known experiment of what may be called late imperial adjudication in the interwar period. This was the British Foreign Office's attempt to replace the Judicial Committee of the Privy Council, which sat at the apex of the British Empire's judicial system, with a Tribunal of the British Commonwealth of Nations. The initiative was triggered by the increasing strain felt within the British Empire regarding the position of the self-governing dominions under international law in the aftermath of World War I. Coffey's chapter describes 'how the tensions between constitutional law and international law within the Empire came to play out in relation to this experiment and how it ultimately failed' as a result of the Irish Free State's will to pursue strict international independence within the new framework provided by international law during the interwar years.[18]

The last part of the volume tackles the issue of specialised courts. It comprises a historical study of the two most comprehensive experiments of permanent specialised courts developed on the European continent. Chapter 12, by Angelo Jr Golia and Ludovic Hennebel, addresses the intellectual foundations of the European Court of Human Rights (ECtHR) in its historical context. It proceeds in two steps. The first section examines the historical origins of the ECtHR by reference to the major milestones of the project and the main issues that were debated during the drafting process. The second part provides a genealogy of the philosophical and legal influences that can be identified in the *travaux préparatoires* of the Convention and appraises their effects on the medium- and long-term functioning of the ECtHR. According to Golia and Hennebel, the ECtHR experiment was meant to institutionalise the permanent production of an 'externalized positivized natural law' and was, as such, intellectually 'not designed to be neutral with regard to the values protected by the ECHR, but rather to contribute to their progressive evolution and expansion' over time.[19] The final chapter of the volume, by Morten Rasmussen, analyses the European Court of Justice from its inception to the aftermath of the Maastricht Treaty in historical perspective. Rasmussen's chapter

[17] See Chapter 10 by Freya Baetens, 'First to Rise and First to Fall: The Court of Cartago (1907–1918)'.
[18] See Chapter 11 by Donal Coffey, 'The Failure of the 1930 Tribunal of the British Commonwealth of Nations: A Conflict Between International and Constitutional Law'.
[19] See Chapter 12 by Angelo Jr. Golia and Ludovic Hennebel, 'The Intellectual Foundations of the European Court of Human Rights'.

shows the key role the Court has played through, in particular, its hierarchical doctrines of direct effect and primacy and its system of judicial review, in the coming into being of the proto-federal and constitutional features of the legal order of the European Union. The breakthrough judgments of *Van Gend en Loos* (1963) and *Costa* v. *E.N.E.L* (1964) arguably constituted a 'critical juncture in the history of European law that created different path-dependent processes' that were to evolve into a comprehensive constitutional practice in European law around 1990. However, as Rasmussen's chapter argues by reference to a 'new archive-based historiography', this development was neither linear nor an undisputed one, but an uphill social battle of actors and institutions arguing over how European law should develop, in which the Court played a key strategic role.[20]

Overall, the chapters in this volume offer a series of fresh perspectives on the history of international adjudication. We hope that it will contribute to draw the attention of researchers in the main disciplines concerned to a range of experiments, some of which have been neglected despite their interest not only *per se*, as objects of historical inquiry, but also as significant precedents of present mechanisms.

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[20] See Chapter 13 by Morten Rasmussen, 'From International Law to a Constitutionalist Dream? The History of European Law and the European Court of Justice (1950–1993)'.