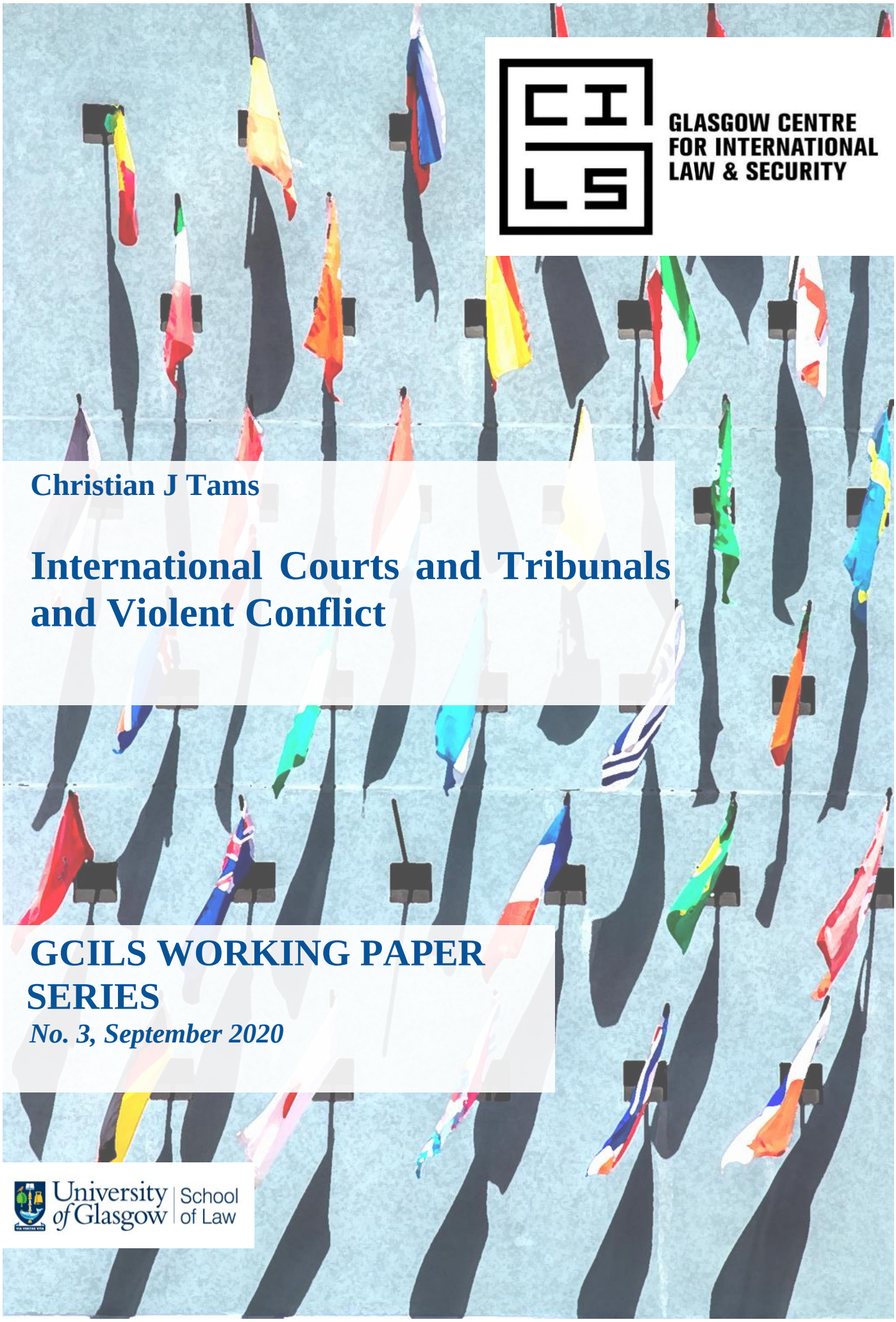

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Christian J Tams

International Courts and Tribunals and Violent Conflict

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Christian J Tams

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Abstract

This chapter examines international adjudication and arbitration, assessing the diverse roles of international courts and tribunals (ICaTs) in relation to violent conflicts. It shows that, over time, ICaTs have come to render decision upon decision, but - contrary to the expectations of early arbitration movements - hardly ever prevent 'wars between nations'. Their mandates have been expanded, but typically only cover aspects of violent conflicts. While such aspects are today increasingly submitted to arbitration or adjudication, 'conflict litigation' remains controversial and challenges the authority of ICaTs. As the chapter demonstrates, the significance of arbitration and adjudication over questions of violent conflict has varied over time and forms part of the general history of international dispute resolution. Having surveyed this general history, the chapter sketches out the evolving legal framework governing courts and conflicts. It discusses which aspects of violent conflicts are addressed by ICaTs under contemporary international law and highlights current challenges of 'conflict litigation'.

A. Introduction: Optimism at Vevey (1872)

It happened 150 years ago, on 'a fine warm autumn evening in Vevey in the year 1872', on the shores of Lake Geneva, in the 'little pension Le Cèdre'. A German lieutenant, von Bleichroden, and his wife share dinner with other guests: a 'melancholy Frenchman' grieving over the loss of Alsace-Lorraine, an Englishman, two Russians, a Spanish family and two ladies from Tyrol. Their conversation flows, touching some of the 'burning questions of the day': could war be stopped? (It is inevitable, thinks the Spaniard.) Might Alsace-Lorraine become part of a Confederation of European States, neither German nor French? (The Frenchman smiles, but his is 'the smile of pessimism and despair'.) Could 'Switzerland [be] the little miniature model after which the Europe of the future will be built up?' (Von Bleichroden is not sure: he certainly hopes so, but, 'formerly a pessimist', he remains scarred by the atrocities of the Franco-German

war, during which he ordered the execution of irregular fighters, the francs-tireurs.) Throughout these big debates, the 'conversation proceeded … quietly and peacefully'—until suddenly, the Englishman receives a telegram, which he reads 'with visible emotion'. And then the spectacle unfolds:

> [T]he dark, steel-blue evening sky was cut through by a streak of light, and above the low-lying Savoy shore there rose a rocket of enormous size. It rose high …; it hung suspended as though it were looking round on the beautiful earth outspread beneath it … before it exploded with a report which took two minutes to reach Vevey. Then there spread out something like a white cloud which assumed a four-cornered rectangular shape, a flag of white fire; a moment after there was another report, and on the white flag appeared a red cross. All the party sprang up and hastened into the veranda. 'What does that mean?' exclaimed Herr von Bleichroden, startled. No one could or would answer, for now there rose a whole volley of rockets … and scattered a shower of fire which was reflected in the gigantic mirror of the lake. 'Ladies and gentlemen!' said the Englishman, raising his voice, while a waiter placed a tray with filled champagne glasses on the table. 'Ladies and gentlemen!' he repeated, 'this means, according to the telegram which I have just received, that the first International Tribunal at Geneva has finished its work; this means that a war between two nations, or what would have been worse—a war against the future, has been prevented; that a hundred thousand Americans and as many Englishmen have to thank this day that they are alive. The Alabama Question has been settled not to the advantage of America, but of justice, not to the injury of England, but for the good of future generations. Does our Spanish friend still believe that wars are unavoidable? When our French friend smiles again, let him smile with the heart and not with the lips only. And you, my German pessimist friend, do you believe now that the franc-tireur question can be settled without … fusillades, but also only in this way? … To-day, as an Englishman, I ought to feel depressed, but I feel proud on account of my country. … I have a right to be so, for England is the first European Power which has appealed to the verdict of honourable men, instead of to blood and iron. And I wish you all many such defeats as we have had to-day, for that will teach us to be victorious. Raise your

> glasses, ladies and gentlemen, for the Red Cross, for in this sign we will certainly conquer.'

***

The little scene appears near the end of one of August Strindberg's novellas, The German Lieutenant.[1] Its emphatic celebration of an arbitral decision (the settlement of the *Alabama* claims[2]) offers a useful perspective on key themes of this chapter: the promise of international adjudication and arbitration ('the verdict of honourable men' instead of 'blood and iron'); the need for States to accept intrusive forms of dispute settlement, and their traditional reluctance to do so; the audacity and the naivety of hope—with an internationally minded group sojourning in Switzerland toasting a billion dollar award as a gateway to a better world.

One hundred and fifty years on, the cause endures, and the hope lives on. The *Alabama* arbitration has become a landmark. States have over time established international courts and tribunals; today, quite frequently they do 'appeal to the verdict of honorable men [and women]' to settle disputes. And yet, were Strindberg's party to meet again today, the Englishman's optimism would probably be mixed with more than a dose of von Bleichroden's pessimism: for international courts and tribunals (ICaTs) produce decision upon decision, but hardly ever prevent 'wars between nations'. Their mandates have been expanded, but typically only cover aspects of violent conflicts. While such aspects are today increasingly submitted to arbitration or adjudication, 'conflict litigation' remains controversial and challenges the authority of ICaTs.

The purpose of this chapter is to offer a condensed account of these developments, and to assess the diverse roles of ICaTs in relation to violent conflicts. As will be shown, the significance of arbitration and adjudication over questions of violent conflict has varied over time and forms part of the general history of international dispute resolution. To reveal as much, Section B sketches out the evolving legal framework governing courts and conflicts. On the basis of this general account, Section C zooms in to discuss what aspects of violent conflicts are addressed by ICaTs under contemporary international law and highlights current challenges of 'conflict litigation'. Section D concludes by asking what Strindberg's Englishman and his friends would

[1] August Strindberg, *The German Lieutenant and Other Stories* (Claud Field tr, T. Werner Laurie 1915) 64–5.
[2] *Alabama claims* (*United States of America v Great Britain*) (1871) XXIX RIAA 125.

make of developments since their celebration of the *Alabama* award on that 'fine warm autumn evening in Vevey in the year 1872'.

B. Courts and Conflicts: The Evolving Legal Framework

The Englishman's enthusiasm at the time rested on a straightforward proposition. Britain and the US had done what States were meant to do: to settle conflicts not on the basis of blood and iron, on the battlefield—but by accepting the decision of impartial decision makers applying standards of law and justice. Peace, in other words, was sought through arbitration or adjudication. The idea no doubt is powerful, but it is clear that it is a particularly ambitious form of ensuring 'peace through law', which requires conflicting parties to be willing, not only to accept legal limits on their conduct, but to entrust sensitive disputes over such limits to an international court or tribunal.

Over time, the appeal of 'peace through arbitration and adjudication' (PtAA)[3] has varied. For the purposes of a summary account, the complex developments since the *Alabama* affair are condensed into three sections, which highlight crucial waypoints in the international community's approach: an idealist vision that viewed ICaTs as central guardians of world peace; a realist turn that saw ICaTs relegated to the margins of international affairs; and the more recent renaissance of international arbitration and adjudication.

1. Grand Schemes: World Courts as Guardians of World Peace?

When von Bleichroden's party met at Vevey in 1872, PtAA was on the verge of breaking through, at least as an intellectual force. The half-century until the end of the First World War may be seen as its heyday.[4] PtAA reflected trust in a rational mode of decision-making based on the power of argument. Compared to alternative visions of transforming world order (world government, disarmament, renunciation of war, etc), it seemed eminently practical and had wide appeal: amongst religious groups, pacifists, workers' movements—all of which came to

[3] In the following, 'PtAA' is used as shorthand to describe the movement towards binding resolution of armed conflicts. A fuller discussion would distinguish between earlier attempts to achieve 'peace through arbitration' and the later efforts to move from arbitration to adjudication.

[4] The following draws on Christian Tams, 'World Peace through International Adjudication?' in Heinz Gerhard Justenhoven et al (eds), *Peace Through Law: Can Humanity Overcome War*? (Nomos/Bloomsbury 2016) 215–54.

embrace the cause. It certainly appealed to international lawyers, organized in new associations, for whom the move towards legal process was an obvious sign of progress. These groupings made for a broad church, but they all shared, in David Caron's words, a 'profound and widespread nineteenth-century faith in the peacekeeping ability of an international court'.[5] Into the early twentieth century, that faith remained strong: by 1914, as Mark Mazower observes, 'the campaign for international arbitration' was 'probably the single most influential strand of internationalism'.[6]

For present purposes, the close link between 'peace' and 'adjudication/ arbitration' is crucial. In the dreams and schemes of activists, as in the mind of Strindberg's Englishman, ICaTs were to be the central guardians of peace; arbitration and adjudication were considered to be 'substitutes for war'. Conversely, to substitute for war was their central rationale: in the debates of the nineteenth and early twentieth century, international courts appeared as, in Yuval Shany's terms, 'war-prevention tools'.[7]

That the reality lagged behind such ambitious visions should not come as a surprise. ICaTs could not be dreamed into being, they had to be established by inter-State treaties; their jurisdiction had to be based on consent. The *Alabama* affair suggested that even great powers might be willing to grant such consent—and just like Strindberg's Englishman, the PtAA movement celebrated the *Alabama* precedent as a model. States remained cautious, though, and did not view arbitration or adjudication as a vademecum. Adjudication remained an elusive ideal, as States disagreed on the composition or competence of a permanent international court.[8] As for arbitration, attempts to reach agreement on a multilateral treaty requiring the submission of all disputes to ad hoc tribunals proved unsuccessful. And States that, in principle, were willing to accept a duty to submit to arbitration frequently insisted on exceptions for questions of national honour or vital interests.

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[5] David D Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 AJIL 1, 9.

[6] Mark Mazower, *Governing the World: The History of an Idea* (Penguin 2013) 83.

[7] Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73, 77.

[8] This was the main obstacle hindering the establishment of a Court of Arbitral Justice at the second Hague Peace Conference of 1907: <IBT>Mary E O'Connell/Lenore VanderZee, 'The History of International Adjudication' in Cesare P Romano et al (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)</IBT> 50. By contrast, a Convention for the Establishment of an International Prize Court was agreed—but never entered into force. On the regional level, States did set up the Central American Court of Justice in 1908: ibid 51; Christian Tams, 'Die Zweite Haager Konferenz und das Recht der friedlichen Streitbeilegung' (2007) 82 Friedens-Warte 119.

Yet to emphasize all this is to miss the central aspect: that in the aftermath of the *Alabama* affair, the PtAA movement seemed firmly on the rise—a rise reflected in the regular conclusion of bilateral (as opposed to multilateral) arbitration treaties; the growing number of cases submitted to arbitration; the increasing use of international commissions to redress reparations claims after violent conflicts; the first serious debates about international courts; and the centrality of binding dispute settlement at the two Hague Conferences of 1899 and 1907. The optimism which Strindberg's Englishman felt at Vevey was widely shared. Forty years after the *Alabama* award, Elihu Root, a central figure in the PtAA movement, used his 1912 Nobel Peace Prize lecture to look ahead: '[t]he next advance is to pass on from an arbitral tribunal … to a permanent court', whose establishment deserved 'the best efforts of those who wish to promote peace'.[9] Peace seemed in sight, and courts would be at the centre of the peace project—for Root and others, like Luis Drago, it was but a question of time until the 'civilization … supported by weapons [was replaced by] a civilization founded on arbitration of justice'.[10]

2. 'Realistic Horizons': International Courts on the Margins

The decision to present Elihu Root with the 1912 Nobel Prize was taken retrospectively, in 1913. Root was to deliver his acceptance speech in September 1914; the outbreak of the war prevented this - and it ushered in a new era, in which the 'realistic horizons' for international courts shrunk.[11] More importantly, the outbreak of the war made Root's words ring hollow. Arbitration had proved powerless to stop countries from sleepwalking into war, and could not restrain them from fighting it with unprecedented intensity.[12] The outbreak of war did not mean the end of law. As has been noted, at least in the official documents of Allied countries, the conflict appeared very much as a 'war about international law';[13] but its outcome (including the

[9] Elihu Root, 'Nobel Lecture: Towards Making Peace Permanent' (1914) <https://www.nobelprize.org/prizes/peace/1912/root/lecture/> accessed 14 April 2020.
[10] Luis Drago, as quoted in William I Hull, *The Two Hague Conferences and Their Contributions to International Law* (Ginn and Company first published 1908) 340–1.
[11] Richard A Falk, 'Realistic Horizons for International Adjudication' (1971) 11 Virginia JIL 314.
[12] As Matheson notes, on the brink of the war, the Tsar had proposed to submit the Austro-Serbian dispute about Franz Ferdinand's murder to arbitration in The Hague, but Austria was unwilling: Michael J Matheson, *International Civil Tribunals and Armed Conflicts* (Martinus Nijhoff 2012) 19.
[13] Marcus Payk, '"What We Seek Is the Reign of Law": The Legalism of the Paris Peace Settlement after the Great War' (2018) 29 EJIL 809, 810.

fate of Alsace-Lorraine, which had so concerned von Bleichroden's party four decades earlier) was determined, not by the 'verdict of honourable men', but by 'blood and iron'.[14]

a. The 'Primacy of Politics': The Inter-War Experience

How did this affect the role of ICaTs in the post-war order? In many ways, debates and developments at the end of the First World War foreshadowed future developments. In the immediate post-war period, the victorious powers sought to have the German Emperor tried, before a 'special tribunal' composed of foreign judges.[15] Their efforts were abandoned relatively quickly, but they marked a first attempt to use courts for a particular function, viz. to impose criminal sanctions on individuals. Another particular function they did exercise, and not just on paper: building on the examples of earlier claims commissions, States in the post-war period set up mixed arbitral tribunals to scrutinize war-time measures affecting private economic interests. No less than thirty-six (typically bilateral) such tribunals were in operation, rendering a total of 70,000 decisions, covering requisitions, damages, intellectual property rights, and much more.[16]

None of this commanded much attention at the time; the focus of debates was on a court of general competence. And indeed, with only a little delay, exactly half a century after the *Alabama* award, a permanent court was becoming a reality.[17] Envisaged in the League of Nations Covenant, the Permanent Court of International Justice (PCIJ)—the first 'world court'—was set up in 1922. Ostensibly, this was 'the next advance'[18] expected by Root, and some observers echoed the optimism voiced fifty years earlier by Strindberg's Englishman. Root's long-term ally James Brown Scott was chief among them; his editorial in the *American Journal* encouraged readers to 'fall upon our knees and thank God that the hope of ages is in process of realization'[19]—a world court born of a World War. Yet the grand rhetoric could not

[14] Tams (n 8).
[15] Treaty of Peace with Germany (Treaty of Versailles) 225 CTS 18 art 227; Kirsten Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law' in Claus Kreß/Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017).
[16] For details see Marta Requejo Isido/Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' in <IBT>Michel Erpelding et al (eds), *Peace Through Law* (Nomos 2019)</IBT>.
[17] The following draws on Christian Tams, 'Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order' in Erpelding et al ibid.
[18] Root (n 9).
[19] James Brown Scott, 'The Permanent Court of International Justice' (1921) 15 *American Journal of International Law* 52, 55.

mask the fact that the world court now created was to have a rather modest brief: whereas in the earlier debates, ICaTs had played a central role, in the post-war order they were created on the margins of the new 'peace machinery'.[20] The League's founders were idealist, too, but theirs was not the idealism of Strindberg's Englishman; they did not primarily rely on arbitration or adjudication, but on collective decision-making within international organizations: not the force of law, but the strength of political action backed by public opinion, was to ensure the League's success.[21]

In line with this, the League's political organs (Council and Assembly) were the key actors of the post-war order, and the PCIJ—just as the various mixed arbitral tribunals doing the groundwork of redressing economic consequences—a useful sidekick. Elihu Root's assessment of the League Covenant reflected a sense of disappointment: '[n]othing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision … We are left with a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right.'[22]

Perhaps curiously, then, 'the next advance'[23] came at a price of a setback: plans to vest the world court with automatic jurisdiction were (unlike in 1907) resisted by all major powers, so consensualism continued to dominate. For the world court to become involved, States had to submit disputes to it, notably by special agreement, through compromissory clauses identifying particular categories of disputes suitable for adjudication, or by a voluntary commitment under the so-called optional clause. Questions of jurisdiction aside, the court was embedded in, and limited by, a collective security system that 'enshrined the primacy of politics over international law institutionally within the powerful organ of the Council'.[24] The ambitious vision of a world court guarding peace was giving way to a more sober perspective on the role of adjudication and arbitration.

[20] Philip C Jessup, 'A Half-Century of Efforts to Subtitute Law for War' (1960) 99 RdC 1, 18.
[21] Payk (n 13) 821 makes the point forcefully: 'Wilson's concept of world peace had little room for legal mechanisms, inflexible treaty arrangements or even a court-like institution'.
[22] Root, as cited in Stephen Wertheim, 'The League of Nations: A Retreat from International Law?' (2012) 7 Journal of Global History 210, 228.
[23] Root (n 9).
[24] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 195.

By and large, this more sober perspective was to dominate the second half-century since the *Alabama* award, and perhaps it has never really gone away. That peace should be sought through arbitration or adjudication has no doubt remained a postulate, but it never regained the prominence and wide support it had before the First World War.[25] The experience of the PCIJ confirmed the new realism: while the Court's systematic and solid approach to judicial dispute resolution, and its role as an agent of international legal development, are widely (and justly) praised, States made sparing use of the new institution. Even for disputes that could have been submitted to adjudication on the basis of compromissory clauses or the optional clause, and certainly for the major disputes of the day, States relied on other means of dispute settlement (or preferred not to settle). If compared to the hopes of Strindberg's Englishman, the PCIJ's figures are indeed sobering: over two decades of active existence, the Court addressed around three disputes per year, and few if any of them could be said to implicate major conflicts. As Ole Spiermann notes, '[i]n the political history of the League of Nations, the Permanent Court [was] but a footnote, partly because it did not address the main political issues of the day'.[26]

b. De-Coupling Adjudication from War Prevention

Perhaps surprisingly, the dramatic upheavals of the Second World War did not immediately affect this general picture. When, following another world war, a new generation of diplomats came to design a new post-war order, they corrected some of the League's design failures. However, they did not revisit the basic division of roles, between an institutionalized 'peace machinery', with 'primary responsibility for international peace and security',[27] on the one hand, and courts and tribunals on the other. Just as they had been after the First World War, ICaTs were part of the post-war settlement, but not central to it. In one respect, to be sure, their role was upgraded: the victorious powers set up international military tribunals to prosecute leaders of defeated nations for their role in the war: a 'creative precedent',[28] and a move from words to deeds, compared to the settlement after the First World War. By contrast, as regards individual reparations claims, the movement was in the opposite direction, as the economic consequences of the war were primarily redressed through inter-State treaties. While a number

[25] Mazower (n 6) 83–4.
[26] Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP 2005) 132.
[27] UN Charter 1 UNTS XVI art 24; and cf. Jessup (n 20).
[28] Claus Kreß, 'Introduction: The Crime of Aggression and the International Legal Order' in Kreß/Barriga (n 16) 3.

of dispute settlement bodies were set up, 'usage of mixed claims commissions [and mixed arbitral tribunals] declined after World War II' to the point where 'this model of dispute settlement appeared to have become extinct'.[29]

Outside these particular fields, and notwithstanding the ruptures of the Second World War, the picture is one of relative continuity. The UN, too, was to have a world court, but attempts to 'upgrade' its role stood no realistic chance of success. The world court's 'second incarnation', the International Court of Justice (ICJ), was closely modelled on the PCIJ; its jurisdiction remained consent-based (with jurisdiction based on either *compromis*, compromissory clause, or optional clause), and its link with the UN's peace and security machinery tenuous.

At least during the first decades of its existence, the role of ICaTs in questions of armed conflict remained limited.[30] The impetus of Nuremberg and Tokyo faded in Cold War stagnation. As Claus Kress observes, for decades 'no real progress was made with respect to international criminal law in general or regarding the codification and enforcement of the crime of aggression in particular'. [31] Communist States resisted the principle of binding dispute settlement and were very cautious not to expand the ICJ's jurisdiction. Many newly independent States shared that scepticism and, in the wake of the *South West Africa* judgment,[32] viewed the ICJ with much reservation. All this affected the role of ICaTs generally, but it applied particularly to sensitive disputes relating to violent conflict, which many States considered ill-suited to judicial assessment. Jurisdictional limitations aside, 'States remained reluctant to accept international adjudication of their conduct during wartime'.[33]

Unsurprisingly, many assessments of international courts during the 1950s to the 1970s reflect a growing sense of resignation. 'At present the Court has very little to do with the enforcement of peace', noted Lissitzyn in an early work on the ICJ.[34] Hersch Lauterpacht (perhaps the twentieth century's most influential advocate of international adjudication) thought it 'an exaggeration to assert that the Court has proved to be a significant instrument for maintaining

[29] Rudolf Dolzer, 'Mixed Claims Commissions' MPEPIL (OUP, May 2011) para 8.
[30] *Corfu Channel* (*UK v Albania*) (Merits) [1949] ICJ Rep 4—brought after British warships were damaged by mines off the Albanian coast –is the main exception to this general trend.
[31] Kress (n 28) 5.
[32] *South West Africa* (*Ethiopia v South Africa; Liberia v South* Africa) (Judgment) [1966] ICJ Rep 6.
[33] Matheson (n 12) 31.
[34] Oliver J Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security* (Carnegie Endowment 1951) 103.

international peace'.[35] According to an influential German study, the idea of arbitration as a substitute for war had been 'completely shipwrecked'.[36] In 1971, the World Court seemed as 'having fallen to perhaps its lowest position of international prestige'.[37] The question was not whether it would prevent wars—but whether it would have any role at all in international relations. A century after the *Alabama* claims, little seemed left of the Englishman's optimism.

3. An 'Age of Adjudication'?[38] International Courts Renascent

A further fifty years on, the landscape of ICaTs has been transformed. In the third half-century since *Alabama*, and notably since the end of the Cold War, the general significance of international adjudication and arbitration has much increased, to the point where international lawyers have begun to speak of an 'age of adjudication'.[39] This age of adjudication is not primarily (this much may be given away) an age of adjudicating violent conflicts; the role of ICaTs in relation to violent conflict requires a nuanced assessment.[40] However, the starting point for that assessment is clear: compared to the gloomy assessments cited at the end of the preceding section, international arbitration and adjudication have seen a renaissance. The trend has been described in detail elsewhere,[41] but for present purposes the main lines of development can be summarized in three steps.

a. Growth and Diversification of Fora

The most obvious development in dispute resolution over the past half-century is the 'enormous growth of fora'.[42] Beginning in the 1970s, and picking up speed during the 1990s, States have established a whole range of new ICaTs. The number of standing international courts has

[35] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons 1958) 4.
[36] Hans von Mangoldt, *Die Schiedsgerichtsbarkeit als Mittel internationaler Streitschlichtung* (Springer 1974) 83 ('hat totalen Schiffbruch erlitten').
[37] Falk (n 11) 314–15.
[38] cf the title of a lecture by <IBT>Judge Christopher Greenwood, 'International Law in the Age of Adjudication' (*UN Audiovisual Library of International Law*) <http://legal.un.org/avl/ls/Greenwood_CT.html> accessed 25 March 2020</IBT>.
[39] ibid.
[40] Part C.
[41] Notably Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order' in James Crawford/Martti Koskenniemi, *The Cambridge Companion to International Law* (CUP 2012); Shany (n 7); Cesare P Romano, 'Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts' in Russel A Miller/Rebecca M Bratspiess, *Progress in International Law* (Martinus Nijhoff 2008).
[42] Romano (n 41) 435.

increased from six at the end of the Cold War to the mid-30s today, and many frameworks envisaging binding dispute settlement by ad hoc bodies have been activated.[43] As Kingsbury observes, in a number of fields (notably human rights, investment and trade) a '[n]ew paradigm of routinized [international] litigation and judicial governance [is] being layered alongside the traditional paradigm of episodic international (inter-state) dispute settlement by international tribunals'.[44]

Routine litigation, in turn, involves a more inclusive set of actors. While inter-State dispute settlement remains the standard, many of the new institutions have opened up. Individuals are the natural claimants before human rights courts and typically have some role before courts of economic integration. Investment arbitration is driven by investors. Since Nuremberg, the fact that '[c]rimes against international law are committed by men, not by abstract entities' [45] has meant that criminal justice is imposed on individuals. A look at the quantitative output reflects the speed and extent of change. By 2014, standing international courts 'ha[d] collectively issued over 37,000 binding legal judgments, more than 90 percent of which were issued since the fall of the Berlin Wall'.[46]

b. Specialization and Regionalization

The enormous growth and diversification of fora has been facilitated by two interrelated trends, those of specialization and regionalization. When Strindberg's Englishman, or participants at the Hague Conferences, reflected on arbitration and adjudication, their debates focused on global institutions with potentially unlimited, general jurisdiction.[47] Reflecting such a globalist, generalist mindset, the PCIJ and ICJ, just like arbitral tribunals established under the Hague system, could potentially address disputes covering international law in its entirety: all that mattered was for them to be vested with jurisdiction. They remain generalist, but the recent growth of fora has been driven by a very different approach.[48] The more recent binding dispute settlement regimes are specialized: particular courts or tribunals are set up to address disputes under a particular treaty, or class of treaties (the Rome Statute; regional economic integration

[43] For many details: Karen J Alter, 'The Multiplication of International Courts and Tribunals after the End of the Cold War' in Romano et al (n 8).
[44] Kingsbury (n 41) 210.
[45] International Military Tribunal, Judgment and Sentences (1947) 41 AJIL 172, 223.
[46] Alter (n 43) 64.
[47] This was not absolute: some of the early projects were specialized (individual claims tribunals, international military tribunals) and the first-ever international court was regional (CACJ); but at the time these were exceptional.
[48] Shany (n 7) 80.

treaties; the African, Inter-American, and European human rights conventions; Bilateral Investment Treaties (BITs); the World Trade Organization (WTO) covered agreements; the UN Convention on the Law of the Sea (UNCLOS) etc), often as an indispensable part of an integrated regime that States wanting to be part of have to accept. Jurisdiction, in other words, is more narrowly defined, but has deepened. Moreover, as many of these deep, but narrow treaties are negotiated by States of geographic proximity, there has also been a move from global towards regional dispute settlement.[49]

Specialization and regionalization have permitted groups of States to carve out greater room for binding dispute settlement where global or general solutions lack support. At the same time, they have made the landscape of international dispute settlement more diverse: systems of international adjudication and arbitration today are tailor-made to meet the demands of specialized sub-systems and regional audiences. The 'honourable men [and women]' to whose 'verdict' litigants submit are an increasingly diverse group and function within highly particular social settings.

c. Diverse Islands of Judicialization

These developments have indeed 'dramatically transformed the field of international dispute settlement'.[50] That ICaTs have gained in relevance seems difficult to dispute: according to most plausible parameters (numbers of decisions, their impact on State governance, newspaper coverage, academic interest, etc) they matter a lot more today than at any point since the *Alabama* award. Judicialization is extremely 'uneven'[51] though. To every particular field that has been judicialized (trade, investment, human rights, etc), one can easily think of three that have not, or not directly (migration, climate change, finance, and most significantly disputes over *ius ad bellum* and *ius in bello*). As importantly, in a system based on consent, and relying on specialized regimes, the role of courts and tribunals varies from region to region and State to State. While the overall trend is clear—ICaTs have gained in relevance—the overall picture is significantly more messy than Strindberg's Englishman might have expected: many islands of judicialization have emerged in the sea of international relations, but they are of widely diverging size and scope.

[49] Alter (n 43) 65.
[50] Shany (n 7) 79.
[51] cf the title of Kingsbury's excellent account (n 41).

C. Litigating Conflicts Today: Status Quo and Current Challenges

Do these islands of judicialization cover the terrain of conflict and security? Are the existing (and now numerous) ICaTs competent to address the questions that Strindberg's Englishman wanted them to address? A short response might be along the lines of 'anything but completely, far from it; but partly, and increasingly'.

The 'anything but completely' part of the response is straightforward: regimes of arbitration and adjudication remain islands, after all, surrounded by sea. The remainder of this section expands on the 'partly, and increasingly' part. It offers a highly condensed overview of the limited, but gradually expanding, roles of ICaTs in relation to violent conflict. It does so by identifying conflict-related questions that are submitted to binding dispute settlement with some measure of regularity and points to factors affecting the impact of exercises in conflict litigation. As will be shown, the involvement of ICaTs with questions of conflict and security mirrors the messy reality of uneven judicialization described above: there is great diversity, and different courts play very different roles. Seeking to reflect this, the subsequent section distinguishes between three forms of involvement: (1) the purposeful reliance on courts and tribunals to address discrete aspects of violent conflict; (2) increasing attempts to seek ICJ decisions during or after such conflicts; and (3) diverse attempts to have specialist ICaTs address violent conflicts from the particular perspective of their respective mandates. Needless to say, these distinctions are not clear-cut; in fact, particular conflicts have prompted litigation before generalist and specialist ICaTs. However, the distinction hopefully goes some way towards explaining the impact and limits of conflict litigation and it is believed may help structure the still nascent academic debate.

1. Judicialization by Design: Discrete Aspects of Violent Conflicts Entrusted to Binding Settlement

It is clear from the general account offered above that international adjudication and arbitration have largely been de-coupled from the task of war prevention.[52] Nevertheless, certain aspects of violent conflicts are today regularly entrusted to binding settlement. This remains

[52] cf Shany (n 7).

exceptional, and the respective mandates of international courts are quite particular. Yet in two fields, something approaching a general pattern has emerged.

a. Binding Resolution of Individual Reparation Claims

The binding resolution of individual claims for reparation is the first example in point. Recent practice seems to reclaim the 'legacy' of early claims commissions and/or mixed arbitral tribunals.[53] No general reparations claims tribunal has ever been set up; the decision to establish commissions has always been ad hoc (or rather post hoc), taken in the aftermath of a particular crisis, and depending on the political will of the parties involved.[54] However, the practice of the last four decades shows a clear trend.

Most commentators view the Iran–US Claims Tribunal—set up to 'clea[r] away the economic debris following [the] large disruptions of human, economic and political relations' in US–Iranian relations during 1979–1981[55]—as a pioneer.[56] Since then, there has been a (modest but significant) resurgence. Mechanisms to address reparation claims were established in the wake of the second Gulf War (the UNCC)[57] and the Eritrea–Ethiopia war of 1998–2000 (the EECC),[58] as well as to deal with more limited aspects of the Yugoslav civil war of 1991–1995 and the Kosovo war of 1999.[59] Belatedly, from the end of the twentieth century onwards, a number of States, including Germany and Austria, also set up commissions to deal with reparations claims of victims of the Holocaust.[60]

The aggregate effect of these initiatives need not be overstated: far more often than not, the impact of violent conflicts on individuals remains un-remedied. However, reliance on ad hoc

[53] Sections B.1. and B.2.
[54] This is in contrast to developments in the field of international criminal justice, where the international community has moved from ad hoc, particular solutions to a general mechanism (in the form of the International Criminal Court (ICC)): see Section *C*.1.b.
[55] <IBT>David D Caron/John R Crook, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (Brill 2000)</IBT> 363.
[56] Algiers Accords (1981) 20 ILM 224; and for an assessment Caron/Crook, ibid.
[57] UNSC Res 687 (1991) paras 16–19; and the clear account in Lea Brilmayer et al, *International Claims Commissions: Righting Wrongs after Conflict* (Edward Elgar 2017) 18–20.
[58] Agreement for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in both Countries (Eritrea-Ethiopia) 2138 UNTS 93 art 5; Brilmayer et al (n 57) 20–2.
[59] Namely the Bosnia-Herzegovina Commission for Real Property Claims of Displaced Persons and Refugees and the Housing and Property Directorate and Claims Commission (Kosovo). For comment and references: Leopold von Carlowitz, 'Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo' (2004) 17 LJIL 599.
[60] Dolzer (n 29) MN 12.

bodies established to 'right wrongs after conflict'[61] has clearly increased, and their output is significant.[62] As a recent study notes, this 'creation of a heterogeneous system of claims commissions complements the proliferation of international courts and tribunals as one further option for post-conflict reparations'[63]—an option that is now regularly on the agenda.

b. Criminal Sanctions for Grave Infractions of International Law

The second example is of more recent vintage; and unlike individual reparation claims, it has attracted an enormous amount of interest: this is the project of international(ized) criminal justice, based on the proposition that individuals responsible for certain grave breaches of international law have to answer for their conduct before a particular type of ICaT.[64] Perhaps more so than with reparation claims, the mandate of such courts or tribunals is particular: they scrutinize the conduct of individuals from a very limited angle and with a view to imposing a particular form of (criminal) liability.

The role and record of the various international(ized) criminal courts is controversial. Nearly all of them have been criticized as ineffective or slow, and few of them are immune from the charge of double standards. The ICC in particular seems to bear the weight of the world upon its shoulders. In 2018, the twentieth anniversary of the Rome Statute was celebrated in a rather subdued mood.[65] All this is properly explored in specialist contributions, which abound. For present purposes, the main takeaway is that, since the 1990s, the notion that certain infractions of international law should attract criminal sanctions imposed by an international(ized) criminal court has gained momentum. A large majority of the States of the world are prepared to recognize a role of international courts to hold accountable individuals responsible for a narrowly defined set of international crimes—and demands for perpetrators to be held

[61] cf the subtitle of Brilmayer et al (n 57).
[62] To illustrate, the Iran-US Claims Tribunals has awarded *circa* $2.5 billion to US claimants; the UNCC has addressed *circa* 2.7 mio claims; the Bosnian commission restored property rights in *circa* 200,000 instances.
[63] Brilmayer et al (n 57) 25–6
[64] For a fuller discussion of developments barely sketched out here, see Frédéric International Criminal Justice as a Peace Project, (2018) 29 EJIL 835.
[65] *Pars pro toto*, see Theodore Meron/Maggie Gardner, 'Introduction to the Symposium on the Rome Statute at Twenty' (2018) 112 AJIL Unbound 155 (considering it 'undeniable that the Rome project still falls short of the expectations of the participants at the groundbreaking conference in Rome'); and a joint op-ed authored by four ex-presidents of the ICC Assembly of States Parties urging institutional reform: Zeid Raad Al Hussein et al, 'The International Criminal Court Needs Fixing' (*Atlantic Council*, 24 April 2019) <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing> accessed 25 March 2020.

accountable have become part of the 'arsenal' of conflict management. This is the most high-profile aspect of violent conflicts to have been judicialized.

2. 'Oblique Paths': Conflict Litigation before the World Court

Beyond the two fields just described, the role of ICaTs in relation to violent conflict is more complex. To speak of 'judicialization by design' would be an overstatement: as Kingsbury notes, 'the ICJ's [and other courts'] route into major security-related issues has in recent decades often been through oblique paths'.[66] What is more, jurisdictional strictures have typically limited the impact of judicial pronouncements. Nevertheless, more and more litigants have chosen to explore the 'oblique paths'.

a. Once Neglected, Now in Regular Use

The case law of the World Court reflects both the limits and increasing appeal of conflict litigation. Since the 1980s, States have, on frequent occasions, brought before the Court questions of violent conflict. Nicaragua's suit against the United States, intended to end US support for Contra rebels, is widely seen as the beginning of a trend: in two 'epochal judgments'[67] the ICJ affirmed its jurisdiction to scrutinize US conduct and held that this conduct violated the prohibitions against the use of force and intervention.[68] This was widely perceived at the time as a remarkable victory of the 'David vs. Goliath' type.[69] At the same time, the case tested, and shook, the Court's authority:[70] the US withdrew from the optional clause system, and it refused to comply with the judgment. Whether this judgment influenced the gradual phasing out of US support for the Contras remains disputed.[71]

[66] Kingsbury (n 41) 211.
[67] Fernando L Bordin, 'The Nicaragua v United States Case: An Overview of the Epochal Judgments' in Edgardo Sobenes Obregon/Benjamin Samson (eds), *Nicaragua Before the International Court of Justice: Impact on International Law* (Springer 2018) 59.
[68] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (Jurisdiction and Admissibility) [1984] ICJ Rep 392; (Merits) [1986] ICJ Rep 14.
[69] Pierre d'Argent, 'Conclusions' in Sobenes Obregon/Samson (n 67) 430.
[70] James R Crawford, 'Military and Paramilitary Affairs in and Against Nicaragua Case' MPEPIL (OUP, January 2019) MN 41.
[71] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004) 197–211.

Since *Nicaragua*, the ICJ has regularly been asked to pronounce on aspects of international conflicts. Its conflict-related cases can broadly be grouped into three[72] categories: First, in a range of conflicts applicants have, following the '*Nicaragua* example', seised the Court while a conflict was ongoing, often requesting interim protection alongside.[73] This has, for example, resulted in litigation prompted by Burundi's, Rwanda's, and Uganda's involvement in the Congo wars and Honduras' involvement in the Nicaraguan civil war; and a range of cases arising from the wars between former Yugoslav Republics during the 1990s, between Serbia/Montenegro and NATO member States during the Kosovo campaign, between Georgia and Russia during the 'July war' of 2008 and more recently between Ukraine and Russia. Second, applicants have occasionally instituted proceedings before the Court to challenge particular actions that were considered to escalate an ongoing conflict. Cases brought by Iran against the United States and by Pakistan against India, following attacks on civilian aircraft and on oil platforms, fit this pattern of more limited conflict litigation. Third, on a number of occasions, the Court has been asked to pronounce on the validity of competing territorial claims at a time when violent conflicts had provisionally been contained: cases between Burkina Faso and Mali, Libya and Chad, Nigeria and Cameroon, are examples in point.

b. Varying Degrees of Influence

This briefest of summaries suggests that conflict litigation before the World Court has become a regular feature. However, to focus on the number of proceedings risks ignoring the fact that the Court's impact on conflict resolution has varied considerably. Jurisdictional strictures are chiefly responsible for this. Unlike in the *Nicaragua* case, most cases falling into the first and second category mentioned above were brought on the basis of compromissory clauses covering only limited aspects of the conflict. This forced applicants to restrict their claims and, at times, to clutch at jurisdictional straws. It has also affected the character of the proceedings, many of which, notwithstanding their origin in a conflict, have been dominated by debates about procedural matters or detailed argument about discrete technical issues.

[72] Advisory opinions—in which the ICJ has, eg, addressed the use of nuclear weapons (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226) and Israel's construction of a security wall/fence (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136)—could be viewed as a fourth category; for reasons of space, and as they are advisory rather than binding in nature, they are left to a side here.

[73] For information about the cases referred to in the following: 'List of All Cases' (*International Court of Justice*) <https://www.icj-cij.org/en/list-of-all-cases> accessed 22 April 2020.

To illustrate, in the majority of Iran's cases against the United States, armed incidents have had to be rationalized as breaches of a bilateral friendship, commerce and navigation (FCN) treaty (the only plausible source of ICJ jurisdiction).[74] The DRC, in the *Armed Activities* case, portrayed Rwanda's involvement in the Congo war as breaching various multilateral conventions, amongst them the Constitution of the World Health Organization and the Convention on the Elimination of All Forms of Discrimination against Women.[75] Similarly, the case between Bosnia-Herzegovina and Serbia and Montenegro (brought in the middle of the Bosnian war 'in order to prevent a human catastrophe of dimensions unprecedented since the Second World War'[76]), eventually turned on technical arguments about the statehood of Serbia and Montenegro and its membership in the United Nations.[77] As regards the merits, the ICJ was limited to looking at the Bosnian war through the prism of the Genocide Convention (this being the only jurisdictional basis): for the purposes of the case, the only question was whether Serbia and Montenegro had breached its obligations regarding genocide. Other atrocities (war crimes, crimes against humanity, human rights violations) were irrelevant: as the Court's President observed at the time, 'we had no jurisdiction to make findings in that regard'.[78]

As this statement indicates, in dealing with conflict-related cases, the Court has approached even dramatic cases (which in the view of applicant States and well-meaning observers may have cried out for some judicial assessment) from a consensualist perspective.[79] The careful handling by the Court, coupled with the time requested by parties to prepare their pleadings, has lengthened proceedings, to the point where eventual judgments have turned into retrospective assessments, typically rendered at a time when the conflict had long cooled down, or its character changed.

[74] eg, *Oil Platforms* (*Iran v USA*) [2001] ICJ Rep 568 (based on the 1955 Treaty of Amity).
[75] *Armed Activities on the Territory of the Congo* (*DRC v Rwanda*) (Jurisdiction and Admissibility) [2006] ICJ Rep 6.
[76] ICJ, 'Application Instituting Proceedings: Application of the Republic of Bosnia and Herzegovina' (20 March 1993) General List No 91, para 137 <https://www.icj-cij.org/files/case-related/91/7199.pdf> accessed 22 April 2020.
[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43.
[78] Rosalyn Higgins, 'Statement to the Press' (26 February 2007) <https://www.icj-cij.org/files/press-releases/7/13757.pdf> accessed 16 April 2020.
[79] Conversely, the ICJ has rejected attempts, by respondents, to portray disputes as non-justiciable because they concerned only an aspect of a broader, and sensitive, conflict: notably *Border and Transborder Armed Actions* (*Nicaragua v Honduras*) (Jurisdiction and Admissibility) [1988] ICJ Rep 69 [51], [54].

This does not mean that the Court's decisions in the cases falling within the first and second category mentioned above have been irrelevant—far from it. But their impact has been different from the one Strindberg's Englishman foreshadowed at Vevey: ICJ proceedings have been one means of keeping conflicts on the international agenda, for example with a view to facilitating a negotiated or mediated settlement. Merits judgments, if and when rendered, may have vindicated the position of victim States; they have on occasion helped establish a historical record; they have determined the legality of particular acts committed during ongoing conflicts; and have forced parties to spell out their position in legal terms.[80] However, the ICJ's jurisprudence hardly fits the initial idea of arbitration and adjudication as an alternative to war: the Court has 'at best had mixed results in attempting to end or constrain ongoing armed conflicts'.[81]

Conversely, where conflicts had been contained, the Court has at times played a decisive role in addressing underlying territorial disputes (the third category of cases mentioned above), thereby paving the way for a settlement. To illustrate, its decisions in the Burkina Faso–Mali and Libya–Chad disputes were complied with promptly[82] and are considered to have been 'important in securing peace'.[83] In the high-stake Bakassi dispute, the Court's judgment[84] (recognizing Cameroon's claims to a peninsula occupied by Nigeria) has defined the parameters for all subsequent attempts to solve the dispute.[85] Where the Court has been 'brought into' a conflict resolution process with the particular task of assessing territorial claims, without urgency, it has been at its most influential.

The overall experience of conflict litigation before the World Court is ambivalent. States, since *Nicaragua*, have regularly brought violent conflicts before the Court: unlike in the PCIJ's time, or during the Cold War, these cases comprise a significant part of the Court's docket. The Court's role however is typically limited: limited to particular legal aspects that often only

[80] For a more nuanced list, <IBT>Matheson (n 12)</IBT> 7–9.
[81] ibid 363.
[82] *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 6 (awarding the disputed Azouzou strip to Chad); *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554 (dividing the Agacher strip between Burkina Faso and Mali); further Schulte (n 71) 232–4 and 183–4.
[83] Aloysius P Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 EJIL 815, 832.
[84] *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v Nigeria; Equatorial Guinea intervening*) (Judgment) [2002] ICJ Rep 303.
[85] Notably: Republic of Cameroon/Federal Republic of Nigeria, Agreement concerning the modalities of withdrawal and transfer of authority in the Bakassi Peninsula 2542 UNTS 13; and further Llamzon (n 83) 835–8.

tangentially relate to the underlying violent conflict; or limited in time in that the Court is asked to assess the validity of claims to territory once a conflict has been contained already. What is more, claimant States tend to seise the Court while pursuing other avenues alongside: conflict litigation is part of a broader strategy at dispute settlement, which regularly involves the UN's political organs, regional actors, and traditional inter-State diplomacy. In that sense, the Court often performs a 'separate but complementary function', but as Rosenne notes, it typically has 'an auxiliary or supporting role'.[86]

3. Linkages and Creeping Jurisdiction: Conflict Litigation before Specialist Courts

When looking beyond reparations claims, international criminal justice and the record of the World Court, the picture becomes fuzzier still. What have other specialist ICaTs had to say on questions of violent conflict? Specialist ICaTs have made at least occasional forays into the terrain of violent conflict. The character and impact of these forays has varied considerably, reflecting the particularities of each individual dispute settlement regime. For the purposes of the present survey, the experience of the more prominent ICaTs can be summarized in two steps.

a. Too Early to Tell: Litigation Based on World Trade Law, Investment Treaties and the United Nations Convention on the Law of the Sea

In three judicialized fields—international trade, investment, and the law of the sea—experience with conflict litigation has so far remained limited. Early attempts, by Nicaragua and Argentina, to challenge trade sanctions imposed during conflicts of the 1980s (the Falklands war and the Nicaraguan civil war, respectively) under the General Agreement on Tariffs and Trade (GATT) system did not go very far.[87] The treatment of investments during Sri Lanka's civil war prompted the first BIT-based investment case, but that initially remained a relatively isolated

[86] Shabtai Rosenne, 'A Role for the International Court of Justice in Crisis Management?' in Gerard Kreijen et al (eds), *State, Sovereignty, and International Governance* (OUP 2002) 217.
[87] Details in Michael J Hahn, 'Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan JIL 558.

episode.[88] Early cases based on UNCLOS did see tribunals pronounce on the use of force, but mostly in the course of law enforcement operations of a limited scope.[89]

Over the course of the last decade, conflict litigation before these specialized ICaTs seems to have gained momentum. The Ukrainian practice is noteworthy: since 2016, Ukraine has challenged trade restrictions imposed by Russia before the WTO and instituted proceedings over a maritime incident in the Kerch strait on the basis of UNCLOS.[90] In addition, a number of Ukrainian investors are seeking compensation from Russia for measures taken in Crimea.[91] At the WTO, Gulf States have followed suit and brought a string of proceedings challenging restrictive measures adopted in the standoff between Qatar, on the one hand, and Saudi Arabia and its allies on the other.[92] This may not be 'a new era',[93] but perhaps it reflects a trend—of parties to conflicts increasingly petitioning specialist ICaTs in the way they have, since *Nicaragua*, petitioned the ICJ: as a forum before which aspects of major conflicts can be raised, in the hope that the even limited judicial scrutiny of the respondents' conduct will further the claimants' cause.

Whether this new trend will yield tangible results, is too early to tell. Experience so far suggests that much will depend on the proper construction of treaty-based security exceptions. In the WTO context, the Panel in *Russia—Traffic in Trade*[94] recognized that Member States enjoy much discretion in taking measures 'consider[ed] necessary for the protection of … essential security interests'.[95] Should this reading become accepted, it would severely limit the potential

[88] *AAPL v Sri Lanka*, ICSID Case No ARB87/3, Award (27 June 1990). Writing in 2013, Christoph Schreuer noted that 'the known effects of armed conflicts on investment protection have been few and far sporadic': 'The Protection of Investment in Armed Conflict' in Freya Baetens (ed), *Investment Law Within International Law* (CUP 2013) 20.

[89] eg, *The M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea)* (Judgment) [1999] ITLOS Reports 10 and *In the Matter of an Arbitration between Guyana v Suriname*, PCA Case No 2004-04, Award (17 September 2007); Matteo Tondini, 'The Use of Force in the Course of Maritime Law Enforcement Operations' (2017) 4 Journal of the Use of Force in International Law 253.

[90] *Russia—Measures Concerning Traffic in Transit* (26 April 2019) WTO DS512; *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)* (Order) [2019 ITLOS Reports.

[91] Useful information about the first nine proceedings is provided by Serhii Uvarov, 'Investment Disputes Related to Crimea: Overview' (*Arbitration Journal*, 22 January 2019) <https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/> accessed 24 March 2020.

[92] For details: 'Chronological List of Disputes Case' (*WTO*) (disputes DS526, DS527, DS528, DS567 ad DS576). <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 22 April 2020.

[93] But cf Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45.

[94] *Russia—Measures Concerning Traffic in Transit*, Panel Report (5 April 2019) (WT/DS512/R).

[95] General Agreement on Tariffs and Trade 64 UNTS 187 art XXI(b)(iii).

for WTO litigation during 'situation[s] of armed conflict, or latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state'.[96] Similar security clauses feature in many investment treaties, but their application to violent conflicts has yet to be tested.[97] Under UNCLOS, parties can exempt 'disputes relating to military measures' from the mandatory jurisdiction of UNCLOS dispute settlement bodies; while ITLOS in a recent interim decision has adopted a restrictive interpretation of that exception, its approach has been criticized and will certainly not be the last word.[98]

All this makes it very difficult to predict whether specialist ICaTs will ever play a significant role in relation to violent conflict. Recent practice certainly suggests that States involved in conflicts are exploring specialist litigation as an option; however, based on the ICJ's (slightly more reliable) experience, one should perhaps not expect WTO, UNCLOS, or investment dispute settlement bodies to play more than 'an auxiliary or supporting role'.[99]

b. Many Cases, Unclear Impact: Human Rights Litigation

Of the various specialist institutions, human rights courts are the only ones to have frequently, and over a relevant period, engaged with questions of violent conflict. Today, they regularly scrutinize State conduct during such conflicts from the perspective of human rights law, in response to individual and State claims. This has resulted in an amalgamation of human rights and rules of international humanitarian law prescribing limits of State conduct during conflict—an amalgamation facilitated by international jurisprudence, which has freed human rights law from two potential shackles. To elaborate, human rights courts, as well as other human rights bodies, have recognized that human rights, while primarily meant to apply in peacetime, remain applicable in armed conflict; and that they are not derogated by special rules of international humanitarian law.[100]

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[96] Panel Report (n 94) para 7.76.

[97] By contrast, in the Crimean cases brought by investors, tribunals seem to agree that investment made in Crimea are protected under the Russia-Ukraine 1998 BIT, which covers investments in 'the territory of the Russian Federation' (art 1(4)); G Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome too Easily?' (*EJILTalk!*, 9 May 2018) <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 25 March 2020.

[98] *Case Concerning the Detention Of Three Ukrainian Naval Vessels* (n 90).

[99] Rosenne (n 86).

[100] For prominent statements reflecting the move towards amalgamation: eg, the ICJ's *Wall* opinion (n 72) para 25; UNHRC 'General Comment No 29: Derogation during a State of Emergency (Article 4)' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 3; Gerd Oberleitner, *Human Rights in Armed Conflict Law, Practice, Policy* (CUP 2015) chs 5–7.

Freed from these shackles, '[t]he main human rights bodies created under international law … have all repeatedly been confronted with situations of armed conflict'.[101] From their 'vast jurisprudence',[102] three main propositions would seem to emerge.

First, the reach of human rights protection during armed conflict may depend on the *locus* of the impugned measure. Human rights may remain applicable in principle, but the jurisdiction of human rights courts is typically limited geographically: for measures taken in conflicts outside a State's territory, some sustained form of control over the human rights victim seems required.[103]

Second, when determining the precise scope of human rights obligations during violent conflict, human rights courts have typically construed human rights obligations in light of applicable rules of IHL. This has resulted in a (challenging) context-specific reading that 'imports' considerations developed in the context of armed conflicts into human rights language: human rights have not only transformed discussions about armed conflict, but have also been transformed in the process.

Third, the 'vast jurisprudence' covers the field very unevenly. Human rights jurisprudence has notably accentuated remedial rights of victims, and emphasized the need for breaches to be investigated. By contrast, the debate about economic and social rights during violent conflict is at an early stage. All this suggests that, as noted by Lubell in 2005, 'the focus of the arguments [has] now shift[ed] from the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application'.[104]

Fifteen years later, these practical problems are far from addressed. In a 2015 study, Oberleitner struck a fairly cautious note: given the 'uneven … impact' of human rights decisions, he saw 'not very strong grounds for positioning human rights bodies as guardians of humanitarian

[101] Oberleitner (n 100) 239.
[102] Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 313.
[103] The precise degree of control is disputed and varies from regime to regime: eg, the ECtHR has exercised jurisdiction over extraterritorial conduct if the State concerned exercised 'effective overall control' over an area (eg, *Cyprus v Turkey*, App no 25781/94, 10 May 2001), but dismissed complaints brought by victims of an airstrike (*Bankovič v Belgium*, App no 52207/99, 12 December 2001). For details: Fons Coomans/Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).
[104] Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 IRRC 737, 738.

law'.[105] If looked at from the comparative angle adopted in the present overview, this may, however, be too cautious a view: of the various specialized ICaTs, those operating in the field of human rights have the most sustained record of scrutinizing State conduct during violent conflict. Their jurisprudence cannot make up for the absence of an international 'IHL court', or more generally the deficiencies of the particular systems of ensuring respect for State conduct during violent conflict. However, their involvement can be seen as a 'second-best … option to ensure respect for humanitarian law'.[106]

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D. Concluding Thoughts

What would von Bleichroden's party make of developments surveyed in the last sections? In some respects, the 'quiet and peaceful' conversation that took place 150 years ago has a modern feel. At enlightened dinner parties, at least those of the progressive-pacifist kind, whether war is inevitable remains a live question. Something more than a 'Confederation of European States'—a rather fanciful thought in 1872—has come to exist and some indeed view it, as Strindberg's Englishman anticipated, as a 'Switzerland writ large'.[107]

Yet when it comes to the role of ICaTs, von Bleichroden and his guests seem to have got it wrong. What they hoped for has proved illusory; while what has happened, they did not foresee. Nothing in their discussion hints at the massive growth of international arbitration and adjudication: presumably even Strindberg's Englishman would be amazed by the industrial scale of 'judgment production' that characterizes the current era. Conversely, his hope that ICaTs would prevent wars has not materialized. They typically have neither the mandate nor the means to do so; neither States nor guests at dinner parties today view ICaTs as central guardians of world peace: the various 'wars against the future' waged in the course of the past 150 years have not led States to rally to the PtAA cause.

Nevertheless, one might hope that Strindberg's Englishman would see the developments of the last 150 years not just as a betrayal of an ideal, but rather as an adjustment of an initial plan: an adjustment that has seen ICaTs cede the centre stage to other actors and mechanisms of dispute

[105] Oberleitner (n 100) 321.
[106] ibid 320.
[107] Zbigniew Brzezinski, 'Living with a New Europe' (2000) 60 The National Interest 17, 20.

resolution, notably to political organs of collective security organizations which, for a century, have been at the forefront of the international community's effort to maintain peace and security. But an adjustment that, especially in the past decades, has seen ICaTs perform a number of diverse functions in relation to violent conflicts. They have become fora for (often retrospective) debates about matters of war and peace, tools for mobilizing public opinion and recorders of history; they occasionally impose sanctions on individuals; they regularly enforce individual claims to reparation following major upheavals; and they undertake an often highly detailed scrutiny of particular aspects of State conduct on the basis of conventions containing compromissory clauses—from bilateral FCN treaties to human rights treaties. As the preceding discussion illustrates, these functions are not integrated into any master plan: the overall impression is of 'bric-à-brac', not coherent 'system'.[108] But the trend is clear: as Matheson notes, '[t]he involvement of international civil tribunals in situations of armed conflict over the past two decades stands in sharp contrast with what came before'.[109] If one adds to this observation (focused as it is on 'civil' tribunals) the gradual 'coming of age' of international criminal justice, then perhaps the picture is not altogether bleak. International courts and tribunals have a lesser role than anticipated by Strindberg's Englishman, but perform a range of functions and are increasingly asked to scrutinize State conduct during violent conflict.

[108] Jean Combacau, 'Le droit international: bric-à-brac ou système?' (1986) 31 Archives de philosophie du droit 85.
[109] Matheson (n 12) 61.