
25 years ago, as a law student at the University of Kiel, I listened in to an international law symposium organised by the Walther Schücking Institute. This was the ‘pre-panel era’ of conferences, when speakers could be asked to present for 30–40 mins and then engage in a long debate. Especially for younger academics addressing an audience of senior colleagues, this could be a bit of a test. One such junior academic, a German post-doc not yet appointed to a full professorship (the crucial step in a German academic career) gave a broad-ranging talk on the role of community interests. Towards the end of it, when attention may have begun to slip, he referred to the Permanent Court of International Justice (PCIJ), casually, as ‘the first international court’. The talk was generally well received by his more senior colleagues, but one of them thought that casual PCIJ reference a bit too casual, perhaps especially coming from someone below full professorial rank. And so he – the senior professor – rose, coughed, and eyed the audience. And then, with the gravitas that in the 1990s still came naturally to a German *ordinarius*, ‘drew our young colleague’s attention to the existence of the Central American Court of Justice’ (CACJ): this was ‘a short-lived one, no doubt, and often overlooked’. But it preceded the creation of the PCIJ – and so to speak of the PCIJ as the first international court was ‘a simplification’, that epithet belonging to the CACJ. The clarification was followed by a more general lesson for the junior colleague, delivered with the full weight of full-professorial authority, to solemn nods and a general murmur of approval: ‘We must study the history of international law with care. And we must be careful not to overlook the lesser-known courts and tribunals.’

The contributors to *Experiments in Adjudication* agree. They, too, care about the lesser-known courts and they, too, set out to correct simplistic narratives. Their volume is presented as ‘an attempt to revisit a prevailing account of
international adjudication’, which is said to ‘emphasis[e] institutional’ progress’ in relatively well-defined ‘phases’ (editors’ introduction, 2), e.g. from arbitration to adjudication, or from general to specialised courts. Instead of linear progress, ‘organic growth’ or examples of ‘success’, the volume seeks to illustrate the ‘trials and errors’ (Viñuales, 12 and 11) in international adjudication, and it does so through a series of inquiries that ‘cast a retrospective eye on a select number of historical experiments’ (introduction, 2) with a view to ‘recall[ing] some forgotten or under-researched strands of the historical record’ (Viñuales, 30).

In this endeavour, the net is cast surprisingly wide. While motivated (like the German law professor from my opening scene) by a desire for ‘deeper historical texture’ (de la Rasilla, 49), the volume looks well beyond the lesser-known courts. Also included are chapters on the handling of individual disputes (incl. by non-binding means of dispute settlement, e.g. in the Dogger Bank dispute) and on the reception of decisions in subsequent law-making attempts (namely by the UN International Law Commission). As regards institutions, the book includes a number of ‘success stories’ in international adjudication (such as the Strasbourg court system, or the Permanent Court of Arbitration – neither of them likely entries on a list of ‘forgotten or under-researched’ experiments): these are covered in an attempt to bring out ‘apparent achievements that ... concealed a disappointing truth’ or to raise awareness for the ‘wide range of views and proposals ... that preceded the solutions’ eventually adopted (Viñuales, 11). All this is brought under a very flexible notion of ‘experiments’, viz. ‘attempts, sometimes fully developed ... but sometimes ... aborted at an early stage, to resort to international adjudication for a variety of purposes’ (introduction, 2), among them a desire to save face, to legitimise political strength, but also (somewhat mysteriously) to achieve ‘genuine dispute settlement’ (Viñuales, 13 et seq). And it is presented as a part of the more general ‘historical turn’ in international legal scholarship, which is said to have – as JHIL readers may be surprised to learn – ‘hitherto neglected [the] history of international adjudication’ (de la Rasilla, 49).

This wide focus is not easy to reconcile with the volume’s repeated emphasis on trials and errors, on ‘failed and aborted experiments in court creation’ (de la Rasilla, 50) and its expressed desire to overcome ‘the standard narrative of the linear and triumphalist growth of international adjudication’ (Van Hulle, 55). It is liberating as much as it is limiting. Liberating because it permits the inclusion of a diverse range of inquiries, which seek nuance not just by looking at the lesser-known courts. At the same time, it results in a collection of heterogeneous chapters that is held together by the thinnest of threads.
Let us start with nuance. This the volume offers in abundance. Most readers parsing the book’s 300 pages will be enriched in some way – will have learned about a new institution, an unknown conflict or case, or about missed opportunities in dispute settlement. My own takeaways can be summarised in three categories.

(i) First, there are the genuine eye-openers. A number of contributions draw attention to institutions or projects that often do not make it into the standard account of dispute settlement. I found two contributions particular enriching, both on the ‘failure end’ of the spectrum. Cesare Romano’s account of ‘regional judicialization in the Arab World’ (169) offers a succinct ‘story of six [Arab] courts and tribunals’ (171). Some of them – like the Arab Court of Human Rights – are quite well-known. But few readers will have been aware of the full range of initiatives aimed at establishing regional courts such as the Tribunal of the Arab Maghreb Union and the Judicial Body of the Organization of Arab Petroleum Exporting Countries. (I certainly wasn’t.) While in the nature of a survey, Romano’s chapter provides the solid basis for more in-depth inquiries, and an encouragement to pursue them.

Donal Coffey’s chapter is very different in style, but equally instructive. It ‘zooms in’ on one particular tribunal project, viz the plans for Commonwealth tribunal put forward in the late 1920s: mooted as a replacement for the existing Judicial Committee of the Privy Council, it was to reflect the new relevance of the dominions, while at the same time preserving a Commonwealth touch. But it was, in Coffey’s words, ‘neither fish nor fowl – insufficiently imperial to satisfy loyal members of the Commonwealth … and too imperial for members who wished to pursue strict international independence’ (257). In its potential first case – a British-Irish dispute about payments on loans to Irish landowners – these competing visions clashed, and the Commonwealth tribunal never got off the ground. (Commonwealth reservations included in dozens of optional clause declarations are a faint echo.) Would it have stood a better chance, Coffey wonders, if its first case had been between two ‘less intransigent’ parties, e.g. Newfoundland and Canada (258)? We do not know, but it is an intriguing ‘what if’. There are not many examples of courts of general jurisdiction that operate between groups of like-minded states (and between them, take precedence over the PCIJ/ICJ or general arbitration). A successful Commonwealth tribunal might have been an interesting, early experiment with this unusual format of organising international adjudication.

(ii) In their focus on largely forgotten episodes and institutions, Romano’s and Coffey’s chapters stand out. Most contributions to the volume look at better-known experiments, on which they seek to offer novel perspectives.
At times, that novel perspective comes as a challenge to the orthodoxy, most firmly in Martin Lemnitzer’s discussion of the Dogger Bank incident of 1904/05. Diplomats and international lawyers – so Lemnitzer – ‘united to twist [and] reinterpret’ (78) the legacy of the Dogger Bank commission. The work of the Commission features in nearly all standard accounts as a prominent example of dispute settlement through fact-finding. Lemnitzer insists that the Commission was not just set up to find facts, but was meant to act as an international (criminal) court martial. And he has a point: the Commission had the power to punish the Russian Admiral Rozhestvensky for his role in the incident. Perhaps this was indeed ‘a quantum leap for the idea of judging individuals for violations of the laws of war’ (77). So why is this quantum leap largely overlooked? Lemnitzer remains tentative: He wonders whether Rozhestvensky’s acquittal may have set an unattractive precedent for those seeking to move towards international criminal justice. And he suggests that arbitrationists may have been interested in presenting the Commission solely as an exercise in inter-state dispute resolution and claim its success for their cause. That may or may not be correct; further research will be required to understand why aspects of the Commission’s mandate feature more prominently than others. But Lemnitzer’s challenge is an invitation to look further, and to interrogate Dogger Bank legacies beyond fact-finding.

Andrei Mamolea and Inge Van Hulle’s challenges, while not put as directly, are perhaps more fundamental. Both set out to uncover darker sides of arbitration, which appears, in their respective chapters, not as a shining example of peaceful dispute resolution, but serves more dubious means. Mamolea offers a critical analysis of the first fifteen years of the PCA (1899–1914), viewed often as arbitration’s ‘golden age’! In Mamolea’s view, arbitral proceedings during this golden age served less benign functions: they were ‘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” (196). Face-saving was key: results reached via arbitration could be ‘sold’ to domestic and international audiences. While that is hardly a novel insight, Mamolea identifies a particular sub-category, which he refers to, intriguingly, as ‘extortion arbitrations’: resort to dispute resolution served to ‘launder cases of extortion – cases where one state used threats of force to extract from another legal rights to which it previously had no conceivable title’ (205). The Orinoco Steamship and North Atlantic Fisheries cases are his examples in point: disputes triggered, in Mamolea’s account, by ‘meritless claims’ (to compensation,

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or to control over fisheries), which were supported by threats of force, and which eventually prompted an arbitral process ‘under the shadow of violence’ (205–206). Van Hulle’s concern is with international law’s most obvious dark side: she looks at ‘arbitration as part of [an] imperial [legal] infrastructure’ (57) in nineteenth-century territorial disputes. Revisiting prominent (Delagoa Bay) and lesser known (Lamu, Bulama) disputes, she describes how resort to dispute settlement helped ‘settle differences regarding disputed territories and boundaries of minor importance’ (the major disputes being left to diplomacy) and ‘aided in lending an aura of legitimacy to the acquisition of Africa’ (at 74 and 58). The instrumental nature of arbitration and adjudication – not as such controversial, but rarely made express – is brought out clearly.

(iii) A third group of chapters cover institutions or episodes on the margins of the canon of standard accounts: not really overlooked, but worthy of increased attention. While not primarily (like Lemnitzer’s, Van Hulle’s or Mamolea’s) presented as challenges to mainstream scholarship, four of these chapters offer a good combination of detailed information and balanced judgment. Freya Baetens’ assessment of the CACJ at Carthage is an example in point. Clearly written, it highlights the pioneering nature of the CACJ, which, among international courts, was the ‘first to rise and first to fall’ (211). (The senior German professor from my opening scene would have nodded in approval.) Its fall, Baetens argues, may have been the result of wanting too much too soon. The CACJ’s ‘overly broad’ jurisdictional mandate (237), which envisaged CACJ decisions in disputes brought by individuals and even between different organs of government, was ‘politically problematic’ (237); perhaps it would have been wiser to start with a more modest jurisdiction that could have been ‘gradually expanded over time’ (238). Compared to the CACJ, the Arbitral Tribunal for Upper Silesia fared better. In his chapter, Gerard Conway agrees with what is probably the mainstream view – producing thousands of decisions in a short period of time, this was ‘an early success in international adjudication’ (98). Conway highlights the Arbitral Tribunal’s modern features (claims by individuals, reference procedures, supremacy over national law) and describes it as an ‘important precedent in the trend over the course of the twentieth century towards placing more competence and trust in the hands of international institutions’ (122).²

² While Conway mentions the influence of the Upper Silesia Arbitral Tribunal on later European court projects, he remains brief. For more on the point, see notably Michel Erpelding’s attempt to trace connections between ‘Upper Silesia [and] Luxembourg’: Erpelding, Michel. ‘Local International Adjudication: The Groundbreaking ‘Experiment’ of the Arbitral Tribunal for Upper Silesia’, in Peace Through Law The Versailles Peace Treaty and Dispute Settlement after World War I, eds. Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (Baden-Baden: Nomos, 2019), 277–322.
While Baetens’ and Conway’s main focus is on the institutions and their output, Frédéric Mégret and Jean d’Aspremont, in two complementary chapters re-assessing the US-Mexican General Claims Commission (1924–1931), ‘zoom out’ and situate. In d’Aspremont’s account, the GCC appears as a ‘decisive experiment’ (151), not so much institutionally, but because its decisions would come to be used by the ILC to consolidate (or, in d’Aspremont’s term, ‘invent’) a doctrine of state responsibility (166). Mégret emphasises the role of claims commissions as ‘an intermediary step in the history of adjudication’ (128) – typically used in bilateral relations of unequal power relations and ‘closely connected with the history of imperialism’ (147). In this narrow setting, claims commissions permitted a ‘controlled experiment for entertaining claims [by individuals possessing a privileged nationality] that had rarely been heard internationally ... before’ (148). In this sense, like the CACJ in Baetens’ account and the Upper Silesia Tribunal in Conway’s, the GCC has left a relevant legacy.

The preceding, brief summaries – at times mere snippets – reflect the breadth and scope of Experiments in International Adjudication. Read together, the various Historical Accounts comprising the volume succeed in bringing nuance to the history of international adjudication. If that history is envisaged as a timeline, then the Historical Accounts could perhaps be said to add dots of information, making it more difficult to think of the historical development as one straight line, leading from the Jay treaty via the Alabama arbitration and The Hague conferences (1899/1907) to the creation and eventual proliferation of international courts during the twentieth century. As is equally clear, those dots of information are extremely diverse and spread out all over the timeline (or indeed all over the place): some represent institutions, others key actors, still others particular disputes. Some focus on formative periods, others on the afterlife of decisions. Some address forgotten aspects; others invite readers to rethink well-known ones; still others distill and reassess. All somehow deal with disputes and their settlement, but beyond that, very little holds them together. The dots are not connected.

Perhaps they were never meant to be. As noted above, the book was always going to have a very wide focus. Somehow, all contributions are ‘experiments’ in the very wide understanding of the editors, viz. ‘attempts ... to resort to international adjudication for a variety of purposes’ (cf 2). Yet beyond a facile ‘things are complex’, the diverse Historical Accounts collected in the volume yield few insights of a more general nature. The editors’ framing chapters, which might have offered a more distinct ‘experimental’ design, are curiously disconnected.
from the rest of the book. De la Rasilla’s attempt to present the project as part of the more general turn to history in international legal scholarship remains abstract. While echoing well-known claims about the new historical sensitivity of international legal scholarship, it does not engage with the particular challenges posed by the historical study of international adjudication. What would a historical turn mean for the study of international adjudication? Can we speak of a ‘turn’, given that - ‘From Athens to Locarno’ and beyond – international courts and tribunals have always been studied in an historical perspective? These questions are not raised; and perhaps unsurprisingly, few of the book’s subsequent chapters engage with the ‘turn to history’ literature or comment on its implications for their inquiry. After over 300 pages of (often intriguing) detail, it remained unclear to me how the history of international adjudication, as presented in the book, would fit with the wider historiographical turn.

Viñuales’ attempt to identify and distinguish various purposes of international adjudication seemed more promising: his distinction between different ‘uses’ of international adjudication – face saving, making up for political weakness, legitimising political strength, the quest for equality, and finally, genuine dispute settlement – is by no means self-explanatory and, in its distinction between genuine dispute settlement and other uses, left me puzzled. However, the scholarship on dispute resolution needs categories that go beyond the naive ‘peace through law’ narrative, and Viñuales’ chapter might mark the beginning of relevant discussion. That discussion, though, is not had in the book: Viñuales’ categories remain curiously divorced from the remaining chapters. Divorced because many of them are developed by reference to ‘experiments’ and disputes not covered in any of the volume’s Historical Accounts (such as President al Sisi’s cession of two Egyptian islands to Saudi Arabia, Palestine’s accession to the ICC, or the experience of the Alabama). And divorced also because the volume’s contributors, in their subsequent chapters, do not rely on them to situate their respective experiments. Overall, the editors’ attempts at providing some overarching framework stand apart from the rest of the volume, rather than structuring it.

The resulting feeling of disconnect is exacerbated by the fact that the chapters addressing individual experiments in adjudication largely stand

4 There are exceptions to the point made in the text: Conway’s chapter, for example, frequently contrasts the experience of the Upper Silesia Arbitral Tribunal from that of the CACJ; while Mégret and d’Aspremont avoid overlaps in their respective discussions of the GCC.
side by side and do not speak to each other. As a result, many opportunities for comparison, cross-fertilisation and synergy are missed, and overarching themes not brought out. The role of imperialism and domination might have been one such theme. It clearly is crucial to many contributions. Inge Van Hulle puts matters most firmly, expressly noting that arbitration formed ‘part of imperial legal infrastructure’ (57) and could be usefully employed to handle lesser disputes. It seemed to me that this perspective could have enriched Mamolea’s and Mégret’s inquiries, focusing on the early PCA cases and the use of claims commissions respectively: could Van Hulle’s point have wider significance? Coffey’s chapter, too, looked at arbitration within an imperial infrastructure – but it used the ‘imperial’ terminology in a very different context. None of these linkages are explored. The same is true for temporal connections: Lemnitzer and Mamolea offer valuable critiques of the ‘golden age’ of arbitration, and both highlight the flexibility of the Hague framework for dispute settlement, which could easily be adjusted. However, they do not connect, which is a genuine pity. Could Mamolea’s claim that saving face was key have informed Lemnitzer’s reading of the Dogger Bank incident? Might Lemnitzer’s concern with the subsequent ‘twisting’ of history by international lawyers have enriched Mamolea’s study, and explained how a series of face-saving and extortion disputes came to be remembered as arbitration’s ‘golden age’? Do these two close, but disconnected, chapters perhaps yield more general insights into the role of well-meaning arbitration lobbyists in shaping the discourse about courts and tribunals? Finally, for the more doctrinally minded: Conway and Mégret/d’Aspremont provide detail on the two most remarkable experiments in handling compensation claims during the 1920s – the GCC and the Upper Silesia Tribunal. Yet their separatist treatment precludes comparison on aspects such as standing, applicable law, or the role of precedent. To give just one example, the fact that both experiments (as well as a third, that of the CACJ) permitted claims by individuals is noted by all contributors. But the wider point – that a century ago, within the space of a decade, and well before the PCIJ’s Courts of Danzig opinion – individuals could lodge claims before three significant institutions falls through the cracks. The dots are not connected.

These comments point to the main limitation of an engaging book. The different experiments are not integrated in a clear framework of analysis; the whole is hardly more than the sum of its parts. It is a testament to the expertise of contributors that the sum of the parts remains considerable: as standalone inquiries, the various Historical Accounts have a lot to offer. As is clear from this review, they taught me a lot (e.g. about Commonwealth and Maghreb
tribunals) and often made me think. They would have saved a German post-doc speaking at Kiel in the 1990s from a costly rookie error. And they would have delighted the senior German law professor who would have found the CACJ restored to its proper place.

Christian J Tams
Professor of International Law and Director of the Glasgow Centre for International Law and Security, School of Law, University of Glasgow, Glasgow, UK | Matrix Chambers, London
Christian.Tams@glasgow.ac.uk

Bibliography